WORLD TRADE ORGANIZATION

WTO ANALYTICAL INDEX

GUIDE TO WTO LAW AND PRACTICE

Second Edition

Volume 1

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WTO Analytical Index

The *WTO Analytical Index* is a guide to the legal interpretation and application of the WTO Agreements by the WTO Appellate Body, WTO dispute settlement panels and other WTO bodies. The book assists anyone working with WTO law in identifying the existing jurisprudence and relevant decisions concerning a given provision of any WTO agreement. This is a unique work produced by the Legal Affairs Division of the WTO Secretariat with contributions from other Divisions of the Secretariat and the Appellate Body Secretariat.

The second edition of the *WTO Analytical Index* covers developments in WTO law and practice through to the end of December 2004.

WTO Analytical Index

Guide to WTO Law and Practice

SECOND EDITION

VOLUME I

World Trade Organization, 2007

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Foreword

The WTO Analytical Index is a guide intended to assist in the legal interpretation and application of findings of WTO dispute settlement panels and the Appellate Body, and of decisions adopted by other WTO bodies. Its principal objective is to make WTO law and jurisprudence more understandable and accessible to the reader by identifying how the legal findings of these WTO adjudicatory bodies and the relevant decisions of the numerous WTO committees relate to any given provision of the various WTO agreements.

This is a unique work produced by the Legal Affairs Division of the WTO Secretariat with important contributions from other Divisions of the Secretariat and from the Appellate Body Secretariat. The material contained in this second edition is inclusive and therefore covers all developments in WTO law and practice from January 1995 through the end of December 2004. Of particular note is that the scope of the chapter on the *Understanding on Rules and Procedures Governing the Settlement of Disputes* has been substantially extended and a number of useful tables containing data on the operation of the dispute settlement system have been added. In addition, greater use of subheadings has been made in this edition in order to facilitate research by readers; this is reflected in each chapter's table of contents. An additional index organised on a case-by-case basis has also been included.

I would like to thank all those who have contributed to the preparation of this publication, but especially María J. Pereyra-Friedrichsen and Siobhan Ackroyd of the division as well as the many talented legal interns who assist the division on an ongoing basis not only with this project but in so many other ways as well. This volume would not have been possible without their hard work.

We hope that this publication will be a useful tool in better understanding WTO law, jurisprudence and practice. We intend to continue updating it on a regular basis.

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Introduction

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I. OVERVIEW OF SCOPE AND ORGANIZATION

A. SCOPE

1. The second edition of the *WTO Analytical Index* provides a guide to the interpretation and application of the *Marrakesh Agreement Establishing the World Trade Organization* ("*WTO Agreement*"), drawing on the jurisprudence of panel, Appellate Body and arbitration reports, and on decisions of WTO bodies. The material covers the period 1 January 1995 to 31 December 2004.

2. Although this volume does not incorporate the material contained in the *GATT Analytical Index*[1], appropriate cross-references are made to this earlier work.

B. ORGANIZATION OF MATERIALS

3. The material is organized into 23 chapters with a separate chapter for each of the Agreements. Within each chapter, there are sections organized on an article by article basis.

4. Each chapter is generally divided into two sections: "A. Text of Article [. . .]" sets out the text of the particular article; and "B. Interpretation and Application of Article [. . .]" provides excerpts, organized in chronological order, of relevant jurisprudence and decisions of WTO bodies. The text of the Understandings relating to specific Articles of the *GATT 1994* are to be found following the text(s) of the Article concerned.

5. Under Section B, excerpts are organized systematically, in chronological order, under the heading "General" and other relevant headings, frequently including words from the particular portion of the text being interpreted. Many chapters also include tables or other descriptive material.

6. This volume does not attempt to set out the drafting history of the *WTO Agreement*. Material on the negotiating history of the Uruguay Round and the transition from the GATT to the WTO can be found in the *GATT Analytical Index*, particularly in the Chapter on "Institutions and Procedure".

II. EDITORIAL CONVENTIONS

A. ABBREVIATIONS

7. This work uses a number of abbreviations, the definitions for which can be found in the tables at the end of this introductory chapter. Abbreviations are provided for the names of the various WTO agreements and the various bodies of the WTO. Abbreviations ("short titles") are also given for panel, Appellate Body and arbitration reports.

B. OTHER CONVENTIONS

8. All excerpts, whether of decisions of WTO bodies or of panel, Appellate Body or arbitration reports, are introduced by short explanatory sentences, setting out the context for including the particular excerpt.

9. Excerpts from decisions of the various WTO bodies are kept to a minimum because the full text of the materials is available in the cited documents and may be accessed on-line through the WTO website (*http://www.wto.org*).

10. Citations to excerpted materials from WTO bodies are generally limited to the relevant document symbol and the paragraph number within that document where the cited text appears. In the case of excerpted material

[1] GATT Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition (1995) ("GATT Analytical Index").

from panel, Appellate Body and arbitration reports, the citations are limited to the name of the adjudicating body, the short title of the case and the paragraph number where the cited text appears, e.g., "Appellate Body Report on *EC – Bananas III*, para. 34". For the first six Appellate Body reports, where paragraph numbering was not used, page numbers for the cited text are used.

11. Full citations for the panel, Appellate Body and arbitration reports are provided in tables at the beginning of each volume of this publication. These full citations reference the WTO-approved published versions of these reports, as found in the *Dispute Settlement Reports ("DSR")*. Where the relevant *DSR* has yet to be published, the document reference from the "*WT/DS*" document series is used.

12. Original footnotes within excerpts are generally omitted except where expressly retained and identified as "(*footnote original*)". Case names in footnotes, other than those found in original footnotes, are changed to the correct short titles as listed in the table at the end of this chapter.

13. Within quoted material, ellipses (". . .") are used to indicate where text within a sentence, a paragraph or larger section has been omitted. Square brackets [ ] are used to indicate editorial changes, all of which have been kept to a strict minimum.

14. Because this work is both for general distribution and for use by Members of the WTO, references are provided to some documents which are still subject to restriction. The rules on document restriction and derestriction are discussed in the Chapter on the *WTO Agreement*.

C. DOCUMENT SERIES, DOCUMENT REFERENCES, AND DOCUMENT SOURCES

15. The various documents series, indicating the document symbols for all the various types of WTO documents, are set out at the end of this chapter.

16. This edition of the *WTO Analytical Index* will be available on CD-ROM and "online" from the WTO website (*http://www.wto.org*). Copies and information on these various sources for the *WTO Analytical Index* may be obtained through the WTO Bookshop or the WTO website or by e-mailing the Publications Office (*publications@wto.org*). The texts of the WTO *Legal Instruments*, *Dispute Settlement Reports* and *Basic Instrument and Selected Documents* series and other WTO publications may also be obtained through the Bookshop or electronically. The contact details of the WTO Bookshop are as follows: WTO, Centre William Rappard, CH-1211 Geneva 21, Switzerland. Telephone +41 22 739 53 08 or +41 22 739 51 05. Fax +41 22 739 54 58. E-mail: publications@wto.org.

17. Set out below are: (i) tables of the full titles, with the title as used in the *WTO Analytical Index*, of agreements and WTO bodies; (ii) the list of WTO document series; and (iii) short titles for dispute cases.

III. MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

A. AGREEMENTS

Marrakesh Agreement Establishing the World Trade Organization	WTO Agreement
General Agreement on Tariffs and Trade 1994	GATT 1994[2]
Agreement on Agriculture	Agreement on Agriculture
Agreement on the Application of Sanitary and Phytosanitary Measures	SPS Agreement
Agreement on Textiles and Clothing	ATC
Agreement on Technical Barriers to Trade	TBT Agreement
Agreement on Trade-Related Investment Measures	TRIMs Agreement
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994	Anti-Dumping Agreement
Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994	Customs Valuation Agreement
Agreement on Preshipment Inspection	PSI Agreement
Agreement on Rules of Origin	Agreement on Rules of Origin
Agreement on Import Licensing Procedures	Licensing Agreement
Agreement on Subsidies and Countervailing Measures	SCM Agreement
Agreement on Safeguards	Agreement on Safeguards

[2] Where reference is made to the General Agreement on Tariffs and Trade 1947, the abbreviation *GATT 1947* is used.

General Agreement on Trade in Services	GATS Agreement
Agreement on Trade-Related Aspects of Intellectual Property Rights	TRIPS Agreement
Understanding on Rules and Procedures Governing the Settlement of Disputes	DSU
Trade Policy Review Mechanism	TPRM
Agreement on Trade in Civil Aircraft	Aircraft Agreement
Agreement on Government Procurement	Agreement on Government Procurement
International Dairy Agreement	International Dairy Agreement
International Bovine Meat Agreement	International Bovine Meat Agreement

B. WTO BODIES

General Council	General Council
– Committee on Trade and Environment	– Committee on Trade and Environment
– Committee on Trade and Development	– Committee on Trade and Development
= Sub-Committee on Least-Developed Countries	= LDC Subcommittee
– Committee on Balance-of-Payments Restrictions	– BOPs Committee
– Committee on Budget, Finance and Administration	– BFA Committee
– Committee on Regional Trade Agreements	– Committee on RTAs or CRTA
– Working Parties on Accession	– Working Parties on Accession
– Working Group on the Relationship between Trade and Investment	– WGTI
– Working Group on the Interaction between Trade and Competition Policy	– WGTCP
– Working Group on Transparency in Government Procurement	– WGTGP
– Working Group on Trade, Debt and Finance	– WGTDF
– Working Group on Trade and Transfer of Technology	– WGTTT
Trade Negotiations Committee	TNC
Dispute Settlement Body	DSB
Trade Policy Review Body	TPRB
Council for Trade in Goods (subsidiary body of the General Council)	Council for Trade in Goods
– Committee on Market Access	– Committee on Market Access
– Committee on Agriculture	– Committee on Agriculture
– Committee on Sanitary and Phytosanitary Measures	– SPS Committee
– Committee on Technical Barriers to Trade	– TBT Committee
– Committee on Subsidies and Countervailing Measures	– SCM Committee
– Committee on Anti-Dumping Practices	– ADP Committee
– Committee on Customs Valuation	– Committee on Customs Valuation
– Committee on Rules of Origin	– Committee on Rules of Origin
– Committee on Import Licensing	– Licensing Committee
– Committee on Trade-Related Investment Measures	– TRIMs Committee
– Committee on Safeguards	– Committee on Safeguards
– Textiles Monitoring Body	– TMB
– Working Party on State-Trading Enterprises	– Working Party on STE
– Committee of Participants on the Expansion of Trade in Information Technology Products	– Committee of Participants on the Expansion of Trade in IT Products
Council for Trade in Services (subsidiary body of the General Council)	Council for Trade in Services
– Committee on Trade in Financial Services	– Committee on Trade in Financial Services
– Committee on Specific Commitments	– CSC
– Working Party on Domestic Regulation	– WPDR
– Working Party on GATS Rules	– WP GATS Rules
Council for Trade-Related Aspects of Intellectual Property Rights (subsidiary body of the General Council)	TRIPS Council
Committee on Trade in Civil Aircraft	Aircraft Committee
Committee on Government Procurement	Committee on Government Procurement

IV. WTO DOCUMENTS[3]

G/ADP/	Committee on Anti-Dumping Practices
G/ADP/AHG/	Ad Hoc Group on Implementation of the Anti-Dumping Committee
G/ADP/IG/W/	Informal Group on Anti-Circumvention of the Anti-Dumping Committee
G/AG/	Committee on Agriculture
G/C/	Council for Trade in Goods
G/IT	Committee of Participants on Expansion of Trade in Information Technology Products
G/L/	General documents
G/LIC/	Committee on Import Licensing
G/MA/	Committee on Market Access
G/NOP/	Working Group on Notification Obligations and Procedures
GPA/	Committee on Government Procurement
GPA/IC/	Interim Committee on Government Procurement
G/PSI/	Preshipment Inspection
G/RO/	Committee on Rules of Origin
G/RS/	Rectifications and Modifications of Schedules Annexed to the Marrakesh Protocol
G/SCM/	Committee on Subsidies and Countervailing Measures
G/SECRET/	Schedules
G/SECRET/HS/	Harmonized System
G/SG/	Committee on Safeguards
G/SP/	Additions to Schedules Annexed to the Marrakesh Protocol to GATT 1994
G/SPS/	Committee on Sanitary and Phytosanitary Measures
G/STR/	State Trading
G/TBT/	Committee on Technical Barriers to Trade
G/TMB/	Textiles Monitoring Body
G/TRIMS/	Committee on Trade-Related Investment Measures
G/VAL/	Committee on Customs Valuation
IDA/	International Dairy Agreement
IDB/URM	Integrated Database – User Reference Manual
IMA/	International Bovine Meat Agreement
IP/C/	Council for Trade-Related Aspects of Intellectual Property Rights
IP/D/	Dispute Settlement
IP/N/	Council for Trade-Related Aspects of Intellectual Property Rights – Notification of Laws and Regulations
IP/Q/[MEMBER]/	Legislation on copyright-related matters: questions and responses
PC/	Preparatory Committee for the WTO
PC/AIR/	Airgrams
PC/BFA/	Sub-Committee on Budget, Finance and Administration
PC/IPL/	Sub-Committee on Institutional, Procedural and Legal Matters
PC/SCS/	Sub-Committee on Services
PC/SCS/SP/	Sub-Committee on Services – Additions to Schedules
PC/SCTE/	Sub-Committee on Trade and Environment
PRESS/	Press Release
S/C/	Council for Trade in Services
S/CSC/	Committee on Specific Commitments
S/ENQ/	Enquiry Point
S/FIN/	Committee on Trade in Financial Services
S/GBT/	Group on Basic Telecommunications
S/IGFS/	Interim Group on Financial Services
S/L/	Trade in Services general documents
S/NGBT/	Negotiating Group on Basic Telecommunications
S/NGMTS/	Negotiating Group on Maritime Transport Services
S/NGNP/	Negotiating Group on Movement of Natural Persons

[3] There are several types of document which are identified by standard abbreviations: **COM** for communication, **D** for Dispute, **INF** for Information and/or List of Representatives, **M** for Minutes, **N** for Notification, **Q** for Questions and Replies, **R** for Report, **W** for Working Paper.

S/P/	Provisional Schedule of Specific Commitments under the GATS
S/WPDR/	Working Party on Domestic Regulation
S/WPGR/	Working Party on GATS Rules
S/WPPS/	Working Party on Professional Services
TCA/	Committee on Trade in Civil Aircraft
TN/AG/	Committee on Agriculture, Special Session
TN/C/	Trade Negotiations Committee
TN/CTD/	Committee on Trade and Development, Special Session
TN/DS/	Dispute Settlement Body, Special Session
TN/IP/	Council for TRIPS, Special Session
TN/MA/	Negotiating Group on Market Access
TN/RL/	Negotiating Group on WTO Rules
TN/S/	Council for Trade in Services, Special Session
TN/TE/	Committee on Trade and Environment, Special Session
TN/TF/	Negotiating Group on Trade Facilitation
UNCTAD/WTO/AIR/	Airgrams convening ITC meetings
WT/AB/WP/	Appellate Body
WT/ACC/	Accessions – Working Party
WT/BFA/	Committee on Budget, Finance and Administration
WT/BOP/	Committee on Balance-of-Payments Restrictions
WT/COMTD/	Committee on Trade and Development
WT/CTE/	Committee on Trade and Environment
WT/DAILYB[YEAR]/	Daily Bulletin
WT/DER/	Derestriction Procedures
WT/DS[NUMBER]/	Dispute Settlement
WT/DSB/	Dispute Settlement Body
WT/FIFTY/	50th Anniversary of the GATT/WTO
WT/GC/	General Council
WT/IFSC/	Integrated Framework Steering Committee
WT/INF/	Information
WT/L/	General documents
WT/LDC/HL/	Least-Developed Countries-High Level Meeting
WT/LDC/SWG/IF	Sub-Committee on Least-Developed Countries
WT/LET/	Letters
WT/MIN(96)/	Ministerial Conference, Singapore
WT/MIN(98)/	Ministerial Conference, Geneva
WT/MIN(99)/	Ministerial Conference, Seattle
WT/MIN(01)/	Ministerial Conference, Doha
WT/MIN(03)/	Ministerial Conference, Cancún
WT/REG/	Regional Trade
WT/SPEC/	Special distribution documents
WT/ST/	Statements
WT/TC/NOTIF/	Technical Cooperation – Handbook on Notification Requirements
WT/TF/	Trade and Finance
WT/TPR/	Trade Policy Review Body
WT/WGTCP/	Working Group on the Interaction between Trade and Competition Policy
WT/WGTDF/	Working Group on Trade, Debt and Finance
WT/WGTGP/	Working Group on Transparency in Government Procurement
WT/WGTI/	Working Group on the Relationship between Trade and Investment
WT/WGTTT/	Working Group on Trade and Transfer of Technology
WTO/AIR/	Airgrams

V. GATT DISPUTES

Australia – Ammonium Sulphate	*The Australian Subsidy on Ammonium Sulphate* Working Party Report, adopted 3 April 1950, BISD II/188
Australia – Glacé Cherries	*Australia – Imposition of Countervailing Duties on Imports of Glacé Cherries from France and Italy in Application of the Australian Customs Amendment Act 1991* Panel Report, 28 October 1993, unadopted, SCM/178
Belgium – Family Allowances	*Belgian Family Allowances (allocations familiales)* Working Party Report, adopted 7 November 1952, BISD 1S/59
Belgium – Income Tax	*Income Tax Practices Maintained by Belgium* Panel Report, adopted 7 December 1981, BISD 23S/127 and 28S/114
Brazil – EEC Milk	*Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community* Panel Report, adopted 28 April 1994, BISD 41S/II/467
Brazil – Internal Taxes	*Brazilian Internal Taxes* Working Party Report, adopted 30 June 1949, BISD II/181 and 186
Canada – Eggs	*Canadian Import Quotas on Eggs* Working Party Report, adopted 17 February 1976, BISD 23S/91
Canada – FIRA	*Canada – Administration of the Foreign Investment Review Act* Panel Report, adopted 7 February 1984, BISD 30S/140
Canada – Gold Coins	*Canada – Measures Affecting the Sale of Gold Coins* Panel Report, 17 September 1985, unadopted, L/5863
Canada – Grain Corn	*Panel on Canadian Countervailing Duties on Grain Corn from the United States* Panel Report, adopted 26 March 1992, BISD 39S/411.
Canada – Herring and Salmon	*Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* Panel Report, adopted 22 March 1988, BISD 35S/98
Canada – Ice Cream and Yoghurt	*Canada – Import Restrictions on Ice Cream and Yoghurt* Panel Report, adopted 5 December 1989, BISD 36S/68
Canada – Lead and Zinc	*Canada – Withdrawal of Tariff Concessions (Lead and Zinc)* Panel Report, adopted 17 May 1978, BISD 25S/42
Canada – Manufacturing Beef CVD	*Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC* Panel Report, 13 October 1987, unadopted, SCM/85
Canada – Potatoes	*Exports of Potatoes to Canada* Panel Report, adopted 16 November 1962, BISD 11S/55 and 88
Canada – Provincial Liquor Boards (EEC)	*Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies* Panel Report, adopted 22 March 1988, BISD 35S/37
Canada – Provincial Liquor Boards (US)	*Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* Panel Report, adopted 18 February 1992, BISD 39S/27
Cuba – Consular Taxes	*The Phrase "Charges of any Kind" in Article I:1 in Relation to Consular Taxes* Ruling by the Chairman, 24 August 1948, BISD II/12
Cuba – Textiles I	*Report of Working Party 7 on the Cuban Schedule* 13 September 1948, unadopted, GATT/CP.2/43
Cuba – Textiles II	*Report of Working Party 8 on Cuban Textiles* 10 August 1949, unadopted, GATT/CP.3/82
EC – Article XXVIII	*Canada/European Communities – Article XXVIII Rights* Award by the Arbitrator, 16 October 1990, BISD 37S/80
EC – Audio Cassettes	*EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan* Panel Report, 28 April 1995, unadopted, ADP/136
EC – Citrus	*European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* Panel Report, 7 February 1985, unadopted, L/5776
EC – Sugar Exports (Australia)	*European Communities – Refunds on Exports of Sugar* Panel Report, adopted 6 November 1979, BISD 26S/290
EC – Sugar Exports (Brazil)	*European Communities – Refunds on Exports of Sugar – Complaint by Brazil* Panel Report, adopted 10 November 1980, BISD 27S/69
EEC – Airbus	*German Exchange Rate Scheme for Deutsche Airbus* Panel Report, 4 March 1992, unadopted, SCM/142
EEC – Animal Feed Proteins	*EEC – Measures on Animal Feed Proteins* Panel Report, adopted 14 March 1978, BISD 25S/49

EEC – Apples (US)	*European Economic Community – Restrictions on Imports of Apples – Complaint by the United States* Panel Report, adopted 22 June 1989, BISD 36S/135
EEC – Apples I (Chile)	*EEC Restrictions on Imports of Apples from Chile* Panel Report, adopted 10 November 1980, BISD 27S/98
EEC – Apples II (Chile)	*EEC – Restrictions on Imports of Apples* Panel Report, 20 June 1994, unadopted, DS39/R
EEC (Member States) – Bananas I	*EEC – Member States' Import Regimes for Bananas* Panel Report, 3 June 1993, unadopted, DS32/R
EEC – Bananas II	*EEC – Import Regime for Bananas* Panel Report, 11 February 1994, unadopted, DS38/R
EEC – Canned Fruit	*European Economic Community – Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes* Panel Report, 20 February 1985, unadopted, L/5778
EEC – Copper Scrap	*European Economic Community – Restrictions on Exports of Copper Scrap* Panel Report, adopted 20 February 1990, BISD 37S/200
EEC – Cotton Yarn	*European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil* Panel Report, adopted 30 October 1995, BISD 42/17
EEC – Dessert Apples	*European Economic Community – Restrictions on Imports of Dessert Apples – Complaint by Chile* Panel Report, adopted 22 June 1989, BISD 36S/93
EEC – Import Restrictions	*EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong* Panel Report, adopted 12 July 1983, BISD 30S/129
EEC – Imports of Beef	*European Economic Community – Imports of Beef from Canada* Panel Report, adopted 10 March 1981, BISD 28S/92
EEC – Minimum Import Prices	*EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables* Panel Report, adopted 18 October 1978, BISD 25S/68
EEC – Newsprint	*Panel on Newsprint* Panel Report, adopted 20 November 1984, BISD 31S/114
EEC – Oilseeds I	*European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* Panel Report, adopted 25 January 1990, BISD 37S/86
EEC – Oilseeds II	*European Economic Community – Follow-Up on the Panel Report "Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins"* Panel Report, 31 March 1992, BISD 39S/91
EEC – Parts and Components	*European Economic Community – Regulation on Imports of Parts and Components* Panel Report, adopted 16 May 1990, BISD 37S/132
EEC – Pasta Subsidies	*European Economic Community – Subsidies on Export of Pasta Products* Panel Report, 19 May 1983, unadopted, SCM/43
EEC – Poultry (US)	*EEC – United Kingdom Application of EEC Directives to Imports of Poultry from the United States* Panel Report, adopted 11 June 1981, BISD 28S/90
EEC – VAT and Threshold	*Panel on Value-Added Tax and Threshold* Panel Report, adopted 16 May 1984, BISD 31S/247
EEC – Wheat Flour Subsidies	*European Economic Community – Subsidies on Export of Wheat Flour* Panel Report, 21 March 1983, unadopted, SCM/42
France – Compensation Tax	*French Special Temporary Compensation Tax on Imports* Contracting Parties Decision, 17 January 1955, BISD 3S/26
France – Import Restrictions	*French Import Restrictions* Panel Report, adopted 14 November 1962, BISD 11S/55 and 94
France – Income Tax	*Income Tax Practices Maintained by France* Panel Report, adopted 7 December 1981, BISD 23S/114 and 28S/114
France – Wheat Exports	*French Assistance to Exports of Wheat and Wheat Flour* Panel Report, adopted 21 November 1958, BISD 7S/46
Germany – Sardines	*Treatment by Germany of Imports of Sardines* Working Party Report, adopted 31 October 1952, BISD 1S/53
Germany – Starch Duties	*German Import Duties on Starch and Potato Flour* Working Party Report, 16 February 1955, unadopted, BISD 3S/77
Greece – Import Duties	*Increase of Import Duties on Products included in Schedule XXV (Greece)* Working Party Report, adopted 3 November 1952, BISD 1S/51

Greece – Import Taxes	*Special Import Taxes Instituted by Greece* Working Party Report, adopted 3 November 1952, BISD 1S/48
Greece – Phonograph Records	*Greece – Increase in Bound Duty* Group of Experts Report, 9 November 1956, unadopted, L/580
Greece – USSR Tariff Quotas	*Greece – Preferential Tariff Quotas to the USSR* Working Party Report, adopted 2 December 1970, BISD 18S/179
India – Tax Rebates	*Application of Article I:1 to Rebates on Internal Taxes* Ruling by the Chairman, 24 August 1948, BISD II/12
Italy – Agricultural Machinery	*Italian Discrimination Against Imported Agricultural Machinery* Panel Report, adopted 23 October 1958, BISD 7S/60
Jamaica – Margins of Preference	*Jamaica – Margins of Preference* Panel Report, adopted 2 February 1971, BISD 18S/183
Japan – Agricultural Products I	*Japan – Restrictions on Imports of Certain Agricultural Products* Panel Report, adopted 2 March 1988, BISD 35S/163
Japan – Alcoholic Beverages I	*Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* Panel Report, adopted 10 November 1987, BISD 34S/83
Japan – Leather (Canada)	*Japan's Measures on Imports of Leather* Panel Report, adopted 10 November 1980, BISD 27S/118
Japan – Leather I (US)	*Japanese Measures on Imports of Leather* Panel Report, adopted 6 November 1979, BISD 26S/320
Japan – Leather II (US)	*Panel on Japanese Measures on Imports of Leather* Panel Report, adopted 15 May 1984, BISD 31S/94
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Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement)

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

The *Parties* to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

Recognizing further that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous

arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the eliminations of discriminatory treatment in international trade relations,

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system,

Agree as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

1. Legal relevance of the Preamble

(a) Environmental context

1. The Appellate Body on *US – Gasoline* emphasized the importance of the Preamble of the *WTO Agreement* in the context of environmental issues:

"Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements."[1]

(b) Integrated WTO system

2. The Appellate Body report on *Brazil – Desiccated Coconut* invoked the Preamble in the context of the integrated WTO system that replaced the old GATT 1947:

"The authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system. This can be seen from the preamble to the *WTO Agreement* which states, in pertinent part:

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations."[2]

(c) Interpretation of Article XX(g) of the GATT 1994

3. For the purpose of interpreting the meaning of "exhaustible natural resources" in paragraph (g) of Article XX of the *GATT 1994* in *US – Shrimp*, the Appellate Body referred to the Preamble:

"The words of Article XX(g), 'exhaustible natural resources', were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement – which informs not only the GATT 1994, but also the other covered agreements – explicitly acknowledges 'the objective of *sustainable development*':

'The Parties to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, ...' (emphasis added)

From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'. . . .

Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources."[3]

4. On this topic, the Appellate Body on *US – Shrimp* further stated:

"At the end of the Uruguay Round, negotiators fashioned an appropriate preamble for the new WTO Agreement, which strengthened the multilateral trading system by establishing an international organization, inter alia, to facilitate the implementation, administra-

[1] Appellate Body Report on *US – Gasoline*, p. 30.
[2] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 17.
[3] Appellate Body Report on *US – Shrimp*, paras. 129–131.

tion and operation, and to further the objectives, of that Agreement and the other agreements resulting from that Round. In recognition of the importance of continuity with the previous GATT system, negotiators used the preamble of the GATT 1947 as the template for the preamble of the new WTO Agreement. Those negotiators evidently believed, however, that the objective of 'full use of the resources of the world' set forth in the preamble of the GATT 1947 was no longer appropriate to the world trading system of the 1990's. As a result, they decided to qualify the original objectives of the GATT 1947 with the following words:

> . . . while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, . . .'

We note once more that this language demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble . . .'.

It is proper for us to take into account, as part of the context of the chapeau, the specific language of the preamble to the WTO Agreement, which, we have said, gives colour, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the GATT 1994, in particular."[4]

(d) Special needs of developing countries

5. The Panel on *India – Quantitative Restrictions* invoked the Preamble in the context of recognising the need to address the concerns of developing countries:

> "At the outset, we recall that the Preamble to the WTO Agreement recognizes both (i) the desirability of expanding international trade in goods and services and (ii) the need for positive efforts designed to ensure that developing countries secure a share in international trade commensurate with the needs of their economic development. In implementing these goals, WTO rules promote trade liberalization, but recognize the need for specific exceptions from the general rules to address special concerns, including those of developing countries."[5]

6. The Panel on *Brazil – Aircraft (Article 21.5 – Canada)* referred to the Preamble in reference to Article 27 of the *SCM Agreement* and the interests of developing countries:

> "The preamble to the WTO Agreement recognises
>
> > 'that there is need for positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.'
>
> This overarching concern of the WTO Agreement finds ample reflection in the *SCM Agreement*. Article 27 of that Agreement recognizes that 'subsidies may play an important role in economic development programmes of developing country Members' and provides substantial special and differential treatment for developing countries, including in respect of export subsidies."[6]

2. Relationship with other WTO Agreements

(a) GATT 1994

(i) Article XX(g)

7. See paragraphs 3–4 above.

(ii) Article XXIV

8. The Panel on *Turkey – Textiles* also referred to the Preamble in the context of the discussion regarding GATT Article XXIV stating that it does not constitute a shield from other GATT/WTO prohibitions or the introduction of measures considered to be *ipso facto* incompatible with GATT/WTO:

> "At the conclusion of the Uruguay Round Members reiterated the same general objective and principles in the GATT 1994 Understanding on Article XXIV:
>
> > '*Reaffirming* that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;'
>
> and in the Preamble to the WTO Agreement:
>
> > 'Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of *discriminatory treatment* in international commerce . . .' (emphasis added)
>
> We also recall the Singapore Ministerial Declaration:
>
> > '7. . . . We reaffirm the primacy of the multilateral trading system, which includes a framework for the development of regional trade agreements, and we renew our commitment to ensure that regional trade

[4] Appellate Body Report on *US – Shrimp*, paras. 152, 153 and 155.
[5] Panel Report on *India – Quantitative Restrictions*, para. 7.2.
[6] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 6.47, fn 49.

agreements are complementary to it and consistent with its rules'

From the above cited provisions, we draw two general conclusions for the present case. Firstly, the objectives of regional trade agreements and those of the GATT and the WTO have always been complementary, and therefore should be interpreted consistently with one another, with a view to increasing trade and not to raising barriers to trade, thereby arguing against an interpretation that would allow, on the occasion of the formation of a customs union, for the introduction of quantitative restrictions. Secondly, we read in these parallel objectives a recognition that the provisions of Article XXIV (together with those of the GATT 1994 Understanding on Article XXIV) do not constitute a shield from other GATT/WTO prohibitions, or a justification for the introduction of measures which are considered generally to be ipso facto incompatible with GATT/WTO. In our view the provisions of Article XXIV on regional trade agreements cannot be considered to exempt constituent members of a customs union from the primacy of the WTO rules."[7]

(b) SCM Agreement

9. See paragraph 6 above.

II. ARTICLE I

A. TEXT OF ARTICLE I

Article I
Establishment of the Organization

The World Trade Organization (hereinafter referred to as "the WTO") is hereby established.

B. INTERPRETATION AND APPLICATION OF ARTICLE I

1. Article I

10. The World Trade Organization (WTO) was established at the conclusion of the Uruguay Round of multilateral trade negotiations. The name "World Trade Organization" was established at the meeting of the Trade Negotiating Committee on 15 December 1993.[8]

11. The World Trade Organization and the World Tourism Organization reached an agreement in order to avoid confusion with respect to the use of the acronym "WTO". According to this agreement, the World Trade Organization will use a distinct logo and will avoid using the acronym in the context of tourism services. The agreement further provides for cooperation between the Secretariats of the two organizations on practical issues arising in this context.[9]

III. ARTICLE II

A. TEXT OF ARTICLE II

Article II
Scope of the WTO

1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

4. The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as "GATT 1994") is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as "GATT 1947").

B. INTERPRETATION AND APPLICATION OF ARTICLE II

1. Article II:2

(a) Single undertaking

12. In *Brazil – Desiccated Coconut*, the Appellate Body referred to Articles II:2 and II:4 and Annex 1A of the *WTO Agreement*, as well as the *DSU* to illustrate the "single undertaking" nature of the *WTO Agreement*[10]: "[t]he single undertaking is further reflected in the provisions of the *WTO Agreement* dealing with original membership, accession, non-application of the Multilateral Trade Agreements between particular Members, acceptance of the *WTO Agreement*, and withdrawal from it.[11] Within this framework, all WTO Members are bound by all the rights and obligations in the *WTO Agreement* and its Annexes 1, 2 and 3."[12]

[7] Panel Report on *Turkey – Textiles*, paras. 9.161–9.163.
[8] GATT doc. MTN.TNC/40.
[9] GATT doc. MTN.TNC/W/146, p. 4.
[10] Appellate Body Report on *Brazil – Desiccated Coconut*, pp. 12–13.
[11] (*footnote original*) *WTO Agreement*, Articles XI, XII, XIII, XIV and XV, respectively.
[12] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 12.

13. In *Argentina – Footwear (EC)*, the Appellate Body also referred to Articles II:2 and II:4 of the *WTO Agreement* as a basis for the following finding:

> "The GATT 1994 and the *Agreement on Safeguards* are both Multilateral Agreements on Trade in Goods contained in Annex 1A of the *WTO Agreement*, and, as such, are both 'integral parts' of the same treaty, the *WTO Agreement*, that are 'binding on all Members'.[13] Therefore, the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are *all* provisions of one treaty, the *WTO Agreement*. They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members. And, as these provisions relate to the same thing, namely the application by Members of safeguard measures, the Panel was correct in saying that 'Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction.' Yet a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.[14] And, an appropriate reading of this 'inseparable package of rights and disciplines' must, accordingly, be one that gives meaning to *all* the relevant provisions of these two equally binding agreements."[15]

2. Article II:4

14. The Appellate Body on *Brazil – Desiccated* Coconut, see paragraph 2 above, and *Argentina – Footwear (EC)*, see paragraph 13 above, referred to this Article in their rulings.

IV. ARTICLE III

A. TEXT OF ARTICLE III

Article III
Functions of the WTO

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "*DSU*") in Annex 2 to this Agreement.

4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement.

5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

B. INTERPRETATION AND APPLICATION OF ARTICLE III

1. Article III:1

(a) "implementation, administration and operation . . . of the Multilateral Trade Agreements"

15. As regards facilitating the implementation, administration and operation of the Multilateral Trade Agreements, see the relevant Chapters on the relevant WTO agreements.

2. Article III:2

(a) "forum for negotiations among its Members"

(i) 1996 Singapore Ministerial Conference

16. At the 1996 Singapore Ministerial Conference (see Section V.B.1 below), Ministers adopted the recommendations below as part of their declaration:

> "We, the Ministers, have met in Singapore . . . as called for in Article IV of the Agreement Establishing the World Trade Organization, to further strengthen the WTO as a forum for negotiation, the continuing liberalization of trade within a rule-based system, and the multilateral review and assessment of trade policies, and in particular to:
>
> - assess the implementation of our commitments under the *WTO Agreements* and decisions;
> - review the ongoing negotiations and Work Programme;
> - examine developments in world trade; and
> - address the challenges of an evolving world economy.
>
> . . . Bearing in mind that an important aspect of WTO activities is a continuous overseeing of the implementation of various agreements, a periodic examination and updating of the WTO Work Programme is a key to enable the WTO to fulfil its objectives. In this context, we endorse the reports of the various WTO bodies. A major share of the Work Programme stems from the *WTO*

[13] (*footnote original*) WTO Agreement, Article II:2.
[14] (*footnote original*) We have recently confirmed this principle in our Report in *Korea – Dairy*, para. 81. See also Appellate Body Reports on *US – Gasoline*, p. 23; *Japan – Alcoholic Beverages II*, p. 12; and *India – Patents (US)*, fn. 25.
[15] Appellate Body Report on *Argentina – Footwear (EC)*, para. 81.

Agreement and decisions adopted at Marrakesh. As part of these Agreements and decisions we agreed to a number of provisions calling for future negotiations on Agriculture, Services and aspects of TRIPS, or reviews and other work on Anti-Dumping, Customs Valuation, Dispute Settlement Understanding, Import Licensing, Preshipment Inspection, Rules of Origin, Sanitary and Phyto-Sanitary Measures, Safeguards, Subsidies and Countervailing Measures, Technical Barriers to Trade, Textiles and Clothing, Trade Policy Review Mechanism, Trade-Related Aspects of Intellectual Property Rights and Trade-Related Investment Measures. We agree to a process of analysis and exchange of information, where provided for in the conclusions and recommendations of the relevant WTO bodies, on the Built-in Agenda issues, to allow Members to better understand the issues involved and identify their interests before undertaking the agreed negotiations and reviews. We agree that:

- the time frames established in the Agreements will be respected in each case;
- the work undertaken shall not prejudge the scope of future negotiations where such negotiations are called for; and
- the work undertaken shall not prejudice the nature of the activity agreed upon (i.e. negotiation or review)".[16]

(ii) 1998 Geneva Ministerial Conference

17. At the 1998 Geneva Ministerial Conference (see Section V.B.1 below), Ministers adopted several recommendations to put before the General Council as a part of their declaration:

"We recall that the Marrakesh Agreement Establishing the World Trade Organization states that the WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to the Agreement, and that it may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference. In the light of paragraphs 1–8 above, we decide that a process will be established under the direction of the General Council to ensure full and faithful implementation of existing agreements, and to prepare for the Third Session of the Ministerial Conference. This process shall enable the General Council to submit recommendations regarding the WTO's work programme, including further liberalization sufficiently broad-based to respond to the range of interests and concerns of all Members, within the WTO framework, that will enable us to take decisions at the Third Session of the Ministerial Conference. In this regard, the General Council will meet in special session in September 1998 and periodically thereafter to ensure full and timely completion of its work, fully respecting the principle of decision-making by consensus. The General Council's work programme shall encompass the following:

(a) recommendations concerning:

  (i) the issues, including those brought forward by Members, relating to implementation of existing agreements and decisions;

  (ii) the negotiations already mandated at Marrakesh, to ensure that such negotiations begin on schedule;

  (iii) future work already provided for under other existing agreements and decisions taken at Marrakesh;

(b) recommendations concerning other possible future work on the basis of the work programme initiated at Singapore;

(c) recommendations on the follow-up to the High-Level Meeting on Least-Developed Countries;

(d) recommendations arising from consideration of other matters proposed and agreed to by Members concerning their multilateral trade relations.

The General Council will also submit to the Third Session of the Ministerial Conference, on the basis of consensus, recommendations for decision concerning the further organization and management of the work programme arising from the above, including the scope, structure and time-frames, that will ensure that the work programme is begun and concluded expeditiously.

The above work programme shall be aimed at achieving overall balance of interests of all Members."[17]

(iii) Doha Ministerial Conference

18. At the Doha Ministerial Conference (see Section V.B.1 below), Members adopted a decision to launch a new round of negotiations, known as the "Doha Round".[18] As regards the declarations and decisions adopted at the Doha Ministerial Conference, see paragraph 38 below and Section XXVII below. The Doha Declaration provided general guidelines for the organization of the new Round.

19. On 1 August 2004, the General Council adopted a decision known as the "July Package", which, *inter alia*, amended the scope of the Doha negotiations. The text of the July Package can be found in Section XXVIII below.

3. Article III:3

(a) "Shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes"

20. As regards the administration of the *DSU*, see Article 2 of the Chapter on the *DSU*. In addition, see the

[16] WT/MIN(96)/DEC paras. 1 and 19.
[17] WT/MIN(98)/DEC/1, paras. 9–11.
[18] WT/MIN(01)/DEC/1

activities of the Special Session of the Dispute Settlement Body in Section XI.B.2 below.[19]

4. Article III:4

(a) "Shall administer the Trade Policy Review Mechanism"

21. Regarding the administration of the *TPRM*, see Section III (paragraph C) of the Chapter on the *TPRM*.

5. Article III:5

(a) "The WTO shall cooperate . . . with the IMF and . . . World Bank"

(i) General

22. At its meeting of 7, 8 and 13 November 1996, the General Council adopted the decision approving agreements with the IMF and the World Bank.[20]

23. The agreement between the WTO and the IMF was signed on 9 December 1996.[21]

24. The agreement between the WTO and the World Bank was signed on 28 April 1997.[22]

(ii) Observer status

25. The IMF and the World Bank have observer status in the WTO as provided for in their respective agreements with the WTO. See also paragraphs 135–137 below.

(iii) Cooperation agreements do not modify, add to or diminish rights and obligations of Members

26. In *Argentina – Textiles and Apparel*, the Appellate Body upheld the Panel's finding "that there is nothing in the Agreement Between the IMF and the WTO, the Declaration on the Relationship of the WTO with the IMF or the Declaration on Coherence which justifies a conclusion that a Member's commitments to the IMF shall prevail over its obligations under Article VIII of the GATT 1994."[23] The Appellate Body explained:

> "The 1994 Declaration on Coherence is a Ministerial decision that articulates the objective of promoting increased cooperation between the WTO and the IMF in order to encourage greater coherence in global economic policy-making. This objective is more explicitly recognized in the treaty language of the *WTO Agreement* in Article III:5, which states:
>
> > 'With a view to achieving greater coherence in global economic policy-making, *the WTO shall cooperate, as appropriate*, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.' (emphasis added)
>
> In furtherance of the WTO's mandate to 'cooperate, as appropriate' with the IMF, the *Agreement Between the IMF and the WTO* was concluded in 1996.[24] This Agreement provides for specific means of administrative cooperation between the two organizations. It provides for consultations and the exchange of information between the WTO Secretariat and the staff of the IMF in certain specified circumstances, and grants to each organization observer status in certain of the other's meetings.[25]
>
> The *Agreement Between the IMF and the WTO*, however, does *not* modify, add to or diminish the rights and obligations of Members under the *WTO Agreement*, nor does it modify individual States' commitments to the IMF. It does not provide any substantive rules concerning the resolution of possible conflicts between obligations of a Member under the *WTO Agreement* and obligations under the Articles of Agreement of the IMF or any agreement with the IMF. However, paragraph 10 of the *Agreement Between the IMF and the WTO* contains a direction to the staff of the IMF and the WTO Secretariat to *consult* on 'issues of *possible inconsistency* between *measures under discussion*'.
>
> In the 1994 Declaration on the Relationship of the WTO with the IMF, Ministers reaffirmed that, unless otherwise provided for in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 'the relationship of the WTO with the International Monetary Fund, with regard to the areas covered by the Multilateral Trade Agreements in Annex 1A of the *WTO Agreement*, will be based on the provisions that have governed the relationship of the CONTRACTING PARTIES to the GATT 1947 with the International Monetary Fund.' We note that certain provisions of the GATT 1994, such as Articles XII, XIV, XV and XVIII, permit a WTO Member, in certain specified circumstances relating to exchange matters and/or balance of payments, to be excused from certain of its obligations under the GATT 1994. However, Article VIII contains no such exception or permission."[26]

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[19] See WT/MIN(01)/DEC/1, para. 30; and para. 57 of this Chapter.

[20] WT/GC/M/16, section 7. The text of the decision to approve these Agreements is in WT/L/194. The WTO Director-General issued a report on the implementation of the cooperation agreements with the IMF and the World Bank on 13 November 1997. The text of the report is in WT/GC/W/68.

[21] The text of the Agreement with the International Monetary Fund is in Annex I to WT/L/195.

[22] The text of the Agreement with the World Bank is in Annex II to WT/L/195

[23] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 70.

[24] (*footnote original*) Done at Singapore, 9 December 1996.

[25] (*footnote original*) Excluding the DSB and dispute settlement panels, except where "matters of jurisdictional relevance to the Fund are to be considered". The WTO may invite a member of the staff of the Fund to attend a meeting of DSB "when the WTO, after consultation between the WTO Secretariat and the staff of the Fund, finds that such a presence would be of particular common interest to both organizations." *Agreement Between the IMF and the WTO*, para. 6.

[26] Appellate Body Report on *Argentina – Textiles and Apparel*, paras. 70–73.

(iv) No requirement for WTO panels to consult with IMF

27. In *Argentina – Textiles and Apparel*, rejecting the claim that the Panel did not make "an objective assessment of the matter" as required under Article 11 of the *DSU*, by not acceding to the parties' request to seek information from the IMF so as to obtain its opinion on certain issues, the Appellate Body stated that "[a]s in the *WTO Agreement*, there are no provisions in the *Agreement Between the IMF and the WTO* that *require* a panel to consult with the IMF in a case such as this."[27] On this issue, see the Chapter on the *DSU*, Section XXIII.B.2.

28. The Declaration on the Relationship of the WTO with the IMF is annexed to the *WTO Agreement*, see Section XX below.

(b) "with a view to achieving greater coherence in global economic policy-making"

(i) General

29. The Managing Director of the IMF, the President of the World Bank and the Director-General of the WTO jointly issued a report on Coherence[28] on 21 October 1998, pursuant to paragraph 5 of the Geneva Ministerial Declaration.

30. The General Council authorized the Chairman to hold special informal meetings regarding coherence issues, on 15 and 16 February 1999, pursuant to the request of either the delegations or the Director-General.[29] The General Council held additional meetings on 13 May 2003[30] and 22 October 2004[31] and discussed issues on coherence.

31. For the text of the Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking, see Section XIX below.

(ii) Annual reports

32. Pursuant to paragraph 2 of the Declaration of the General Council on "Agreements between the WTO, the IMF and the World Bank", the Director-General issues an annual report to Members on the activities carried out by the WTO under its cooperation agreements with these aforementioned institutions.[32]

V. ARTICLE IV

A. TEXT OF ARTICLE IV

Article IV
Structure of the WTO

1. There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

2. There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council. The General Council shall also carry out the functions assigned to it by this Agreement. The General Council shall establish its rules of procedure and approve the rules of procedure for the Committees provided for in paragraph 7.

3. The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

4. The General Council shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the TPRM. The Trade Policy Review Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

5. There shall be a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Council for TRIPS"), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functioning of the Multilateral Trade Agreements in Annex 1A. The Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services (hereinafter referred to as "GATS"). The Council for TRIPS shall oversee the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Agreement on TRIPS"). These Councils shall carry out the functions assigned to them by their respective agreements and by the General Council. They shall establish their respective rules of procedure subject to the approval of the General Council. Membership in these Councils shall be open to representatives of all Members. These Councils shall meet as necessary to carry out their functions.

6. The Council for Trade in Goods, the Council for Trade in Services and the Council for TRIPS shall establish

[27] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 85.
[28] The text of the report can be found in WT/GC/13.
[29] WT/GC/M/35, section 3.
[30] WT/GC/M/79.
[31] WT/GC/M/89.
[32] WT/TF/COH/S/3–6, 8 and 10.

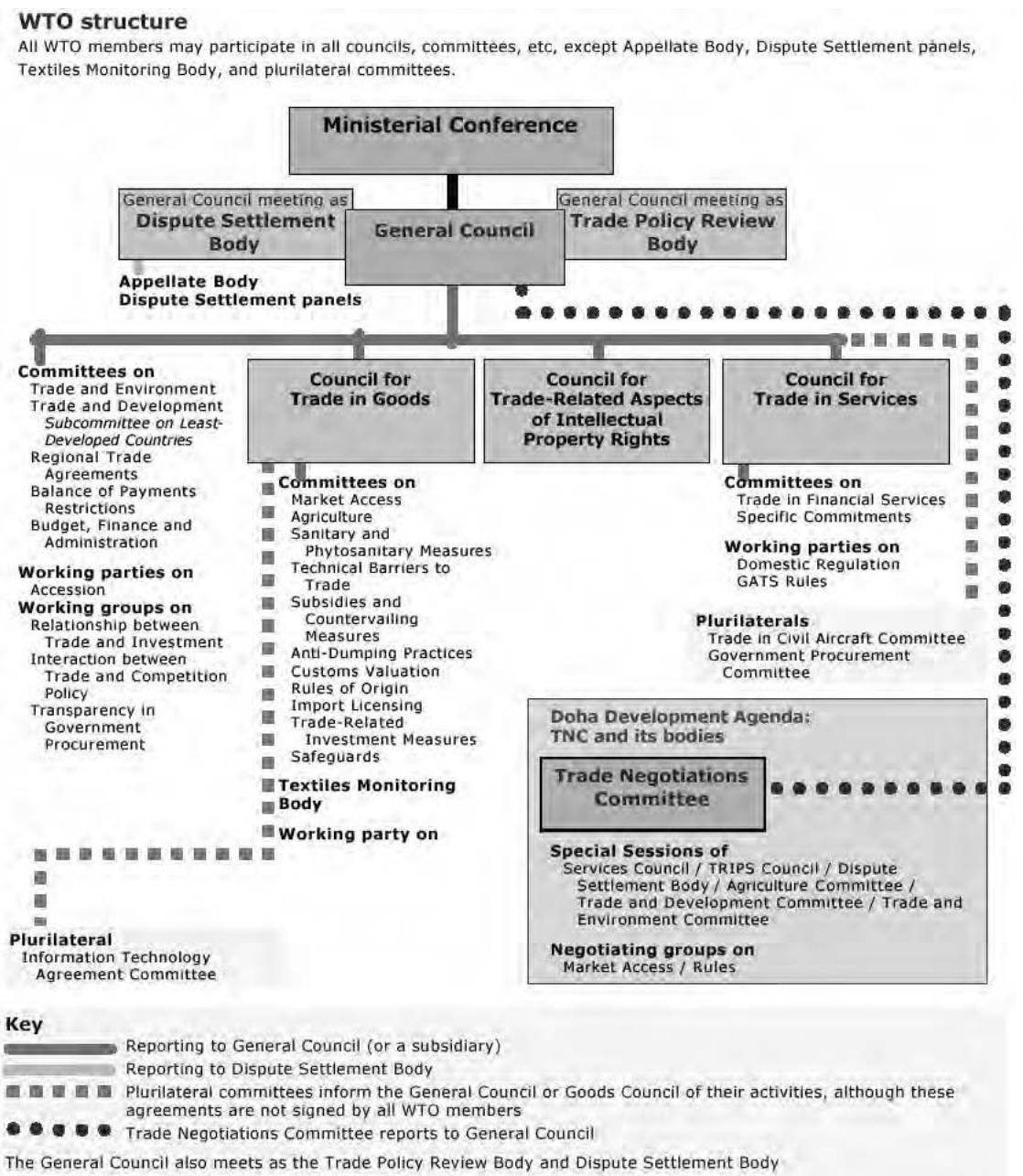
subsidiary bodies as required. These subsidiary bodies shall establish their respective rules of procedure subject to the approval of their respective Councils.

7. The Ministerial Conference shall establish a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration, which shall carry out the functions assigned to them by this Agreement and by the Multilateral Trade Agreements, and any additional functions assigned to them by the General Council, and may establish such additional Committees with such functions as it may deem appropriate. As part of its functions, the Committee on Trade and Development shall periodically review the special provisions in the Multilateral Trade Agreements in favour of the least-developed country Members and report to the General Council for appropriate action. Membership in these Committees shall be open to representatives of all Members.

8. The bodies provided for under the Plurilateral Trade Agreements shall carry out the functions assigned to them under those Agreements and shall operate within the institutional framework of the WTO. These bodies shall keep the General Council informed of their activities on a regular basis.

B. INTERPRETATION AND APPLICATION OF ARTICLE IV

33. For an overview of the WTO structure see the flowchart below.



1. Article IV:1

(a) "there shall be a Ministerial Conference . . . which shall meet at least once every two years"

34. Five Ministerial Conferences have been convened between the establishment of the WTO in 1995 and 31 December 2004:

(i) 1996 Singapore Ministerial Conference

35. The First WTO Ministerial Conference was held in Singapore between 9 and 13 December 1996. The *Ministerial Declaration*[33] was adopted on 13 December 1996. In addition, the Conference adopted the *Ministerial Declaration on Trade in Information Technology Products.*[34] The Conference also set up working groups to study the relationship between trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation. These subjects are mainly referred to as the "Singapore issues".

(ii) 1998 Geneva Ministerial Conference

36. The Second Ministerial Conference was held in Geneva, Switzerland, between 18 and 20 May 1998. The *Ministerial Declaration*[35] was adopted on 20 May 1998. Ministers also adopted a *Declaration on Global Electronic Commerce.*[36]

(iii) 1999 Seattle Ministerial Conference

37. The Third Ministerial Conference was held in Seattle, United States, between 30 November and 3 December 1999. Despite intense negotiations with a view to launching a new Millennium Round, consensus was not achieved. Members did not adopt any Ministerial Declaration.[37]

(iv) 2001 Doha Ministerial Conference

38. The Fourth Ministerial Conference was held in Doha, Qatar, between 9 and 14 November 2001. Members launched a new round of negotiations (commonly known as the Doha Round). In addition to the *Ministerial Declaration* (also known as the Doha Declaration)[38], Ministers adopted the declarations and decisions listed below:

- Declaration on the TRIPS Agreement and Public Health[39]
- Decision on "Implementation-Related Issues and Concerns";[40]
- Decision on "Procedures for Extensions under Article 27.4 of the SCM Agreement[41] for Certain Developing Country Members";[42]
- Decision on the "ACP-EC Partnership Agreement";[43]
- Decision on the "Transitional Regime for the EC Autonomous Tariff Rate Quota Regime on Imports of Bananas".[44]

39. The text of the Doha Declaration and related decisions is in Section XXVII below. The text of the Declaration on the TRIPS Agreement and Public Health is in Section LXXVIII of the Chapter on the *TRIPS Agreement.*

(v) 2003 Cancun Ministerial Conference

40. The Fifth Ministerial Conference was held in Cancun, Mexico, between 10 and 14 September 2003. The main task was to take stock of progress in negotiations and other work under the Doha Development Agenda. The Members approved a Ministerial statement on 14 September 2003 instructing Member government officials to continue working on outstanding issues.[45]

(b) "The Ministerial Conference shall carry out the functions of the WTO"

(i) Competencies of the Ministerial Conference

41. In addition to general powers under Article IV:1, the Ministerial Conference has specific powers under other Articles of the *WTO Agreement*, including: the power to appoint a Director-General[46], to adopt an authoritative interpretation of the Multilateral Trade Agreements[47], to grant a waiver[48], to adopt amendments[49], and to decide on accessions.[50]

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[33] WT/MIN(96)/DEC.
[34] WT/MIN(96)/DEC/16.
[35] WT/DEC(98)/DEC/1.
[36] WT/DEC(98)/DEC/2.
[37] See all documents related to the Ministerial Conference WT/MIN(99)/
[38] WT/MIN(01)/DEC/1.
[39] WT/MIN(01)/DEC/2. See also Section LXXVIII of the Chapter on the *TRIPS Agreement.*
[40] WT/MIN(01)/17.
[41] For further analysis, see Section XXVII.B.4 of the Chapter on the SCM Agreement.
[42] G/SCM/39.
[43] WT/MIN(01)/15. This decision refers to a waiver granted until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP States, without being required to extend the same preferential treatment to like products of any other member, subject to the terms and conditions set out in this document. See also Article IX, para. 3 below.
[44] WT/MIN(01)/16.
[45] WT/MIN(03)/20
[46] With respect to the appointment of the Director-General, see Section VII.B of this Chapter.
[47] With respect to the authoritative interpretations of the Multilateral Trade Agreements, see paras. 159–160 of this Chapter.
[48] With respect to waivers, see Section X.B.3 of this Chapter.
[49] With respect to the adoption of amendments, see the provisions of Article X.
[50] With respect to accession, see Section XIII.B.2 of this Chapter.

(ii) Competencies under other Agreements

GATS

42. Articles XII:5(b) and XII:6 gives the Ministerial Conference power to establish certain procedures in connection with balance-of-payments restrictions.[51]

TRIPS

43. Article 64.3 gives the Ministerial Conference power to extend the non-applicability of non-violation complaints to the *TRIPS Agreement* on recommendation of the TRIPS Council.[52]

GATT 1994

44. Paragraph 2(b) provides that powers granted to the CONTRACTING PARTIES acting jointly in the GATT may be allocated to the various WTO organs by decision of the Ministerial Conference. See Articles VII:4(c), XII:5, XV:5, XV:6, XXXVI:1(f) and XXXVI:6 of GATT. With respect to GATT practice concerning Article VII, see GATT Analytical Index, pages 259–265.

(iii) Working parties

45. The Ministerial Conference and General Council have established the following working parties to carry out various functions:

(a) Working Group on the Relationship between Trade and Investment[53];

(b) Working Group on the Interaction between Trade and Competition Policy[54];

(c) Working Group on Transparency in Government Procurement[55];

(d) Working Parties on Accession[56]; and

(e) Working Party on Preshipment Inspection[57];

(f) Working Group on Trade, Debt and Finance[58]; and

(g) Working Group on Trade and the Transfer of Technology.[59]

(c) "Ministerial Conference shall . . . take decisions on all matters under any of the Multilateral Trade Agreements"

46. As of 31 December 2004, the Ministerial Conference had adopted the following decisions (also see Section V.B.1 above:

(a) Ministerial Declaration adopted in Singapore[60];

(b) Ministerial Declaration on Trade in Information Technology Products adopted in Singapore[61];

(c) Ministerial Declaration adopted in Geneva[62];

(d) Ministerial Declaration on electronic commerce adopted in Geneva[63];

(e) Ministerial Declarations adopted in Doha[64];

(f) Ministerial Declaration on the TRIPS Agreement and Public Health adopted in Doha[65];

(g) Decision on Implementation-Related Issues and Concerns, adopted in Doha[66];

(h) Decision on Procedures for Extensions under Article 27.4 of the SCM Agreement for Certain Developing Country Members, adopted in Doha[67];

(i) Decision on the ACP-EC Partnership Agreement, adopted in Doha[68]; and

(j) Decision on Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas, adopted in Doha.[69]

(d) "in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreements"

47. As regards the specific requirements for decision-making, see Section X.B below. Also see the relevant sections of the various Multilateral Trade Agreements.

(e) Rules of procedure

48. The General Council adopted the rules of procedure for the Ministerial Conference at its meeting of 31 January 1995.[70] The General Council amended these rules on 25 July 1996.

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[51] See Chapter on the *GATS*, Article XII.
[52] See Chapter on the *TRIPS Agreement*, Article 64.3.
[53] Established at the Singapore Ministerial Conference, WT/MIN(96)/DEC, para. 20.
[54] Established at the Singapore Ministerial Conference, WT/MIN(96)/DEC, para. 20.
[55] Established at the Singapore Ministerial Conference, WT/MIN(96)/DEC, para. 21.
[56] See Section XIII.B(3) of this Chapter.
[57] See paragraph 8 of the Chapter on the Preshipment Inspection Agreement.
[58] Established at the Doha Ministerial Conference, WT/MIN(01)/DEC/1, para. 36.
[59] Established at the Doha Ministerial Conference, WT/MIN(01)/DEC/1, para. 37.
[60] WT/MIN(96)/DEC.
[61] WT/MIN(96)/DEC/16.
[62] WT/MIN(98)/DEC/1.
[63] WT/MIN(98)/DEC/2.
[64] WT/MIN(01)/DEC/1.
[65] WT/MIN(01)/DEC/2.
[66] WT/MIN(01)/17.
[67] G/SCM/39.
[68] WT/MIN(01)/15.
[69] WT/MIN(01)/16.
[70] WT/GC/M/1, section 4.I. The text of the adopted rules of procedure can be found in WT/L/28. The rules of procedure were amended in accordance with the amendment to the guidelines on observer status for international intergovernmental organizations, which is annexed to the Rules of Procedure as Annex 3. The text of the amended Rules of Procedure can be found in WT/L/161.

2. Article IV:2

(a) "there shall be a General Council"

49. The General Council is the WTO's highest-level decision-making body. It meets regularly to carry out the functions of the WTO. It has representatives (usually ambassadors or equivalent) from all Member governments and has the authority to act on behalf of the Ministerial Conference.

(b) "The General Council shall also carry out the functions assigned to it by this Agreement"

(i) General

50. The General Council is charged with the power to form cooperation agreements with intergovernmental organizations and non-governmental organizations[71], adopt staff and financial regulations[72], and adopt the budget.[73]

Circulation and derestriction of documents

51. On 14 May 2002, the General Council adopted a new decision abrogating the decision of 18 July 1996.[74] Paragraph 4 of this decision states that "[t]he Decision of the General Council of 18 July 1996 on Procedures for the Circulation and Derestriction of WTO documents, as contained in WT/L/160/Rev.1, shall be abrogated as of the date of adoption of the present decision, but will remain in effect for documents circulated prior to that date."[75]

(c) "the General Council shall establish its rules of procedure"

52. The General Council adopted its rules of procedure on 31 January 1995 (see paragraph 48 above).[76]

53. The General Council approved the first set of guidelines for appointment of officers to WTO bodies on 31 January 1995. These guidelines were proposed by the Chairman of the GATT 1947 CONTRACTING PARTIES and approved by the Preparatory Committee for the World Trade Organization.[77] These guidelines were reviewed on 11 December 2002.[78]

(d) "the General Council shall . . . approve the rules of procedure for the committees . . ."

54. The General Council adopted the rules of procedure for the following Committees at its meetings on the dates set forth below:

(a) Committee on Trade and Development – 15 November 1995[79];

(b) Committee on Balance-of-Payments Restrictions – 13 and 15 December 1995[80]; and

(c) Committee on Regional Trade Agreements[81] – 2 October 1996.[82]

3. Article IV:3: "the General Council shall convene . . . to discharge the responsibilities of the Dispute Settlement Body (DSB)"

(a) General

55. The General Council, acting as the DSB, discharges the responsibilities enumerated in Article 2.1 of the *DSU*[83], including: the authority to establish panels, to adopt Panel and Appellate Body reports, to maintain surveillance of implementation of rulings and recommendations and authorize suspension of concessions and other obligations under the covered agreements.[84] For the activities of the DSB generally, see Chapter on the *DSU*, in particular, Section II.B.

(b) "The DSB . . . shall establish such rules of procedure"

56. The DSB adopted its own rules of procedure[85] on 10 February 1995. The DSB follows, *mutatis mutandis*, the rules of procedure for the General Council[86] with

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[71] With respect to cooperation agreements with international intergovernmental organizations concluded by the General Council, see paras. 22 and 134–135 of this Chapter.
[72] With respect to staff and financial regulations adopted by the General Council, see paras. 143–146 and 152 of this Chapter.
[73] With respect to the adoption of the budget by the General Council, see Section VIII.B.1 of this Chapter.
[74] WT/GC/M/13, Section 9(b). The text of the decision can be found in WT/L/160/Rev.1
[75] WT/L/452.
[76] WT/GC/M/1, section 4.I. The text of the adopted rules of procedure can be found in WT/L/28. At its meeting of 3 April 1995, the General Council amended the rules of procedure with regard to Chapter V – Officers, WT/GC/M/3, section 1. On 25 July 1996, the rules of procedure were further amended in accordance with the amendment to the guidelines on observer status for international intergovernmental organizations, which is annexed to the Rules of Procedure as Annex 3. The text of the amended Rules of Procedure can be found in WT/L/161.
[77] WT/GC/M/1, section 4.I(h). The text of the approved guidelines can be found in WT/L/31.
[78] The text of the reviewed guidelines can be found in WT/L/510.
[79] WT/GC/M/8, section 4(c). The text of the adopted rules of procedure can be found in WT/COMTD/6. The rules of procedure follow, *mutatis mutandis*, the rules of procedure established for meetings of the General Council with certain special provisions.
[80] WT/GC/M/9, section 1(b). The text of the adopted rules of procedure can be found in WT/BOP/10. The rules of procedure follow, *mutatis mutandis*, the rules of procedure established for meetings of the General Council with certain special provisions.
[81] With respect to the establishment of the Committee on Regional Trade Agreement under Article IV:7, see para. 117.
[82] WT/GC/M/14, section 3. The text of the adopted rules of procedure can be found in WT/REG/1. The rules of procedure follow, *mutatis mutandis*, the rules of procedure for the General Council with certain special provisions.
[83] See Chapter on the *DSU*, Article 2.1.
[84] The powers referred to are found in Articles 6, 16, 21 and 22 of the *DSU*.
[85] WT/DSB/M/1, section 1.
[86] WT/L/161.

certain exceptions. The DSB adopted Chapter V of the rules of procedure concerning officers on 25 April 1995.[87] For the text of the Rules of Procedure, see Section XXXV of the Chapter on the *DSU*.

(c) Special Session of the Dispute Settlement Body

57. The Trade Negotiations Committee created a Special Session of the Dispute Settlement Body to negotiate improvements and clarifications of the Dispute Settlement Understanding. This negotiation will not be part of the single undertaking. In this respect, see paragraph 47 of the Doha Declaration in Section XXVII below.

4. Article IV:4: "the General Council shall . . . discharge the responsibilities of the Trade Policy Review Body"

(a) Country reviews

58. Country reviews are conducted on a rotational basis, with the frequency of review being determined by reference to each Member's share of world trade in a recent representative period. See Section III.B.2 of the Chapter on the *TPRM*.

59. The TPRB conducted 197 reviews[88] between its formation and 31 December 2004. The reviews covered 114 Members, counting the European Union as one Member.

(b) "the Trade Policy Review Body shall . . . establish such rules of procedure"

60. At its meeting of 6 June 1995, the TPRB adopted the rules of procedure[89] following *mutatis mutandis*, the rules of procedures for the General Council[90] with certain exceptions.

5. Article IV:5

(a) "Council for Trade in Goods"

(i) Functions

61. The Council for Trade in Goods oversees the functioning of the Multilateral Trade Agreements in Annex IA; the Agreements specifically set forth the following:

(a) Understanding on the Interpretation of Article XVII of the *General Agreement on Tariffs and Trade 1994*:

(i) To receive notifications of state trading enterprises – Article 1;

(ii) To receive counter-notifications of state trading enterprises – Article 4;

(iii) To make recommendations with regard to the adequacy of notifications and the need for further information – Article 5; and

(iv) To receive annual reports of the Working Party on State Trading – Article 5;

(b) *Agreement on Textiles and Clothing*

(i) The Council for Trade in Goods conducted a review of the Agreement before the end of each stage of the integration process until all restrictions thereunder terminated on 1 January 2005.

(c) *Agreement on Trade-Related Investment Measures*

(i) To receive notifications of all applied TRIMS and those not in conformity with TRIMS – Article 5.1;

(ii) To extend the transition period for the elimination of TRIMs notified by developing country Members – Article 5.3;

(iii) To receive notifications on any TRIM applied to a new investment – Article 5.5;

(iv) To assign responsibilities to the Committee on TRIMS and receive reports on the operation and implementation of the *TRIMs Agreement* – Article 7; and

(v) To review operation of the *TRIMs Agreement* and as appropriate propose amendments to the text to the Ministerial Conference – Article 9.

(d) *Customs Valuation Agreement*

(i) To receive reviews on developments on the implementation and operation of the Agreement – Article 23; and

(ii) Points 1 and 2 of Annex III of the Custom Valuation Agreement refers to the "Members". This could be the Council for Trade in Goods or the Customs Valuation Committee.

(e) *Agreement on Safeguards*

(i) To review the suspension of substantially equivalent concessions – Article 8.2;

(ii) To receive notifications on results of consultations – Article 12.5; any form of compensation (Article 8.1); proposed suspension of

[87] WT/DSB/M/4, section 1. The text of the adopted rules of procedure can be found in WT/DSB/9.
[88] The minutes of the meetings are numbered WT/TPR/M/1–109.
[89] WT/TPR/6.
[90] WT/L/161.

concessions (Article 8.2) and other obligations; and

(iii) To establish a Committee on Safeguards (Article 13.1) and receive its reports on functioning of agreement.

(f) *GATT 1994*

(i) Moreover, under paragraph 2(b) of GATT 1994 powers granted to the CONTRACTING PARTIES acting jointly in the GATT may be allocated to the various WTO organs by decision of the Ministerial Conference. Such decision has not been taken to date. Under such a decision, the Council for Trade in Goods may well be charged with most of the powers now allocated to CONTRACTING PARTIES acting jointly in the GATT, in conformity with allocating the overseeing function also with respect to GATT 1994 to the Council for Trade in Goods.[91]

62. As regards the activities of the Council for Trade in Goods in the areas enumerated in paragraph 61 above, see the Chapters dealing with the relevant Agreements. The Council for Trade in Goods reports to the General Council on an annual basis.[92]

(ii) Rules of procedure

63. The General Council approved the rules of procedure and the relevant addendum for meetings of the Council for Trade in Goods at its meeting of 31 July 1995.[93]

(b) "Council for Trade in Services"

(i) Functions

64. The Council for Trade in Services[94] oversees the functioning of the *General Agreement on Trade in Services (GATS)*. The Agreement specifically sets forth the following:

(a) Under Article XXIV of the *GATS*, powers "to facilitate the operation of this Agreement and further its objectives", including the power to create subsidiary bodies (a variant of this latter power is in Article VI:4 of GATS); and

(b) Under Article V:7 of the *GATS*, power to make recommendations to parties to economic integration agreements.[95]

65. As regards the activities of the Council for Trade in Services in the areas set out in paragraph 64 above, see the Chapter on the *GATS*. The Council for Trade in Services reports to the General Council on an annual basis.[96]

(ii) Rules of procedure

66. The General Council approved the rules of procedure for the Council on Trade in Services at its meeting of 15 November 1995.[97]

(c) "The Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS)"

(i) Functions

67. The Council for Trade-Related Aspects of Intellectual Property Rights[98] oversees the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights; the Agreement specifically sets forth the following:

(a) To keep under review application of the provisions of Section 3 (Geographical Indications) of the Agreement – Article 24.2;

(b) To receive notification on laws and regulations, final judicial decisions and administrative rulings of general application pertaining to the TRIPS agreement made effective by a Member – Article 63.2;

(c) to grant extensions of the implementation period to least-developed countries under Article 66.1; and

(d) to monitor the operation of the Agreement and Members' compliance thereunder, pursuant to Article 68.

68. With respect to the activities of the Council for Trade-Related Aspects of Intellectual Property Rights in the areas described in paragraph 67 above, see Chapter on the *TRIPS Agreement*. See also the annual reports of the Council for Trade-Related Aspects of Intellectual Property Rights to the General Council.[99]

(ii) Rules of procedure

69. The General Council approved the rules of procedure for the Council for Trade-Related Aspects of Intellectual Property Rights on 15 November 1995.[100]

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[91] Doc. JOB(01)/124/Rev. 1.
[92] G/C/W/34, 62, 62/Rev.1, 98, 98/Rev.1, 129, 159, 241, 302, 433, 472 and 501.
[93] WT/GC/M/6, section 3. The text of the adopted rules of procedure can be found in WT/L/79.
[94] Refer to the text on the Council for Trade in Services for further commentary.
[95] In this regard, see also Chapter on *GATS*, Section VII.B.
[96] S/C/W/12, 31, 67, 128, 128/Rev.1, 174, 197, 220, 227 and 230.
[97] WT/GC/M/8, section 4(a). The text of the adopted rules of procedures can be found in S/L/15.
[98] Refer to the text on the TRIPS Council for further commentary.
[99] The text of the reports can be found in IP/C/W/16, 16/Rev.1, IP/C/8, 12, 15, 19, 22, 23, 27, 27/Add.1, 30 and 32.
[100] WT/GC/M/8, section 4(b). The text of the adopted rules of procedure can be found in IP/C/1.

(d) The Councils "shall operate under the general guidance of the General Council"

70. The Council for Trade in Goods, see paragraph 62 above, Council for Trade in Services, see paragraph 65 above, and Council for Trade-Related Aspects of Intellectual Property Rights, see paragraph 68 above, all report to the General Council.

6. Article IV:6

(a) "the [Council for Trade in Goods] . . . shall establish subsidiary bodies"

71. The Council for Trade in Goods has established the following working parties as at 31 December 2004, :

(a) Working Party on State Trading Enterprises[101];

(b) Working Group on Notification Obligations and Procedures[102]; and

(c) ten working parties on various regional trade agreements.[103]

72. The Council for Trade in Goods has also established the following committees (all, except (a), under specified provisions):

(a) Committee on Market Access;

(b) Committee on Agriculture[104];

(c) Committee on Sanitary and Phytosanitary Measures[105];

(d) Committee on Technical Barriers to Trade[106];

(e) Committee on Subsidies and Countervailing Measures[107];

(f) Committee on Anti-Dumping Practices[108];

(g) Committee on Customs Valuation[109];

(h) Committee on Rules of Origin[110];

(i) Committee on Import Licensing[111];

(j) Committee on Trade-Related Investment Measures[112];

(k) Committee on Safeguards[113]; and

(l) Committee of Participants on the Expansion of Trade in Information Technology Products.

(b) Subsidiary bodies shall establish . . . rules of procedure subject to approval of their respective Councils:

73. The Council for Trade in Goods approved the rules of procedure for the following subsidiary bodies on the dates set forth below:

(a) Committee on Market Access – 1 December 1995[114];

(b) Committee on Agriculture – 22 May 1996[115];

(c) Committee on Sanitary and Phytosanitary Measures – 11 June 1997[116];

(d) Committee on Technical Barriers to Trade – 1 December 1995[117];

(e) Committee on Subsidies and Countervailing Measures – 22 May 1996[118];

(f) Committee on Anti-Dumping Practices – 22 May 1996[119];

(g) Committee on Customs Valuation – 1 December 1995[120];

(h) Committee on Rules of Origin – 1 December 1995[121];

[101] G/C/M/1, section 5(A). The Working Party reports to the Council for Trade in Goods on an annual basis, see G/L/35, 128, 198, 281, 335, 418, 491 and 491/Corr.1.

[102] G/C/M/1, section 6. The Working Party reports to the Council for Trade in Goods on an annual basis, see G/L/30, 112, 112/Add.1, Add.2, 223, 223/Corr.1, 223/Rev.1, Rev.2, Rev.3, Rev.4, Rev.5. The Working Party held its last meeting on 3 July 1996.

[103] For an exhaustive list of regional trade agreement working parties established under the GATT 1947, refer to WT/GC/M/5, para. 11. Subsequently, at its meeting of 6 February 1996, the General Council established the Regional Trade Agreements Committee.

[104] With respect to the establishment of this Committee, see Chapter on the *Agreement on Agriculture*, Article 17.

[105] With respect to the establishment of this Committee, see Chapter on the *SPS Agreement*, Article 12.

[106] With respect to the establishment of this Committee, see Chapter on the *TBT Agreement*, Article 13.

[107] With respect to the establishment of this Committee, see Chapter on the *SCM Agreement*, Article 24.

[108] With respect to the establishment of this Committee, see Chapter on the *Anti-Dumping Agreement*, Article 16.

[109] With respect to the establishment of this Committee, see Chapter on the *Customs Valuation Agreement*, Article 18.

[110] With respect to the establishment of this Committee, see Chapter on the *Agreement on Rules of Origin*, Article 4.

[111] With respect to the establishment of this Committee, see Chapter on the *Import Licensing Agreement*, Article 4.

[112] With respect to the establishment of this Committee, see Chapter on the *TRIMs Agreement*, Article 7.

[113] With respect to the establishment of this Committee, see Chapter on the *Safeguards Agreement*, Article 13.

[114] G/C/M/7, section 2. The text of the adopted rules of procedure can be found in G/L/148.

[115] G/C/M/10, section 1(i). The text of the adopted rules of procedure can be found in G/L/142.

[116] G/C/M/20, section 2. The text of the adopted rules of procedure can be found in G/L/170.

[117] G/C/M/7, section 2. The text of the adopted rules of procedure can be found in G/L/150.

[118] G/C/M/10, section 1(iv). The text of the adopted rules of procedure can be found in G/L/144.

[119] G/C/M/10, section 1(ii). The text of the approved rules of procedure can be found in G/L/143.

[120] G/C/M/7, section 2. The text of the approved rules of procedure can be found in G/L/146.

[121] G/C/M/7, section 2. The text of the approved rules of procedure can be found in G/L/149.

(i) Committee on Import Licensing – 1 December 1995[122];

(j) Committee on Trade-Related Investment Measures – 1 December 1995[123];

(k) Committee on Safeguards – 22 May 1996.[124]

74. The Rules of Procedure for the Independent Entity are included in Annex III to the decision by the General Council establishing the Independent Entity.[125]

75. No rules of procedure have been adopted for the Working Party on State Trading Enterprises.

(c) "the [Council for Trade in Services] . . . shall establish subsidiary bodies as required"

76. As at 31 December 2004, the Council for Trade in Services has established the following subsidiary bodies:

(a) Committee on Trade in Financial Services;

(b) Committee on Specific Commitments;

(c) Working Party on Domestic Regulation;

(d) Working Party on GATS Rules; and

(e) Working Party on Professional Services.

(d) "the [TRIPS Council] shall establish subsidiary bodies as required"

77. The Council for Trade-Related Aspects of Intellectual Property Rights has not established any subsidiary bodies to date.

7. Article IV:7: Committees established by the Ministerial Conference or General Council

78. The Ministerial Conference and General Council have established the following Committees to date:

(a) Committee on Trade and Development[126];

(b) Committee on Balance-of-Payments Restrictions[127];

(c) Committee on Budget, Finance and Administration[128];

(d) Committee on Market Access[129];

(e) Committee on Trade and Environment[130]; and

(f) Committee on Regional Trade Agreements.[131]

(a) Committee on Trade and Development

(i) Establishment and terms of reference

79. The General Council established the Committee on Trade and Development on 31 January 1995, with the following terms of reference:

"1. To serve as a focal point for consideration and coordination of work on development in the World Trade Organization (WTO) and its relationship to development-related activities in other multilateral agencies.[132]

2. To keep under continuous review the participation of developing country Members in the multilateral trading system and to consider measures and initiatives to assist developing country Members, and in particular the least-developed country Members, in the expansion of their trade and investment opportunities, including support for their measures of trade liberalization.[133]

3. To review periodically, in consultation as appropriate with the relevant bodies of the WTO, the application of special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of developing country Members, and in particular least-developed country Members, and report to the General Council for appropriate action.

4. To consider any questions which may arise with regard to either the application or the use of special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of developing country Members and report to the General Council for appropriate action.

5. To provide guidelines for, and to review periodically, the technical cooperation activities of the WTO[134] as they relate to developing country Members.

6. The Committee will establish a programme of work which may be reviewed as necessary each year."[135]

80. At the Doha Ministerial Conference, Members decided that the Committee on Trade and Development

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[122] G/C/M/7, section 2. The text of the approved rules of procedures can be found in G/L/147.
[123] G/C/M/7, section 2. The text of the approved rules of procedure can be found in G/L/151.
[124] G/C/M/10, section 1(iii). The text of the approved rules of procedure can be found in G/L/145.
[125] WT/L/125/Rev.1, Annex III.
[126] WT/GC/M/1, section 7.A(1).
[127] WT/GC/M/1, section 7.A(1).
[128] WT/GC/M/1, section 7.A(2).
[129] See also the Committee on Market Access in paras. 107–111 of this Chapter.
[130] See also the Special Session of the Committee on Trade and Development in paras. 79–83 of this Chapter.
[131] WT/GC/M/5, section 11.
[132] (*footnote original*) It is understood that matters relating to activities in other multilateral agencies will come under the guidance of the General Council.
[133] (*footnote original*) The Committee would give consideration, *inter alia*, to any report that the Committee on Agriculture may decide to refer to it following paragraph 6 of the "Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries" and Article XVI of the Agreement on Agriculture.
[134] (*footnote original*) The technical cooperation activities referred to in this provision do not include technical assistance for accession negotiations.
[135] WT/L/46. The adopted terms of reference were prepared by the Sub-Committee on Institutional, Procedural and Legal Matters at its meeting of 18 November 1994. PC/IPL/4.

should act as a forum to identify and debate developmental aspects of the new negotiations.[136]

(ii) Rules of procedure and observer status

81. The General Council approved the rules of procedure for the Committee on Trade and Development[137], on 15 November 1995. The rules were adopted by the committee on 5 July 1995.[138]

82. Several intergovernmental organizations have been given observer status in the Committee on Trade and Development and the Sub-Committee on Least Developed Countries (see paragraph 84 below).[139]

(iii) Reporting

83. The Committee on Trade and Development reports to the General Council on an annual basis.[140]

(iv) Activities

Establishment of the Sub-Committee on Least-Developed Countries

84. The Committee on Trade and Development adopted the decision establishing the Sub-Committee on Least-Developed Countries[141] on 5 July 1995 with the following terms of reference:

> "(a) to give particular attention to the special and specific problems of least-developed countries;
>
> (b) to review periodically the operation of the special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of the least-developed country Members;
>
> (c) to consider specific measures to assist and facilitate the expansion of the least-developed countries' trade and investment opportunities, with a view to enabling them to achieve their development objectives;[142] and,
>
> (d) to report to the Committee on Trade and Development for consideration and appropriate action."[143]

85. The Sub-Committee on Least-Developed Countries adopted its rules of procedure on 17 October 1995.[144]

Work Programme for Least-Developed Countries

86. Pursuant to paragraph 42 of the Doha Declaration the Sub-Committee on Least-Developed Countries was mandated to report to the General Council on an agreed work programme for least-developed countries.[145] With respect to the mandate of the Doha Declaration and the negotiations on least-developed countries, see paragraphs 42–43 of the Doha Declaration in Section XXVII.A below. The work programme for least-developed countries was adopted by the Sub-Committee on Least-Developed Countries on 12 February 2002.[146]

Technical cooperation

87. The Committee on Trade and Development adopted the Guidelines for WTO Technical Cooperation on 15 October 1996.[147] On 13 December 1996, the Singapore Ministerial Conference adopted the Comprehensive and Integrated WTO Plan of Action for the Least-Developed Countries[148], prepared by the Committee on Trade and Development. The Plan of Action "offers a comprehensive approach and includes measures relating to the implementation of the Decision in Favour of Least-Developed Countries[149], as well as in the areas of capacity-building and market access from a WTO perspective."[150]

88. Also, on the basis of a recommendation by the Committee on Trade and Development[151], the Singapore Ministerial Conference agreed to "organize a meeting with UNCTAD and the International Trade Centre in 1997, with the participation of aid agencies, multilateral financial institutions and least-developed countries to foster an integrated approach to assist these countries enhance their trading opportunities."[152] On 27–28 October 1997, the High-Level Meeting on Integrated Initiatives for Least-Developed Countries' Trade Development was organized jointly by the WTO, UNCTAD and ITC, with the participation of the IMF, UNDP and World Bank.[153] At this High-Level Meeting, Members

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136 WT/MIN(01)/DEC/1, para 51.
137 WT/GC/M/8, section 4(c). The text of the adopted rules of procedure can be found in WT/COMTD/6.
138 WT/COMTD/M/2, para. 4.
139 WT/COMTD/W/22 and its revisions.
140 These reports are numbered WT/SPEC/17, WT/COMTD/9, 13, 15, 22, 28, 33, 33/Corr.1, 44, 46, 48 and 50.
141 WT/COMTD/M/2, para. 3.
142 (*footnote original*) The Sub-Committee would give consideration, *inter alia*, to any report that the Committee on Agriculture may decide to refer to it following paragraph 6 of the "Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries" and Article XVI of the Agreement on Agriculture.
143 WT/COMTD/W/8.
144 WT/COMTD/LLDC/1.
145 WT/MIN(01)/DEC/1, para 42.
146 WT/COMTD/LDC/11.
147 WT/COMTD/M/12, para. 4. The text of the adopted guidelines can be found in WT/COMTD/8.
148 WT/MIN(96)/DEC, para. 14. The text of the Plan of Action can be found in WT/MIN(96)/14.
149 This Decision is referenced in Section XXII of this Chapter.
150 WT/MIN(96)/14, para. 3.
151 At its meeting of 15 and 31 October 1996, the Committee on Trade and Development adopted the report to the General Council (WT/COMTD/9) which contains the recommendation to hold such a high-level meeting. WT/COMTD/M/12, Section B. Accordingly, at its meeting of 7, 8 and 13 November 1996, the General Council adopted that report for adoption by the Singapore Ministerial Conference. WT/GC/M/16, Section 8(c)(iv).
152 WT/MIN(96)/DEC, para. 14.
153 The text of the report of this Meeting can be found in WT/LDC/HL/23.

(i) "endorsed the Integrated Framework for Trade-Related Technical Assistance, including for Human and Institutional Capacity Building, to support Least-Developed Countries in Their Trade and Trade-Related Activities",[154] (ii) recommended "all WTO Members to keep under active review all options for improving market access for least-developed countries presented in the Comprehensive and Integrated WTO Plan of Action for the Least-Developed Countries and to monitor the implementation of the commitments made in this regard"[155], and (iii) "took note of the two reports and the recommendations" produced in the two round-table discussions.[156]

89. In 2000, pursuant to the mandate in paragraph 88 above[157], the Sub-Committee on Least-Developed Countries conducted the review of all options for improving market access for least-developed countries presented in the Comprehensive and Integrated WTO Plan of Action for the Least-Developed Countries, and reported it to the Committee on Trade and Development.[158] In addition, pursuant to that mandate, the six core international agencies of the Integrated Framework, i.e. IMF, ITC, UNCTAD, UNDP, World Bank and WTO, conducted the review of the Integrated Framework.[159] In order to implement the decision by the heads of the six core agencies for the Integrated Framework to revamp the Integrated Framework, the Sub-Committee on Least-Developed Countries adopted the Integrated Framework Pilot Scheme.[160] The Pilot Scheme included (i) the recommendation on the establishment of a trust fund[161], and, (ii) the proposal on the establishment of the Integrated Framework Steering Committee and the Inter-Agency Working Group.[162]

90. The Doha Declaration instructed the Director-General to consult with the relevant agencies, bilateral donors and beneficiaries, to identify ways of enhancing and rationalizing the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries and the Joint Integrated Technical Assistance Programme (JITAP). The Committee on Budget, Finance and Administration was instructed to develop a plan for adoption by the General Council in December 2001 to ensure long-term funding for WTO technical assistance.[163]

91. On 13 July 2003, the six core agencies issued a joint communiqué that reaffirmed their commitment to providing assistance that would enable the effective integration of least-developed countries into the multilateral trading system.[164]

92. At its meeting of 9–10 February 2004, the Integrated Framework Working Group adopted its work programme in the wake of the second evaluation of the Integrated Framework.[165] The work programme was subsequently approved by the IF Steering Committee at its 11th Session on 13 February 2004.[166] The Integrated Framework Working Group aims to achieve, *inter alia*, the following by 31 December 2005:

> (a) "Encourage effective follow-up to the Diagnostic Trade Integration Study (DTIS) in those countries where the studies have been completed[167], as outlined in document WT/LDC/SWG/IF/13. Bilateral and multilateral development partners are urged to work with committed IF partner governments to respond to the trade-related technical assistance priorities identified in the DTIS and its Action Matrix;
>
> (b) undertake new DTIS in countries that have demonstrated clear and strong commitment to mainstream trade into national development plans . . ."

Favourable and more preferential treatment for developing countries

93. The Comprehensive and Integrated WTO Plan of Action for the Least-Developed Countries (see paragraph 87 above), also includes "provision for taking positive measures, for example duty-free access, on an autonomous basis, aimed at improving their overall capacity to respond to the opportunities offered by the trading system."[168] At the High-Level Meeting referenced in paragraph 88 above, as well as shortly thereafter, 28 Members announced steps taken, or to be taken to enhance market access for imports from LDCs.[169]

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[154] The text of the Integrated Framework can be found in WT/LDC/HL/1.

[155] WT/LDC/HL/23, p. 1. With respect to the preferential tariff treatment taken to date by the Members for the least-developed country Members, see para. 93 of this Chapter.

[156] WT/LDC/HL/23, p. 2. The text of the recommendations can be found in WT/LDC/HL/23, pp. 5–10.

[157] WT/LDC/HL/1/Rev.1, para. 6.

[158] WT/COMTD/33, para. 28.

[159] Taking into account the outcome of the evaluation, the head of the six agencies issued a joint statement on 12 July 2000. See WT/LDC/SWG/IF/2.

[160] WT/LDC/SWG/IF/13.

[161] WT/LDC/SWG/IF/13, sections IV and VII.

[162] WT/LDC/SWG/IF/13, section V. The responsibilities of the IF Steering Committee and the Inter-Agency Working Group are set out in WT/ LDC/SWG/IF/13, paras. 7–9.

[163] The relevant TA Plan for 2002 is contained in WT/COMTD/W/101/Add.4, the Plan for 2003 in document WT/COMTD/W/104/Rev.2, the TA Plan 2004 in WT/COMTD/W/119/Rev.3, and for 2005 in WT/COMTD/W/133/Rev.1.

[164] WT/IFSC/5.

[165] WT/IFSC/7.

[166] WT/IFSC/M/10

[167] Burundi, Cambodia, Djibouti, Ethiopia, Guinea, Lesotho, Madagascar, Malawi, Mali, Mauritania, Nepal, Senegal and Yemen.

[168] WT/MIN(96)/DEC, para. 14, first item.

[169] The 28 Members are: Argentina Australia, Bulgaria, Canada, Chile, Czech Republic, Egypt, European Communities, Hong Kong-China, Hungary, Iceland, India, Indonesia, Japan, Republic

94. Paragraph 42 of the Doha Ministerial Declaration commits WTO Members "to the objective of duty-free, quota-free market access for products originating from LDCs" and "to consider additional measures for progressive improvements in market access for LDCs."[170]

95. The Decision on Implementation-Related Issues and Concerns combined with paragraph 12 of the Doha Declaration aimed to provide a two-track solution to the issue faced by developing countries of implementing the WTO agreements.[171]

96. As part of the Work Programme adopted by the Sub-Committee on Least-Developed Countries on 28 February 2002[172], it was agreed that the focus would be on: (i) the identification and examination of market access barriers to products of least-developed countries in desired markets; (ii) annual reviews in the Sub-Committee on Least-Developed Countries of market access improvements, market access measures taken by Members; and (iii) examination of possible additional measures for improvement of market access, including elimination of barriers to exports and further improvement of preferential access schemes such the GSP.[173]

97. As of 31 December 2004, the WTO maintains, beyond the specific provisions contained in the *WTO Agreement*, two additional legal instruments concerning favourable and more preferential treatment for developing countries: (i) the Enabling Clause[174] and (ii) the Waiver on Preferential Tariff Treatment for Least-Developed Countries.[175] With respect to the activities of the Committee on Trade and Development, and the Sub-Committee on Least-Developed Countries concerning the Enabling Clause and the Waiver on Preferential Tariff Treatment for Least-Developed Countries respectively, see Section II.D.3 of the Chapter on the *GATT 1994*.

(v) Reference to GATT practice

98. As regards the Committee on Trade and Development under *GATT 1947*, see relevant sections of the Chapter on the *GATT 1994*.

(b) Committee on Balance-of-Payments Restrictions

(i) Establishment and terms of reference

99. The General Council established the BOPs Committee[176] on 31 January 1995, with the following terms of reference:

> "(a) to conduct consultations, pursuant to Article XII:4, Article XVIII:12 and the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994, on all restrictive import measures taken or maintained for balance-of-payments purposes and, pursuant to Article XII:5 of the General Agreement on Trade in Services, on all restrictions adopted or maintained for balance-of-payments purposes on trade in services on which specific commitments have been undertaken; and,
>
> (b) to carry out any additional functions assigned to it by the General Council."[177]

(ii) Rules of procedure

100. The General Council approved the rules of procedure for the BOPs Committee at its meeting of 13 and 15 December 1995.[178]

(iii) Reporting

101. The BOPs Committee reports to the General Council on an annual basis.

(iv) Activities

102. With respect to the activities of the BOPs Committee, see Article XVIII:C of the Chapter on the *GATT 1994*.

(c) Committee on Budget, Finance and Administration

(i) Establishment and terms of reference

103. The General Council established the BFA Committee[179] at its meeting of 31 January 1995, with the following terms of reference:

> "(i) To examine any questions arising in connection with the audited accounts, proposals for the budgets of the WTO and [of the International Trade Centre UNCTAD/WTO, and][180] the financing thereof.
>
> (ii) To study any financial and administrative questions which may be referred to it by the Ministerial Conference

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of Korea, Malaysia, Mauritius, Morocco, New Zealand, Norway, Poland, Singapore, Slovak Republic, Slovenia, Switzerland, Thailand, Turkey and United States. See WT/COMTD/LDC/W/22, fn. 4. Further, among them, the following 13 Members notified their market access measures for LDCs to the WTO: Canada, Egypt, European Communities, Japan, Mauritius, Morocco, Norway, New Zealand, Republic of Korea, Singapore, Switzerland, Turkey, and the United States. See WT/COMTD/LDC/W/22, fn. 6.

170 WT/MIN(01)/DEC/1, para 42.

171 WT/MIN(01)/17.

172 See para 109 of this Chapter.

173 The text of this entire paragraph can be found at WT/COMTD/LDC/11, Section (a), paras. 6–8.

174 Officially known as the 1979 Decision on Differential and More Favourable Treatment, see L/4903.

175 WT/L/304.

176 WT/GC/M/1, section 7.A(1).

177 The adopted terms of reference were agreed for proposal by the Sub-Committee on Institutional, Procedural and Legal Matters at its meeting of 21 October 1994. PC/IPL/3.

178 WT/GC/M/9, section 1(b). The text of the adopted rules of procedure can be found in WT/BOP/10.

179 WT/GC/M/1, section 7.A(1).

180 (*footnote original*) The text in square brackets is being kept pending a decision on the future relationship between the WTO and the ITC, and will be altered in the light of that decision.

or the General Council, or submitted to it by the Director-General, and undertake such other studies as may be assigned to it by the Ministerial Conference or the General Council."[181]

(ii) Rules of procedure

104. At its meeting of 17 February 1995, the Chairman of the General Council suggested that the BFA Committee follow the rules of procedure for the General Council, except for voting procedures. The BFA Committee agreed to work by consensus.[182]

(iii) Reporting

105. The BFA Committee submits annual reports to the General Council.

(iv) Activities

106. With respect to the activities of the BFA Committee, see paragraphs 147–153 below.

(d) Committee on Market Access

(i) Establishment and terms of reference

107. The General Council established the Committee on Market Access[183] on 31 January 1995, with the following terms of reference:

"(a) in relation to market access issues not covered by any other WTO body:

- [to] supervise the implementation of concessions relating to tariffs and non-tariff measures;
- [to] provide a forum for consultation on matters relating to tariffs and non-tariff measures;

(b) [to] oversee the application of procedures for modification or withdrawal of tariff concessions;

(c) [to] ensure that GATT Schedules are kept up-to-date, and that modifications, including those resulting from changes in tariff nomenclature, are reflected;

(d) [to] conduct the updating and analysis of the documentation on quantitative restrictions and other non-tariff measures, in accordance with the timetable and procedures agreed by the CONTRACTING PARTIES in 1984 and 1985 (BISD 31S/227 and 228, and BISD 32S/92 and 93);

(e) [to] oversee the content and operation of, and access to, the Integrated Data Base;

(f) [to] report periodically – and in any case not less than once a year – to the Council on Trade in Goods."[184]

(ii) Rules of procedure

108. On 1 December 1995, the Council for Trade in Goods approved the rules of procedure for meetings of the Committee on Market Access.[185]

(iii) Reporting

109. The Committee on Market Access reports to the Council for Trade in Goods on an annual basis.[186] It also reports to the Council for Trade in Goods on a periodic basis.[187]

(iv) Activities

110. With respect to the activities of the Committee on Market Access, see Sections III.C.1.(d) and XII.C.3 of the Chapter on the *GATT 1994*.

111. With regard to the Integrated Data Base (IDB) and the Consolidated Tariff Schedules (CTS) database, the Committee on Market Access decided that providing broader access to the information in the IDB and the CTS database would contribute to the effective delivery of market access-related technical assistance to developing and least developed countries. In order to achieve this, it adopted a dissemination policy[188] which draws upon the IDB dissemination practices[189] focused on the accessibility of IDB and CTS information via the Internet and on the distribution of CD-ROMs.

(e) Committee on Trade and Environment

(i) Establishment and terms of reference

112. Pursuant to the Marrakesh Ministerial Decision on Trade and Environment, the General Council established the Committee on Trade and Environment on 31 January 1995 with the following terms of reference:

"(a) [T]o identify the relationship between trade measures and environmental measures, in order to promote sustainable development;

(b) [T]o make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular:

- [T]he need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special

[181] The adopted terms of reference were agreed for proposal by the Sub-Committee on Institutional, Procedural and Legal Matters at its meeting of 21 October 1994. PC/IPL/2.
[182] WT/BFA/1, para. 4.
[183] WT/GC/M/1, section 7.A(2).
[184] The terms of reference were agreed for proposal by the Subcommittee on Institutional, Procedural and Legal Matters at its meeting of 18 November 1994. PC/IPL/M/9, para. 8.
[185] G/C/M/7. The text of the adopted rules of procedure can be found in G/L/148.
[186] The reports are contained in documents G/L/50, 132, 215, 284, 331, 431 and 486.
[187] The reports are numbered G/MA/1, 4, 57, 58, 59, 60, 61, 62, 71, 107 and 111–116/Corr.1, 117, 149, 151, and 154. .
[188] G/MA/115.
[189] G/MA/IDB/3.

consideration to the needs of developing countries, in particular those of the least developed among them; and

- [T]he avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; and
- [S]urveillance of trade measures used for environmental purposes, of trade-related aspects of environmental measures which have significant trade effects, and of effective implementation of the multilateral disciplines governing those measures".[190]

113. The Council for Trade in Services, pursuant to the Ministerial Decision on Trade in Services and the Environment, requested the Committee on Trade and Environment to examine and report on the relationship between trade in services and the environment on 1 March 1995. See also Section XVII.B.1(b) of the Chapter on the *GATS*.

(ii) Rules of procedure

114. In practice, the Committee on Trade and Environment follows the rules of procedure adopted by the General Council.[191]

(iii) Reporting

115. The Committee on Trade and Environment reports to the General Council on an annual basis.[192]

(iv) Activities

116. See paragraphs 31–33 of Section XXVII.A below (Doha Declaration). See also the relevant committee reports.[193]

(f) Committee on Regional Trade Agreements

(i) Establishment and terms of reference

117. The General Council established the Committee on Regional Trade Agreements (Committee on RTAs)[194] on 6 February 1996 with the following terms of reference:

"(a) to carry out the examination of agreements in accordance with the procedures and terms of reference adopted by the Council for Trade in Goods, the Council for Trade in Services or the Committee on Trade and Development, as the case may be, and thereafter present its report to the relevant body for appropriate action;[195]

(b) to consider how the required reporting on the operation of such agreements should be carried out and make appropriate recommendations to the relevant body;

(c) to develop, as appropriate, procedures to facilitate and improve the examination process;

(d) to consider the systemic implications of such agreements and regional initiatives for the multilateral trading system and the relationship between them, and make appropriate recommendations to the General Council; and

(e) to carry out any additional functions assigned to it by the General Council."[196]

(ii) Rules of procedure

118. The Committee on RTAs adopted its rules of procedure on 2–3 July 1996,, which provide, *inter alia*, that the rules of procedure for meetings of the General Council shall apply, *mutatis mutandis*, for meetings of the Committee on RTAs, with some exceptions.[197]

(iii) Reporting

119. The Committee on RTAs reports to the General Council on an annual basis.[198]

120. In accordance with recommendations adopted by the Council for Trade in Goods on how to comply with the reporting requirements on the operation of RTAs,[199] the Committee on RTAs presented schedules for the submission of biennial reports at its 20th, 28th and 35th Sessions (respectively in December 1998, February 2001 and December 2003).[200]

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[190] WT/GC/M/1, section 7.A(3), and MTN.TNC/45(MIN), Annex II. The Marrakesh Ministerial Decision also sets out a ten-point work programme covering the three areas of the WTO, *i.e.* goods, services and intellectual property rights. See MTN.TNC/45(MIN), Annex II.

[191] WT/L/161.

[192] The reports are numbered WT/CTE/1–7, 10 and 11.

[193] WT/CTE/1–11.

[194] WT/GC/M/10, para.11. The text of the decision can be found in WT/L/127.

[195] (*footnote original*) The Committee will also carry out the outstanding work of the working parties already established by the Council for Trade in Goods, the Council for Trade in Services or the Committee on Trade and Development, within the terms of reference defined for those working parties, and report to the appropriate bodies.

[196] WT/L/127, para. 1.

[197] WT/REG/M/2, para. 11. The rules of procedures can be found in WT/REG/1. See also WT/REG/M/2, para. 13.

[198] WT/REG/2, 3, 7, 8, 9, 10, 11, 12, 13 and 14.

[199] Pursuant to paragraph 11 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 and paragraph 1(b) of the CRTA's Terms of Reference. The recommendations are contained in G/L/286.

[200] Respectively WT/REG/W/33, WT/REG/W/42 and WT/REG/W/48. For more detailed information on reports on the operation of regional trade agreements, see the Chapter on the *GATT 1994*, Article XXIV. At its 33rd Session, the CRTA decided to postpone biennial reporting obligations for the year 2003, to the following year in 2004, due to the fact that the Committee was still considering reports for 2001 and this would add to the already burdensome workload of delegations who were preparing for the upcoming Ministerial Conference in Cancun (see WT/REG/M/33, para. 9).

(iv) Activities

121. Under point 1(a) of its terms of reference (see paragraph 117 above), the Councils or the Committee will adopt separate terms of reference for the examination of each regional trade agreement in the Committee on RTAs.[201] With respect to the examination tasks of the Committee on RTAs, see Sections XXV.D(1)(a) and Annexes 1–IV of the Chapter on the *GATT 1994*. Also see Sections VII.B(2) and VII.C-D of the Chapter on the *GATS*.

122. On 20 February 1998, under item 1(b) of its terms of reference, the Committee adopted recommendations to the Council for Trade in Goods, Council for Trade in Services and the Committee on Trade and Development on how the required reporting on the operation of regional trade agreements should be carried out.[202] In November 1998, the relevant bodies acted on these recommendations; see paragraph 120 above and Article I of the Chapter on the *GATT 1994*, for action taken by the Committee on Trade and Development; Article XXIV for action taken by the Council for Trade in Goods; and Article V of the Chapter on the *GATS*, for action taken by the Council for Trade in Services.

123. As regards the number of regional trade agreements notified to the GATT/WTO and under examination in the Committee on RTAs, see Section XXV.D.4 of the Chapter on the *GATT 1994*.

Procedures for the examination of RTAs

124. The following procedures apply to the examination of RTAs notified to the WTO[203]:

- The notification of an agreement (together with its text) is considered by the Council for Trade in Goods (if the RTA is notified under Article XXIV of the GATT 1994), the Council for Trade in Services (if the RTA is notified under GATS Article V) or the Committee on Trade and Development (if the RTA is notified under the Enabling Clause). If examination of the agreement is provided for, the relevant body adopts the terms of reference for the examination and transfers the examination task to the CRTA.[204]
- Initial information on the agreement is distributed as a formal document. That information may either be conveyed by the Parties in the form of a Standard Format or take the form of a factual presentation of the RTA prepared by the Secretariat on its own responsibility, on the basis of an established outline and in consultation with the Parties to the agreement[205] (see paragraph 123 above). This is the initial step of what is called the "factual" examination.
- During (at least one or two) CRTA regular sessions, there is an exchange of oral questions and replies on the examined RTA, as well as more general statements by the parties and other Members. Detailed minutes are produced on each meeting devoted to the RTA examination, and published as formal documents.
- Between each of those meetings, usually a round of additional written questions and replies takes place. These are also published as a formal document.
- Once the CRTA feels that the factual part of the examination has been concluded, the Secretariat is requested to draft a report on the examination, as the basis for consultations among Members.

125. The report by the Committee on RTAs on a given agreement is sent to the WTO body which mandated the examination, for adoption.[206]

(g) Trade Negotiations Committee (TNC)

126. The Doha Ministerial Declaration[207] provided that the overall conduct of the negotiations shall be supervised by the TNC under the authority of the General Council. The TNC was also mandated to establish appropriate negotiating mechanisms as required and supervise the progress of the negotiations.[208] Accordingly, at its first meeting held on 28 January and 1 February 2002[209], and on the basis of proposals made by the Chairman of the General Council, the TNC appointed the Director-General in an *ex officio* capacity to chair the TNC until the deadline established in the Doha Declaration for concluding the negotiations, i.e. 1 January 2005 (see paragraph 45 of the Doha Declaration in Section XXVII.A below).

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[201] For details on the transfer of competence of GATT 1947 working parties' to WTO working parties, as well as on the procedural aspects of examinations, see the Chapter on the *GATT 1994*, Article XXIV.

[202] WT/REG/M/16, Section B. The text of these recommendations can be found in WT/REG/4–6.

[203] WT/REG/W/15 Guidelines on Procedures to Facilitate and Improve the Examination Process.

[204] Examination is mandatory for RTAs notified under Article XXIV of the GATT 1994. In the case of services agreements and those notified under the Enabling Clause, examination is not automatic but can be decided by Members. By 31 December 2004, decision to submit RTAs to examination was taken for all services agreements notified and considered by the Council for Trade in Services, and for a single RTA notified under the Enabling Clause.

[205] This option has been introduced on an experimental basis.

[206] Since the entry into force of the WTO, that stage of examination has never been attained; thus, since its establishment, the CRTA has been unable to finalize reports on any of the examinations before it.

[207] WT/MIN(01)/DEC/1.

[208] WT/MIN(01)/DEC/1, para. 46.

[209] TN/C/M/1.

127. At the TNC's first meeting, Members also agreed to a comprehensive structure comprising a number of groups and bodies to organize the negotiations. According to this arrangement, each negotiating body would be responsible for the work on one or more[210] of the topics listed in the Work Programme of the Doha Declaration (see paragraphs 12–44 of the Doha Declaration in Section XXVII.A below). The TNC established the following Special Sessions and Negotiating Groups to carry out the work under the Doha mandate:

- Special Session of the Committee on Agriculture[211];
- Special Session of the Council for Trade in Services[212];
- Negotiating Group on Market Access[213];
- Special Session of the Council for TRIPS[214];
- Negotiating Group on Rules[215];
- Special Session of the Dispute Settlement Body[216];
- Special Session of the Committee on Trade and Environment[217];
- Special Session of the Committee on Trade and Development.

8. Article IV: 8

(a) Bodies provided for under Plurilateral Trade Agreements

(i) International Dairy Council

128. As regards the establishment, activities and termination of the International Dairy Council, see Article VII and relevant paragraphs of the Chapter on the *International Dairy Agreement.*

(ii) International Meat Council

129. With respect to the establishment, activities and termination of the International Meat Council, see Article IV and relevant paragraphs of the Chapter on the *International Bovine Meat Agreement.*

(iii) Committee on Trade in Civil Aircraft

130. As regards the establishment and activities of the Committee on Trade in Civil Aircraft, see relevant paragraphs of the Chapter on the *Agreement on Trade in Civil Aircraft.*

131. The Committee on Trade in Civil Aircraft reports to the General Council on an annual basis.[218]

(iv) Committee on Government Procurement

132. Regarding the establishment and activities of the Committee on Government Procurement, see Article XXI and relevant paragraphs of the Chapter on the *Agreement on Government Procurement.*

133. The Committee on Government Procurement reports to the General Council on an annual basis, from its inception in 1996.[219]

VI. ARTICLE V

A. TEXT OF ARTICLE V

Article V
Relations with Other Organizations

1. The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.

2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.

B. INTERPRETATION AND APPLICATION OF ARTICLE V

1. Article V:1

(a) "Shall make appropriate arrangements for effective cooperation with other intergovernmental organizations"

134. As of 31 December 2004, the WTO had concluded agreements with the following intergovernmental organizations:

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[210] See for example, the Negotiating Group on Rules, which deals with: anti-dumping, subsidies and regional trade agreements.

[211] The Committee on Agriculture in Special Session agreed on 19 November 2004 to establish a Sub-Committee on Cotton. As for the Doha mandate with respect to Agriculture, see paragraphs 13–14 of the Doha Declaration.

[212] As regards the respective Doha mandate, see paragraph 15 of the Doha Declaration.

[213] As regards the respective Doha mandate, see paragraph 16 of the Doha Declaration.

[214] As regards the respective Doha mandate, see paragraphs 17–19 of the Doha Declaration.

[215] As regards the respective Doha mandate, see paragraphs 28–29 of the Doha Declaration.

[216] As regards the respective Doha mandate, see paragraph 47 of the Doha Declaration.

[217] As regards the respective Doha mandate, see paragraphs 31–33 of the Doha Declaration.

[218] The reports are numbered WT/L/107, 247, 291, 340, 340/Corr.1, 374, 434, 500, 544, 544/Corr.1 and 591.

[219] The reports are numbered GPA/8, 8/Add.1, 19, 25, 30, 44, 58, 73, 75 and 82.

Intergovernmental organization	Date of entry into force	Date of expiry
United Nations Economic and Social Commission for Asia and the Pacific/Asian Development Bank	8 July 2004	31 December 2006
International Chamber of Commerce/ International Federation of Inspection Agencies	29 March 1996	31 December 2020
International Monetary Fund	9 December 1996	15 December 2020
International Institute for Trade and Development	28 February 2003	28 February 2007
International Telecommunications Union	22 November 2000	15 December 2020
Office International des Epizooties	4 May 1998	15 December 2020
United Nations	29 September 1995	15 December 2020
United Nations Conference on Trade and Development	16 April 2003	16 April 2008
United Nations Development Programme	24 July 2001	31 December 2020
United Nations Environment Programme	29 November 1999	31 December 2008
United Nations Industrial Development Organization	10 September 2003	10 September 2008
World Bank	28 April 1997	31 December 2020
World Intellectual Property Organization	22 December 1995	31 December 2020

(b) Observer status

135. The General Council has allowed some intergovernmental organizations to observe its meetings.[220] In 1995 and 1996, the General Council accorded *ad hoc* observer status to seven international intergovernmental organizations, including: the United Nations, UNCTAD, IMF, the World Bank, FAO, WIPO, and the OECD.[221] Subsequently, the IMF and the World Bank were granted permanent observer status in General Council meetings by the terms of their respective cooperation agreements.[222] In its meetings of 7 February 1997, the General Council granted permanent observer status to the United Nations, UNCTAD, FAO, WIPO, and the OECD.[223] In the General Council meeting of 10 December 1997, the ITC, as a joint technical cooperation agency between the WTO and UNCTAD, was "invited, as appropriate, to attend meetings of those WTO bodies it wished to attend without having to submit a request for observer status".[224]

136. To date, no intergovernmental organizations have been granted permanent observer status in General Council meetings pursuant to the guidelines for "Observer Status for International Intergovernmental Organizations in the WTO" set out in Annex 3 to the "Rules of Procedure for Sessions of the Ministerial Council and Meetings of the General Council."[225] However, consultations have been held concerning the pending requests of intergovernmental organizations for observer status in the General Council.[226]

137. Under Article XXVI of *GATS* a specific power to conclude arrangements with organizations in the area of services has also been allocated to the General Council, whereas under Article 68, *in fine*, of the *TRIPS Agreement*, the TRIPS Council is charged with establishing appropriate arrangements for cooperation with WIPO bodies.

2. Article V:2

(a) "may make appropriate arrangements . . . with non-governmental organizations"

(i) Guidelines for Arrangements on Relations with Non-Governmental Organizations

138. At its meeting of 18 July 1996, and pursuant to Article V:2, the General Council adopted the "Guidelines for Arrangements on Relations with Non-Governmental Organizations".[227] Since the adoption of the Guidelines, the General Council has addressed the issue of external transparency in its meetings.[228]

[220] *See* The Rules of Procedure of the General Council, Chapter IV, Rule 11. Rule 11 of the Rules of Procedure for the General Council provides: "Representatives of international intergovernmental organizations may attend the meetings as observers on the invitation of the General Council in accordance with the guidelines in Annex 3 to these Rules."

[221] WT/GC/M/3, 4, 5, 6, 8, 13, 17. The General Council, upon the recommendation of the Preparatory Committee, extended *ad hoc* observer status to the UN, UNCTAD, IMF and the World Bank for the first General Council meeting. WT/GC/M/1. In subsequent meetings, WIPO, FAO, and the OECD were extended the same invitation. WT/GC/M/3, 4, 5, 6, 8, 13, 17.

[222] With respect to the Agreement with the IMF, see WT/L/195, Annex I, para. 6. Also, with respect to the Agreement with the World Bank, see WT/L/195, Annex II, para. 5.

[223] WT/GC/M/18.

[224] WT/GC/M/25. Note that this was a grant of permanent observer status.

[225] WT/L/161.

[226] WT/GC/M/18, 25, 26, 35, 40/Add.3, 45, 48, 55, 57, 61, 66, 69, 71, 78, 80, 81 and 82. A list of these organizations is provided in Section II of WT/GC/W/51/Rev.9.

[227] WT/GC/M/13, section 9(c). The text of the adopted guidelines can be found in WT/L/162.

[228] WT/GC/M/29, 35, 45, 57.

(ii) Procedure to provide observer capacity

139. The General Council agreed to allow non-governmental organizations to attend the Ministerial Conference as observers at its meeting of 18 July 1996[229], and in subsequent Ministerial Conferences (Geneva, Seattle, Doha and Cancun).[230]

VII. ARTICLE VI

A. TEXT OF ARTICLE VI

Article VI
The Secretariat

1. There shall be a Secretariat of the WTO (hereinafter referred to as "the Secretariat") headed by a Director-General.

2. The Ministerial Conference shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General.

3. The Director-General shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with regulations adopted by the Ministerial Conference.

4. The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials. The Members of the WTO shall respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.

B. INTERPRETATION AND APPLICATION OF ARTICLE VI

1. Article VI:1

(a) WTO Secretariat

140. The WTO Secretariat is based in Geneva, Switzerland and is headed by a Director-General. As regards the Headquarters Agreement with the Swiss Confederation, see paragraph 156 below.

2. Article VI: 2

(a) "the Ministerial Conference shall appoint the Director-General"

141. The General Council has appointed the following Director-Generals to date:

(a) Mr Peter Sutherland – from 1 January 1995 to 30 April 1995[231];

(b) Mr Renato Ruggiero – from 1 May 1995 to 30 April 1999[232];

(c) Mr Mike Moore – from 1 September 1999 to 31 August 2002[233]; and

(d) Dr Supachai Panitchpakdi – from 1 September 2002 to 31 August 2005.[234]

(b) "regulations setting out the powers, duties, conditions of service and term of office of the Director-General"

142. At its meeting of 22 July 1999, the General Council resolved that, "in order to improve and strengthen the current rules and procedures [for the appointment of the Director-General], a comprehensive set of rules and procedures for such appointments shall be elaborated and adopted by the end of September 2000."[235] The General Council approved the comprehensive set of procedures[236] for the appointment of the Director-General at its meeting on 10–12 and 20 December 2002.[237] These procedures would apply in their entirety to the appointment of the next Director-General.

3. Article VI:3

(a) "The Director-General shall . . . determine the duties and conditions of service of the WTO Secretariat"

143. On 15 April 1994, the Ministerial Conference adopted a declaration on "Organizational and Financial Consequences Flowing from the Implementation of the Agreement Establishing the World Trade Organization"[238], providing that "the Preparatory Committee shall consider the organizational changes, resource requirements and staff conditions of service proposed

[229] WT/GC/M/13, section 11(b). See WT/L/162 for the text of the guidelines.
[230] WT/GC/M/65, 66, 68 and 78.
[231] Mr Sutherland, as former Director-General to the GATT 1947, served as the first Director-General pursuant to Article XVI:2 of the *WTO Agreement*.
[232] At its meeting on 24 March 1995, the General Council appointed Mr Ruggiero as the Director-General. See WT/GC/M/2, p. 1.
[233] At its meeting of 22 July 1999, the General Council appointed Mr Moore as the Director-General. See WT/GC/M/46, in particular, p. 18. The text of the adopted decision can be found in WT/L/308.
[234] At its meeting of 22 July 1999, the General Council also appointed Dr Panitchpakdi as the Director-General to succeed to Mr Moore. See WT/GC/M/46, in particular, p. 18. The text of the adopted decision can be found in WT/L/308.
[235] WT/L/308, last paragraph.
[236] Issued as WT/GC/W/482 and 482/Rev.1.
[237] WT/GC/M/77. The text of the procedures were subsequently issued as WT/L/509. In addition, the General Council approved modified Conditions of Service issued as WT/GC/67.
[238] MTN.TNC/45(MIN).

in connection with the establishment of the WTO and the implementation of the Uruguay Round agreements and prepare recommendations and take decisions, to the extent necessary, on the adjustments required."[239]

144. The General Council adopted decisions regarding the terms of service applicable to the WTO staff[240] at its meetings of 30 October 1995, 7, 8 and 13 November 1996, 7 February 1997, 30 June–1 July 1997, and 24 April 1998. The General Council agreed to establish the Working Group on Conditions of Service Applicable to the Staff of the WTO Secretariat[241] on 7 February 1997.

145. At its meeting of 14, 16 and 23 October 1998, taking into consideration the report of the Working Group, the General Council decided "to endorse the compensation philosophy and to adopt the Staff Regulations and Staff Rules and the Regulations and Administrative Rules of the WTO Pension Plan, as contained in *Annex 2* of the present Decision . . .".[242]

4. Article VI:4

(a) The responsibilities of the Director-General and the staff of the Secretariat

146. See the Staff Regulations and Staff Rules of the World Trade Organization.[243]

VIII. ARTICLE VII

A. TEXT OF ARTICLE VII

Article VII
Budget and Contributions

1. The Director-General shall present to the Committee on Budget, Finance and Administration the annual budget estimate and financial statement of the WTO. The Committee on Budget, Finance and Administration shall review the annual budget estimate and the financial statement presented by the Director-General and make recommendations thereon to the General Council. The annual budget estimate shall be subject to approval by the General Council.

2. The Committee on Budget, Finance and Administration shall propose to the General Council financial regulations which shall include provisions setting out:

(a) the scale of contributions apportioning the expenses of the WTO among its Members; and

(b) the measures to be taken in respect of Members in arrears.

The financial regulations shall be based, as far as practicable, on the regulations and practices of GATT 1947.

3. The General Council shall adopt the financial regulations and the annual budget estimate by a two-thirds majority comprising more than half of the Members of the WTO.

4. Each Member shall promptly contribute to the WTO its share in the expenses of the WTO in accordance with the financial regulations adopted by the General Council.

B. INTERPRETATION AND APPLICATION OF ARTICLE VII

1. Article VII:1

(a) "the Director-General shall present to the Committee on Budget, Finance and Administration the annual budget estimate and financial statement of the WTO"

147. The Director-General submits budgetary and financial reports to the BFA Committee annually.[244]

(b) "the Committee on Budget, Finance & Administration shall . . . make recommendations"

148. The BFA Committee makes regular recommendations to the General Council on the Director-General's annual budget estimates and the financial statement.[245] These recommendations embody a compromise among the members of the BFA Committee and are presented to the General Council for adoption.[246]

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[239] MTN.TNC/45(MIN), last paragraph.

[240] WT/GC/M/7, section 1 (the text of the adopted decision can be found in WT/L/91); WT/GC/M/16, section 6 (the text of the adopted decision can be found in WT/L/197); WT/GC/M/18, section 3 (the text of the adopted decision can be found in WT/L/205); WT/GC/M/20, section 1 (the text of the adopted decision can be found in WT/L/223); and WT/GC/M/28, section 1 (the text of the adopted decision can be found in WT/L/269).

[241] WT/L/205.

[242] WT/GC/M/31, section 10(a). The text of the adopted decision can be found in WT/L/282, whose Annex 2 contains the adopted Staff Regulations, Staff Rules and the Regulations and Administrative Rules of the WTO Pension Plan.

[243] Annex 2 to WT/L/282 and Annex B to Annex 2, e.g. Regulation 1.4 of the Staff Regulations and point 4 of the Standards of Conduct.

[244] For budgetary and financial reports proposed by the Director-General: WT/BFA/23, WT/BFA/25 – 1995; WT/BFA/W/15, WT/BFA/W/19 – 1996; WT/BFA/W/25, WT/BFA/W/26 – 1997; WT/BFA/W/33, WT/BFA/W/34 – 1998; WT/BFA/W/42 – 1999; WT/BFA/W/57 – 2000; WT/BFA/W/97 – 2002; WT/BFA/W/114 – 2003; and WT/BFA/W/128 – 2004.

[245] The recommendations are contained in WT/BFA/2, 3, 4, 5 (including Add.1), 6, 7, 8, 13, 15, 16, 18, 20, 21, 22, 24, 26, 28, 30, 31, 32, 33 (including Add.1 and Corr.1), 35, 36, 38, 39, 40, 44, 45, 46, 47, 48, 49.

[246] WT/BFA/2 adopted 3 April 1995, WT/GC/M/3; WT/BFA/3 and 4 adopted 31 May 1995, WT/GC/M/4; WT/BFA/5 adopted 11 July 1995, WT/GC/M/5; WT/BFA/6, 7 and 8 adopted 15 November 1995, WT/GC/M/8; WT/BFA/13 and 15 adopted on 13 and 15 December 1995, WT/GC/M/9; WT/BFA/16 and 18 adopted on 6 February 1996, WT/GC/M/10; WT/BFA/20, 21 and 22 adopted on 16 April 1996, WT/GC/M/11; WT/BFA/24 adopted on 26 June 1996, WT/GC/M/12; WT/BFA/26 adopted on 18 July 1996,

2. Article VII:2

(a) "Committee on Budget, Finance and Administration shall propose . . . financial regulations"

149. At its meeting of 15 November 1995, the General Council adopted the WTO Financial Regulations and Financial Rules[247] on the basis of the recommendation of the Joint WTO/GATT Committee on Budget, Finance and Administration.[248] The BFA Committee regularly reviews the scale of contributions assessed to the Members and has made a decision on "inactive Members".[249]

(b) "provisions setting out the scale of contributions"

150. At its meeting of 29 June 1995, the Joint WTO/GATT Committee on Budget, Finance and Administration recommended to the General Council a new methodology[250] for calculation of the assessment of Members' contributions to the WTO budget.[251] The General Council approved the recommendations on 15 November 1995.[252] On 9 August 2000, the BFA Committee submitted draft recommendations modifying the original calculation methodology.[253]

(c) Doha Development Agenda Global Trust Fund

151. Following the guidelines set by the Doha Ministerial Conference[254], the BFA Committee developed a plan to ensure long-term funding for WTO technical assistance at an overall level no lower than that of the year 2001. A draft recommendation was presented on 3 December 2003.[255]

WT/GC/M/13; WT/BFA/28 adopted on 26 November 1996, WT/GC/M/17; WT/BFA/30 adopted on 24 April 1997, WT/GC/M/19; WT/BFA/31 adopted on 16 July 1997, WT/GC/M/21; WT/BFA/32 adopted on 22 October 1997, WT/GC/M/23; WT/BFA/33 adopted on 10 December 1997, WT/GC/M/25; WT/BFA/35 adopted on 24 April 1998, WT/GC/M/28; WT/BFA/36 adopted on 15, 16 and 22 July 1998, WT/GC/M/29; WT/BFA/38 adopted on 9–11 and 18 December 1998, WT/GC/M/32; WT/BFA/39 and 40 adopted on 15 July 1999, WT/GC/M/45; WT/BFA/44 adopted on 17 December 1999, WT/GC/M/52 and Corr.1; WT/BFA/45 adopted on 7 and 8 February 2000, WT/GC/M/53; WT/BFA/46 adopted on 3 and 8 May 2000, WT/GC/M/55; WT/BFA/47 and 48 adopted on 17 and 19 July 2000, WT/GC/M/57; WT/BFA/49 adopted on 10 October 2000, WT/GC/M/58; WT/BFA/51 adopted 7 February 2001, WT/GC/M/61; WT/BFA/52 adopted 2 March 2001, WT/GC/M/63; WT/BFA/53 adopted 10 August 2001, WT/GC/M/66; WT/BFA/54 adopted 26 October WT/GC/M/69; WT/BFA/55 adopted 13 December 2001, WT/GC/M/71; WT/BFA/56 adopted 6 February 2002, WT/GC/M/72; WT/BFA/58–59 adopted 27 September 2002, WT/GC/M/75; WT/BFA/60 adopted 5 November 2002, WT/GC/M/76; WT/BFA/62 adopted 13 February 2003, WT/GC/M/77 ; WT/BFA/63 adopted 18 July 2003, WT/GC/M/80; WT/BFA/64 adopted 28 August 2003,WT/GC/M/81; WT/BFA/67 adopted 13 November 2003, WT/GC/M/82; WT/BFA/70 adopted on 16 December 2003, WT/GC/M/84; WT/BFA/71–2 adopted on 18 May 2004, WT/GC/M/86; WT/BFA/73 adopted on 1 August 2004, WT/GC/M/87; WT/BFA/75 adopted on 13 December 2004, WT/GC/M/90.

247 WT/GC/M/8, section 7(c). The text of the Financial Regulations can be found in WT/L/156 and the text of the Financial Rules can be found in WT/L/157.

248 WT/BFA/13, L/7649, Section VII.

249 In relation to "Inactive Members", on 9 December 1994, the Preparatory Committee for the WTO adopted the following recommendation:

"(a) a Member be designated as an Inactive Member if, at the end of a financial year, the full contributions for three or more years, commencing with the year 1989*, are unpaid;

(b) the list of Inactive Members be notified to the General Council by the Committee on Budget, Finance and Administration at the beginning of each calendar year with a recommendation that these Members be urged to liquidate their arrears;

(c) assessments for Inactive Members for a given year be placed in a separate account and not counted as part of the anticipated revenue of the WTO for that year;

(d) as soon as an appropriate payment is made by an Inactive Member, the General Council be notified immediately of the consequential deletion from the list of Inactive Members;

(e) Inactive Members be denied access to training or technical assistance other than that necessary to meet their WTO Article XIV-2 obligations;

(f) arrears collected from Inactive Members for a given year be placed in the Surplus Account."

PC/7 and L/7578, para. 7. In accordance with (b) above, the Secretariat prepared the list of Inactive Members. See e.g. WT/BFA/52, Section I and WT/BFA/W/108 for the status as at February 2004.

250 The new methodology was based on the following principles: (a) The share to be contributed by each Contracting Party/Member to the annual operating budget of the GATT/WTO shall be established on the basis of that country's (or separate customs territory's) international trade (imports plus exports) in relation to the total international trade of all GATT Contracting Parties/WTO Members; (b) The figures used shall be those for the last three years for which data are available; (c) The statistics used shall relate to trade in goods, services and intellectual property rights as reported in balance-of-payments statistics from the International Monetary Fund (IMF); with regard to services, the statistics shall relate to the definition of commercial services as applied in the WTO; (d) Where IMF data deviate from IMF guidelines and include transactions not related to goods, services or intellectual property rights, adjustments provided to the WTO by the Central Bank or the National Statistical Office of a Contracting Party/Member shall be taken into account by the Secretariat when adequately documented and justified; (e) If IMF data are not available, the WTO Secretariat will use estimates based on the best other available sources; (f) A minimum contribution of 0.03 per cent will be applied to those contracting parties/members whose share in the total international trade of all GATT Contracting Parties/WTO Members is less than 0.03 per cent. WT/BFA/6, L/7633. The BFA Committee subsequently recommended that the minimum percentage contribution be changed to 0.015 per cent. WT/BFA/44. The General Council approved this recommendation at its meeting on 17 December 1999. WT/GC/M/52.

251 WT/BFA/6, L/7633.

252 WT/GC/M/8, section 7(a).

253 WT/BFA/W/50/Rev.2.

254 WT/MIN(01)/DEC/1, para.40.

255 WT/BFA/W/107.

3. Article VII:3

(a) "The General Council shall adopt the financial regulations and the annual budget estimate"

152. The General Council adopted the BFA Committee's proposed financial regulations[256] on 15 November 1995. On 15 December 2000, the General Council approved guidelines[257] with respect to Voluntary Contributions, Gifts, or Donations from Non-Governmental Donors[258] to be reviewed by January 2003.[259] Pursuant to paragraph 9 of the Guidelines, the Committee on Budget, Finance and Administration started the review in October 2002 and continued discussions in the course of 2003. At its meeting of 1 April 2004, the Committee further discussed the item and, on the basis of comments made, decided to revert to an amended text.[260]

4. Article VII:4

(a) "Each Member shall . . . contribute to the WTO . . ."

153. As regards the budget contributions of Members, see paragraph 150 above.

IX. ARTICLE VIII

A. TEXT OF ARTICLE VIII

Article VIII
Status of the WTO

1. The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions.

2. The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions.

3. The officials of the WTO and the representatives of the Members shall similarly be accorded by each of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the WTO.

4. The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947.

5. The WTO may conclude a headquarters agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE VIII

1. Article VIII:1, VIII:2 and VIII:3

(a) Genera1

154. Paragraphs 1–3 establish certain principles regarding the legal personality, the privileges and immunities enjoyed by the Organization, its officials and the representatives of its Members, and in particular the functional character of these notions. Privileges and immunities are extended to the staff of the Organization with a view to facilitating the independent exercise of their functions. Officials of the Secretariat are, in turn, required to observe the laws of the host State and to perform their private obligations accordingly. The Director-General may decide, whether, in respect of these obligations, and in the interest of the WTO, an immunity shall be waived.[261]

2. Article VIII:4

155. Under this provision, Members are bound by the obligation to grant "similar" privileges and immunities to the WTO as those laid down in the Convention on the Privileges and Immunities of the Specialized Agencies 1947[262], whether or not the Member in question is a party to that Convention.

3. Article VIII:5

(a) Headquarters Agreement

156. The Headquarters Agreement[263] and the Infrastructure Agreement[264] between the World Trade Organization and the Swiss Confederation was approved by the General Council on 31 May 1995.[265]

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[256] WT/GC/M/8, section 7(c). The text of the adopted Financial Regulations can be found in WT/L/156.
[257] WT/L/386.
[258] In compliance with these guidelines and in particular with paragraph 4 of WT/L/386, the Secretariat submitted document WT/BFA/W/56 that described a donation from Friedrich-Ebert-Stiftung (FES), a German-based non-profit foundation. The Committee decided that the Director-General could accept the donation in kind from the Friedrich-Ebert-Stiftung (FES) estimated at CHF 115,000 in order to facilitate the participation of developing country journalists in a series of two half-day seminars designed to familiarize these journalists with current WTO issues and build their capacity to write on WTO topics as described in document WT/BFA/W/56. (WT/BFA/53).
[259] WT/L/386, para. 9.
[260] WT/BFA/W/111 and 111/Rev.1.
[261] Staff Regulation 1.6.
[262] See G.A. Res. 179(III) of 21 November 1947, United Nations Treaty Series; 33 U.N.T.S., p. 261.
[263] The text of the Headquarters Agreement can be found in WT/GC/1 and Add.1.
[264] The text of the Infrastructure Agreement can be found in WT/GC/2.
[265] WT/GC/M/4, section 5, and WT/L/69.

(b) Transfer of assets

157. Pursuant to the decision adopted by the Preparatory Committee for the World Trade Organization on 8 December 1994[266], the Preparatory Committee, the CONTRACTING PARTIES to GATT 1947 and the Executive Committee of ICITO entered into the Agreement on the Transfer of Assets, Liabilities, Records, Staff and Functions from the Interim Commission of the International Trade Organization and the GATT to the World Trade Organization.[267]

X. ARTICLE IX

A. TEXT OF ARTICLE IX

Article IX
Decision-Making

1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.[1] Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States[2] which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.[3]

(*footnote original*) [1] The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.
(*footnote original*) [2] The number of votes of the European Communities and their member States shall in no case exceed the number of the member States of the European Communities.
(*footnote original*) [3] Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.

2. The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

3. In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths[4] of the Members unless otherwise provided for in this paragraph.[268]

(*footnote original*) [4] A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period shall be taken only by consensus.

(a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths[4] of the Members.

(b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.

4. A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.

5. Decisions under a Plurilateral Trade Agreement, including any decisions on interpretations and waivers, shall be governed by the provisions of that Agreement.

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[266] The text of the decision can be found in PC/9. At its meeting of 31 January 1995, the General Council endorsed certain provisions of the decision of the Preparatory Committee. WT/GC/M/1, section 4.I(d). The text of the endorsed decision can be found in WT/L/36.

[267] The text of the Agreement can be found in ICITO/1/39.

[268] In respect of waivers, the *WTO Agreement* contains the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, see Section XXIII of this Chapter.

B. INTERPRETATION AND APPLICATION OF ARTICLE IX

1. Article IX:1

(a) "The WTO shall continue the practice of decision-making by consensus"

158. The General Council adopted the decision on "Decision-Making Procedures Under Articles IX and XII of the *WTO Agreement*" on 15 November 1995.[269] See also paragraph 163 below.

2. Article IX:2

(a) "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements"

(i) Statements by the Appellate Body

159. In *Japan – Alcoholic Beverages II*, the Appellate Body disagreed with the Panel's finding that panel reports adopted by the DSB constitute "subsequent practice" within the meaning of Article 31 of the *Vienna Convention on the Laws of Treaties*.[270] In support of this conclusion, the Appellate Body referred to the exclusive authority of the Ministerial Conference and General Council to adopt interpretations of the *WTO Agreement* under Article IX:2:

> "We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in the *WTO Agreement*. Article IX:2 of the *WTO Agreement* provides: 'The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements'. Article IX:2 provides further that such decisions 'shall be taken by a three-fourths majority of the Members'. The fact that such an 'exclusive authority' in interpreting the treaty has been established so specifically in the *WTO Agreement* is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere."[271]

160. In *US – Wool Shirts and Blouses*, the Appellate Body, in support of the Panel's exercise of judicial economy referred to the exclusive authority of the Ministerial Conference and the General Council to adopt interpretations of the *WTO Agreement*:

> "As India emphasizes, Article 3.2 of the *DSU* states that the Members of the WTO 'recognize' that the dispute settlement system 'serves to preserve the rights and obligations of Members under the covered agreements, and *to clarify the existing provisions of those agreements* in accordance with customary rules of interpretation of public international law' emphasis added). Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.[272]
>
> We note, furthermore, that Article IX of the *WTO Agreement* provides that the Ministerial Conference and the General Council have the 'exclusive authority' to adopt interpretations of the *WTO Agreement* and the Multilateral Trade Agreements.[273]"[274]

(b) Requests for authoritative interpretations

161. The first request for an authoritative interpretation of the Multilateral Trade Agreements was made on 21 January 1999[275] in relation to Articles 3.7, 21.5, 22.2, 22.6, 22.7 and 23 of the *DSU*. Although the General Council was requested to hold a meeting to deal with these interpretation issues,[276] no such meeting was ever held.[277]

162. The *TRIPS Agreement* has been interpreted in regard to its specific relationship with the public health sector by the Ministerial Conference in Doha although without making reference to Article IX:2. The Declaration on the *TRIPS Agreement* and Public Health[278], adopted on 14 November 2001, states that the *TRIPS Agreement* "does not and should not prevent Members from taking measures to protect public health . . ., in particular, to promote access to medicines for all." For such purpose, the *TRIPS Agreement* provides flexibility in its interpretation.[279]

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[269] WT/L/93. Refer to the text on Article XII of the *WTO Agreement*.
[270] Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 12–15. In this regard, see excerpt referenced in para. 30, of the Chapter on the *DSU*.
[271] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 13.
[272] (*footnote original*) The "matter in issue" is the "matter referred to the DSB" pursuant to Article 7 of the *DSU*.
[273] (*footnote original*) *Japan – Taxes on Alcoholic Beverages*, AB-1996–2, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 13.
[274] Appellate Body Report on *US – Wool Shirts and Blouses*, pp. 19–20.
[275] WT/GC/W/133.
[276] WT/GC/W/143.
[277] With respect to the attempt to amend Articles 21.5 and 22 of the *DSU*, see paras 65–66 of the *DSU*. Also, with respect to the jurisprudence on this issue, see excerpts referenced in the Chapter on the *DSU*.
[278] WT/MIN(01)/DEC/2.
[279] WT/MIN(01)/DEC/2, para. 5. See also Section LXXVIII of the Chapter on the *TRIPS Agreement*.

3. Article IX:3 and IX:4: Waivers

(a) Decision-making procedures for granting a waiver

163. The General Council adopted the decision on "Decision-Making Procedures Under Articles IX and XII of the *WTO Agreement*" on 15 November 1995. For procedures dealing with requests for waivers or accessions to the WTO under Articles IX or XII of the *WTO Agreement*,[280] the Decision provides as follows:

> "On occasions when the General Council deals with matters related to requests for waivers or accessions to the WTO under Articles IX or XII of the *WTO Agreement* respectively, the General Council will seek a decision in accordance with Article IX:1. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting under the relevant provisions of Articles IX or XII."[281]

(i) Interpretation of waivers

164. In *EC – Bananas III*, the European Communities argued that a certain waiver on its import regime for bananas should be interpreted so as to justify a deviation from Article XIII of the *GATT 1994* although it waived only compliance with Article I of the *GATT 1994* in its terms. The Panel accepted this argument to the extent that "the scope of Article XIII is identical with that of Article I"[282], but the Appellate Body rejected this finding, stating:

> "The wording of the Lomé Waiver is clear and unambiguous. By its precise terms, it waives only 'the provisions of paragraph 1 of Article I of the *General Agreement* . . . to the extent necessary' to do what is 'required' by the relevant provisions of the Lomé Convention. The Lomé Waiver does not refer to, or mention in any way, any other provision of the GATT 1994 or of any other covered agreement. Neither the circumstances surrounding the negotiation of the Lomé Waiver, nor the need to interpret it so as to permit it to achieve its objectives, allow us to disregard the clear and plain wording of the Lomé Waiver by extending its scope to include a waiver from the obligations under Article XIII. Moreover, although Articles I and XIII of the GATT 1994 are both non-discrimination provisions, their relationship is not such that a waiver from the obligations under Article I implies a waiver from the obligations under Article XIII.[283]
>
> The Panel's interpretation of the Lomé Waiver as including a waiver from the GATT 1994 obligations relating to the allocation of tariff quotas is difficult to reconcile with the limited GATT practice in the interpretation of waivers, the strict disciplines to which waivers are subjected under the *WTO Agreement*, the history of the negotiations of this particular waiver and the limited GATT practice relating to granting waivers from the obligations of Article XIII.
>
> There is little previous GATT practice on the interpretation of waivers. In the panel report in *United States – Sugar Waiver*, the panel stated:
>
> > 'The Panel took into account in its examination that waivers are granted according to Article XXV:5 only in 'exceptional circumstances', that they waive obligations under the basic rules of the General Agreement and that their terms and conditions consequently have to be interpreted narrowly.'[284]
>
> Although the WTO Agreement does not provide any specific rules on the interpretation of waivers, Article IX of the WTO Agreement and the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, which provide requirements for granting and renewing waivers, stress the exceptional nature of waivers and subject waivers to strict disciplines. Thus, waivers should be interpreted with great care.
>
> With regard to the history of the negotiations of the Lomé Waiver, we have already noted that the CONTRACTING PARTIES limited the scope of the waiver by replacing 'preferential treatment *foreseen* by the Lomé Convention' with 'preferential treatment *required* by the Lomé Convention' (emphasis added). This change clearly suggests that the CONTRACTING PARTIES wanted to restrict the scope of the Lomé Waiver.
>
> Finally, we note that between 1948 and 1994, the CONTRACTING PARTIES granted only one waiver of Article XIII of the GATT 1947.[285] In view of the truly exceptional nature of waivers from the non-discrimination obligations under Article XIII, it is all the more difficult to accept the proposition that a waiver that does not explicitly refer to Article XIII would nevertheless waive the obligations of that Article. If the CONTRACTING PARTIES had intended to waive the obligations of the European Communities under Article XIII in the Lomé Waiver, they would have said so explicitly."[286]

165. As regards GATT practice concerning waivers, see Article XXV of the GATT Analytical Index.

(b) Waivers granted

166. The table below lists the waivers currently in force:

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[280] WT/GC/M/8, section 3. The text of the adopted procedures can be found in WT/L/93.
[281] WT/L/93, first paragraph.
[282] Panel Report on *EC – Bananas III*, para. 7.107.
[283] Appellate Body Report on *EC – Bananas III*, para. 183.
[284] (*footnote original*) Panel Report on *US – Sugar Waiver*, para. 5.9.
[285] (*footnote original*) Waiver Granted in Connection with the European Coal and Steel Community, Decision of 10 November 1952, BISD 1S/17, para. 3.
[286] Appellate Body Report on *EC – Bananas III*, paras. 184–187.

Waiver	Granted	Expires	Decision
United States – Caribbean Basin Economic Recovery Act	15 November 1995	31 December 2005	WT/L/104
United States – Former Trust Territory of the Pacific Islands	14 October 1996	31 December 2006	WT/L/183
Canada – CARIBCAN	14 October 1996	31 December 2006	WT/L/185
Preferential Tariff Treatment for Least-Developed Countries	15 June 1999	30 June 2009	WT/L/304
EC – Autonomous Preferential Treatment to the Countries of the Western Balkans	8 December 2000	31 December 2006	WT/L/380
Turkey – Preferential Treatment for Bosnia-Herzegovina	8 December 2000	31 December 2006	WT/L/381
EC – The ACP-EC Partnership Agreement	14 November 2001	31 December 2007	WT/L/436
EC – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas	14 November 2001	31 December 2005	WT/L/437
Cuba – Article XV:6 of GATT 1994	20 December 2001	31 December 2006	WT/L/440
LDCs – Article 70.9 of the TRIPS Agreement with respect to pharmaceutical products	8 July 2002	1 January 2016	WT/L/478
Australia, Brazil, Canada, Israel, Japan, Korea, Philippines, Sierra Leone, Thailand, United Arab Emirates and the United States – Kimberley Process Certification Scheme for rough diamonds Countries notified to be covered by the waiver under paragraph 3 of the Decision: Bulgaria, Croatia, Czech Republic, European Communities, Hungary, Mauritius, Mexico, Norway, Romania, Chinese Taipei, Slovenia, Switzerland, Venezuela, Mexico, Norway, Romania, Chinese Taipei, Slovenia, Switzerland, Venezuala, Mexico	15 May 2003	31 December 2005	WT/L/518
Malaysia – Introduction of Harmonized System 1996 changes into WTO Schedules of Tariff Concessions – Extension of Time-Limit	17 May 2004	30 April 2005	WT/L/569
Panama – Introduction of Harmonized System 1996 changes into WTO Schedules of Tariff Concessions – Extension of Time-Limit	17 May 2004	30 April 2005	WT/L/570
Senegal – Minimum values in regard to the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994	17 May 2004	30 June 2005	WT/L/571
Israel – Introduction of Harmonized System 1996 changes into WTO Schedules of Tariff Concessions – Extension of Time-Limit	20 October 2004	31 October 2005	WT/L/589
Argentina – Introduction of Harmonized System 1996 changes into WTO Schedules of Tariff Concessions – Extension of Time-Limit	20 October 2004	30 April 2005	WT/L/590
Argentina; Australia; Brazil; Bulgaria; Canada; China; Costa Rica; Croatia; El Salvador; European Communities; Hong Kong, China; Iceland; India; Korea; Macao, China; Mexico; New Zealand; Nicaragua; Norway; Romania; Singapore; Switzerland; Chinese Taipei; Thailand; United States; Uruguay – Introduction of Harmonized System 2002 Changes into WTO Schedules of Tariff Concessions	13 December 2004	31 December 2005	WT/L/598

4. Article IX:5

167. The *International Dairy Agreement* specifically addresses waivers in Article 7.1 of the Annex on Certain Milk Products.

XI. ARTICLE X

A. TEXT OF ARTICLE X

Article X
Amendments

1. Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils listed in paragraph 5 of Article IV may also submit to the Ministerial Conference proposals to amend the provisions of the corresponding Multilateral Trade Agreements in Annex 1 the functioning of which they oversee. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus. Unless the provisions of paragraphs 2, 5 or 6 apply, that decision shall specify whether the provisions of paragraphs 3 or 4 shall apply. If con-

sensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance. Except as provided in paragraphs 2, 5 and 6, the provisions of paragraph 3 shall apply to the proposed amendment, unless the Ministerial Conference decides by a three-fourths majority of the Members that the provisions of paragraph 4 shall apply.

2. Amendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members:

Article IX of this Agreement;
Articles I and II of GATT 1994;
Article II:1 of GATS;
Article 4 of the Agreement on TRIPS.

3. Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

4. Amendments to provisions of this Agreement or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members.

5. Except as provided in paragraph 2 above, amendments to Parts I, II and III of GATS and the respective annexes shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under the preceding provision is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference. Amendments to Parts IV, V and VI of GATS and the respective annexes shall take effect for all Members upon acceptance by two thirds of the Members.

6. Notwithstanding the other provisions of this Article, amendments to the Agreement on TRIPS meeting the requirements of paragraph 2 of Article 71 thereof may be adopted by the Ministerial Conference without further formal acceptance process.

7. Any Member accepting an amendment to this Agreement or to a Multilateral Trade Agreement in Annex 1 shall deposit an instrument of acceptance with the Director-General of the WTO within the period of acceptance specified by the Ministerial Conference.

8. Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference. Decisions to approve amendments to the Multilateral Trade Agreement in Annex 3 shall take effect for all Members upon approval by the Ministerial Conference.

9. The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4.

10. Amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE X

1. Article X:1

(a) "Amendments to this Agreement or the Multilateral Trade Agreements in Annex 1"

168. As of 31 December 2004, no provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 had been amended.

2. Article X:8

(a) Amendments to the Multilateral Trade Agreements in Annexes 2 and 3

(i) Annex 2: Dispute Settlement Understanding

169. The 1994 Marrakesh Ministerial Conference mandated WTO Members to conduct a review of the *DSU* within four years of the entry into force of the *WTO Agreement* (i.e. by 1 January 1999). The DSB started the review in late 1997, and held a series of informal discussions on the basis of proposals and issues that Members identified. The review did not lead to any modification of the *DSU*.

170. The Doha Declaration mandated negotiations on improvements and clarifications of the *DSU* with the aim of reaching an agreement by May 2003.[287] The Declaration states in paragraph 47 that the negotiations on the *DSU* are not part of the single undertaking (see Section XXVII.A below).

171. On 1 February 2002, the TNC established the Special Session of the DSB to conduct the negotiations. As at 31 December 2004, the Special Session of the DSB has met a number of times to carry out negotiations on improvements and clarifications to the *DSU*, in accordance with paragraph 30 of the Doha Declaration.[288]

172. From February 2002 to December 2004 more than 40 proposals had been put forward containing text relating to 24 out of the 27 articles of the *DSU*.[289] In July 2003, the General Council extended until May 2004 the time-frame for conclusion of the negotiations.[290] In May 2004, the Chairman reported to the TNC that further time would be required to complete the work of the DSB Special Session.[291] On 1 August 2004 in the context of the "July Package" the General Council agreed to an extension of the time-frame for conclusion of the negotiations.[292] To date the negotiations have focused on a broad range of issues, including: consultations, panel proceedings, appellate proceedings, issues relating to implementation and the surveillance of implementation, and proposals relating to special and differential treatment.[293]

(ii) Annex 3: TPRM

173. As at 31 December 2004, no provisions of this Agreement had been amended.

3. Article X:9

(a) Additions to Plurilateral Trade Agreements

174. As of 31 December 2004, no Plurilateral Trade Agreements had been added to Annex 4.

(b) Deletions of Plurilateral Trade Agreements

175. The *International Bovine Meat Agreement* and the *International Dairy Agreement* were deleted from Annex 4 by decisions of the General Council. With respect to the deletion of these Agreements, see the Chapters on these Agreements, paragraphs 6 and 12, respectively.

4. Article X:10

(a) "Amendments to a Plurilateral Agreement shall be governed by the provisions of that Agreement"

176. The following provisions govern amendments to the respective Plurilateral Agreements:

(a) *Agreement on Trade in Civil Aircraft* – Article 9.5;

(b) *Agreement on Government Procurement* – Article XXIV:9;

(c) *International Dairy Agreement* – Article VIII:4 (See paragraph 175 above); and

(d) *International Bovine Meat Agreement* – Article VI:4 (See paragraph 175 above).

177. None of the Plurilateral Agreements had been amended as at 31 December 2004.

XII. ARTICLE XI

A. TEXT OF ARTICLE XI

Article XI
Original Membership

1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.

2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

B. INTERPRETATION AND APPLICATION OF ARTICLE XI

1. General

(a) Members

178. On 31 December 2004, the WTO membership stood at 148 Members. See Sections XII.B.2 below and XXV below.

(b) Observers

179. Section XXVI below lists the observers to the WTO as at 31 December 2004.

180. Also see paragraph 135 above on intergovernmental organizations; paragraph 139 above on non-

[287] See also WT/MIN(01)/DEC/1, para. 30.
[288] TN/DS/1–11.
[289] TN/DS/9.
[290] WT/GC/M/81.
[291] TN/DS/10.
[293] WT/GC/M/87. (Draft decision contained in WT/GC/W/535 and Corr.1.)
[293] TN/DS/4, para. 6.

governmental organizations; and paragraph 187 below on applicants for accession.

2. Article XI:1

(a) "The contracting parties to GATT 1947 . . . shall become original Members of the WTO"

181. The General Council adopted the decision proposed by the Preparatory Committee for the World Trade Organization concerning the finalization of negotiations on schedules on goods and services of certain contracting parties to *GATT 1947* eligible to be original Members of the WTO[294] on 1 January 1995.

182. Of the 148 Members, 123 are original Members while 25 acceded to the Agreement.[295]

183. The Agreement entered into force for the following 76 original Members on 1 January 1995: Antigua and Barbuda, Argentina, Australia, Austria, Bahrain, Bangladesh, Barbados, Belgium, Belize, Brazil, Brunei Darussalam, Canada, Chile, Costa Rica, Côte d'Ivoire, Czech Republic, Denmark, Dominica, European Communities[296], Finland, France, Gabon, Germany, Ghana, Greece, Guyana, Honduras, Hong Kong[297], Hungary, Iceland, India, Indonesia, Ireland, Italy, Japan, Kenya, Korea, Kuwait, Luxembourg, Macau[298], Malaysia, Malta, Mauritius, Mexico, Morocco, Myanmar, Namibia, Netherlands (for the Kingdom in Europe and for the Netherlands Antilles), New Zealand, Nigeria, Norway, Pakistan, Paraguay, Peru, Philippines, Portugal, Romania, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Singapore, Slovak Republic, South Africa, Spain, Sri Lanka, Suriname, Swaziland, Sweden, Tanzania, Thailand, Uganda, United Kingdom, United States, Uruguay, Venezuela and Zambia.

184. The following remaining 47 original Members accepted the *WTO Agreement* after the date of the entry into force of the Agreement: Trinidad and Tobago, Zimbabwe, Dominican Republic, Jamaica, Turkey, Tunisia, Cuba, Israel, Colombia, El Salvador, Burkina Faso, Egypt, Botswana, Central African Republic, Djibouti, Guinea Bissau, Lesotho, Malawi, Mali, Maldives, Mauritania, Togo, Poland, Switzerland, Guatemala, Burundi, Sierra Leone, Cyprus, Slovenia, Mozambique, Liechtenstein, Nicaragua, Bolivia, Guinea (Republic of), Madagascar, Cameroon, Fiji, Haiti, Benin, Rwanda, Solomon Islands, Chad, Gambia, Angola, Niger, the Democratic Republic of Congo, the Congo (Republic of).

3. Article XI:2: Least-developed countries

185. Pursuant to the Ministerial Decision on Measures in Favour of Least-Developed Countries, the General Council approved schedules on goods and services of 20 least-developed country Members[299] at its meeting of 31 May 1995. Further, the General Council approved the schedule on goods and services of the Solomon Islands at its meeting of 13 and 15 December 1995.[300] As regards the establishment and activities of the Committee on LDCs, see Section V.B.7(a) above.

XIII. ARTICLE XII

A. TEXT OF ARTICLE XII

Article XII
Accession

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.

3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE XII

1. General

186. Ministers adopted the Decision on the Acceptance of Accession to the Agreement Establishing the World Trade Organization at the end of Uruguay negotiations.[301]

(a) Observer status for applicants for accession

187. The General Council decided to grant observer status to governments whose accession process had already begun at its meeting of 31 January 1995[302] as

[294] WT/GC/M/1, section 4.I(f). The text of the adopted decision can be found in WT/L/30.
[295] With respect to the accession, see paras. 187–192 of this Chapter.
[296] Note that the text of the Agreement identifies the original Member as the European Communities.
[297] Since 1 July 1997, when sovereignty over Hong Kong reverted to China, this separate customs territory has been known as "Hong Kong, China".
[298] Since 20 December 1999, when sovereignty over Macau reverted to China, this separate customs territory has been known as "Macau, China".
[299] WT/GC/M/4, section 2. The text of the approval can be found in WT/L/70.
[300] WT/GC/M/9, section 1(i).
[301] MTN.TNC/40
[302] WT/GC/M/1, section 2.

was the practice under GATT.[303] Section XXVI below enumerates observers to WTO bodies as at 31 December 2004.

(b) Accession working parties under GATT 1947

188. The General Council agreed at its meeting of 31 January 1995, that "as and when requests for the WTO accession under Article XII were made by states and separate customs territories for whom a GATT 1947 working party already existed, the existing working parties should continue their work as WTO accession working parties, with standards terms of reference and their respective current chairpersons".[304]

(c) Least-developed countries

189. At the High-Level Meeting on Integrated Initiatives for Least-Developed Countries' Trade Development, of 27–28 October 1997 (see Section V.B.7(a) above), Members recommended that the WTO take steps to assist LDCs in the process of accession.[305]

190. Pursuant to paragraph 42 of the Doha Ministerial Declaration, the Sub-Committee on Least-Developed Countries established a work programme (see Section V.B.7(a) above) which included a mandate from ministers to "facilitate and accelerate negotiations with acceding Least-Developed Countries."[306] On 10 December 2002, the General Council adopted a decision to facilitate and accelerate negotiations for the accession of LDCs through simplified and streamlined procedures. The Decision set down guidelines in the following broad areas: Market Access[307], WTO Rules[308], Process[309] and Trade-Related Technical Assistance and Capacity Building.[310]

2. Article XII:1

(a) "Any State or separate customs territory . . . may accede to this Agreement"

191. Between 1 January 1995 and 31 December 2004, 25 Members acceded to the *WTO Agreement*. See the table in Section XXIV below.

192. For WTO practice on accession procedures, see the Note by the Secretariat, dated 24 March 1995.[311]

3. Article XII:2

(a) Decision-making procedures on accession

193. As regards the decision-making procedures applicable to requests for accessions to the WTO, see paragraph 163 above.

(b) Working parties on accession

(i) Establishment

194. The General Council established working parties on accession on behalf of the Ministerial Conference.[312] Since 1 January 1995, the General Council has established 23 Working Parties[313] on accession for the following applicants: Viet Nam[314], Seychelles[315], Tonga[316], Vanuatu[317], Kazakstan[318], Kyrgyz Republic[319], Oman[320], Georgia[321], Azerbaijan[322], Andorra[323], Laos[324], Samoa[325], Lebanon[326], Bosnia and Herzegovina[327], Bhutan[328], Cape Verde[329], Yemen[330] and the Federal Republic of Yugoslavia[331], Bahamas[332], Tajikistan[333], Former Yugoslav Republic of Macedonia[334], Armenia[335], and Ethiopia[336].

195. Of the working parties on accession carried over from GATT 1947, 19 accessions have been completed as at 31 December 2004, including: Ecuador[337], Bulgaria[338],

[303] See GATT Analytical Index, pp. 1017–1028. .
[304] WT/GC/M/1, section 4.I(g). At the same meeting, the General Council applied this treatment to Belarus. WT/GC/M/1, section 4.I(g).
[305] WT/LDC/HL/23, the section dealing with Thematic Round Table A, para. II(b). With respect to the High-Level Meeting generally, see para. 88.
[306] See WT/COMTD/LDC/11 Section (f) para. 18(iii).
[307] WT/COMTD/LCD/12, WT/L/508, Section I.
[308] WT/L/508, Section II.
[309] WT/L/508, Section III.
[310] WT/L/508, Section IV.
[311] WT/ACC/1.
[312] WT/ACC/1, para. 5.
[313] This figure includes only Working Parties on accession established after 1 January 1995. Several Working Parties on accession were established before 1995 by the GATT 1947 Council. These Working Parties were transformed from GATT Working Parties to WTO Working Parties by a decision of the General Council on 31 January 1995. In this regard, see para. 188 of this Chapter.
[314] WT/GC/M/1, section 3.
[315] WT/GC/M/5, section 2(a).
[316] WT/GC/M/8, section 1.
[317] WT/GC/M/5, section 2(b).
[318] WT/GC/M/10, section 1.
[319] WT/GC/M/11, section 1.
[320] WT/GC/M/12, section 1.
[321] WT/GC/M/13, section 2.
[322] WT/GC/M/21, section 2.
[323] WT/GC/M/23, section 2.
[324] WT/GC/M/26, section 2.
[325] WT/GC/M/29, section 1.
[326] WT/GC/M/40, section 2.
[327] WT/GC/M/45, section 1(a).
[328] WT/GC/M/48, section 3(a).
[329] WT/GC/M/57, section 3.
[330] WT/GC/M/57, section 4.
[331] WT/GC/M/63, section 2.
[332] WT/GC/M/66, section 3.
[333] WT/GC/M/66, section 4.
[334] WT/GC/M/76, section 1.
[335] WT/GC/M/77, section 1.
[336] WT/GC/M/78, section 2.
[337] WT/GC/M/6. The Working Party was established in October of 1992 and the accession protocol accepted on 31 July 1995. The text of the decision can be found in WT/ACC/ECU/5.
[338] WT/GC/M/14. The Working Party was established in November 1986 and February 1990 and the accession protocol accepted on 2 October 1996. The text of the decision can be found in WT/ACC/BGR/6.

Mongolia[339], Panama[340], Kyrgyz Republic[341], Latvia[342], Estonia[343], Jordan[344], Georgia[345], Albania[346], Oman[347], Croatia[348] and Lithuania,[349] Armenia,[350] Cambodia,[351] Former Yugoslav Republic of Macedonia,[352] Moldova,[353] Nepal,[354] and Chinese Taipei[355]. Seven of the working parties on accession carried over from the GATT 1947 were still active as at 31 December 2004, including: Algeria, Belarus, the Russian Federation, Saudi Arabia, Sudan, Ukraine and Uzbekistan.[356]

(ii) Terms of reference

196. The General Council sets the following terms of reference for a working party on accession: "to examine the application for accession to the WTO under Article XII and to submit to the General Council/Ministerial Conference recommendations which may include a draft Protocol of Accession".[357]

(c) Accession decisions adopted by the WTO

197. The General Council, acting on behalf of the Ministerial Conference, has adopted 24 accession decisions, and thus the *WTO Agreement* has entered into force for: Ecuador[358], Qatar[359], Grenada[360], Saint Kitts and Nevis[361], Papua New Guinea[362], United Arab Emirates[363], Mongolia[364], Republic of Panama[365], Bulgaria[366], Latvia[367], Kyrgyz Republic[368], Estonia[369], Georgia[370], Jordan[371], Albania[372], Croatia[373], Oman[374], Lithuania[375], Moldova[376], China[377], Chinese Taipei[378], Former Yugoslav Republic of Macedonia[379], Armenia[380],

[339] WT/GC/M/13. The Working Party was established in October of 1991 and the accession protocol accepted on 18 July 1996. The text of the decision can be found in WT/ACC/MNG/10.

[340] WT/GC/M/14. The Working Party was established in October of 1991 and the accession protocol accepted on 2 October 1996. The text of the decision can be found in WT/ACC/PAN/20.

[341] WT/GC/M/31. The Working Party was established in April of 1996 and the accession protocol accepted on 14, 16 and 23 October 1998. The text of the decision can be found in WT/ACC/KGZ/28.

[342] WT/GC/M/31. The Working Party was established in December of 1993 and the accession protocol accepted on 14, 16 and 23 October 1998. The text of the decision can be found in WT/ACC/LVA/34.

[343] WT/GC/M/41. The Working Party was established 23 March 1994 and the accession protocol accepted on 21 May 1999. The text of the decision can be found in WT/ACC/EST/29.

[344] WT/GC/M/52. The Working Party was established 25 January 1994 and the accession protocol accepted on 17 December 1999. The text of the decision can be found in WT/ACC/JOR/34.

[345] WT/GC/M/48. The Working Party was established in July of 1996 and the accession protocol accepted on 6 October 1999. The text of the decision can be found in WT/ACC/GEO/32.

[346] WT/GC/M/57. The Working Party was established 10 December 1992 and the accession protocol accepted on 17 and 19 July 2000. The text of the decision can be found in WT/ACC/ALB/52.

[347] WT/GC/M/58. The Working Party was established in June of 1996 and the accession protocol accepted on 10 October 2000. The text of the decision can be found in WT/ACC/OMN/27.

[348] WT/GC/M/57. The Working Party was established 27 October 1993 and the accession protocol accepted on 17 and 19 July 2000. The text of the decision can be found in WT/ACC/HRV/60.

[349] WT/GC/M/61. The Working Party was established in February of 1994 and the accession protocol accepted on 7, 8, 11 and 15 December 2000. The text of the decision can be found in WT/ACC/LTU/53.

[350] WT/GC/M/1. The Working Party was established on 17 December 1993 and the accession protocol accepted on 5 February 2004. The text of the decision can be found in WT/ACC/ARM/23.

[351] WT/ACC/KHM/1/Rev.6. The Working Party was established on 21 December 1994 and the accession protocol accepted on 11 September 2003. The text of the decision can be found in WT/MIN(03)/18.

[352] WT/ACC/807/1/Rev.9. The Working Party was established on 21 December 1994 and the accession protocol accepted on 15 October 2002. The text of the decision can be found in WT/L/494.

[353] WT/GC/M/65. The Working Party was established on 17 December 1993 and the accession protocol accepted on 8 May 2001. The text of the decision can be found in WT/ACC/MOL/40.

[354] WT/GC/M/1. The Working Party was established on 21/22 June 1989 and the accession protocol accepted on 11 September 2003. The text of the decision can be found in WT/MIN(03)/19.

[355] WT/ACC/TPKM/18. The Working Party was established on 1 October 1992 and the accession protocol accepted on 11 November 2001. The text of the decision can be found in WT/L/43.

[356] WT/GC/W/100. Five countries who acceded to the WTO after 1 January 1995 did not have working parties carried over from the GATT 1947. The General Council gave Grenada, Papua New Guinea, Qatar, St. Kitts and Nevis and the United Arab Emirates additional time to complete the negotiation of their schedules. WT/L/30.

[357] WT/ACC/1, para. 5.

[358] WT/ACC/ECU/5. Decision dated 16 August 1995. Entry into force 21 January 1996.

[359] WT/L/100. Decision dated 15 November 1995. Entry into force 13 January 1996.

[360] WT/L/96. Decision dated 15 November 1995. Entry into force 22 February 1996.

[361] WT/L/94. Decision dated 15 November 1995. Entry into force 21 February 1996.

[362] WT/L/98. Decision dated 15 November 1995. Entry into force 9 June 1996.

[363] WT/L/128. Decision dated 6 February 1996. Entry into force 10 April 1996.

[364] WT/ACC/MNG/10. Decision dated 18 July 1996. Entry into force 29 January 1997.

[365] WT/ACC/PAN/20. Decision dated 2 October 1996. Entry into force 6 September 1997.

[366] WT/ACC/BGR/6. Decision dated 2 October 1996. Entry into force1 December 1996.

[367] WT/ACC/LVA/34. Decision dated 14 October 1998. Entry into force 10 February 1999.

[368] WT/ACC/KGZ/28. Decision dated 14 October 1998. Entry into force 20 December 1998.

[369] WT/ACC/EST/29. Decision dated 21 May 1999. Entry into force 13 November 1999.

[370] WT/ACC/GEO/32. Decision dated 6 October 1999. Entry into force 14 June 2000.

[371] WT/ACC/JOR/34. Decision dated 17 December 1999. Entry into force 11 April 2000.

[372] WT/ACC/ALB/52. Decision dated 17 July 2000. Entry into force 8 September 2000.

[373] WT/ACC/HRV/60. Decision dated 17 July 2000. Entry into force 30 November 2000.

[374] WT/ACC/OMN/27. Decision dated 10 October 2000. Entry into force 9 November 2000.

[375] WT/ACC/LTU/53. Decision dated 8 December 2000. Entry into force 31 May 2001.

[376] WT/ACC/MOL/39. Decision dated 8 May 2001. Entry into force 16 may 2001.

[377] WT/ACC/CHN/49, WT/ACC/CHN/49/Corr.1. Decision dated 1 October 2001. Entry into force 23 November 2001(WT/L/432).

[378] WT/ACC/TPKM/18. Decision dated 5 October 2001. Entry into force 23 November 2001 (WT/L/433).

[379] WT/L/494. Decision dated 15 October 2002. Entry into force 18 October 2002.

[380] WT/ACC/ARM/23. Decision dated 10 December 2002. Entry into force 17 December 2002 (WT/L/506).

and Nepal[381]. Qatar, Saint Kitts and Nevis, Grenada, Papua New Guinea and the United Arab Emirates were GATT contracting parties, but finalized their schedules in 1995, and thus acceded to the WTO instead of becoming original Members.

4. Article XII:3: Accession to a Plurilateral Trade Agreement

(a) Agreement on Government Procurement

198. Article XXIV of the *Agreement on Government Procurement* provides for accession "on terms to be agreed between that government and the Parties".

199. As at 31 December 2004, there were five accessions to the *Agreement on Government Procurement*: the Kingdom of the Netherlands for Aruba[382], Liechtenstein[383], Singapore[384], Hong Kong[385] and Iceland[386].

(b) Other Plurilateral Trade Agreements

200. The *International Bovine Meat Agreement*, the *International Dairy Agreement* and the *Agreement on Civil Aircraft* do not contain accession provisions.

XIV. ARTICLE XIII

A. TEXT OF ARTICLE XIII

Article XIII
Non-Application of Multilateral Trade Agreements between Particular Members

1. This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.

2. Paragraph 1 may be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of this Agreement.

3. Paragraph 1 shall apply between a Member and another Member which has acceded under Article XII only if the Member not consenting to the application has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference.

4. The Ministerial Conference may review the operation of this Article in particular cases at the request of any Member and make appropriate recommendations.

5. Non-application of a Plurilateral Trade Agreement between parties to that Agreement shall be governed by the provisions of that Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIII

1. Article XIII:1

(a) "This Agreement . . . shall not apply as between any Member and any other Member . . . if either . . . does not consent"

201. As at 31 December 2004, three Members had invoked this Article with respect to other Members. The United States invoked Article XIII:1 with respect to Romania[387], Mongolia[388], Kyrgyz Republic[389], Georgia[390], Moldova[391] and Armenia[392]. As at 31 December 2004, the United States had revoked its invocation with respect to Romania[393], Mongolia[394], the Kyrgyz Republic[395] and Georgia.[396]

202. El Salvador[397] invoked Article XIII with respect to China on 5 November 2001.

203. Turkey[398] invoked Article XIII with respect to Armenia on 29 November 2001.

XV. ARTICLE XIV

A. TEXT OF ARTICLE XIV

Article XIV
Acceptance, Entry into Force and Deposit

1. This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to GATT 1947, and the European Communities, which are eligible to become original Members of the WTO in accor-

[381] WT/LET/449. Decision dated 12 September 2003. Entry into force 14 October 2003.
[382] GPA/2. Decision dated 27 February 1996. The instrument of accession was deposited on 25 September 1996 and entered into force on 25 October 1996. WT/Let/111 and GPA/7.
[383] GPA/3. Decision dated 27 February 1996. The instrument of accession was deposited on 19 August 1997 and entered into force on 18 September 1997. WT/Let/166 and GPA/17.
[384] GPA/6. Decision dated 20 September 1996. The instrument of accession was deposited on 20 September 1997 and entered into force on 20 October 1997. WT/Let/179 and GPA/18.
[385] GPA/9. Decision dated 9 December 1996. The accession instrument was deposited on 20 May 1997 and entered into force on 19 June 1997. WT/Let/141 and GPA/14.
[386] GPA/43. Decision dated 29 September 2000. The instrument of accession was deposited on 29 March 2001 and entered into force on 28 April 2001 (WT/Let/388 and GPA/48).
[387] WT/L/11. The United States informed the Director-General on 30 December 1994 and formally invoked Article XIII:1 on 27 January 1995. WT/L/11.
[388] WT/L/159.
[389] WT/L/275.
[390] WT/L/318.
[391] WT/L/395.
[392] WT/L/505
[393] WT/L/203.
[394] WT/L/306.
[395] WT/L/363.
[396] WT/L/385.
[397] WT/L/429.
[398] WT/L/501.

dance with Article XI of this Agreement. Such acceptance shall apply to this Agreement and the Multilateral Trade Agreements annexed hereto. This Agreement and the Multilateral Trade Agreements annexed hereto shall enter into force on the date determined by Ministers in accordance with paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and shall remain open for acceptance for a period of two years following that date unless the Ministers decide otherwise. An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the date of such acceptance.

2. A Member which accepts this Agreement after its entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force.

3. Until the entry into force of this Agreement, the text of this Agreement and the Multilateral Trade Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. The Director-General shall promptly furnish a certified true copy of this Agreement and the Multilateral Trade Agreements, and a notification of each acceptance thereof, to each government and the European Communities having accepted this Agreement. This Agreement and the Multilateral Trade Agreements, and any amendments thereto, shall, upon the entry into force of this Agreement, be deposited with the Director-General of the WTO.

4. The acceptance and entry into force of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement. Such Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. Upon the entry into force of this Agreement, such Agreements shall be deposited with the Director-General of the WTO.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIV

1. Transition from GATT 1947 to the WTO

204. The Preparatory Committee for the World Trade Organization adopted Decisions on the transitional coexistence of the *GATT 1947* and the *WTO Agreement*[399] on 8 December 1994. The General Council also adopted a decision to avoid procedural and institutional duplication at its meeting of 31 January 1995.[400]

205. In addition, the Preparatory Committee adopted Decisions to deal with cases of withdrawal from or termination of certain agreements associated with the *GATT 1947*[401] on 8 December 1994. The General Council similarly adopted a decision for invocations of provisions for delayed application and reservations under the *Customs Valuation Agreement* by developing countries.[402]

206. Pursuant to the Decision adopted on 8 December 1994 (see paragraph 204 above)[403], the General Council adopted a Decision on participation of certain signatories of the Final Act (who were eligible to become original Members of the WTO) at its meeting of 31 January 1995.[404] See also Section II on Institutions and Procedure of the GATT Analytical Index.

2. Article XIV:1

(a) Date of entry into force of the WTO Agreement

207. The *WTO Agreement* entered into force on 1 January 1995.[405]

3. Article XIV:3

(a) Notifications of acceptance of the WTO Agreement

(i) Acceptance before 1 January 1995

208. Pursuant to Article XIV:3, the Director-General of the WTO issued notifications of acceptance for the following States and separate customs territories: Antigua and Barbuda[406], Argentina[407], Australia[408], Austria[409], Bahrain[410], Bangladesh[411], Barbados[412], Belgium[413],

[399] The text of the adopted decisions can be found in PC/11, PC/12, PC/13 and PC/15.
[400] WT/GC/M/1, section 4.I(e). The text of the adopted decision can be found in WT/L/29.
[401] The text of the decision relating to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade can be found in PC/14. Also, the text of the decision relating to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade can be found in PC/16.
[402] WT/GC/M/1, section 11. See also Chapter on the *Agreement on Customs Valuation*, para. 20.
[403] The text of the adopted decision can be found in PC/10.
[404] WT/GC/M/1, section 4.I(b). The text of the adopted decision can be found in WT/L/27.
[405] W/Let/1. The Preparatory Committee for the World Trade Organization, on 8 December 1994, "confirmed 1 January 1995 as the date of entry into force of the WTO Agreement." PC/M/10, para. 4.
[406] Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.
[407] Accepted 29 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[408] Accepted 21 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[409] Accepted 6 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[410] Accepted 27 July 1994. The notification was issued 27 January 1995. WT/LET/1.
[411] Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.
[412] Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.
[413] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

Belize[414], Brazil[415], Brunei Darussalam[416], Canada[417], Chile[418], Costa Rica[419], Côte d'Ivoire[420], Czech Republic[421], Denmark[422], Dominica[423], European Community[424], Finland[425], France[426], Gabon[427], Germany[428], Ghana[429], Greece[430], Guyana[431], Honduras[432], Hong Kong[433], Hungary[434], Iceland[435], India[436], Indonesia[437], Ireland[438], Italy[439], Japan[440], Kenya[441], Korea[442], Kuwait[443], Luxembourg[444], Macau[445], Malaysia[446], Malta[447], Mauritius[448], Mexico[449], Morocco[450], Myanmar[451], Namibia[452], Netherlands[453], New Zealand[454], Nigeria[455], Norway[456], Pakistan[457], Paraguay[458], Peru[459], Philippines[460], Portugal[461], Romania[462], Saint Lucia[463], Saint Vincent and the Grenadines[464], Senegal[465], Singapore[466], Slovak Republic[467], South Africa[468], Spain[469], Sri Lanka[470], Suriname[471], Swaziland[472], Sweden[473], Tanzania[474], Thailand[475],

[414] Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.
[415] Accepted 21 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[416] Accepted 16 November 1994. The notification was issued 27 January 1995. WT/LET/1.
[417] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[418] Accepted 28 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[419] Accepted 26 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[420] Accepted 29 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[421] Accepted 23 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[422] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[423] Accepted 22 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[424] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1. Note that the Agreement refers to the "European Communities" in Article XI, but only "the European Community" officially accepted the WTO Agreement.
[425] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[426] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[427] Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.
[428] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[429] Accepted 23 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[430] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[431] Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.
[432] Accepted 16 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[433] Accepted 3 October 1994. The notification was issued 27 January 1995. WT/LET/1. Since 1 July 1997, when sovereignty over Hong Kong reverted to China, this separate customs territory has been known as "Hong Kong, China".
[434] Accepted 28 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[435] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[436] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[437] Accepted 2 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[438] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[439] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[440] Accepted 27 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[441] Accepted 23 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[442] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[443] Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.
[444] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[445] Accepted 23 December 1994. The notification was issued 27 January 1995. WT/LET/1. Since 20 December 1999, when sovereignty over Macau reverted to China, this separate customs territory has been known as "Macau, China".
[446] Accepted 6 September 1994. The notification was issued 27 January 1995. WT/LET/1.
[447] Accepted 22 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[448] Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.
[449] Accepted 31 August 1994. The notification was issued 27 January 1995. WT/LET/1.
[450] Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.
[451] Accepted 29 November 1994. The notification was issued 27 January 1995. WT/LET/1.
[452] Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.
[453] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[454] Accepted 7 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[455] Accepted 6 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[456] Accepted 7 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[457] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[458] Accepted 30 November 1994. The notification was issued 27 January 1995. WT/LET/1.
[459] Accepted 21 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[460] Accepted 19 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[461] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[462] Accepted 23 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[463] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[464] Accepted 28 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[465] Accepted 29 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[466] Accepted 17 October 1994. The notification was issued 27 January 1995. WT/LET/1.
[467] Accepted 23 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[468] Accepted 2 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[469] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[470] Accepted 6 July 1994. The notification was issued 27 January 1995. WT/LET/1.
[471] Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.
[472] Accepted 28 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[473] Accepted 22 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[474] Accepted 6 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[475] Accepted 28 December 1994. The notification was issued 27 January 1995. WT/LET/1.

Uganda[476], United Kingdom[477], United States[478], Uruguay[479], Venezuela[480] and Zambia.[481]

(ii) Acceptance after 1 January 1995

209. The notification requirement is the same for countries accepting before or after 1 January 1995. However, under Article XIV:1, acceptances after 1 January 1995 enter into force on the 30th day following the date of such acceptance. Thus, the notifications of acceptance for these countries also indicate the date of entry into force of the Agreement. The following countries accepted the *WTO Agreement* after 1 January 1995: Trinidad and Tobago[482], Zimbabwe[483], Dominican Republic[484], Jamaica[485], Turkey[486], Tunisia[487], Cuba[488], Israel[489], Colombia[490], El Salvador[491], Burkina Faso[492], Egypt[493], Botswana[494], Central African Republic[495], Djibouti[496], Guinea Bissau[497], Lesotho[498], Malawi[499], Mali[500], Maldives[501], Mauritania[502], Togo[503], Poland[504], Switzerland[505], Guatemala[506], Burundi[507], Sierra Leone[508], Cyprus[509], Slovenia[510], Mozambique[511], Liechtenstein[512], Nicaragua[513], Bolivia[514], Guinea[515], Madagascar[516], Cameroon[517], Fiji[518], Haiti[519], Benin[520], Rwanda[521], Solomon Islands[522], Chad[523], the Gambia[524], Angola[525], Niger[526], Zaire[527], the Republic of the Congo[528], Panama[529], Latvia[530], Kyrgyz Republic[531],

[476] Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.
[477] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[478] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[479] Accepted 29 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[480] Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.
[481] Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.
[482] Accepted 30 January 1995. Entry into force 1 March 1995. The notification was issued 14 February 1995. WT/LET/7.
[483] Accepted 3 February 1995. Entry into force 5 March 1995. The notification was issued 14 February 1995. WT/LET/7.
[484] Accepted 7 February 1995. Entry into force 9 March 1995. The notification was issued 14 February 1995. WT/LET/7.
[485] Accepted 7 February 1995. Entry into force 9 March 1995. The notification was issued 14 February 1995. WT/LET/7.
[486] Accepted 24 February 1995. Entry into force 26 March 1995. The notification was issued 22 May 1995. WT/LET/1/Rev.2.
[487] Accepted 21 March 1995. Entry into force 20 April 1995. The notification was issued 22 May 1995. WT/LET/1/Rev.2.
[488] Accepted 24 February 1995. Entry into force 26 March 1995. The notification was issued 22 May 1995. WT/LET/1/Rev.2.
[489] Accepted 22 March 1995. Entry into force 21 April 1995. The notification was issued 22 May 1995. WT/LET/1/Rev.2.
[490] Accepted 31 March 1995. Entry into force 30 April 1995. The notification was issued 7 April 1995. WT/LET/12.
[491] Accepted 7 April 1995. Entry into force 7 May 1995. The notification was issued 22 May 1995. WT/LET/1/Rev.2.
[492] Accepted 4 May 1995. Entry into force 3 June 1995. The notification was issued 22 May 1995. WT/LET/1/Rev.2.
[493] Accepted 31 May 1995. Entry into force 30 June 1995. The notification was issued 15 June 1995. WT/LET/19.
[494] Accepted 30 December 1994. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.
[495] Accepted 15 April 1994. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.
[496] Accepted 30 March 1995. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.
[497] Accepted 15 April 1994. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.
[498] Accepted 21 December 1994. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.
[499] Accepted 3 January 1995. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.
[500] Accepted 15 April 1994. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.
[501] Accepted 12 October 1994. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.
[502] Accepted 15 April 1994. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.
[503] Accepted 19 April 1995. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.
[504] Accepted 1 June 1995. Entry into force 1 July 1995. The notification was issued 15 June 1995. WT/LET/19.
[505] Accepted 1 June 1995. Entry into force 1 July 1995. The notification was issued 15 June 1995. WT/LET/19.
[506] Accepted 21 June 1995. Entry into force 23 July 1995. The notification was issued 28 June 1995. WT/LET/24.
[507] Accepted 23 June 1995. Entry into force 23 July 1995. The notification was issued 28 June 1995. WT/LET/24.
[508] Accepted 23 June 1995. Entry into force 23 July 1995. The notification was issued 28 June 1995. WT/LET/24.
[509] Accepted 30 June 1995. Entry into force 30 July 1995. The notification was issued 5 July 1995. WT/LET/26.
[510] Accepted 30 June 1995. Entry into force 30 July 1995. The notification was issued 5 July 1995. WT/LET/26.
[511] Accepted 27 July 1995. Entry into force 26 August 1995. The notification was issued 23 August 1995. WT/LET/29.
[512] Accepted 2 August 1995. Entry into force 1 September 1995. The notification was issued 23 August 1995. WT/LET/29.
[513] Accepted 4 August 1995. Entry into force 3 September 1995. The notification was issued 23 August 1995. WT/LET/29.
[514] Accepted 13 August 1995. Entry into force 14 September 1995. The notification was issued 23 August 1995. WT/LET/29.
[515] Accepted 25 September 1995. Entry into force 25 October 1995. The notification was issued 13 October 1995. WT/LET/31.
[516] Accepted 18 October 1995. Entry into force 17 November 1995. The notification was issued 23 October 1995. WT/LET/33.
[517] Accepted 13 November 1995. Entry into force 13 December 1995. The notification was issued 20 November 1995. WT/LET/41.
[518] Accepted 15 December 1995. Entry into force 14 January 1996. The notification was issued 19 December 1995. WT/LET/47.
[519] Accepted 31 December 1995. Entry into force 30 January 1996. The notification was issued 8 January 1996. WT/LET/52.
[520] Accepted 23 January 1996. Entry into force 22 February 1995. The notification was issued 25 January 1996. WT/LET/60.
[521] Accepted 22 April 1996. Entry into force 22 May 1996. The notification was issued 30 April 1996. WT/LET/77.
[522] Accepted 26 June 1996. Entry into force 26 July 1996. The notification was issued 1 July 1996. WT/LET/97.
[523] Accepted 19 September 1996. Entry into force 19 October 1996. The notification was issued 24 September 1996. WT/LET/110.
[524] Accepted 23 September 1996. Entry into force 23 October 1996. The notification was issued 24 September 1996. WT/LET/110.
[525] Accepted 24 October 1996. Entry into force 23 November 1996. The notification was issued 29 October 1996. WT/LET/116.
[526] Accepted 13 November 1996. Entry into force 13 December 1996. The notification was issued 15 November 1996. WT/LET/121.
[527] Now known as the Democratic Republic of Congo. Accepted 2 December 1996. Entry into force 1 January 1997. The notification was issued 5 December 1996. WT/LET/128.
[528] Accepted 25 February 1997. Entry into force 24 April 1997. The notification was issued 30 April 1997. WT/LET/139.
[529] Accepted 7 August 1997. Entry into force 6 September 1997. The notification was issued 2 October 1996. WT/LET/161.
[530] Accepted 14 October 1998. Entry into force 10 February 1999. The notifications were issued 11 November 1998 and 13 January 1999. WT/LET/246 and WT/LET/281.
[531] Accepted 20 November 1998. Entry into force 20 December 1998. The notifications were issued 11 and 25 November 1998. WT/LET/245 and WT/LET/262.

Estonia[532], Jordan[533], Georgia[534], Albania[535], Croatia[536], Oman[537], Lithuania[538] and Moldova[539], China[540] and Chinese Taipei[541], Armenia[542], Cambodia[543], Former Yugoslav Republic of Macedonia[544], and Nepal[545].

4. Article XIV:4

(a) Acceptance and entry into force of the Plurilateral Trade Agreements

(i) International Dairy Agreement

210. Acceptance of the *International Dairy Agreement* was governed by the provisions of Article VIII of that Agreement.[546] However, the *International Dairy Agreement* was deleted from Annex 4 by a decision of the General Council.[547]

(ii) International Bovine Meat Agreement

211. Acceptance of the *International Bovine Meat Agreement* was governed by the provisions of Article VI of that Agreement.[548] However, the *International Bovine Meat Agreement* was terminated by a decision of the General Council.[549]

(iii) Agreement on Civil Aircraft

212. Acceptance of the *Agreement on Civil Aircraft* is governed by the provisions of Article 9 of that Agreement. It states: "This Agreement shall be open for acceptance by signature or otherwise by governments contracting parties to the GATT and by the European Economic Community".[550]

(iv) Agreement on Government Procurement

213. Acceptance of the *Agreement on Government Procurement* is governed by the provisions of Article XXIV:1 of that Agreement.[551]

XVI. ARTICLE XV

A. TEXT OF ARTICLE XV

Article XV
Withdrawal

1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.

2. Withdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

[532] Accepted 14 October 1999. Entry into force 13 November 1999. The notification was issued 18 October 1999. WT/LET/313.
[533] Accepted 12 March 2000. Entry into force 11 April 2000. The notifications were issued 12 January and 14 March 2000. WT/LET/323 and WT/LET/333.
[534] Accepted 15 May 2000. Entry into force 14 June 2000. The notification was issued 17 May 2000. WT/LET/341.
[535] Accepted 9 August 2000. Entry into force 8 September 2000. The notifications were issued 19 July and 11 August 2000. WT/LET/347 and WT/LET/353.
[536] Accepted 31 October 2000. Entry into force 30 November 2000. The notifications were issued 19 July and 31 October 2000. WT/LET/348 and WT/LET/359.
[537] Accepted 10 October 2000. Entry into force 9 November 2000. The notification was issued 10 October 2000. WT/LET/357 and WT/LET/369.
[538] Accepted 8 December 2000. Entry into force 31 May 2001. The notifications were issued 1 May 2000 and 31 May 2001. WT/LET/364 and WT/LET/393.
[539] Accepted 26 June 2001. Entry into force 26 July 2001. The notifications were issued 11 May 2001 and 28 June 2001. WT/LET/395 and WT/LET/399.
[540] Accepted 11 November 2001. Entry into force 11 December 2001.The notification was issued 11 November 2001. WT/L/408.
[541] Accepted 11 November 2001. Entry into force 1 January 2002. The notification was issued 12 November 2001. WT/L/409 and WT/LET/411.
[542] Accepted 10 December 2002. Entry into force 5 February 2003. The notification was issued on 19 December 2002. WT/LET/434 and WT/LET/436.
[543] Accepted 11 September 2003. Entry into force 13 October 2004. The notification was issued on 14 October 2003. WT/LET/450 and WT/LET/480.
[544] Accepted 15 October 2002. Entry into force 4 April 2003. The notification was issued on 21 October 2002. WT/LET/430 and WT/LET/439.
[545] Accepted 11 September 2003. Entry into force 23 April 2004. The notification was issued on 14 October 2003. WT/LET/449 and WT/LET/464.
[546] The following governments accepted the *International Dairy Agreement* prior to its deletion from Annex 4: Argentina, Brazil, Bulgaria, Chad, European Community, Finland, Hungary, Japan, New Zealand, Norway, Romania, Sweden, Switzerland and Uruguay.
[547] WT/L/251.
[548] The following governments accepted the *International Bovine Meat Agreement* prior to its deletion from Annex 4: Argentina, Australia, Austria, Brazil, Bulgaria, Canada, Chad, Colombia, the European Community, Finland, Hungary, Japan, New Zealand, Norway, Paraguay, Romania, South Africa, Sweden, Switzerland, Tunisia, the United States and Uruguay.
[549] WT/L/252.
[550] There are 30 Signatories to the Agreement to date (31 December 2004): Bulgaria, Canada, the European Communities, Austria, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, the United Kingdom, Egypt, Estonia, Georgia, Japan, Latvia, Lithuania, Macau, Malta, Norway, Romania, Switzerland, Chinese Taipei and the United States. Those WTO Members with observer status in the Committee are: Argentina, Australia, Bangladesh, Brazil, Cameroon, China, Colombia, the Czech Republic, Finland, Gabon, Ghana, Hungary, India, Indonesia, Israel, the Republic of Korea, Mauritius, Nigeria, Oman, Poland, Russian Federation, Saudi Arabia, Singapore, the Slovak Republic, Sri Lanka, Trinidad and Tobago, Tunisia and Turkey. In addition, the IMF and UNCTAD are also observers.
[551] As at 31 December 2004, the following governments had accepted the *Agreement on Government Procurement*: Canada, European Communities (including its 25 member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom), Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Netherlands with respect to Aruba, Norway, Singapore, Switzerland and the United States.

B. INTERPRETATION AND APPLICATION OF ARTICLE XV

1. Article XV:1

(a) "Any member may withdraw from this Agreement"

214. No Member has withdrawn from the *WTO Agreement* to date (31 December 2004).

2. Article XV:2

(a) "Withdrawal from a Plurilateral Trade Agreement"

215. No Member has withdrawn from any Plurilateral Agreement to date (31 December 2004).

XVII. ARTICLE XVI

A. TEXT OF ARTICLE XVI

Article XVI
Miscellaneous Provisions

1. Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

2. To the extent practicable, the Secretariat of GATT 1947 shall become the Secretariat of the WTO, and the Director-General to the CONTRACTING PARTIES to GATT 1947, until such time as the Ministerial Conference has appointed a Director-General in accordance with paragraph 2 of Article VI of this Agreement, shall serve as Director-General of the WTO.

3. In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.

4. Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

5. No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

6. This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

B. INTERPRETATION AND APPLICATION OF ARTICLE XVI

1. Article XVI:1

(a) "the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947"

216. In *Japan – Alcoholic Beverages II*, the Appellate Body referred to Article XVI:1 in the course of examining the legal effect of panel reports adopted by the CONTRACTING PARTIES to *GATT 1947* or the Dispute Settlement Body.[552] The Appellate Body stated:

> "Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement* bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 – and acknowledges the continuing relevance of that experience to the new trading system served by the WTO."[553]

(b) Status of bilateral agreements

217. In *EC – Poultry*, the Appellate Body upheld the Panel's rejection of Brazil's argument that "the MFN principle under Articles I and XIII of GATT does not necessarily apply to TRQs opened as a result of the compensation negotiations under Article XXVIII of GATT". In so doing, the Appellate Body found that the Oilseeds Agreement, which was a bilateral agreement between the European Communities and Brazil under Article XXVIII of the *GATT 1947*, does not constitute part of the "decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947" within the meaning of Article XVI:1. The Appellate Body stated: "These 'decisions, procedures and customary practices' include only those taken or followed by the CONTRACTING PARTIES to the GATT 1947 acting *jointly*."[554]

(c) Status of subsequent agreements

218. In *Brazil – Desiccated Coconut*, the Panel examined the legal relevance under Article XVI:1 of the Tokyo Round *SCM Code* and the practice of Code

[552] This issue is related to that of "legitimate expectation". See Section III.B(c)(xii) of the Chapter on the *DSU*.
[553] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 14. In *India – Patents (US)*, the Appellate Body acknowledged the first of the paragraphs cited above, see Appellate Body Report on *India – Patents (US)*, para. 35.
[554] Appellate Body Report on *EC – Poultry*, para. 80.

signatories to the interpretation of GATT Article VI and the *SCM Agreement* and stated:

> "We recognize that the *Pork* Panel had indicated, in passing, that the Tokyo Round SCM Code represents 'practice' under Article VI of GATT 1947. Article 31.3(b) of the Vienna Convention provides that there may be taken into account, when interpreting a treaty, '[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. Article 31.3 clearly distinguishes between the use of subsequent *agreements* and of subsequent *practice* as interpretive tools. The Tokyo Round SCM Code is, in our view, in the former category and cannot itself reasonably be deemed to represent 'customary practice' of the GATT 1947 CONTRACTING PARTIES. In any event, while the practice of Code signatories might be of some interpretive value in establishing their agreement regarding the interpretation of the Tokyo Round SCM Code (and arguably through Article XVI:1 of the WTO Agreement in interpreting provisions of that Code that were carried over into the successor SCM Agreement), it is clearly not relevant to the interpretation of Article VI of GATT 1994 itself; rather, only practice under Article VI of GATT 1947 is legally relevant to the interpretation of Article VI of GATT 1994."[555]

(d) Status of unadopted panel reports

219. In *Argentina – Textiles and Apparel*, the Appellate Body reversed the Panel's finding that past GATT practice has generally required that once a Member has indicated the type(s) of duties in specifying its bound rate, it must apply such type(s) of duties, and explained the status of GATT panel reports:

> "We are not persuaded that the past GATT practice is clear. The three working party reports cited by the Panel did not arise in the context of dispute settlement cases brought pursuant to Article XXIII of the GATT 1947, unlike some working party reports in GATT history that resulted from complaints made under Article XXIII.[556] We also note that these three working party reports did not result in the CONTRACTING PARTIES giving a ruling or making recommendations, pursuant to Article XXIII:2 of the GATT 1994, on whether a variance in the type of duty applied by a contracting party from the type of duty provided for in its Schedule constituted an infringement of Article II:1 of the GATT 1947.[557] The Panel also referred to the report of the *Panel on Newsprint* that did not, on its facts, deal with the application by a contracting party of a specific duty rather than an *ad valorem* duty provided for in its Schedule.[558] Finally, the Panel relied extensively on the *unadopted* panel report in *Bananas II*. In our Report in *Japan – Taxes on Alcoholic Beverages*[559], we agreed with that panel that '*unadopted* panel reports have no legal status in the GATT or WTO system . . ., although we believe that a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant'. In the case before us, the Panel's use of the *Bananas II* panel report appears to have gone beyond deriving 'useful guidance' from the reasoning employed in that unadopted panel report. The Panel, in fact, *relies* upon the *Bananas II* panel report."[560]

(e) Status of decisions by GATT 1947 Council

220. In *US – FSC*, the Appellate Body examined the legal relevance to the interpretation of the *SCM Agreement* and GATT Article XVI:4 of the 1981 decision by the GATT 1947 Council to adopt the four panel reports on *Belgium – Income Tax*, *US – DISC*, *France – Income Tax* and *Netherlands – Income Tax*, subject to certain understandings. The Appellate Body stated:

> "We recognize that, as 'decisions' within the meaning of Article XVI:1 of the *WTO Agreement*, the adopted panel reports in the *Tax Legislation Cases*, together with the 1981 Council action, could provide 'guidance' to the WTO."[561]

221. In this regard, the Panel on *US – FSC* stated:

> "Article XVI:1 of the *WTO Agreement* on its face is not limited to decisions in the form of 'legal instruments',

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[555] Panel Report on *Brazil – Desiccated Coconut*, para. 256.

[556] The Appellate Body quoted the Panel Report on *Australia – Ammonium Sulphate*.

[557] (*footnote original*) As the Panel observed in paragraph 6.26 of the Panel Report, we note that the working party report in *Transposition of Schedule XXXVII – Turkey*, BISD 3S/127, stated in paragraph 4:

> "The obligations of contracting parties are established by the rates of duty appearing in the schedules and any change in the rate such as a change from a specific to an ad valorem duty could in some circumstances adversely affect the value of the concessions to other contracting parties. Consequently, any conversion of specific into *ad valorem* rates of duty can be made only under some procedure for the modification of concessions."

This working party report, which examined a proposal by Turkey to change into *ad valorem* duties the specific duties provided for in its Schedule, did not address whether or not such a modification would be inconsistent with Article II of the GATT 1947.

[558] (*footnote original*) We note that the Panel Report on *EEC – Newsprint*, stated in paragraph 50:

> . . . under long-standing GATT practice, even purely formal changes in the tariff schedule of a contracting party, which may not affect the GATT rights of other countries, such as the conversion of a specific to an *ad valorem* duty without an increase in the protective effect of the tariff rate in question, have been considered to require renegotiations.

It should be noted that the issue before the *Panel on Newsprint* was *not* whether a change in the type of customs duty applied by a contracting party from a specific duty to an *ad valorem* duty was consistent with Article II of the GATT 1947, but whether a reduction in a tariff-rate quota from 1.5 million tonnes to 0.5 million tonnes was consistent with Article II of the GATT 1947. For this reason, we consider the above statement to be *obiter*.

[559] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 14–15.

[560] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 43.

[561] Appellate Body Report on *US – FSC*, para. 115.

but rather applies to all decisions by the CONTRACTING PARTIES to GATT 1947 – including decisions to adopt panel reports – as well as to procedures and customary practices of the CONTRACTING PARTIES."[562]

(f) Status of adopted panel reports

222. The Appellate Body on *Japan – Alcoholic Beverages II* noted that the Panel in that case, stated that adopted panel reports "are often considered by subsequent panels" and that "they create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."[563] The Appellate Body found that adopted panel reports are not binding "except with respect to resolving the particular dispute between the parties to that dispute":

> "Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[564] In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*.
>
> For these reasons, we do not agree with the Panel's conclusion in paragraph 6.10 of the Panel Report that 'panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case' as the phrase 'subsequent practice' is used in Article 31 of the *Vienna Convention*. Further, we do not agree with the Panel's conclusion in the same paragraph of the Panel Report that adopted panel reports in themselves constitute 'other decisions of the CONTRACTING PARTIES to GATT 1947' for the purposes of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*.
>
> However, we agree with the Panel's conclusion in that same paragraph of the Panel Report that *unadopted* panel reports 'have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members'. Likewise, we agree that 'a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant."[565]

(g) Status of panel findings that are not appealed

223. In *Canada – Periodicals*, the Appellate Body stated:

> "[A] panel finding that has not been specifically appealed in a particular case should not be considered to have been endorsed by the Appellate Body. Such a finding may be examined by the Appellate Body when the issue is raised properly in a subsequent appeal."[566]

(i) Relationship with Paragraph 1(b) of GATT 1994

224. In *US – FSC*, with respect to the difference in scope between Article XVI:1 of the *WTO Agreement* and Paragraph 1(b) of the *GATT 1994*, the Panel stated:

> "In our view, the difference between the more particularly defined range of actions falling within the ambit of Article XVI:1 of the *WTO Agreement* and the list of 'legal instruments' that are incorporated into GATT 1994 pursuant to the language in Annex 1A incorporating GATT 1994 into the *WTO Agreement* is explained by the different implications of the two provisions. Inclusion of a decision in the language of Annex 1A means that the decision actually becomes part of GATT 1994 and thus of the *WTO Agreement*. Inclusion of a decision within the scope of Article XVI:1 of the *WTO Agreement*, on the other hand, means that the WTO 'shall be guided' by that decision. A decision which is part of GATT 1994 is legally binding on all WTO Members (to the extent it is not in conflict with a provision of another Annex 1A agreement), while a decision which provides 'guidance' in our view is not legally binding but provides direction to the WTO. It is important to note that, as explained by the Appellate Body, adopted panel reports should be taken into account 'where they are relevant to a dispute'. In our view, this consideration applies equally to any other decision, procedure or customary practice of the CONTRACTING PARTIES to GATT 1947."[567]

225. See also paragraph 216 above, and Section I.B.1of the Chapter on the *GATT 1994*.

2. Article XVI:2

(a) "the Director-General to the CONTRACTING PARTIES to GATT 1947, . . ., shall serve as Director-General of the WTO"

226. Mr Peter Sutherland, Director-General to the *GATT 1947*, served as the first Director-General to the WTO from 1 January 1995 to 30 April 1995. See paragraph 141 above.

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[562] Panel Report on *US – FSC*, para. 7.77.
[563] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 14.
[564] (*footnote original*) It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.
[565] Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 14–15. See also Panel Report on *US – Wool Shirts and Blouses*, para. 7.15.
[566] Appellate Body Report on *Canada – Periodicals*, fn. 28.
[567] Panel Report on *US – FSC*, para. 7.78.

227. As regards the procedures governing the appointment of the Director-General, see Section VII.B.2 above.

3. Article XVI:4

(a) "Each Member shall ensure the conformity of its laws, regulations and administrative procedures"

228. In *US – 1916 Act (Japan)*, the Appellate Body upheld the Panel's findings of violation[568] that a breach of any provision of any annexed agreement gives rise to a violation of Article XVI:4 of the *WTO Agreement*.

> "With respect to Article XVI:4 of the Agreement Establishing the WTO, we note that, if some of the terms of Article XVI:4 differ from those of Article 18.4, they are identical and unqualified as far as the basic obligation of ensuring the conformity of laws, regulations and administrative procedures found in both articles is concerned. The same reasoning as for Article 18.4 applies to Article XVI:4 regarding the terms found in both provisions. In other words, if a provision of an 'annexed Agreement' is breached, a violation of Article XVI:4 immediately occurs. GATT 1994 is one of the 'annexed Agreements' within the meaning of Article XVI:4. Since we found that provisions of Article VI of the GATT 1994 have been breached, we conclude that, by violating this provision, the United States violates Article XVI:4 of the *WTO Agreement*."[569]

229. In *US – Section 301 Trade Act*, the Panel described the role of Article XVI as confirming the following "GATT *acquis*":

> "As a general proposition, GATT *acquis*, confirmed in Article XVI:4 of the *WTO Agreement* and recent WTO panel reports, make abundantly clear that legislation as such, independently from its application in specific cases, may breach GATT/WTO obligations:
>
> (a) In GATT jurisprudence, to give one example, legislation providing for tax discrimination against imported products was found to be GATT inconsistent even before it had actually been applied to specific products and thus before any given product had actually been discriminated against.
>
> (b) Article XVI:4 of the *WTO Agreement* explicitly confirms that legislation as such falls within the scope of possible WTO violations. It provides as follows:
>
> > 'Each Member shall ensure the conformity of its *laws, regulations and administrative procedures* with its obligations as provided in the annexed Agreements' (emphasis added).
> >
> > The three types of measures explicitly made subject to the obligations imposed in the *WTO Agreement*s – 'laws, regulations and administrative procedures' – are measures that are applicable generally; not measures taken necessarily in a specific case or dispute. Article XVI:4, though not expanding the material obligations under *WTO Agreement*s, expands the type of measures made subject to these obligations.
>
> (c) Recent WTO panel reports confirm, too, that legislation as such, independently from its application in a specific case, can be inconsistent with WTO rules.
>
> > Legislation my thus breach WTO obligations. This must be true, too, in respect of Article 23 of the *DSU*. This is so, in our view, not only because of the above-mentioned case law and Article XVI:4, but also because of the very nature of obligations under Article 23."[570]

230. The Appellate Body on *US – Hot-Rolled Steel from Japan* upheld the Panel's finding of a violation of Article 9.4 of the *Anti-Dumping Agreement*, and the "consequent findings" that the US acted inconsistently with *inter alia*, Article XVI:4 of the *WTO Agreement*[571].

231. In *US – Countervailing Measures on Certain EC Products*, the Panel concluded that 19 U.S.C. § 1677(5)(F) mandated the United States to act inconsistently with the *SCM Agreement* and with Article XVI:4 of the *WTO Agreement*, and, *as such*, was inconsistent with United States' obligations:

> "[T]he aggregate effect of the legislative history, object and purpose of Section 1677(5)(F), the Statement of Administrative Action, and the determinative interpretation of that legislation by the US Court of Appeals for the Federal Circuit, is to mandate an application of Section 1677(5)(F) that will be inconsistent with Articles 10, 14, 19, and 21 of the *SCM Agreement* since it prohibits the relevant authority from adopting a general rule that in all situations of arm's-length privatizations for fair market value, no benefit from prior financial contributions . . . continues to accrue to the privatized producer, even though Section 1677(5)(F)'s statutory language alone would not mandate a violation of the *SCM Agreement* and the *WTO Agreement*."[572]

232. However, the Appellate Body disagreed and reversed the Panel's finding:[573]

> "We agree with the Panel that privatization at arm's length and at fair market price will *usually* extinguish the remaining part of a benefit bestowed by a prior, non-

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[568] Appellate Body Report on *US – 1916 Act*, paras. 134–135.
[569] Panel Report on *US – 1916 Act (Japan)*, paras. 6.287; as regards the Anti-Dumping Agreement see also: Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.93 as confirmed by the respective Appellate Body Report at para. 302.
[570] Panel Report on *US – Section 301 Trade Act*, paras. 7.41–7.42.
[571] Appellate Body Report on *U.S. – Hot-Rolled Steel from Japan*, paras.
[572] Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 7.157.
[573] Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 161.

recurring financial contribution. However, we disagree with the Panel that this result will *necessarily* and *always* follow from every privatization at arm's length and for fair market value . . . The Panel's basis for this finding is incorrect."[574]

233. The Appellate Body on *US – Offset Act ("Byrd Amendment")* found that violations of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* implied a violation of Article XVI:4 of the *WTO Agreement*.[575]

4. Article XVI:5

(a) "Reservations in respect of any of the provisions of the Multilateral Trade Agreements"

234. Exceptions to the "principle of non-reservation" are provided in the following articles:

(a) *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* – Article 21 and paragraph 2 of Annex III;

(b) *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* – Article 18.2;

(c) *Agreement on Technical Barriers to Trade* – Article 15.1;

(d) *Agreement on Subsidies and Countervailing Measures* – Article 32.2; and

(e) *TRIPS* – Article 72.

235. As of 31 December 2004, no reservation has been made under the provisions noted in paragraph 234 above.

(b) "Reservations in respect of a provision of a Plurilateral Trade Agreement"

236. The following Agreements provide for reservations:

(a) *Agreement on Civil Aircraft* – Article 9.2.1;

(b) *Agreement on Government Procurement* – Article XXIV:4;

(c) *International Dairy Agreement* – Article VIII:1(b); and

(d) *International Bovine Meat Agreement* – Article VI:1(b).

237. As of 31 December 2004, no reservation has been made under any of the Plurilateral Agreements in paragraph 236 above.

5. Article XVI:6

(a) Registration of the Agreement

238. The *WTO Agreement* was registered on 1 June 1995[576] in accordance with Article 102 of the United Nations Charter.[577]

XVIII. EXPLANATORY NOTES

A. TEXT OF EXPLANATORY NOTES

Explanatory Notes

The terms "country" or "countries" as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO.

In the case of a separate customs territory Member of the WTO, where an expression in this Agreement and the Multilateral Trade Agreements is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified.

B. INTERPRETATION AND APPLICATION OF THE EXPLANATORY NOTES

No jurisprudence or decision of a competent WTO body.

XIX. DECLARATION ON THE CONTRIBUTION OF THE WORLD TRADE ORGANIZATION TO ACHIEVING GREATER COHERENCE IN GLOBAL ECONOMIC POLICYMAKING

A. TEXT

1. *Ministers recognize* that the globalization of the world economy has led to ever-growing interactions between the economic policies pursued by individual countries, including interactions between the structural, macroeconomic, trade, financial and development aspects of economic policymaking. The task of achieving harmony between these policies falls primarily on

[574] Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, paras. 157–158.
[575] Panel Report on *US – Offset Act ("Byrd Amendment")* paras. 300–302.
[576] Registration Number 31874.
[577] Article 102 of the United Nations Charter provides:

"1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into effect shall as soon as possible be registered by the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations."

governments at the national level, but their coherence internationally is an important and valuable element in increasing the effectiveness of these policies at national level. The Agreements reached in the Uruguay Round show that all the participating governments recognize the contribution that liberal trading policies can make to the healthy growth and development of their own economies and of the world economy as a whole.

2. Successful cooperation in each area of economic policy contributes to progress in other areas. Greater exchange rate stability, based on more orderly underlying economic and financial conditions, should contribute towards the expansion of trade, sustainable growth and development, and the correction of external imbalances. There is also a need for an adequate and timely flow of concessional and non-concessional financial and real investment resources to developing countries and for further efforts to address debt problems, to help ensure economic growth and development. Trade liberalization forms an increasingly important component in the success of the adjustment programmes that many countries are undertaking, often involving significant transitional social costs. In this connection, Ministers note the role of the World Bank and the IMF in supporting adjustment to trade liberalization, including support to net food-importing developing countries facing short-term costs arising from agricultural trade reforms.

3. The positive outcome of the Uruguay Round is a major contribution towards more coherent and complementary international economic policies. The results of the Uruguay Round ensure an expansion of market access to the benefit of all countries, as well as a framework of strengthened multilateral disciplines for trade. They also guarantee that trade policy will be conducted in a more transparent manner and with greater awareness of the benefits for domestic competitiveness of an open trading environment. The strengthened multilateral trading system emerging from the Uruguay Round has the capacity to provide an improved forum for liberalization, to contribute to more effective surveillance, and to ensure strict observance of multilaterally agreed rules and disciplines. These improvements mean that trade policy can in the future play a more substantial role in ensuring the coherence of global economic policymaking.

4. *Ministers recognize*, however, that difficulties the origins of which lie outside the trade field cannot be redressed through measures taken in the trade field alone. This underscores the importance of efforts to improve other elements of global economic policymaking to complement the effective implementation of the results achieved in the Uruguay Round.

5. The interlinkages between the different aspects of economic policy require that the international institutions with responsibilities in each of these areas follow consistent and mutually supportive policies. The World Trade Organization should therefore pursue and develop cooperation with the international organizations responsible for monetary and financial matters, while respecting the mandate, the confidentiality requirements and the necessary autonomy in decision-making procedures of each institution, and avoiding the imposition on governments of cross-conditionality or additional conditions. Ministers further invite the Director-General of the WTO to review with the Managing Director of the International Monetary Fund and the President of the World Bank, the implications of the WTO's responsibilities for its cooperation with the Bretton Woods institutions, as well as the forms such cooperation might take, with a view to achieving greater coherence in global economic policymaking.

B. INTERPRETATION AND APPLICATION

239. In *Argentina – Textiles and Apparel*, the Appellate Body upheld the Panel's finding "that there is nothing in the . . . Declaration on Coherence which justifies a conclusion that a Member's commitments to the IMF shall prevail over its obligations under Article VIII of the GATT 1994."[578] Also see paragraph 26 above.

XX. DECLARATION ON THE RELATIONSHIP OF THE WORLD TRADE ORGANIZATION WITH THE INTERNATIONAL MONETARY FUND

A. TEXT

Ministers,

Noting the close relationship between the CONTRACTING PARTIES to the GATT 1947 and the International Monetary Fund, and the provisions of the GATT 1947 governing that relationship, in particular Article XV of the GATT 1947;

Recognizing the desire of participants to base the relationship of the World Trade Organization with the International Monetary Fund, with regard to the areas covered by the Multilateral Trade Agreements in Annex 1A of the WTO Agreement, on the provisions that have governed the relationship of the CONTRACTING PARTIES to the GATT 1947 with the International Monetary Fund;

Hereby reaffirm that, unless otherwise provided for in the Final Act, the relationship of the WTO with the International Monetary Fund, with regard to the areas covered by the Multilateral Trade Agreements in Annex 1A of the WTO Agreement, will be based on the provisions that have governed the relationship of the

[578] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 70.

CONTRACTING PARTIES to the GATT 1947 with the International Monetary Fund.

B. INTERPRETATION AND APPLICATION

240. In *Argentina – Textiles and Apparel*, the Appellate Body upheld the Panel's finding "that there is nothing in the Agreement Between the IMF and the WTO ... which justifies a conclusion that a Member's commitments to the IMF shall prevail over its obligations under Article VIII of the GATT 1994."[579]

XXI. DECISION ON THE ACCEPTANCE OF AND ACCESSION TO THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

A. TEXT

Ministers,

Noting that Articles XI and XIV of the Agreement Establishing the World Trade Organization (hereinafter referred to as "*WTO Agreement*") provide that only contracting parties to the GATT 1947 as of the entry into force of the *WTO Agreement* for which schedules of concessions and commitments are annexed to GATT 1994 and for which schedules of specific commitments are annexed to the General Agreement on Trade in Services (hereinafter referred to as "GATS") may accept the *WTO Agreement*;

Noting further that paragraph 5 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (hereinafter referred to as "Final Act" and "Uruguay Round" respectively) provides that the schedules of participants which are not contracting parties to GATT 1947 as of the date of the Final Act are not definitive and shall be subsequently completed for the purpose of their accession to GATT 1947 and their acceptance of the *WTO Agreement*;

Having regard to paragraph 1 of the Decision on Measures in Favour of Least-Developed Countries which provides that the least-developed countries shall be given an additional time of one year from 15 April 1994 to submit their schedules as required in Article XI of the *WTO Agreement*;

Recognizing that certain participants in the Uruguay Round which had applied GATT 1947 on a *de facto* basis and became contracting parties under Article XXVI:5(c) of the GATT 1947 were not in a position to submit schedules to GATT 1994 and the GATS;

Recognizing further that some States or separate customs territories which were not participants in the Uruguay Round may become contracting parties to GATT 1947 before the entry into force of the *WTO Agreement* and that States or customs territories should be given the opportunity to negotiate schedules to GATT 1994 and the GATS so as to enable them to accept the *WTO Agreement*;

Taking into account that some States or separate customs territories which cannot complete the process of accession to GATT 1947 before the entry into force of the *WTO Agreement* or which do not intend to become contracting parties to GATT 1947 may wish to initiate the process of their accession to the WTO before the entry into force of the *WTO Agreement*;

Recognizing that the *WTO Agreement* does not distinguish in any way between WTO Members which accepted that Agreement in accordance with its Articles XI and XIV and WTO Members which acceded to it in accordance with its Article XII and wishing to ensure that the procedures for accession of the States and separate customs territories which have not become contracting parties to the GATT 1947 as of the date of entry into force of the *WTO Agreement* are such as to avoid any unnecessary disadvantage or delay for these States and separate customs territories;

Decide that:

1. (a) Any Signatory of the Final Act

   - to which paragraph 5 of the Final Act applies, or
   - to which paragraph 1 of the Decision on Measures in Favour of Least-Developed Countries applies, or
   - which became a contracting party under Article XXVI:5(c) of the GATT 1947 before 15 April 1994 and was not in a position to establish a schedule to GATT 1994 and the GATS for inclusion in the Final Act, and any State or separate customs territory
   - which becomes a contracting party to the GATT 1947 between 15 April 1994 and the date of entry into force of the *WTO Agreement*

   may submit to the Preparatory Committee for its examination and approval a schedule of concessions and commitments to GATT 1994 and a schedule of specific commitments to the GATS.

   (b) The *WTO Agreement* shall be open for acceptance in accordance with Article XIV of that Agreement by contracting parties to GATT 1947 the schedules of which have been so submitted and approved before the entry into force of the *WTO Agreement*.

   (c) The provisions of subparagraphs (a) and (b) of this paragraph shall be without prejudice to the

[579] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 70.

right of the least-developed countries to submit their schedules within one year from 15 April 1994.

2. (a) Any State or separate customs territory may request the Preparatory Committee to propose for approval by the Ministerial Conference of the WTO the terms of its accession to the *WTO Agreement* in accordance with Article XII of that Agreement. If such a request is made by a State or separate customs territory which is in the process of acceding to GATT 1947, the Preparatory Committee shall, to the extent practicable, examine the request jointly with the Working Party established by the CONTRACTING PARTIES to GATT 1947 to examine the accession of that State or separate customs territory.

(b) The Preparatory Committee shall submit to the Ministerial Conference a report on its examination of the request. The report may include a protocol of accession, including a schedule of concessions and commitments to GATT 1994 and a schedule of specific commitments for the GATS, for approval by the Ministerial Conference. The report of the Preparatory Committee shall be taken into account by the Ministerial Conference in its consideration of any application by the State or separate customs territory concerned to accede to the *WTO Agreement*.

B. INTERPRETATION AND APPLICATION

No jurisprudence or decision of a competent WTO body.

XXII. DECISION ON MEASURES IN FAVOUR OF LEAST-DEVELOPED COUNTRIES

A. TEXT

Ministers,

Recognizing the plight of the least-developed countries and the need to ensure their effective participation in the world trading system, and to take further measures to improve their trading opportunities;

Recognizing the specific needs of the least-developed countries in the area of market access where continued preferential access remains an essential means for improving their trading opportunities;

Reaffirming their commitment to implement fully the provisions concerning the least-developed countries contained in paragraphs 2(d), 6 and 8 of the Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries;

Having regard to the commitment of the participants as set out in Section B (vii) of Part I of the Punta del Este Ministerial Declaration;

1. Decide that, if not already provided for in the instruments negotiated in the course of the Uruguay Round, notwithstanding their acceptance of these instruments, the least-developed countries, and for so long as they remain in that category, while complying with the general rules set out in the aforesaid instruments, will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities. The least-developed countries shall be given additional time of one year from 15 April 1994 to submit their schedules as required in Article XI of the Agreement Establishing the World Trade Organization.

2. Agree that:

(i) Expeditious implementation of all special and differential measures taken in favour of least-developed countries including those taken within the context of the Uruguay Round shall be ensured through, inter alia, regular reviews.

(ii) To the extent possible, MFN concessions on tariff and non-tariff measures agreed in the Uruguay Round on products of export interest to the least-developed countries may be implemented autonomously, in advance and without staging. Consideration shall be given to further improve GSP and other schemes for products of particular export interest to least-developed countries.

(iii) The rules set out in the various agreements and instruments and the transitional provisions in the Uruguay Round should be applied in a flexible and supportive manner for the least-developed countries. To this effect, sympathetic consideration shall be given to specific and motivated concerns raised by the least-developed countries in the appropriate Councils and Committees.

(iv) In the application of import relief measures and other measures referred to in paragraph 3(c) of Article XXXVII of GATT 1947 and the corresponding provision of GATT 1994, special consideration shall be given to the export interests of least-developed countries.

(v) Least-developed countries shall be accorded substantially increased technical assistance in the development, strengthening and diversification of their production and export bases including those of services, as well as in trade promotion, to enable them to maximize the benefits from liberalized access to markets.

3. Agree to keep under review the specific needs of the least-developed countries and to continue to seek the adoption of positive measures which facilitate the expansion of trading opportunities in favour of these countries.

B. INTERPRETATION AND APPLICATION

1. Least-Developed Countries (LDCs) in the Doha Round

241. The Doha Declaration[580] launched a comprehensive round of negotiations. The Work Programme for the negotiations includes provisions for LDCs.[581] As regards the Sub-Committee on LDCs, see Section V.B.7(a) above. As regards accession of LDCs, see Section XIII.B.1(c) above.

XXIII. UNDERSTANDING IN RESPECT OF WAIVERS OF OBLIGATIONS UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

A. TEXT

Members hereby *agree* as follows:

1. A request for a waiver or for an extension of an existing waiver shall describe the measures which the Member proposes to take, the specific policy objectives which the Member seeks to pursue and the reasons which prevent the Member from achieving its policy objectives by measures consistent with its obligations under GATT 1994.

2. Any waiver in effect on the date of entry into force of the WTO Agreement shall terminate, unless extended in accordance with the procedures above and those of Article IX of the WTO Agreement, on the date of its expiry or two years from the date of entry into force of the WTO Agreement, whichever is earlier.

3. Any Member considering that a benefit accruing to it under GATT 1994 is being nullified or impaired as a result of:

(a) the failure of the Member to whom a waiver was granted to observe the terms or conditions of the waiver, or

(b) the application of a measure consistent with the terms and conditions of the waiver

may invoke the provisions of Article XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding.

B. INTERPRETATION AND APPLICATION

242. With respect to the WTO practice on waivers, see Section X.B.3 above.

243. As regards Members' invocation of provisions of Article XXIII (as elaborated and applied by the *DSU*) in response to the nullification or impairments of benefits accruing to Members under *GATT 1994*, see Section XXIV of the Chapter on the *GATT 1994*.

XXIV. ACCESSIONS UNDER ARTICLE XXXIII OF THE GATT 1994

Contracting Party	Date
Albania	8 September 2000
Armenia	5 February 2003
Bulgaria	1 December 1996
Cambodia	13 October 2004
China	11 December 2001
Croatia	30 November 2000
Ecuador	21 January 1996
Estonia	13 November 1999
Former Yugoslav Republic of Macedonia	4 April 2003
Georgia	14 June 2000
Grenada	22 February 1996
Jordan	11 April 2000
Kyrgyz Republic	20 December 1998
Latvia	10 February 1999
Lithuania	31 May 2001
Moldova	26 July 2001
Mongolia	29 January 1997
Nepal	23 April 2004
Oman	9 November 2000
Panama	6 September 1997
Papua New Guinea	9 June 1996
Qatar	13 January 1996
Saint Kitts and Nevis	21 February 1996
Chinese Taipei	1 January 2002
United Arab Emirates	10 April 1996

XXV. WTO MEMBERSHIP

Government	Effective Date of Membership
Albania	8 September 2000
Angola	23 November 1996
Antigua and Barbuda	1 January 1995
Argentina	1 January 1995
Armenia	5 February 2003
Australia	1 January 1995
Austria	1 January 1995
Bahrain	1 January 1995
Bangladesh	1 January 1995
Barbados	1 January 1995
Belgium	1 January 1995
Belize	1 January 1995
Benin	22 February 1996
Bolivarian Republic of Venezuela	1 January 1995
Bolivia	12 September 1995
Botswana	31 May 1995
Brazil	1 January 1995
Brunei Darussalam	1 January 1995
Bulgaria	1 December 1996
Burkina Faso	3 June 1995
Burundi	23 July 1995
Cambodia	13 October 2004
Cameroon	13 December 1995
Canada	1 January 1995

[580] WT/MIN(01)/DEC/1.
[581] WT/MIN(01)/DEC/1, paras. 42–43.

Table (*cont.*)

Government	Effective Date of Membership
Central African Republic	31 May 1995
Chad	19 October 1996
Chile	1 January 1995
China	11 December 2001
Colombia	30 April 1995
Congo	27 March 1997
Costa Rica	1 January 1995
Côte d'Ivoire	1 January 1995
Croatia	30 November 2000
Cuba	20 April 1995
Cyprus	30 July 1995
Czech Republic	1 January 1995
Democratic Republic of the Congo	1 January 1997
Denmark	1 January 1995
Djibouti	31 May 1995
Dominica	1 January 1995
Dominican Republic	9 March 1995
Ecuador	21 January 1996
Egypt	30 June 1995
El Salvador	7 May 1995
Estonia	13 November 1999
European Communities	1 January 1995
Fiji	14 January 1996
Finland	1 January 1995
Former Yugoslav Republic of Macedonia	4 April 2003
France	1 January 1995
Gabon	1 January 1995
The Gambia	23 October 1996
Georgia	14 June 2000
Germany	1 January 1995
Ghana	1 January 1995
Greece	1 January 1995
Grenada	22 February 1996
Guatemala	21 July 1995
Guinea	25 October 1995
Guinea Bissau	31 May 1995
Guyana	1 January 1995
Haiti	30 January 1996
Honduras	1 January 1995
Hong Kong, China	1 January 1995
Hungary	1 January 1995
Iceland	1 January 1995
India	1 January 1995
Indonesia	1 January 1995
Ireland	1 January 1995
Israel	21 April 1995
Italy	1 January 1995
Jamaica	9 March 1995
Japan	1 January 1995
Jordan	11 April 2000
Kenya	1 January 1995
Korea, Republic of	1 January 1995
Kuwait	1 January 1995
Kyrgyz Republic	20 December 1998
Latvia	10 February 1999
Lesotho	31 May 1995
Liechtenstein	1 September 1995
Lithuania	31 May 2001
Luxembourg	1 January 1995
Macao, China	1 January 1995
Madagascar	17 November 1995

Table (*cont.*)

Government	Effective Date of Membership
Malawi	31 May 1995
Malaysia	1 January 1995
Maldives	31 May 1995
Mali	31 May 1995
Malta	1 January 1995
Mauritania	31 May 1995
Mauritius	1 January 1995
Mexico	1 January 1995
Moldova	26 July 2001
Mongolia	29 January 1997
Morocco	1 January 1995
Mozambique	26 August 1995
Myanmar	1 January 1995
Namibia	1 January 1995
Nepal	23 April 2004
Netherlands – For the Kingdom in Europe and for the Netherlands Antilles	1 January 1995
New Zealand	1 January 1995
Nicaragua	3 September 1995
Niger	13 December 1996
Nigeria	1 January 1995
Norway	1 January 1995
Oman	9 November 2000
Pakistan	1 January 1995
Panama	6 September 1997
Papua New Guinea	9 June 1996
Paraguay	1 January 1995
Peru	1 January 1995
Philippines	1 January 1995
Poland	1 July 1995
Portugal	1 January 1995
Qatar	13 January 1996
Romania	1 January 1995
Rwanda	22 May 1996
Saint Kitts and Nevis	21 February 1996
Saint Lucia	1 January 1995
Saint Vincent and the Grenadines	1 January 1995
Senegal	1 January 1995
Sierra Leone	23 July 1995
Singapore	1 January 1995
Slovak Republic	1 January 1995
Slovenia	30 July 1995
Solomon Islands	26 July 1996
South Africa	1 January 1995
Spain	1 January 1995
Sri Lanka	1 January 1995
Suriname	1 January 1995
Swaziland	1 January 1995
Sweden	1 January 1995
Switzerland	1 July 1995
Chinese Taipei	1 January 2002
Tanzania	1 January 1995
Thailand	1 January 1995
Togo	31 May 1995
Trinidad and Tobago	1 March 1995
Tunisia	29 March 1995
Turkey	26 March 1995
Uganda	1 January 1995
United Arab Emirates	10 April 1996
United Kingdom	1 January 1995

Table (*cont.*)

Government	Effective Date of Membership
United States of America	1 January 1995
Uruguay	1 January 1995
Zambia	1 January 1995
Zimbabwe	5 March 1995

XXVI. WTO OBSERVERS

Afghanistan	Algeria
Andorra	Azerbaijan
Bahamas	Belarus
Bhutan	Bosnia and Herzegovina
Cape Verde	Equatorial Guinea
Ethiopia	Holy See (Vatican)
Iraq	Kazakhstan
Lao People's Democratic Republic	Libyan Arab Jamahiriya
Lebanon	Russian Federation
Samoa	Sao Tome and Principe
Saudi Arabia	Serbia and Montenegro[582]
Seychelles	Sudan
Tajikistan	Tonga
Ukraine	Uzbekistan
Vanuatu	Viet Nam
Yemen	

XXVII. DOHA TEXTS

A. DOHA DECLARATION

MINISTERIAL DECLARATION

Adopted on 14 November 2001[583]

1. The multilateral trading system embodied in the World Trade Organization has contributed significantly to economic growth, development and employment throughout the past fifty years. We are determined, particularly in the light of the global economic slowdown, to maintain the process of reform and liberalization of trade policies, thus ensuring that the system plays its full part in promoting recovery, growth and development. We therefore strongly reaffirm the principles and objectives set out in the Marrakesh Agreement Establishing the World Trade Organization, and pledge to reject the use of protectionism.

2. International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play.

3. We recognize the particular vulnerability of the least-developed countries and the special structural difficulties they face in the global economy. We are committed to addressing the marginalization of least-developed countries in international trade and to improving their effective participation in the multilateral trading system. We recall the commitments made by Ministers at our meetings in Marrakesh, Singapore and Geneva, and by the international community at the Third UN Conference on Least-Developed Countries in Brussels, to help least-developed countries secure beneficial and meaningful integration into the multilateral trading system and the global economy. We are determined that the WTO will play its part in building effectively on these commitments under the Work Programme we are establishing.

4. We stress our commitment to the WTO as the unique forum for global trade rule-making and liberalization, while also recognizing that regional trade agreements can play an important role in promoting the liberalization and expansion of trade and in fostering development.

5. We are aware that the challenges Members face in a rapidly changing international environment cannot be addressed through measures taken in the trade field alone. We shall continue to work with the Bretton Woods institutions for greater coherence in global economic policy-making.

6. We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We take note of the efforts by Members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same

[582] At the time of writing, the General Council had agreed on 15 February 2005 to establish a working party in relation to the accession of Montenegro and a separate working party in relation to the accession of Serbia – WT/GC/M/92.

[583] WT/MIN(01)/DEC/1.

conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements. We welcome the WTO´s continued cooperation with UNEP and other inter-governmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg, South Africa, in September 2002.

7. We reaffirm the right of Members under the General Agreement on Trade in Services to regulate, and to introduce new regulations on, the supply of services.

8. We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards. We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization.

9. We note with particular satisfaction that this Conference has completed the WTO accession procedures for China and Chinese Taipei. We also welcome the accession as new Members, since our last Session, of Albania, Croatia, Georgia, Jordan, Lithuania, Moldova and Oman, and note the extensive market-access commitments already made by these countries on accession. These accessions will greatly strengthen the multilateral trading system, as will those of the 28 countries now negotiating their accession. We therefore attach great importance to concluding accession proceedings as quickly as possible. In particular, we are committed to accelerating the accession of least-developed countries.

10. Recognizing the challenges posed by an expanding WTO membership, we confirm our collective responsibility to ensure internal transparency and the effective participation of all Members. While emphasizing the intergovernmental character of the organization, we are committed to making the WTO's operations more transparent, including through more effective and prompt dissemination of information, and to improve dialogue with the public. We shall therefore at the national and multilateral levels continue to promote a better public understanding of the WTO and to communicate the benefits of a liberal, rules-based multilateral trading system.

11. In view of these considerations, we hereby agree to undertake the broad and balanced Work Programme set out below. This incorporates both an expanded negotiating agenda and other important decisions and activities necessary to address the challenges facing the multilateral trading system.

WORK PROGRAMME

IMPLEMENTATION-RELATED ISSUES AND CONCERNS

12. We attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them. In this connection, and having regard to the General Council Decisions of 3 May and 15 December 2000, we further adopt the Decision on Implementation-Related Issues and Concerns in document WT/MIN(01)/17 to address a number of implementation problems faced by Members. We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this Declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action.

AGRICULTURE

13. We recognize the work already undertaken in the negotiations initiated in early 2000 under Article 20 of the Agreement on Agriculture, including the large number of negotiating proposals submitted on behalf of a total of 121 Members. We recall the long-term objective referred to in the Agreement to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets. We reconfirm our commitment to this programme. Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development. We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture.

14. Modalities for the further commitments, including provisions for special and differential treatment, shall be established no later than 31 March 2003. Participants shall submit their comprehensive draft Schedules based on these modalities no later than the date of the Fifth

Session of the Ministerial Conference. The negotiations, including with respect to rules and disciplines and related legal texts, shall be concluded as part and at the date of conclusion of the negotiating agenda as a whole.

SERVICES

15. The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries. We recognize the work already undertaken in the negotiations, initiated in January 2000 under Article XIX of the General Agreement on Trade in Services, and the large number of proposals submitted by Members on a wide range of sectors and several horizontal issues, as well as on movement of natural persons. We reaffirm the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001 as the basis for continuing the negotiations, with a view to achieving the objectives of the General Agreement on Trade in Services, as stipulated in the Preamble, Article IV and Article XIX of that Agreement. Participants shall submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003.

MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS

16. We agree to negotiations which shall aim, by modalities to be agreed, to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. Product coverage shall be comprehensive and without *a priori* exclusions. The negotiations shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments, in accordance with the relevant provisions of Article XXVIII *bis* of GATT 1994 and the provisions cited in paragraph 50 below. To this end, the modalities to be agreed will include appropriate studies and capacity-building measures to assist least-developed countries to participate effectively in the negotiations.

TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

17. We stress the importance we attach to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines and, in this connection, are adopting a separate Declaration.

18. With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference. We note that issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of this Declaration.

19. We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.

RELATIONSHIP BETWEEN TRADE AND INVESTMENT

20. Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 21, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

21. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

22. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to

regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

INTERACTION BETWEEN TRADE AND COMPETITION POLICY

23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

TRANSPARENCY IN GOVERNMENT PROCUREMENT

26. Recognizing the case for a multilateral agreement on transparency in government procurement and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations. These negotiations will build on the progress made in the Working Group on Transparency in Government Procurement by that time and take into account participants' development priorities, especially those of least-developed country participants. Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers. We commit ourselves to ensuring adequate technical assistance and support for capacity building both during the negotiations and after their conclusion.

TRADE FACILITATION

27. Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations. In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of Members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area.

WTO RULES

28. In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries. We note that fisheries subsidies are also referred to in paragraph 31.

29. We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.

DISPUTE SETTLEMENT UNDERSTANDING

30. We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not

later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter.

TRADE AND ENVIRONMENT

31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;

(ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;

(iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.

32. We instruct the Committee on Trade and Environment, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to:

(i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development;

(ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and

(iii) labelling requirements for environmental purposes.

Work on these issues should include the identification of any need to clarify relevant WTO rules. The Committee shall report to the Fifth Session of the Ministerial Conference, and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations. The outcome of this work as well as the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries.

33. We recognize the importance of technical assistance and capacity building in the field of trade and environment to developing countries, in particular the least-developed among them. We also encourage that expertise and experience be shared with Members wishing to perform environmental reviews at the national level. A report shall be prepared on these activities for the Fifth Session.

ELECTRONIC COMMERCE

34. We take note of the work which has been done in the General Council and other relevant bodies since the Ministerial Declaration of 20 May 1998 and agree to continue the Work Programme on Electronic Commerce. The work to date demonstrates that electronic commerce creates new challenges and opportunities for trade for Members at all stages of development, and we recognize the importance of creating and maintaining an environment which is favourable to the future development of electronic commerce. We instruct the General Council to consider the most appropriate institutional arrangements for handling the Work Programme, and to report on further progress to the Fifth Session of the Ministerial Conference. We declare that Members will maintain their current practice of not imposing customs duties on electronic transmissions until the Fifth Session.

SMALL ECONOMIES

35. We agree to a work programme, under the auspices of the General Council, to examine issues relating to the trade of small economies. The objective of this work is to frame responses to the trade-related issues identified for the fuller integration of small, vulnerable economies into the multilateral trading system, and not to create a subcategory of WTO Members. The General Council shall review the work programme and make recommendations for action to the Fifth Session of the Ministerial Conference.

TRADE, DEBT AND FINANCE

36. We agree to an examination, in a Working Group under the auspices of the General Council, of the relationship between trade, debt and finance, and of any possible recommendations on steps that might be taken within the mandate and competence of the WTO to enhance the capacity of the multilateral trading system to contribute to a durable solution to the problem of external indebtedness of developing and least-developed countries, and to strengthen the coherence of international trade and financial policies, with a view to safeguarding the multilateral trading system from the effects of financial and monetary instability. The General Council shall report to the Fifth Session of the Ministerial Conference on progress in the examination.

TRADE AND TRANSFER OF TECHNOLOGY

37. We agree to an examination, in a Working Group under the auspices of the General Council, of the relationship between trade and transfer of technology, and of any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries. The General Council shall report to the Fifth Session of the Ministerial Conference on progress in the examination.

TECHNICAL COOPERATION AND CAPACITY BUILDING

38. We confirm that technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system, and we welcome and endorse the New Strategy for WTO Technical Cooperation for Capacity Building, Growth and Integration. We instruct the Secretariat, in coordination with other relevant agencies, to support domestic efforts for mainstreaming trade into national plans for economic development and strategies for poverty reduction. The delivery of WTO technical assistance shall be designed to assist developing and least-developed countries and low-income countries in transition to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rules-based multilateral trading system. Priority shall also be accorded to small, vulnerable, and transition economies, as well as to Members and Observers without representation in Geneva. We reaffirm our support for the valuable work of the International Trade Centre, which should be enhanced.

39. We underscore the urgent necessity for the effective coordinated delivery of technical assistance with bilateral donors, in the OECD Development Assistance Committee and relevant international and regional intergovernmental institutions, within a coherent policy framework and timetable. In the coordinated delivery of technical assistance, we instruct the Director-General to consult with the relevant agencies, bilateral donors and beneficiaries, to identify ways of enhancing and rationalizing the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries and the Joint Integrated Technical Assistance Programme (JITAP).

40. We agree that there is a need for technical assistance to benefit from secure and predictable funding. We therefore instruct the Committee on Budget, Finance and Administration to develop a plan for adoption by the General Council in December 2001 that will ensure long-term funding for WTO technical assistance at an overall level no lower than that of the current year and commensurate with the activities outlined above.

41. We have established firm commitments on technical cooperation and capacity building in various paragraphs in this Ministerial Declaration. We reaffirm these specific commitments contained in paragraphs 16, 21, 24, 26, 27, 33, 38–40, 42 and 43, and also reaffirm the understanding in paragraph 2 on the important role of sustainably financed technical assistance and capacity-building programmes. We instruct the Director-General to report to the Fifth Session of the Ministerial Conference, with an interim report to the General Council in December 2002, on the implementation and adequacy of these commitments in the identified paragraphs.

LEAST-DEVELOPED COUNTRIES

42. We acknowledge the seriousness of the concerns expressed by the least-developed countries (LDCs) in the Zanzibar Declaration adopted by their Ministers in July 2001. We recognize that the integration of the LDCs into the multilateral trading system requires meaningful market access, support for the diversification of their production and export base, and trade-related technical assistance and capacity building. We agree that the meaningful integration of LDCs into the trading system and the global economy will involve efforts by all WTO Members. We commit ourselves to the objective of duty-free, quota-free market access for products originating from LDCs. In this regard, we welcome the significant market access improvements by WTO Members in advance of the Third UN Conference on LDCs (LDC-III), in Brussels, May 2001. We further commit ourselves to consider additional measures for progressive improvements in market access for LDCs. Accession of LDCs remains a priority for the Membership. We agree to work to facilitate and accelerate negotiations with acceding LDCs. We instruct the Secretariat to reflect the priority we attach to LDCs' accessions in the annual plans for technical assistance. We reaffirm the commitments we undertook at LDC-III, and agree that the WTO should take into account, in designing its work programme for LDCs, the trade-related elements of the Brussels Declaration and Programme of Action, consistent with the WTO's mandate, adopted at LDC-III. We instruct the Sub-Committee for Least-Developed Countries to design such a work programme and to report on the agreed work programme to the General Council at its first meeting in 2002.

43. We endorse the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries (IF) as a viable model for LDCs' trade development. We urge development partners to significantly increase contributions to the IF Trust Fund and WTO extra-budgetary trust funds in favour of LDCs. We urge the core agencies, in coordination with development partners, to explore the enhancement of the IF with a view to addressing the supply-side constraints of LDCs and the extension of the model to all LDCs, following the review of the IF and the appraisal of the ongoing Pilot Scheme in selected LDCs. We request the Director-General, following coordination with heads of the other agencies, to provide an interim report to the General Council in December 2002 and a full report to the Fifth Session of the Ministerial Conference on all issues affecting LDCs.

SPECIAL AND DIFFERENTIAL TREATMENT

44. We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.

ORGANIZATION AND MANAGEMENT OF THE WORK PROGRAMME

45. The negotiations to be pursued under the terms of this Declaration shall be concluded not later than 1 January 2005. The Fifth Session of the Ministerial Conference will take stock of progress in the negotiations, provide any necessary political guidance, and take decisions as necessary. When the results of the negotiations in all areas have been established, a Special Session of the Ministerial Conference will be held to take decisions regarding the adoption and implementation of those results.

46. The overall conduct of the negotiations shall be supervised by a Trade Negotiations Committee under the authority of the General Council. The Trade Negotiations Committee shall hold its first meeting not later than 31 January 2002. It shall establish appropriate negotiating mechanisms as required and supervise the progress of the negotiations.

47. With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations.

48. Negotiations shall be open to:

(i) all Members of the WTO; and

(ii) States and separate customs territories currently in the process of accession and those that inform Members, at a regular meeting of the General Council, of their intention to negotiate the terms of their membership and for whom an accession working party is established.

Decisions on the outcomes of the negotiations shall be taken only by WTO Members.

49. The negotiations shall be conducted in a transparent manner among participants, in order to facilitate the effective participation of all. They shall be conducted with a view to ensuring benefits to all participants and to achieving an overall balance in the outcome of the negotiations.

50. The negotiations and the other aspects of the Work Programme shall take fully into account the principle of special and differential treatment for developing and least-developed countries embodied in: Part IV of the GATT 1994; the Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries; the Uruguay Round Decision on Measures in Favour of Least-Developed Countries; and all other relevant WTO provisions.

51. The Committee on Trade and Development and the Committee on Trade and Environment shall, within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.

52. Those elements of the Work Programme which do not involve negotiations are also accorded a high priority. They shall be pursued under the overall supervision of the General Council, which shall report on progress to the Fifth Session of the Ministerial Conference.

B. DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

244. The text of the Declaration on the TRIPS Agreement and Public Health is annexed to the Chapter on the *TRIPS Agreement.*

C. IMPLEMENTATION-RELATED ISSUES AND CONCERNS

IMPLEMENTATION-RELATED ISSUES AND CONCERNS

Decision of 14 November 2001[584]

The Ministerial Conference,

Having regard to Articles IV.1, IV.5 and IX of the Marrakesh Agreement Establishing the World Trade Organization (WTO);

Mindful of the importance that Members attach to the increased participation of developing countries in the multilateral trading system, and of the need to ensure that the system responds fully to the needs and interests of all participants;

Determined to take concrete action to address issues and concerns that have been raised by many developing-country Members regarding the implementation of some WTO Agreements and Decisions, including the difficulties

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and resource constraints that have been encountered in the implementation of obligations in various areas;

Recalling the 3 May 2000 Decision of the General Council to meet in special sessions to address outstanding implementation issues, and to assess the existing difficulties, identify ways needed to resolve them, and take decisions for appropriate action not later than the Fourth Session of the Ministerial Conference;

Noting the actions taken by the General Council in pursuance of this mandate at its Special Sessions in October and December 2000 (WT/L/384), as well as the review and further discussion undertaken at the Special Sessions held in April, July and October 2001, including the referral of additional issues to relevant WTO bodies or their chairpersons for further work;

Noting also the reports on the issues referred to the General Council from subsidiary bodies and their chairpersons and from the Director-General, and the discussions as well as the clarifications provided and understandings reached on implementation issues in the intensive informal and formal meetings held under this process since May 2000;

Decides as follows:

1. General Agreement on Tariffs and Trade 1994 (GATT 1994)

   1.1 Reaffirms that Article XVIII of the GATT 1994 is a special and differential treatment provision for developing countries and that recourse to it should be less onerous than to Article XII of the GATT 1994.

   1.2 Noting the issues raised in the report of the Chairperson of the Committee on Market Access (WT/GC/50) concerning the meaning to be given to the phrase "substantial interest" in paragraph 2(d) of Article XIII of the GATT 1994, the Market Access Committee is directed to give further consideration to the issue and make recommendations to the General Council as expeditiously as possible but in any event not later than the end of 2002.

2. Agreement on Agriculture

   2.1 Urges Members to exercise restraint in challenging measures notified under the green box by developing countries to promote rural development and adequately address food security concerns.

   2.2 Takes note of the report of the Committee on Agriculture (G/AG/11) regarding the implementation of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, and approves the recommendations contained therein regarding (i) food aid; (ii) technical and financial assistance in the context of aid programmes to improve agricultural productivity and infrastructure; (iii) financing normal levels of commercial imports of basic foodstuffs; and (iv) review of follow-up.

   2.3 Takes note of the report of the Committee on Agriculture (G/AG/11) regarding the implementation of Article 10.2 of the Agreement on Agriculture, and approves the recommendations and reporting requirements contained therein.

   2.4 Takes note of the report of the Committee on Agriculture (G/AG/11) regarding the administration of tariff rate quotas and the submission by Members of addenda to their notifications, and endorses the decision by the Committee to keep this matter under review.

3. Agreement on the Application of Sanitary and Phytosanitary Measures

   3.1 Where the appropriate level of sanitary and phytosanitary protection allows scope for the phased introduction of new sanitary and phytosanitary measures, the phrase "longer time-frame for compliance" referred to in Article 10.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures, shall be understood to mean normally a period of not less than 6 months. Where the appropriate level of sanitary and phytosanitary protection does not allow scope for the phased introduction of a new measure, but specific problems are identified by a Member, the Member applying the measure shall upon request enter into consultations with the country with a view to finding a mutually satisfactory solution to the problem while continuing to achieve the importing Member's appropriate level of protection.

   3.2 Subject to the conditions specified in paragraph 2 of Annex B to the Agreement on the Application of Sanitary and Phytosanitary Measures, the phrase "reasonable interval" shall be understood to mean normally a period of not less than 6 months. It is understood that timeframes for specific measures have to be considered in the context of the particular circumstances of the measure and actions necessary to implement it. The entry into force of measures which contribute to the liberalization of trade should not be unnecessarily delayed.

   3.3 Takes note of the Decision of the Committee on Sanitary and Phytosanitary Measures

(G/SPS/19) regarding equivalence, and instructs the Committee to develop expeditiously the specific programme to further the implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

3.4 Pursuant to the provisions of Article 12.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures, the Committee on Sanitary and Phytosanitary Measures is instructed to review the operation and implementation of the Agreement on Sanitary and Phytosanitary Measures at least once every four years.

3.5 (i) Takes note of the actions taken to date by the Director-General to facilitate the increased participation of Members at different levels of development in the work of the relevant international standard setting organizations as well as his efforts to coordinate with these organizations and financial institutions in identifying SPS-related technical assistance needs and how best to address them; and

(ii) urges the Director-General to continue his cooperative efforts with these organizations and institutions in this regard, including with a view to according priority to the effective participation of least-developed countries and facilitating the provision of technical and financial assistance for this purpose.

3.6 (i) Urges Members to provide, to the extent possible, the financial and technical assistance necessary to enable least-developed countries to respond adequately to the introduction of any new SPS measures which may have significant negative effects on their trade; and

(ii) urges Members to ensure that technical assistance is provided to least-developed countries with a view to responding to the special problems faced by them in implementing the Agreement on the Application of Sanitary and Phytosanitary Measures.

4. Agreement on Textiles and Clothing

Reaffirms the commitment to full and faithful implementation of the Agreement on Textiles and Clothing, and agrees:

4.1 that the provisions of the Agreement relating to the early integration of products and the elimination of quota restrictions should be effectively utilised.

4.2 that Members will exercise particular consideration before initiating investigations in the context of antidumping remedies on textile and clothing exports from developing countries previously subject to quantitative restrictions under the Agreement for a period of two years following full integration of this Agreement into the WTO.

4.3 that without prejudice to their rights and obligations, Members shall notify any changes in their rules of origin concerning products falling under the coverage of the Agreement to the Committee on Rules of Origin which may decide to examine them.

Requests the Council for Trade in Goods to examine the following proposals:

4.4 that when calculating the quota levels for small suppliers for the remaining years of the Agreement, Members will apply the most favourable methodology available in respect of those Members under the growth-on-growth provisions from the beginning of the implementation period; extend the same treatment to least-developed countries; and, where possible, eliminate quota restrictions on imports of such Members;

4.5 that Members will calculate the quota levels for the remaining years of the Agreement with respect to other restrained Members as if implementation of the growth-on-growth provision for stage 3 had been advanced to 1 January 2000;

and make recommendations to the General Council by 31 July 2002 for appropriate action.

5. Agreement on Technical Barriers to Trade

5.1 Confirms the approach to technical assistance being developed by the Committee on Technical Barriers to Trade, reflecting the results of the triennial review work in this area, and mandates this work to continue.

5.2 Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase "reasonable interval" shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.

5.3 (i) Takes note of the actions taken to date by the Director-General to facilitate the increased participation of Members at different levels of development in the work of the relevant international standard setting organizations as well as his

efforts to coordinate with these organizations and financial institutions in identifying TBT-related technical assistance needs and how best to address them; and

(ii) urges the Director-General to continue his cooperative efforts with these organizations and institutions, including with a view to according priority to the effective participation of least-developed countries and facilitating the provision of technical and financial assistance for this purpose.

5.4 (i) Urges Members to provide, to the extent possible, the financial and technical assistance necessary to enable least-developed countries to respond adequately to the introduction of any new TBT measures which may have significant negative effects on their trade; and

(ii) urges Members to ensure that technical assistance is provided to least-developed countries with a view to responding to the special problems faced by them in implementing the Agreement on Technical Barriers to Trade.

6. Agreement on Trade-Related Investment Measures

6.1 Takes note of the actions taken by the Council for Trade in Goods in regard to requests from some developing-country Members for the extension of the five-year transitional period provided for in Article 5.2 of Agreement on Trade-Related Investment Measures.

6.2 Urges the Council for Trade in Goods to consider positively requests that may be made by least-developed countries under Article 5.3 of the TRIMs Agreement or Article IX.3 of the WTO Agreement, as well as to take into consideration the particular circumstances of least-developed countries when setting the terms and conditions including time-frames.

7. Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

7.1 Agrees that investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed.

7.2 Recognizes that, while Article 15 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is a mandatory provision, the modalities for its application would benefit from clarification. Accordingly, the Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to examine this issue and to draw up appropriate recommendations within twelve months on how to operationalize this provision.

7.3 Takes note that Article 5.8 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 does not specify the time-frame to be used in determining the volume of dumped imports, and that this lack of specificity creates uncertainties in the implementation of the provision. The Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to study this issue and draw up recommendations within 12 months, with a view to ensuring the maximum possible predictability and objectivity in the application of time frames.

7.4 Takes note that Article 18.6 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 requires the Committee on Anti-Dumping Practices to review annually the implementation and operation of the Agreement taking into account the objectives thereof. The Committee on Anti-dumping Practices is instructed to draw up guidelines for the improvement of annual reviews and to report its views and recommendations to the General Council for subsequent decision within 12 months.

8. Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994

8.1 Takes note of the actions taken by the Committee on Customs Valuation in regard to the requests from a number of developing-country Members for the extension of the five-year transitional period provided for in Article 20.1 of Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.

8.2 Urges the Council for Trade in Goods to give positive consideration to requests that may be made by least-developed country Members under paragraphs 1 and 2 of Annex III of the Customs Valuation Agreement or under Article IX.3 of the WTO Agreement, as well as

to take into consideration the particular circumstances of least-developed countries when setting the terms and conditions including time-frames.

8.3 Underlines the importance of strengthening cooperation between the customs administrations of Members in the prevention of customs fraud. In this regard, it is agreed that, further to the 1994 Ministerial Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value, when the customs administration of an importing Member has reasonable grounds to doubt the truth or accuracy of the declared value, it may seek assistance from the customs administration of an exporting Member on the value of the good concerned. In such cases, the exporting Member shall offer cooperation and assistance, consistent with its domestic laws and procedures, including furnishing information on the export value of the good concerned. Any information provided in this context shall be treated in accordance with Article 10 of the Customs Valuation Agreement. Furthermore, recognizing the legitimate concerns expressed by the customs administrations of several importing Members on the accuracy of the declared value, the Committee on Customs Valuation is directed to identify and assess practical means to address such concerns, including the exchange of information on export values and to report to the General Council by the end of 2002 at the latest.

9. Agreement on Rules of Origin

9.1 Takes note of the report of the Committee on Rules of Origin (G/RO/48) regarding progress on the harmonization work programme, and urges the Committee to complete its work by the end of 2001.

9.2 Agrees that any interim arrangements on rules of origin implemented by Members in the transitional period before the entry into force of the results of the harmonisation work programme shall be consistent with the Agreement on Rules of Origin, particularly Articles 2 and 5 thereof. Without prejudice to Members' rights and obligations, such arrangements may be examined by the Committee on Rules of Origin.

10. Agreement on Subsidies and Countervailing Measures

10.1 Agrees that Annex VII(b) to the Agreement on Subsidies and Countervailing Measures includes the Members that are listed therein until their GNP per capita reaches US $1,000 in constant 1990 dollars for three consecutive years. This decision will enter into effect upon the adoption by the Committee on Subsidies and Countervailing Measures of an appropriate methodology for calculating constant 1990 dollars. If, however, the Committee on Subsidies and Countervailing Measures does not reach a consensus agreement on an appropriate methodology by 1 January 2003, the methodology proposed by the Chairman of the Committee set forth in G/SCM/38, Appendix 2 shall be applied. A Member shall not leave Annex VII(b) so long as its GNP per capita in current dollars has not reached US $1000 based upon the most recent data from the World Bank.

10.2 Takes note of the proposal to treat measures implemented by developing countries with a view to achieving legitimate development goals, such as regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production as non-actionable subsidies, and agrees that this issue be addressed in accordance with paragraph 13 below. During the course of the negotiations, Members are urged to exercise due restraint with respect to challenging such measures.

10.3 Agrees that the Committee on Subsidies and Countervailing Measures shall continue its review of the provisions of the Agreement on Subsidies and Countervailing Measures regarding countervailing duty investigations and report to the General Council by 31 July 2002.

10.4 Agrees that if a Member has been excluded from the list in paragraph (b) of Annex VII to the Agreement on Subsidies and Countervailing Measures, it shall be re-included in it when its GNP per capita falls back below US$ 1,000.

10.5 Subject to the provisions of Articles 27.5 and 27.6, it is reaffirmed that least-developed country Members are exempt from the prohibition on export subsidies set forth in Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures, and thus have flexibility to finance their exporters, consistent with their development needs. It is understood that the eight-year period in Article 27.5 within which a least-developed country Member must phase out its export subsidies in respect of a product in which it

is export-competitive begins from the date export competitiveness exists within the meaning of Article 27.6.

10.6 Having regard to the particular situation of certain developing-country Members, directs the Committee on Subsidies and Countervailing Measures to extend the transition period, under the rubric of Article 27.4 of the Agreement on Subsidies and Countervailing Measures, for certain export subsidies provided by such Members, pursuant to the procedures set forth in document G/SCM/39. Furthermore, when considering a request for an extension of the transition period under the rubric of Article 27.4 of the Agreement on Subsidies and Countervailing Measures, and in order to avoid that Members at similar stages of development and having a similar order of magnitude of share in world trade are treated differently in terms of receiving such extensions for the same eligible programmes and the length of such extensions, directs the Committee to extend the transition period for those developing countries, after taking into account the relative competitiveness in relation to other developing-country Members who have requested extension of the transition period following the procedures set forth in document G/SCM/39.

11. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

11.1 The TRIPS Council is directed to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to the Fifth Session of the Ministerial Conference. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement.

11.2 Reaffirming that the provisions of Article 66.2 of the TRIPS Agreement are mandatory, it is agreed that the TRIPS Council shall put in place a mechanism for ensuring the monitoring and full implementation of the obligations in question. To this end, developed-country Members shall submit prior to the end of 2002 detailed reports on the functioning in practice of the incentives provided to their enterprises for the transfer of technology in pursuance of their commitments under Article 66.2. These submissions shall be subject to a review in the TRIPS Council and information shall be updated by Members annually.

12. Cross-cutting Issues

12.1 The Committee on Trade and Development is instructed:

(i) to identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council with clear recommendations for a decision by July 2002;

(ii) to examine additional ways in which special and differential treatment provisions can be made more effective, to consider ways, including improved information flows, in which developing countries, in particular the least-developed countries, may be assisted to make best use of special and differential treatment provisions, and to report to the General Council with clear recommendations for a decision by July 2002; and

(iii) to consider, in the context of the work programme adopted at the Fourth Session of the Ministerial Conference, how special and differential treatment may be incorporated into the architecture of WTO rules.

The work of the Committee on Trade and Development in this regard shall take fully into consideration previous work undertaken as noted in WT/COMTD/W/77/Rev.1. It will also be without prejudice to work in respect of implementation of WTO Agreements in the General Council and in other Councils and Committees.

12.2 Reaffirms that preferences granted to developing countries pursuant to the Decision of the Contracting Parties of 28 November 1979 ("Enabling Clause")[1] should be generalised, non-reciprocal and non-discriminatory.

(*footnote original*) [1] BISD 26S/203.

13. Outstanding Implementation Issues[2]

Agrees that outstanding implementation issues be addressed in accordance with paragraph 12 of the Ministerial Declaration (WT/MIN(01)/DEC/1).

(*footnote original*) [2] A list of these issues is compiled in document Job(01)/152/Rev.1.

14. Final Provisions

Requests the Director-General, consistent with paragraphs 38 to 43 of the Ministerial Declaration (WT/MIN(01)/DEC/1), to ensure that WTO technical assistance focuses, on a priority basis, on assisting developing countries to implement existing WTO obligations as well as on increasing their capacity to participate more effectively in future multilateral trade negotiations. In carrying out this mandate, the WTO Secretariat should cooperate more closely with international and regional intergovernmental organisations so as to increase efficiency and synergies and avoid duplication of programmes.

D. PROCEDURES FOR EXTENSIONS UNDER ARTICLE 27.4 FOR CERTAIN DEVELOPING COUNTRY MEMBERS

PROCEDURES FOR EXTENSIONS UNDER ARTICLE 27.4 FOR CERTAIN DEVELOPING COUNTRY MEMBERS[585]

The Committee on Subsidies and Countervailing Measures ("SCM Committee") shall follow the procedures set forth below in respect of extensions of the transition period under Article 27.4 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") for certain developing country Members. The programmes to which these procedures shall apply are those meeting the criteria set forth in 2.

1. Mechanism for extension

(a) A Member that maintains programmes meeting the criteria set forth in 2 and that wishes to make use of these procedures, shall initiate Article 27.4 consultations with the Committee in respect of an extension for its eligible subsidy programmes as referred to in 2, on the basis of documentation to be submitted to the Committee not later than 31 December 2001. This documentation shall consist of (i) an identification by the Member of those programmes for which it is seeking an extension under SCM Article 27.4 pursuant to these procedures; and (ii) a statement that the extension is necessary in the light of the Member's economic, financial and development needs.

(b) Not later than 28 February 2002, the Member seeking an extension shall submit to the SCM Committee an initial notification as referred to in 3(a) providing detailed information about the programmes for which extension is being sought.

(c) Following receipt of the notifications referred to in 1(b), the SCM Committee shall consider those notifications, with an opportunity for Members to seek clarification of the notified information and/or additional detail with a view to understanding the nature and operation of the notified programmes, and their scope, coverage and intensity of benefits, as referred to in 3(b). The purpose of this consideration by the SCM Committee shall be to verify that the programmes are of the type eligible under these procedures as referred to in 2, and that the transparency requirement referred to in 3(a) and 3(b) is fulfilled. Not later than 15 December 2002, Members of the SCM Committee shall grant extensions for calendar year 2003 for those programmes notified pursuant to these procedures, provided that the notified programmes meet the eligibility criteria in 2 and that the transparency requirement is fulfilled. The notified information on the basis of which the extensions are granted, including information provided in response to requests from Members as referred to above, shall form the frame of reference for the annual reviews of the extensions as referred to in 1(d) and 1(e).

(d) As provided for in SCM Article 27.4, the extensions granted by the SCM Committee pursuant to these procedures shall be subject to annual review in the form of consultations between the Committee and the Members receiving the extensions. These annual reviews shall be conducted on the basis of updating notifications from the Members in question, as referred to in 3(a) and 3(b). The purpose of the annual reviews shall be to ensure that the transparency and standstill requirements as set forth in 3 and 4 are being fulfilled.

(e) Through the end of calendar year 2007, subject to annual reviews during that period to verify that the transparency and standstill requirements set forth in 3 and 4 are being fulfilled, Members of the Committee shall agree to continue the extensions granted pursuant to 1(c).

(f) During the last year of the period referred to in 1(e), a Member that has received an extension under these procedures shall have the possibility to seek a continuation of the extension pursuant to SCM Article 27.4, for the programmes in question. The Committee shall consider any such requests at that year's annual review, on the basis of the provisions of SCM Article 27.4, i.e., outside the framework of these procedures.

(g) If a continuation of the extension pursuant to 1(f) is either not requested or not granted, the Member in question shall have the final two

[585] G/SCM/39.

years referred to in the last sentence of SCM Article 27.4.

2. Eligible programmes

Programmes eligible for extension pursuant to these procedures, and for which Members shall therefore grant extensions for calendar year 2003 as referred to in 1(c), are export subsidy programmes (i) in the form of full or partial exemptions from import duties and internal taxes, (ii) which were in existence not later than 1 September 2001, and (iii) which are provided by developing country Members (iv) whose share of world merchandise export trade was not greater than 0.10 per cent[1], (v) whose total Gross National Income ("GNI") for the year 2000 as published by the World Bank was at or below US $ 20 billion,[2] (vi) and who are otherwise eligible to request an extension pursuant to Article 27.4,[3] and (vii) in respect of which these procedures are followed.

(*footnote original*) [1] According to the calculations performed by the WTO Secretariat as reflected in Appendix 3 to the Report of the Chairman (G/SCM/38).
(*footnote original*) [2] The SCM Committee shall consider other appropriate data sources in respect of Members for whom the World Bank does not publish total GNI data.
(*footnote original*) [3] The fact that a Member is listed in Annex VII(b) shall not be deemed to make that Member otherwise ineligible to request an extension pursuant to Article 27.4.

3. Transparency

(a) The initial notification referred to in 1(b), and the updating notifications referred to in 1(d), shall follow the agreed format for subsidy notifications under SCM Article 25 (found in G/SCM/6).

(b) During the SCM Committee's consideration/review of the notifications referred to in 1(c) and 1(d), notifying Members can be requested by other Members to provide additional detail and clarification, with a view to confirming that the programmes meet the criteria set forth in 2, and to establishing transparency in respect of the scope, coverage and intensity of benefits (the "favourability") of the programmes in question.[4] Any information provided in response to such requests shall be considered part of the notified information.

(*footnote original*) [4] The scope, coverage and intensity of the programmes in question will be determined on the basis of the legal instruments underlying the programmes.

4. Standstill

(a) The programmes for which an extension is granted shall not be modified during the period of extension referred to in 1(e) so as to make them more favourable than they were as at 1 September 2001. The continuation of an expiring programme without modification shall not be deemed to violate standstill.

(b) The scope, coverage and intensity of benefits (the "favourability") of the programmes as at 1 September 2001 shall be specified in the initial notification referred to in 1(b), and standstill as referred to in 4(a) shall be verified on the basis of the notified information referred to in 1(d) and 3(b).

5. Product graduation on the basis of export competitiveness

Notwithstanding these procedures, Articles 27.5 and 27.6 shall apply in respect of export subsidies for which extensions are granted pursuant to these procedures.

6. Members listed in Annex VII(b)

(a) A Member listed in Annex VII(b) whose GNP per capita has reached the level provided for in that Annex and whose programme(s) meet the criteria in 2 shall be eligible to make use of these procedures.

(b) A Member listed in Annex VII(b) whose GNP per capita has not reached the level provided for in that Annex and whose programme(s) meet the criteria in 2 may reserve its right to make use of these procedures, as referred to in 6(c), by submitting the documentation referred to in 1(a) not later than 31 December 2001.

(c) If the per capita GNP of a Member referred to in 6(b) reaches the level provided for in that Annex during the period referred to in 1(e), that Member shall be able to make use of these procedures as from the date at which its per capita GNP reaches that level and for the remainder of the period referred to in 1(e), as well as for any additional periods as referred to in 1(f) and 1(g), subject to the remaining provisions of these procedures.

(d) For a Member referred to in 6(b), the effective date for the standstill requirement referred to in 4(a) shall be the year in which that Member's GNP per capita reaches the level provided for in Annex VII(b).

7. Final provisions

(a) The decision by Ministers, these procedures, and the SCM Article 27.4 extensions granted thereunder, are without prejudice to any requests for extensions under Article 27.4 that are not made pursuant to these procedures.

(b) The decision by Ministers, these procedures, and the SCM Article 27.4 extensions granted thereunder, shall not affect any other existing rights and obligations under SCM Article 27.4

or under other provisions of the SCM Agreement.

(c) The criteria set forth in these procedures are solely and strictly for the purpose of determining whether Members are eligible to invoke these procedures. Members of the Committee agree that these criteria have no precedential value or relevance, direct or indirect, for any other purpose.

E. EUROPEAN COMMUNITIES — THE ACP-EC PARTNERSHIP AGREEMENT

EUROPEAN COMMUNITIES – THE ACP-EC PARTNERSHIP AGREEMENT

Decision of 14 November 2001[586]

The Ministerial Conference,

Having regard to paragraphs 1 and 3 of Article IX of the Marrakech Agreement Establishing the World Trade Organisation (the "WTO Agreement"), the Guiding Principles to be followed in considering applications for waivers adopted on 1 November 1956 (BISD 5S/25), the Understanding in Respect to Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, paragraph3 of Article IX of the WTO Agreement, and Decision-Making Procedures under Articles IX and XII of the WTO Agreement agreed by the General Council (WT/L/93);

Taking note of the request of the European Communities (EC) and of the Governments of the ACP States which are also WTO members (hereinafter also the "Parties to the Agreement") for a waiver from the obligations of the European Communities under paragraph 1 of Article I of the General Agreement with respect to the granting of preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement (hereinafter also referred to as "the Agreement")[1];

(*footnote original*) [1] As contained in documents G/C/W/187, G/C/W/204, G/C/W/254 and G/C/W/269).

Considering that, in the field of trade, the provisions of the ACP-EC Partnership Agreement requires preferential tariff treatment by the EC of exports of products originating in the ACP States;

Considering that the Agreement is aimed at improving the standard of living and economic development of the ACP States, including the least developed among them;

Considering also that the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement is designed to promote the expansion of trade and economic development of beneficiaries in a manner consistent with the objectives of the WTO and with the trade, financial and development needs of the beneficiaries and not to raise undue barriers or to create undue difficulties for the trade of other members;

Considering that the Agreement establishes a preparatory period extending until 31 December 2007, by the end of which new trading arrangements shall be concluded between the Parties to the Agreement;

Considering that the trade provisions of the Agreement have been applied since 1 March 2000 on the basis of transitional measures adopted by the ACP-EC joint institutions;

Noting the assurances given by the Parties to the Agreement that they will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement;

Noting that the tariff applied to bananas imported in the "A" and "B" quotas shall not exceed 75 €/tonne until the entry into force of the new EC tariff-only regime.

Noting that the implementation of the preferential tariff treatment for bananas may be affected as a result of GATT Article XXVIII negotiations;

Noting the assurances from the Parties to the Agreement that any re-binding of the EC tariff on bananas under the relevant GATT Article XXVIII procedures should result in at least maintaining total market access for MFN banana suppliers and their willingness to accept a multilateral control on the implementation of this commitment.

Considering that, in light of the foregoing, the exceptional circumstances justifying a waiver from paragraph 1 of Article I of the General Agreement exist;

Decides as follows:

1. Subject to the terms and conditions set out hereunder, Article I, paragraph 1 of the General Agreement shall be waived, until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement,[2] without being required to extend the same preferential treatment to like products of any other member.

(*footnote original*) [2] Any reference to the Partnership Agreement in this Decision shall also include the period during which the trade provisions of this Agreement are applied on the basis of transitional measures adopted by the ACP-EC joint institutions.

[586] WT/MIN (01)/15

2. The Parties to the Agreement shall promptly notify the General Council of any changes in the preferential tariff treatment to products originating in ACP States as required by the relevant provisions of the Agreement covered by this waiver.

3. The Parties to the Agreement will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement; where a member considers that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of such implementation, such consultations shall examine the possibility of action for a satisfactory adjustment of the matter.

3bis With respect to bananas, the additional provisions in the Annex shall apply.

4. Any member which considers that the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement is being applied inconsistently with this waiver or that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement and that consultations have proved unsatisfactory, may bring the matter before the General Council, which will examine it promptly and will formulate any recommendations that they judge appropriate.

5. The Parties to the Agreement will submit to the General Council an annual report on the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement.

6. This waiver shall not preclude the right of affected members to have recourse to Articles XXII and XXIII of the General Agreement.

ANNEX

The waiver would apply for ACP products under the Cotonou Agreement until 31 December 2007. In the case of bananas, the waiver will also apply until 31 December 2007, subject to the following, which is without prejudice to rights and obligations under Article XXVIII.

- The parties to the Cotonou Agreement will initiate consultations with Members exporting to the EU on a MFN basis (interested parties) early enough to finalize the process of consultations under the procedures hereby established at least three months before the entry into force of the new EC tariff only regime.
- No later than 10 days after the conclusion of Article XXVIII negotiations, interested parties will be informed of the EC intentions concerning the rebinding of the EC tariff on bananas. In the course of such consultations, the EC will provide information on the methodology used for such rebinding. In this regard, all EC WTO market-access commitments relating to bananas should be taken into account.
- Within 60 days of such an announcement, any such interested party may request arbitration.
- The arbitrator shall be appointed within 10 days, following the request subject to agreement between the two parties, failing which the arbitrator shall be appointed by the Director-General of the WTO, following consultations with the parties, within 30 days of the arbitration request. The mandate of the arbitrator shall be to determine, within 90 days of his appointment, whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, taking into account the above-mentioned EC commitments.
- If the arbitrator determines that the rebinding would not result in at least maintaining total market access for MFN suppliers, the EC shall rectify the matter. Within 10 days of the notification of the arbitration award to the General Council, the EC will enter into consultations with those interested parties that requested the arbitration. In the absence of a mutually satisfactory solution, the same arbitrator will be asked to determine, within 30 days of the new arbitration request, whether the EC has rectified the matter. The second arbitration award will be notified to the General Council. If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime. The Article XXVIII negotiations and the arbitration procedures shall be concluded before the entry into force of the new EC tariff only regime on 1 January 2006.

F. EUROPEAN COMMUNITIES – TRANSITIONAL REGIME FOR THE EC AUTONOMOUS TARIFF RATE QUOTAS ON IMPORTS OF BANANAS

EUROPEAN COMMUNITIES – TRANSITIONAL REGIME FOR THE EC AUTONOMOUS TARIFF RATE QUOTAS ON IMPORTS OF BANANAS

Decision of 14 November 2001[587]

The Ministerial Conference,

Having regard to the Guiding Principles to be followed in considering applications for waivers adopted on 1 November 1956, the Understanding in Respect of

[587] WT/MIN(01)/16.

Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, and paragraphs 3 and 4 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter "*WTO Agreement*");

Taking note of the request of the European Communities for a waiver from its obligations under paragraphs 1 and 2 of Article XIII of the GATT 1994 with respect to bananas;

Taking note of the understandings reached by the EC, Ecuador and the United States that identify the means by which the longstanding dispute over the EC's banana regime can be resolved, in particular their provision for a temporary global quota allocation for ACP banana supplying countries under specified conditions;

Taking into account the exceptional circumstances surrounding the resolution of the bananas dispute and the interests of many WTO Members in the EC banana regime;

Recognizing the need to afford sufficient protection to the ACP banana supplying countries, including the most vulnerable, during a limited transition period, to enable them to prepare for a tariff-only regime;

Noting assurances given by the EC that it will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the tariff rate quota for bananas originating in ACP States;

Considering that, in light of the foregoing, the exceptional circumstances justifying a waiver from paragraphs 1 and 2 of Article XIII of the GATT 1994 with respect to bananas exist;

Decides as follows:

1. With respect to the EC's imports of bananas, as of 1 January 2002, and until 31 December 2005, paragraphs 1 and 2 of Article XIII of the GATT 1994 are waived with respect to the EC's separate tariff quota of 750,000 tonnes for bananas of ACP origin.

2. The EC will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the separate tariff rate quota for bananas originating in ACP States covered by this waiver; where a Member considers that any benefit accruing to it under the GATT 1994 may be or is being impaired unduly as a result of such implementation, such consultations shall examine the possibility of action for a satisfactory adjustment of the matter.

3. Any Member which considers that the separate tariff rate quota for bananas originating in ACP States covered by this waiver is being applied inconsistently with this waiver or that any benefit accruing to it under the GATT 1994 may be or is being impaired unduly as a result of the implementation of the separate tariff rate quota for bananas originating in ACP States covered by this waiver and that consultations have proved unsatisfactory, may bring the matter before the General Council, which will examine it promptly and will formulate any recommendations that they judge appropriate.

4. This waiver shall not preclude the right of affected members to have recourse to Articles XXII and XXIII of the GATT 1994.

XXVIII. THE JULY PACKAGE

Doha Work Programme

Decision Adopted by the General Council on 1 August 2004[588]

1. The General Council reaffirms the Ministerial Declarations and Decisions adopted at Doha and the full commitment of all Members to give effect to them. The Council emphasizes Members' resolve to complete the Doha Work Programme fully and to conclude successfully the negotiations launched at Doha. Taking into account the Ministerial Statement adopted at Cancún on 14 September 2003, and the statements by the Council Chairman and the Director-General at the Council meeting of 15–16 December 2003, the Council takes note of the report by the Chairman of the Trade Negotiations Committee (TNC) and agrees to take action as follows:

a. **Agriculture**: the General Council adopts the framework set out in Annex A to this document.

b. **Cotton**: the General Council reaffirms the importance of the Sectoral Initiative on Cotton and takes note of the parameters set out in Annex A within which the trade-related aspects of this issue will be pursued in the agriculture negotiations. The General Council also attaches importance to the development aspects of the Cotton Initiative and wishes to stress the complementarity between the trade and development aspects. The Council takes note of the recent Workshop on Cotton in Cotonou on 23–24 March 2004 organized by the WTO Secretariat, and other bilateral and multilateral efforts to make progress on the development assistance aspects and instructs the Secretariat to continue to work with the development community and to provide the Council with periodic reports on relevant developments.

Members should work on related issues of development multilaterally with the international financial institutions, continue their bilateral programmes, and all developed countries are urged to

[588] WT/L/579.

participate. In this regard, the General Council instructs the Director General to consult with the relevant international organizations, including the Bretton Woods Institutions, the Food and Agriculture Organization and the International Trade Centre to direct effectively existing programmes and any additional resources towards development of the economies where cotton has vital importance.

c. Non-agricultural Market Access: the General Council adopts the framework set out in Annex B to this document.

d. Development:

Principles: development concerns form an integral part of the Doha Ministerial Declaration. The General Council rededicates and recommits Members to fulfilling the development dimension of the Doha Development Agenda, which places the needs and interests of developing and least-developed countries at the heart of the Doha Work Programme. The Council reiterates the important role that enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity building programmes can play in the economic development of these countries.

Special and Differential Treatment: the General Council reaffirms that provisions for special and differential (S&D) treatment are an integral part of the *WTO Agreements*. The Council recalls Ministers' decision in Doha to review all S&D treatment provisions with a view to strengthening them and making them more precise, effective and operational. The Council recognizes the progress that has been made so far. The Council instructs the Committee on Trade and Development in Special Session to expeditiously complete the review of all the outstanding Agreement-specific proposals and report to the General Council, with clear recommendations for a decision, by July 2005. The Council further instructs the Committee, within the parameters of the Doha mandate, to address all other outstanding work, including on the cross-cutting issues, the monitoring mechanism and the incorporation of S&D treatment into the architecture of WTO rules, as referred to in TN/CTD/7 and report, as appropriate, to the General Council.

The Council also instructs all WTO bodies to which proposals in Category II have been referred to expeditiously complete the consideration of these proposals and report to the General Council, with clear recommendations for a decision, as soon as possible and no later than July 2005. In doing so these bodies will ensure that, as far as possible, their meetings do not overlap so as to enable full and effective participation of developing countries in these discussions.

Technical Assistance: the General Council recognizes the progress that has been made since the Doha Ministerial Conference in expanding Trade-Related Technical Assistance (TRTA) to developing countries and low-income countries in transition. In furthering this effort the Council affirms that such countries, and in particular least-developed countries, should be provided with enhanced TRTA and capacity building, to increase their effective participation in the negotiations, to facilitate their implementation of WTO rules, and to enable them to adjust and diversify their economies. In this context the Council welcomes and further encourages the improved coordination with other agencies, including under the Integrated Framework for TRTA for the LDCs (IF) and the Joint Integrated Technical Assistance Programme (JITAP).

Implementation: concerning implementation-related issues, the General Council reaffirms the mandates Ministers gave in paragraph 12 of the Doha Ministerial Declaration and the Doha Decision on Implementation-Related Issues and Concerns, and renews Members' determination to find appropriate solutions to outstanding issues. The Council instructs the Trade Negotiations Committee, negotiating bodies and other WTO bodies concerned to redouble their efforts to find appropriate solutions as a priority. Without prejudice to the positions of Members, the Council requests the Director-General to continue with his consultative process on all outstanding implementation issues under paragraph 12(b) of the Doha Ministerial Declaration, including on issues related to the extension of the protection of geographical indications provided for in Article 23 of the TRIPS Agreement to products other than wines and spirits, if need be by appointing Chairpersons of concerned WTO bodies as his Friends and/or by holding dedicated consultations. The Director-General shall report to the TNC and the General Council no later than May 2005. The Council shall review progress and take any appropriate action no later than July 2005.

Other Development Issues: in the ongoing market access negotiations, recognising the fundamental principles of the WTO and relevant provisions of GATT 1994, special attention shall be given to the specific trade and development related needs and concerns of developing countries, including capacity constraints. These particular concerns of developing countries, including relating to food security, rural development, livelihood, preferences, commodities and net food imports, as well as prior unilateral liberalisation, should be taken into consideration, as appropriate, in the course of the Agriculture and NAMA negotiations. The trade-related issues identified for the fuller integration of small, vulnerable economies into the multilateral trading

system, should also be addressed, without creating a sub-category of Members, as part of a work programme, as mandated in paragraph 35 of the Doha Ministerial Declaration.

Least-Developed Countries: the General Council reaffirms the commitments made at Doha concerning least-developed countries and renews its determination to fulfil these commitments. Members will continue to take due account of the concerns of least-developed countries in the negotiations. The Council confirms that nothing in this Decision shall detract in any way from the special provisions agreed by Members in respect of these countries.

e. **Services**: the General Council takes note of the report to the TNC by the Special Session of the Council for Trade in Services[1] and reaffirms Members' commitment to progress in this area of the negotiations in line with the Doha mandate. The Council adopts the recommendations agreed by the Special Session, set out in Annex C to this document, on the basis of which further progress in the services negotiations will be pursued. Revised offers should be tabled by May 2005.

(*footnote original*) [1] This report is contained in document TN/S/16.

f. Other negotiating bodies:

Rules, Trade & Environment and TRIPS: the General Council takes note of the reports to the TNC by the Negotiating Group on Rules and by the Special Sessions of the Committee on Trade and Environment and the TRIPS Council.[2] The Council reaffirms Members' commitment to progress in all of these areas of the negotiations in line with the Doha mandates.

(*footnote original*) [2] The reports to the TNC referenced in this paragraph are contained in the following documents: Negotiating Group on Rules – TN/RL/9; Special Session of the Committee on Trade and Environment – TN/TE/9; Special Session of the Council for TRIPS – TN/IP/10.

Dispute Settlement: the General Council takes note of the report to the TNC by the Special Session of the Dispute Settlement Body[3] and reaffirms Members' commitment to progress in this area of the negotiations in line with the Doha mandate. The Council adopts the TNC's recommendation that work in the Special Session should continue on the basis set out by the Chairman of that body in his report to the TNC.

(*footnote original*) [3] This report is contained in document TN/DS/10.

g. **Trade Facilitation**: taking note of the work done on trade facilitation by the Council for Trade in Goods under the mandate in paragraph 27 of the Doha Ministerial Declaration and the work carried out under the auspices of the General Council both prior to the Fifth Ministerial Conference and after its conclusion, the General Council decides by explicit consensus to commence negotiations on the basis of the modalities set out in Annex D to this document.

Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20–22, 23–25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.

h. **Other elements of the Work Programme**: the General Council reaffirms the high priority Ministers at Doha gave to those elements of the Work Programme which do not involve negotiations. Noting that a number of these issues are of particular interest to developing-country Members, the Council emphasizes its commitment to fulfil the mandates given by Ministers in all these areas. To this end, the General Council and other relevant bodies shall report in line with their Doha mandates to the Sixth Session of the Ministerial Conference. The moratoria covered by paragraph 11.1 of the Doha Ministerial Decision on Implementation-related Issues and Concerns and paragraph 34 of the Doha Ministerial Declaration are extended up to the Sixth Ministerial Conference.

2. The General Council agrees that this Decision and its Annexes shall not be used in any dispute settlement proceeding under the *DSU* and shall not be used for interpreting the existing WTO Agreements.

3. The General Council calls on all Members to redouble their efforts towards the conclusion of a balanced overall outcome of the Doha Development Agenda in fulfilment of the commitments Ministers took at Doha. The Council agrees to continue the negotiations launched at Doha beyond the timeframe set out in paragraph 45 of the Doha Declaration, leading to the Sixth Session of the Ministerial Conference. Recalling its decision of 21 October 2003 to accept the generous offer of the Government of Hong Kong, China to host the Sixth Session, the Council further agrees that this Session will be held in December 2005.

Annex A
Framework for Establishing Modalities in Agriculture

1. The starting point for the current phase of the agriculture negotiations has been the mandate set out in Paragraph 13 of the Doha Ministerial Declaration. This in turn built on the long-term objective of the Agreement

on Agriculture to establish a fair and market-oriented trading system through a programme of fundamental reform. The elements below offer the additional precision required at this stage of the negotiations and thus the basis for the negotiations of full modalities in the next phase. The level of ambition set by the Doha mandate will continue to be the basis for the negotiations on agriculture.

2. The final balance will be found only at the conclusion of these subsequent negotiations and within the Single Undertaking. To achieve this balance, the modalities to be developed will need to incorporate operationally effective and meaningful provisions for special and differential treatment for developing country Members. Agriculture is of critical importance to the economic development of developing country Members and they must be able to pursue agricultural policies that are supportive of their development goals, poverty reduction strategies, food security and livelihood concerns. Non-trade concerns, as referred to in Paragraph 13 of the Doha Declaration, will be taken into account.

3. The reforms in all three pillars form an interconnected whole and must be approached in a balanced and equitable manner.

4. The General Council recognizes the importance of cotton for a certain number of countries and its vital importance for developing countries, especially LDCs. It will be addressed ambitiously, expeditiously, and specifically, within the agriculture negotiations. The provisions of this framework provide a basis for this approach, as does the sectoral initiative on cotton. The Special Session of the Committee on Agriculture shall ensure appropriate prioritization of the cotton issue independently from other sectoral initiatives. A subcommittee on cotton will meet periodically and report to the Special Session of the Committee on Agriculture to review progress. Work shall encompass all trade-distorting policies affecting the sector in all three pillars of market access, domestic support, and export competition, as specified in the Doha text and this Framework text.

5. Coherence between trade and development aspects of the cotton issue will be pursued as set out in paragraph 1.b of the text to which this Framework is annexed.

DOMESTIC SUPPORT

6. The Doha Ministerial Declaration calls for "substantial reductions in trade-distorting domestic support". With a view to achieving these substantial reductions, the negotiations in this pillar will ensure the following:

- Special and differential treatment remains an integral component of domestic support. Modalities to be developed will include longer implementation periods and lower reduction coefficients for all types of trade-distorting domestic support and continued access to the provisions under Article 6.2.
- There will be a strong element of harmonisation in the reductions made by developed Members. Specifically, higher levels of permitted trade-distorting domestic support will be subject to deeper cuts.
- Each such Member will make a substantial reduction in the overall level of its trade-distorting support from bound levels.
- As well as this overall commitment, Final Bound Total AMS and permitted *de minimis* levels will be subject to substantial reductions and, in the case of the Blue Box, will be capped as specified in paragraph 15 in order to ensure results that are coherent with the long-term reform objective. Any clarification or development of rules and conditions to govern trade distorting support will take this into account.

Overall Reduction: A Tiered Formula

7. The overall base level of all trade-distorting domestic support, as measured by the Final Bound Total AMS plus permitted *de minimis* level and the level agreed in paragraph 8 below for Blue Box payments, will be reduced according to a tiered formula. Under this formula, Members having higher levels of trade-distorting domestic support will make greater overall reductions in order to achieve a harmonizing result. As the first instalment of the overall cut, in the first year and throughout the implementation period, the sum of all trade-distorting support will not exceed 80 per cent of the sum of Final Bound Total AMS plus permitted *de minimis* plus the Blue Box at the level determined in paragraph 15.

8. The following parameters will guide the further negotiation of this tiered formula:

- This commitment will apply as a minimum overall commitment. It will not be applied as a ceiling on reductions of overall trade-distorting domestic support, should the separate and complementary formulae to be developed for Total AMS, *de minimis* and Blue Box payments imply, when taken together, a deeper cut in overall trade-distorting domestic support for an individual Member.
- The base for measuring the Blue Box component will be the higher of existing Blue Box payments during a recent representative period to be agreed and the cap established in paragraph 15 below.

Final Bound Total AMS: A Tiered Formula

9. To achieve reductions with a harmonizing effect:

- Final Bound Total AMS will be reduced substantially, using a tiered approach.
- Members having higher Total AMS will make greater reductions.
- To prevent circumvention of the objective of the Agreement through transfers of unchanged domestic support between different support categories,

product-specific AMSs will be capped at their respective average levels according to a methodology to be agreed.

- Substantial reductions in Final Bound Total AMS will result in reductions of some product-specific support.

10. Members may make greater than formula reductions in order to achieve the required level of cut in overall trade-distorting domestic support.

De Minimis

11. Reductions in *de minimis* will be negotiated taking into account the principle of special and differential treatment. Developing countries that allocate almost all *de minimis* support for subsistence and resource-poor farmers will be exempt.

12. Members may make greater than formula reductions in order to achieve the required level of cut in overall trade-distorting domestic support.

Blue Box

13. Members recognize the role of the Blue Box in promoting agricultural reforms. In this light, Article 6.5 will be reviewed so that Members may have recourse to the following measures:

- Direct payments under production-limiting programmes if:
  - such payments are based on fixed and unchanging areas and yields; or
  - such payments are made on 85% or less of a fixed and unchanging base level of production; or
  - livestock payments are made on a fixed and unchanging number of head.

Or

- Direct payments that do not require production if:
  - such payments are based on fixed and unchanging bases and yields; or
  - livestock payments made on a fixed and unchanging number of head; and
  - such payments are made on 85% or less of a fixed and unchanging base level of production.

14. The above criteria, along with additional criteria will be negotiated. Any such criteria will ensure that Blue Box payments are less trade-distorting than AMS measures, it being understood that:

- Any new criteria would need to take account of the balance of WTO rights and obligations.
- Any new criteria to be agreed will not have the perverse effect of undoing ongoing reforms.

15. Blue Box support will not exceed 5% of a Member's average total value of agricultural production during an historical period. The historical period will be established in the negotiations. This ceiling will apply to any actual or potential Blue Box user from the beginning of the implementation period. In cases where a Member has placed an exceptionally large percentage of its trade-distorting support in the Blue Box, some flexibility will be provided on a basis to be agreed to ensure that such a Member is not called upon to make a wholly disproportionate cut.

Green Box

16. Green Box criteria will be reviewed and clarified with a view to ensuring that Green Box measures have no, or at most minimal, trade-distorting effects or effects on production. Such a review and clarification will need to ensure that the basic concepts, principles and effectiveness of the Green Box remain and take due account of non-trade concerns. The improved obligations for monitoring and surveillance of all new disciplines foreshadowed in paragraph 48 below will be particularly important with respect to the Green Box.

EXPORT COMPETITION

17. The Doha Ministerial Declaration calls for "reduction of, with a view to phasing out, all forms of export subsidies". As an outcome of the negotiations, Members agree to establish detailed modalities ensuring the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by a credible end date.

End Point

18. The following will be eliminated by the end date to be agreed:

- Export subsidies as scheduled.
- Export credits, export credit guarantees or insurance programmes with repayment periods beyond 180 days.
- Terms and conditions relating to export credits, export credit guarantees or insurance programmes with repayment periods of 180 days and below which are not in accordance with disciplines to be agreed. These disciplines will cover, *inter alia*, payment of interest, minimum interest rates, minimum premium requirements, and other elements which can constitute subsidies or otherwise distort trade.
- Trade distorting practices with respect to exporting STEs including eliminating export subsidies provided to or by them, government financing, and the underwriting of losses. The issue of the future use of monopoly powers will be subject to further negotiation.
- Provision of food aid that is not in conformity with operationally effective disciplines to be agreed. The objective of such disciplines will be to prevent commercial displacement. The role of international organizations as regards the provision of food aid by

Members, including related humanitarian and developmental issues, will be addressed in the negotiations. The question of providing food aid exclusively in fully grant form will also be addressed in the negotiations.

19. Effective transparency provisions for paragraph 18 will be established. Such provisions, in accordance with standard WTO practice, will be consistent with commercial confidentiality considerations.

Implementation

20. Commitments and disciplines in paragraph 18 will be implemented according to a schedule and modalities to be agreed. Commitments will be implemented by annual instalments. Their phasing will take into account the need for some coherence with internal reform steps of Members.

21. The negotiation of the elements in paragraph 18 and their implementation will ensure equivalent and parallel commitments by Members.

Special and Differential Treatment

22. Developing country Members will benefit from longer implementation periods for the phasing out of all forms of export subsidies.

23. Developing countries will continue to benefit from special and differential treatment under the provisions of Article 9.4 of the Agreement on Agriculture for a reasonable period, to be negotiated, after the phasing out of all forms of export subsidies and implementation of all disciplines identified above are completed.

24. Members will ensure that the disciplines on export credits, export credit guarantees or insurance programs to be agreed will make appropriate provision for differential treatment in favour of least-developed and net food-importing developing countries as provided for in paragraph 4 of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries. Improved obligations for monitoring and surveillance of all new disciplines as foreshadowed in paragraph 48 will be critically important in this regard. Provisions to be agreed in this respect must not undermine the commitments undertaken by Members under the obligations in paragraph 18 above.

25. STEs in developing country Members which enjoy special privileges to preserve domestic consumer price stability and to ensure food security will receive special consideration for maintaining monopoly status.

Special Circumstances

26. In exceptional circumstances, which cannot be adequately covered by food aid, commercial export credits or preferential international financing facilities, ad hoc temporary financing arrangements relating to exports to developing countries may be agreed by Members. Such agreements must not have the effect of undermining commitments undertaken by Members in paragraph 18 above, and will be based on criteria and consultation procedures to be established.

MARKET ACCESS

27. The Doha Ministerial Declaration calls for "substantial improvements in market access". Members also agreed that special and differential treatment for developing Members would be an integral part of all elements in the negotiations.

The Single Approach: a Tiered Formula

28. To ensure that a single approach for developed and developing country Members meets all the objectives of the Doha mandate, tariff reductions will be made through a tiered formula that takes into account their different tariff structures.

29. To ensure that such a formula will lead to substantial trade expansion, the following principles will guide its further negotiation:

- Tariff reductions will be made from bound rates. Substantial overall tariff reductions will be achieved as a final result from negotiations.
- Each Member (other than LDCs) will make a contribution. Operationally effective special and differential provisions for developing country Members will be an integral part of all elements.
- Progressivity in tariff reductions will be achieved through deeper cuts in higher tariffs with flexibilities for sensitive products. Substantial improvements in market access will be achieved for all products.

30. The number of bands, the thresholds for defining the bands and the type of tariff reduction in each band remain under negotiation. The role of a tariff cap in a tiered formula with distinct treatment for sensitive products will be further evaluated.

Sensitive Products

Selection

31. Without undermining the overall objective of the tiered approach, Members may designate an appropriate number, to be negotiated, of tariff lines to be treated as sensitive, taking account of existing commitments for these products.

Treatment

32. The principle of 'substantial improvement' will apply to each product.

33. 'Substantial improvement' will be achieved through combinations of tariff quota commitments and tariff reductions applying to each product. However, balance in this negotiation will be found only if the final negotiated result also reflects the sensitivity of the product concerned.

34. Some MFN-based tariff quota expansion will be required for all such products. A base for such an expansion will be established, taking account of coherent and equitable criteria to be developed in the negotiations. In order not to undermine the objective of the tiered approach, for all such products, MFN based tariff quota expansion will be provided under specific rules to be negotiated taking into account deviations from the tariff formula.

Other Elements

35. Other elements that will give the flexibility required to reach a final balanced result include reduction or elimination of in-quota tariff rates, and operationally effective improvements in tariff quota administration for existing tariff quotas so as to enable Members, and particularly developing country Members, to fully benefit from the market access opportunities under tariff rate quotas.

36. Tariff escalation will be addressed through a formula to be agreed.

37. The issue of tariff simplification remains under negotiation.

38. The question of the special agricultural safeguard (SSG) remains under negotiation.

Special and differential treatment

39. Having regard to their rural development, food security and/or livelihood security needs, special and differential treatment for developing countries will be an integral part of all elements of the negotiation, including the tariff reduction formula, the number and treatment of sensitive products, expansion of tariff rate quotas, and implementation period.

40. Proportionality will be achieved by requiring lesser tariff reduction commitments or tariff quota expansion commitments from developing country Members.

41. Developing country Members will have the flexibility to designate an appropriate number of products as Special Products, based on criteria of food security, livelihood security and rural development needs. These products will be eligible for more flexible treatment. The criteria and treatment of these products will be further specified during the negotiation phase and will recognize the fundamental importance of Special Products to developing countries.

42. A Special Safeguard Mechanism (SSM) will be established for use by developing country Members.

43. Full implementation of the long-standing commitment to achieve the fullest liberalisation of trade in tropical agricultural products and for products of particular importance to the diversification of production from the growing of illicit narcotic crops is overdue and will be addressed effectively in the market access negotiations.

44. The importance of long-standing preferences is fully recognised. The issue of preference erosion will be addressed. For the further consideration in this regard, paragraph 16 and other relevant provisions of TN/AG/W/1/Rev.1 will be used as a reference.

LEAST-DEVELOPED COUNTRIES

45. Least-Developed Countries, which will have full access to all special and differential treatment provisions above, are not required to undertake reduction commitments. Developed Members, and developing country Members in a position to do so, should provide duty-free and quota-free market access for products originating from least-developed countries.

46. Work on cotton under all the pillars will reflect the vital importance of this sector to certain LDC Members and we will work to achieve ambitious results expeditiously.

RECENTLY ACCEDED MEMBERS

47. The particular concerns of recently acceded Members will be effectively addressed through specific flexibility provisions.

MONITORING AND SURVEILLANCE

48. Article 18 of the Agreement on Agriculture will be amended with a view to enhancing monitoring so as to effectively ensure full transparency, including through timely and complete notifications with respect to the commitments in market access, domestic support and export competition. The particular concerns of developing countries in this regard will be addressed.

OTHER ISSUES

49. Issues of interest but not agreed: sectoral initiatives, differential export taxes, GIs.

50. Disciplines on export prohibitions and restrictions in Article 12.1 of the Agreement on Agriculture will be strengthened.

Annex B

Framework for Establishing Modalities in Market Access for Non-Agricultural Products

1. This Framework contains the initial elements for future work on modalities by the Negotiating Group on Market Access. Additional negotiations are required to reach agreement on the specifics of some of these elements. These relate to the formula, the issues concerning the treatment of unbound tariffs in indent two of paragraph 5, the flexibilities for developing-country participants, the issue of participation in the sectorial tariff component and the preferences. In order to finalize the modalities, the Negotiating Group is instructed to address these issues expeditiously in a manner consistent with the mandate of paragraph 16 of the Doha Ministerial Declaration and the overall balance therein.

2. We reaffirm that negotiations on market access for non-agricultural products shall aim to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. We also reaffirm the importance of special and differential treatment and less than full reciprocity in reduction commitments as integral parts of the modalities.

3. We acknowledge the substantial work undertaken by the Negotiating Group on Market Access and the progress towards achieving an agreement on negotiating modalities. We take note of the constructive dialogue on the Chair's Draft Elements of Modalities (TN/MA/W/35/Rev.1) and confirm our intention to use this document as a reference for the future work of the Negotiating Group. We instruct the Negotiating Group to continue its work, as mandated by paragraph 16 of the Doha Ministerial Declaration with its corresponding references to the relevant provisions of Article XXVIII bis of GATT 1994 and to the provisions cited in paragraph 50 of the Doha Ministerial Declaration, on the basis set out below.

4. We recognize that a formula approach is key to reducing tariffs, and reducing or eliminating tariff peaks, high tariffs, and tariff escalation. We agree that the Negotiating Group should continue its work on a non-linear formula applied on a line-by-line basis which shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments.

5. We further agree on the following elements regarding the formula:

- product coverage shall be comprehensive without *a priori* exclusions;
- tariff reductions or elimination shall commence from the bound rates after full implementation of current concessions; however, for unbound tariff lines, the basis for commencing the tariff reductions shall be [two] times the MFN applied rate in the base year;
- the base year for MFN applied tariff rates shall be 2001 (applicable rates on 14 November);
- credit shall be given for autonomous liberalization by developing countries provided that the tariff lines were bound on an MFN basis in the WTO since the conclusion of the Uruguay Round;
- all non-*ad valorem* duties shall be converted to *ad valorem* equivalents on the basis of a methodology to be determined and bound in *ad valorem* terms;
- negotiations shall commence on the basis of the HS96 or HS2002 nomenclature, with the results of the negotiations to be finalized in HS2002 nomenclature;
- the reference period for import data shall be 1999–2001.

6. We furthermore agree that, as an exception, participants with a binding coverage of non-agricultural tariff lines of less than [35] percent would be exempt from making tariff reductions through the formula. Instead, we expect them to bind [100] percent of non-agricultural tariff lines at an average level that does not exceed the overall average of bound tariffs for all developing countries after full implementation of current concessions.

7. We recognize that a sectorial tariff component, aiming at elimination or harmonization is another key element to achieving the objectives of paragraph 16 of the Doha Ministerial Declaration with regard to the reduction or elimination of tariffs, in particular on products of export interest to developing countries. We recognize that participation by all participants will be important to that effect. We therefore instruct the Negotiating Group to pursue its discussions on such a component, with a view to defining product coverage, participation, and adequate provisions of flexibility for developing-country participants.

8. We agree that developing-country participants shall have longer implementation periods for tariff reductions. In addition, they shall be given the following flexibility:

a) applying less than formula cuts to up to [10] percent of the tariff lines provided that the cuts are no less than half the formula cuts and that these tariff lines do not exceed [10] percent of the total value of a Member's imports; or

b) keeping, as an exception, tariff lines unbound, or not applying formula cuts for up to [5] percent of tariff lines provided they do not exceed [5] percent of the total value of a Member's imports.

We furthermore agree that this flexibility could not be used to exclude entire HS Chapters.

9. We agree that least-developed country participants shall not be required to apply the formula nor participate in the sectorial approach, however, as part of their contribution to this round of negotiations, they are expected to substantially increase their level of binding commitments.

10. Furthermore, in recognition of the need to enhance the integration of least-developed countries into the multilateral trading system and support the diversification of their production and export base, we call upon developed-country participants and other participants who so decide, to grant on an autonomous basis duty-free and quota-free market access for non-agricultural

products originating from least-developed countries by the year [. . .].

11. We recognize that newly acceded Members shall have recourse to special provisions for tariff reductions in order to take into account their extensive market access commitments undertaken as part of their accession and that staged tariff reductions are still being implemented in many cases. We instruct the Negotiating Group to further elaborate on such provisions.

12. We agree that pending agreement on core modalities for tariffs, the possibilities of supplementary modalities such as zero-for-zero sector elimination, sectorial harmonization, and request & offer, should be kept open.

13. In addition, we ask developed-country participants and other participants who so decide to consider the elimination of low duties.

14. We recognize that NTBs are an integral and equally important part of these negotiations and instruct participants to intensify their work on NTBs. In particular, we encourage all participants to make notifications on NTBs by 31 October 2004 and to proceed with identification, examination, categorization, and ultimately negotiations on NTBs. We take note that the modalities for addressing NTBs in these negotiations could include request/offer, horizontal, or vertical approaches; and should fully take into account the principle of special and differential treatment for developing and least-developed country participants.

15. We recognize that appropriate studies and capacity building measures shall be an integral part of the modalities to be agreed. We also recognize the work that has already been undertaken in these areas and ask participants to continue to identify such issues to improve participation in the negotiations.

16. We recognize the challenges that may be faced by non-reciprocal preference beneficiary Members and those Members that are at present highly dependent on tariff revenue as a result of these negotiations on non-agricultural products. We instruct the Negotiating Group to take into consideration, in the course of its work, the particular needs that may arise for the Members concerned.

17. We furthermore encourage the Negotiating Group to work closely with the Committee on Trade and Environment in Special Session with a view to addressing the issue of non-agricultural environmental goods covered in paragraph 31 (iii) of the Doha Ministerial Declaration.

Annex C
Recommendations of the Special Session of the Council for Trade in Services

(a) Members who have not yet submitted their initial offers must do so as soon as possible.

(b) A date for the submission of a round of revised offers should be established as soon as feasible.

(c) With a view to providing effective market access to all Members and in order to ensure a substantive outcome, Members shall strive to ensure a high quality of offers, particularly in sectors and modes of supply of export interest to developing countries, with special attention to be given to least-developed countries.

(d) Members shall aim to achieve progressively higher levels of liberalization with no a priori exclusion of any service sector or mode of supply and shall give special attention to sectors and modes of supply of export interest to developing countries. Members note the interest of developing countries, as well as other Members, in Mode 4.

(e) Members must intensify their efforts to conclude the negotiations on rule-making under GATS Articles VI:4, X, XIII and XV in accordance with their respective mandates and deadlines.

(f) Targeted technical assistance should be provided with a view to enabling developing countries to participate effectively in the negotiations.

(g) For the purpose of the Sixth Ministerial meeting, the Special Session of the Council for Trade in Services shall review progress in these negotiations and provide a full report to the Trade Negotiations Committee, including possible recommendations.

Annex D
Modalities for Negotiations on Trade Facilitation

1. Negotiations shall aim to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit.[1] Negotiations shall also aim at enhancing technical assistance and support for capacity building in this area. The negotiations shall further aim at provisions for effective cooperation between customs or any other appropriate authorities on trade facilitation and customs compliance issues.

(*footnote original*) [1] It is understood that this is without prejudice to the possible format of the final result of the negotiations and would allow consideration of various forms of outcomes.

2. The results of the negotiations shall take fully into account the principle of special and differential treatment for developing and least-developed countries. Members recognize that this principle should extend beyond the granting of traditional transition periods for implementing commitments. In particular, the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least-developed Members. It is further agreed that those Members would not be obliged to undertake

investments in infrastructure projects beyond their means.

3. Least-developed country Members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

4. As an integral part of the negotiations, Members shall seek to identify their trade facilitation needs and priorities, particularly those of developing and least-developed countries, and shall also address the concerns of developing and least-developed countries related to cost implications of proposed measures.

5. It is recognized that the provision of technical assistance and support for capacity building is vital for developing and least-developed countries to enable them to fully participate in and benefit from the negotiations. Members, in particular developed countries, therefore commit themselves to adequately ensure such support and assistance during the negotiations.[2]

(*footnote original*) [2] In connection with this paragraph, Members note that paragraph 38 of the Doha Ministerial Declaration addresses relevant technical assistance and capacity building concerns of Members.

6. Support and assistance should also be provided to help developing and least-developed countries implement the commitments resulting from the negotiations, in accordance with their nature and scope. In this context, it is recognized that negotiations could lead to certain commitments whose implementation would require support for infrastructure development on the part of some Members. In these limited cases, developed-country Members will make every effort to ensure support and assistance directly related to the nature and scope of the commitments in order to allow implementation. It is understood, however, that in cases where required support and assistance for such infrastructure is not forthcoming, and where a developing or least-developed Member continues to lack the necessary capacity, implementation will not be required. While every effort will be made to ensure the necessary support and assistance, it is understood that the commitments by developed countries to provide such support are not open-ended.

7. Members agree to review the effectiveness of the support and assistance provided and its ability to support the implementation of the results of the negotiations.

8. In order to make technical assistance and capacity building more effective and operational and to ensure better coherence, Members shall invite relevant international organizations, including the IMF, OECD, UNCTAD, WCO and the World Bank to undertake a collaborative effort in this regard.

9. Due account shall be taken of the relevant work of the WCO and other relevant international organizations in this area.

10. Paragraphs 45–51 of the Doha Ministerial Declaration shall apply to these negotiations. At its first meeting after the July session of the General Council, the Trade Negotiations Committee shall establish a Negotiating Group on Trade Facilitation and appoint its Chair. The first meeting of the Negotiating Group shall agree on a work plan and schedule of meetings.

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I. GENERAL INTERPRETATIVE NOTE TO ANNEX 1A

A. TEXT OF GENERAL INTERPRETATIVE NOTE TO ANNEX 1A

General Interpretative Note to Annex 1A

In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "*WTO Agreement*"), the provision of the other agreement shall prevail to the extent of the conflict.

B. INTERPRETATION AND APPLICATION OF GENERAL INTERPRETATIVE NOTE TO ANNEX 1A

1. General

(a) Presumption against conflict

1. In *EC – Bananas III*, given the existence of claims raised under *GATT 1994*, the *Licensing Agreement* and the *TRIMs Agreement*, the Panel was required to consider the interpretative interrelationship of these three agreements. In so doing, it first referred to the *General Interpretative Note to Annex 1A* of the *WTO Agreement*, which provides that in the event of conflict between a provision of the *GATT 1994* and another Agreement of Annex 1A, the provision of the other Agreement prevails. Noting that both the *Licensing Agreement* and the *TRIMs Agreement* are agreements in Annex 1A to *WTO Agreement*, the Panel, in a finding not reviewed by the Appellate Body, concluded that, in the case before it, "no conflicting, i.e. mutually exclusive, obligations arise from the provisions of the three Agreements . . .".[1]

(b) Issue of lex specialis/conflict

2. In *Indonesia – Autos*, Indonesia argued that the measures under examination were subsidies and therefore the *SCM Agreement*, being *lex specialis*, was the only "applicable law" (to the exclusion of other WTO provisions). The Panel recalled that a presumption against conflict existed in public international law:

> "We recall the Panel's finding in *Indonesia – Autos*, a dispute where
>
> > 'In considering Indonesia's defence that there is a general conflict between the provisions of the SCM Agreement and those of Article III of GATT, and consequently that the SCM Agreement is the only applicable law, we recall first that in public international law there is a presumption against conflict. This presumption is especially relevant in the WTO context[2] since all *WTO Agreement*s, including GATT 1994 which was modified by Understandings when judged necessary, were negotiated at the same time, by the same Members and in the same forum. In this context we recall the principle of effective interpretation pursuant to which all provisions of a treaty (and in the WTO system all agreements) must be given meaning, using the ordinary meaning of words'."[3]

3. As regards the order of analysis where two or more provisions from different covered Agreements appear *a priori* to the measure in question, see Section XXXVI.A.1 of the Chapter on the *DSU*.

4. As regards conflicts between provisions of the *GATT 1994* and provisions of other agreements in Annex IA, see relevant Chapters in the WTO Analytical Index.

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[1] Panel Report on *EC – Bananas III*, paras. 7.157–7.163.

[2] (*footnote original*) In this context we note that the WTO Agreement contains a specific rule on conflicts which is however limited to conflicts between a specific provision of GATT 1994 and a provision of another agreement of Annex 1A. We do not consider this interpretative note in this section of the report because we are dealing with Indonesia's argument that there is a general conflict between Article III and the SCM Agreement, while the note is concerned with specific conflicts between a provision of GATT 1994 and a specific provision of another agreement of Annex 1A.

[3] Panel Report on *Indonesia – Autos*, para. 14.28. See also Panel Report on *Turkey – Textiles*, paras. 9.92–9.95.

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I. GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

A. TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

1. The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of:

   (a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement;

   (b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:

   (i) protocols and certifications relating to tariff concessions;

   (ii) protocols of accession (excluding the provisions (*a*) concerning provisional application and withdrawal of provisional application and (*b*) providing that Part II of GATT 1947 shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol);

   (iii) decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement[1];

(*footnote original*) [1] The waivers covered by this provision are listed in footnote 7 on pages 11 and 12 in Part II of document MTN/FA of 15 December 1993 and in MTN/FA/Corr.6 of 21 March 1994.[1] The Ministerial Conference shall establish at its first session a revised list of waivers covered by this provision that adds any waivers granted under GATT 1947 after 15 December 1993 and before the date of entry into force of the WTO Agreement, and deletes the waivers which will have expired by that time.

   (iv) other decisions of the CONTRACTING PARTIES to GATT 1947;

   (c) the Understandings set forth below:

   (i) Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994;

   (ii) Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994;

   (iii) Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994;

   (iv) Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994;

   (v) Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994;

   (vi) Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994; and

   (d) the Marrakesh Protocol to GATT 1994.

2. *Explanatory Notes*

   (a) The references to "contracting party" in the provisions of GATT 1994 shall be deemed to read "Member". The references to "less-developed contracting party" and "developed contracting party" shall be deemed to read "developing country Member" and "developed country Member". The references to "Executive Secretary" shall be deemed to read "Director-General of the WTO".

   (b) The references to the CONTRACTING PARTIES acting jointly in Articles XV:1, XV:2, XV:8, XXXVIII and the Notes *Ad* Article XII and XVIII; and in the provisions on special exchange agreements in Articles XV:2, XV:3, XV:6, XV:7 and XV:9 of GATT 1994 shall be deemed to be references to the WTO. The other functions that the provisions of GATT 1994 assign to the CONTRACTING PARTIES acting jointly shall be allocated by the Ministerial Conference.

   (c) (i) The text of GATT 1994 shall be authentic in English, French and Spanish.

   (ii) The text of GATT 1994 in the French language shall be subject to the rectifications of terms indicated in Annex A to document MTN.TNC/41.

   (iii) The authentic text of GATT 1994 in the Spanish language shall be the text in Volume IV of the Basic Instruments and Selected

[1] By Procés-Verbal of rectification the correct date of document MTN/FA/Corr.6 was noted as 18 March 1994.

Documents series, subject to the rectifications of terms indicated in Annex B to document MTN.TNC/41.

3. (a) The provisions of Part II of GATT 1994 shall not apply to measures taken by a Member under specific mandatory legislation, enacted by that Member before it became a contracting party to GATT 1947, that prohibits the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone. This exemption applies to: (*a*) the continuation or prompt renewal of a non-conforming provision of such legislation; and (*b*) the amendment to a non-conforming provision of such legislation to the extent that the amendment does not decrease the conformity of the provision with Part II of GATT 1947. This exemption is limited to measures taken under legislation described above that is notified and specified prior to the date of entry into force of the WTO Agreement. If such legislation is subsequently modified to decrease its conformity with Part II of GATT 1994, it will no longer qualify for coverage under this paragraph.

(b) The Ministerial Conference shall review this exemption not later than five years after the date of entry into force of the WTO Agreement and thereafter every two years for as long as the exemption is in force for the purpose of examining whether the conditions which created the need for the exemption still prevail.

(c) A Member whose measures are covered by this exemption shall annually submit a detailed statistical notification consisting of a five-year moving average of actual and expected deliveries of relevant vessels as well as additional information on the use, sale, lease or repair of relevant vessels covered by this exemption.

(d) A Member that considers that this exemption operates in such a manner as to justify a reciprocal and proportionate limitation on the use, sale, lease or repair of vessels constructed in the territory of the Member invoking the exemption shall be free to introduce such a limitation subject to prior notification to the Ministerial Conference.

(e) This exemption is without prejudice to solutions concerning specific aspects of the legislation covered by this exemption negotiated in sectoral agreements or in other fora.

B. INTERPRETATION AND APPLICATION OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

1. Paragraph 1

(a) Paragraph 1(b)

(i) Item (iv) – "other decisions of the CONTRACTING PARTIES to GATT 1947"

1. In *Japan – Alcoholic Beverages II*, the Appellate Body referred to paragraph 1(b)(iv) in examining the legal effect of the panel reports adopted by the CONTRACTING PARTIES to GATT 1947. The Appellate Body stated:

> "Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement* bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 – and acknowledges the continuing relevance of that experience to the new trading system served by the WTO. Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[2] In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*.
>
> [W]e do not agree with the Panel's conclusion in the same paragraph of the Panel Report that adopted panel reports in themselves constitute 'other decisions of the CONTRACTING PARTIES to GATT 1947' for the purposes of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*."[3]

2. In *EC – Poultry*, the Appellate Body found that the Oilseeds Agreement, concluded between Brazil and the European Communities was not one of the legal instruments enumerated in paragraph 1(b). In the words of the Appellate Body:

---

[2] (*footnote original*) It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.

[3] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 14. In *India – Patents (US)*, the Appellate Body acknowledged the first of the paragraphs cited above. Appellate Body Report on *India – Patents (US)*, para. 50. Also, in *US – FSC*, the Appellate Body endorsed the second paragraph. Appellate Body Report on *US – FSC*, para. 108.

"The Oilseeds Agreement [. . .] is a bilateral agreement negotiated by the European Communities and Brazil under Article XXVIII of the GATT 1947, as part of the resolution of the dispute in *EEC – Oilseeds.*[4] As such, the Oilseeds Agreement is not a 'covered agreement' within the meaning of Articles 1 and 2 of the DSU. Nor is the Oilseeds Agreement part of the multilateral obligations accepted by Brazil and the European Communities pursuant to the *WTO Agreement*, which came into effect on 1 January 1995. The Oilseeds Agreement is not cited in any Annex to the *WTO Agreement*. Although the provisions of certain legal instruments that entered into force under the GATT 1947 were made part of the GATT 1994 pursuant to the language in Annex 1A incorporating the GATT 1994 into the *WTO Agreement*[5], the Oilseeds Agreement is not one of those legal instruments."[6]

3. In *Argentina – Footwear (EC)*, the Appellate Body explained with precision that the GATT 1947 is an integral part of GATT 1994. The Appellate Body held:

"We note that the GATT 1994 is the first agreement that appears in Annex 1A to the *WTO Agreement*, and that it consists of: the provisions of the GATT 1947, as rectified, amended or modified by the terms of legal instruments that entered into force before the entry into force of the *WTO Agreement*; the provisions of certain legal instruments, such as protocols and certifications, decisions on waivers and other decisions of the CONTRACTING PARTIES to the GATT 1947, that entered into force under the GATT 1947 before the entry into force of the *WTO Agreement*; certain Uruguay Round Understandings relating to specific GATT articles; and the Marrakesh Protocol to the GATT 1994 containing Members' Schedules of Concessions."[7]

4. In *Korea – Dairy*, the same conclusion was reiterated with regard to the incorporation of GATT 1947 in the GATT 1994. The Appellate Body stated:

"The GATT 1994 consists of: (a) the provisions of the GATT 1947, as rectified, amended or modified before the entry into force of the *WTO Agreement*; (b) provisions of certain other legal instruments which entered into force under the GATT 1947 and before the date of entry into force of the *WTO Agreement*; (c) a number of Uruguay Round Understandings on the interpretation of certain GATT articles; and (d) the Marrakesh Protocol to GATT 1994."[8]

5. In *US – FSC*, the Appellate Body, in examining whether a certain decision of the GATT 1947 Council to adopt panel reports constituted "other decision" within the meaning of paragraph 1(b)(iv), agreed on the Panel's decision to examine not only the text of the decision but also "the circumstances surrounding the [decision]."[9]

6. In *EC – Tariff Preferences*, the Appellate Body held that the Enabling Clause is one of the "other decisions of the CONTRACTING PARTIES" within the meaning of paragraph 1(b)(iv). On that basis the Appellate Body found that the Enabling Clause is "an integral part of the GATT 1994."[10]

(b) Relationship with Article XVI:1 of the WTO Agreement

7. With respect to the relationship between Article XVI:1 of the *WTO Agreement* and paragraph 1(b), see Chapter on the *WTO Agreement*, Section XVII.B.1(g)(i).

PART I

II. ARTICLE I

A. TEXT OF ARTICLE I

Article I
General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

(*a*) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;

(*b*) Preferences in force exclusively between two or more territories which on July 1, 1939, were

[4] (*footnote original*) Adopted 25 January 1990, BISD 37S/86; and DS28/R, 31 March 1992.
[5] (*footnote original*) Those legal instruments are described in paragraph 1(b) of that incorporating language as including certain protocols and certifications relating to tariff concessions, certain protocols of accession, certain decisions on waivers granted under Article XXV of the GATT 1947, and "other decisions of the CONTRACTING PARTIES to GATT 1947".
[6] Appellate Body Report on *EC – Poultry*, para 79.
[7] Appellate Body Report on *Argentina – Footwear (EC)*, para. 80.
[8] Appellate Body Report on *Korea – Dairy*, para 75.
[9] Appellate Body Report on *US – FSC*, para. 111.
[10] Appellate Body Report on *EC – Tariff Preferences*, para 90.
* For the convenience of the reader, asterisks mark the portions of the text which should be read in conjunction with notes and supplementary provisions.

connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;

(*c*) Preferences in force exclusively between the United States of America and the Republic of Cuba;

(*d*) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such preferences are approved under paragraph 5[1], of Article XXV which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

(*footnote original*) [1] The authentic text erroneously reads "subparagraph 5 (a)".

4. The margin of preference* on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

(*a*) in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, 1947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on April 10, 1947;

(*b*) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favoured-nation and preferential rates existing on April 10, 1947.

In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in subparagraph (*a*) and (*b*) of this paragraph shall be replaced by the respective dates set forth in that Annex.

B. TEXT OF *AD* ARTICLE I

Ad Article I
Paragraph 1

The obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III and those incorporated in paragraph 2 *(b)* of Article II by reference to Article VI shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application.

The cross-references, in the paragraph immediately above and in paragraph 1 of Article I, to paragraphs 2 and 4 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.[1]

(*footnote original*) [1] This Protocol entered into force on 14 December 1948.

Paragraph 4

The term "margin of preference" means the absolute difference between the most-favoured-nation rate of duty and the preferential rate of duty for the like product, and not the proportionate relation between those rates. As examples:

(1) If the most-favoured-nation rate were 36 per cent *ad valorem* and the preferential rate were 24 per cent *ad valorem*, the margin of preference would be 12 per cent *ad valorem*, and not one-third of the most-favoured-nation rate;

(2) If the most-favoured-nation rate were 36 per cent *ad valorem* and the preferential rate were expressed as two-thirds of the most-favoured-nation rate, the margin of preference would be 12 per cent *ad valorem*;

(3) If the most-favoured-nation rate were 2 francs per kilogramme and the preferential rate were 1.50 francs per kilogramme, the margin of preference would be 0.50 franc per kilogramme.

The following kinds of customs action, taken in accordance with established uniform procedures, would not be contrary to a general binding of margins of preference:

(i) The re-application to an imported product of a tariff classification or rate of duty, properly applicable to such product, in cases in which the application of such classification or rate to such product was temporarily suspended or inoperative on April 10, 1947; and

(ii) The classification of a particular product under a tariff item other than that under which importations of that product were classified on April 10, 1947, in cases in which the tariff law clearly contemplates that such product may be classified under more than one tariff item.

C. INTERPRETATION AND APPLICATION OF ARTICLE I

1. Article I:1

(a) General

(i) Object and purpose

8. In *Canada – Autos*, in support of its interpretation of Article I:1, the Appellate Body explained the object and purpose of Article I:1 as follows:

"Th[e] object and purpose [of Article I] is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis."[11]

9. In *EC – Bananas III*, in support of the proposition that Article II of *GATS* prohibits *de facto* discrimination as well as *de jure* discrimination, the Appellate Body noted that in past practice, *GATT* Article I applied to de facto discrimination. See Chapter on the *GATS*, Section III.B.3(a).

(ii) Scope of application

10. In *Canada – Autos*, the Appellate Body reviewed the Panel's finding that the Canadian import duty exemptions granted to motor vehicles originating in certain countries were inconsistent with Article I:1. The Appellate Body found the prohibition of discrimination under Article I:1 to include both *de jure* and de facto discrimination:

"In approaching this question, we observe first that the words of Article I:1 do not restrict its scope only to cases in which the failure to accord an 'advantage' to like products of all other Members appears *on the face* of the measure, or can be demonstrated on the basis of the words of the measure. Neither the words '*de jure*' nor 'de facto' appear in Article I:1. Nevertheless, we observe that Article I:1 does not cover only 'in law', or *de jure*, discrimination. As several GATT panel reports confirmed, Article I:1 covers also 'in fact', or de facto, discrimination.[12] Like the Panel, we cannot accept Canada's argument that Article I:1 does not apply to measures which, on their face, are 'origin-neutral'."[13]

(iii) Order of examination

11. In *Indonesia – Autos*, the Panel explained how to carry out the examination of a measure under Article I:1:

"The Appellate Body, in *Bananas III*, confirmed that to establish a violation of Article I, there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all 'like products' of all WTO Members. Following this analysis, we shall first examine whether the tax and customs duty benefits are advantages of the types covered by Article I. Second, we shall decide whether the advantages are offered (i) to all like products and (ii) unconditionally."[14]

(b) "any advantage, favour, privilege or immunity granted by any Member"

(i) General

12. In *Canada – Autos*, the Appellate Body came to the conclusion that Canada's import duty exemption accorded to motor vehicles originating in some countries in which affiliates of certain designated manufacturers were present, was inconsistent with Article I:1. The Appellate Body touched on the term "any advantage . . . granted by any Member to any product":

"We note next that Article I:1 requires that '*any advantage*, favour, privilege or immunity granted by any Member to *any product* originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of *all other Members*.' (emphasis added) The words of Article I:1 refer not to *some* advantages granted 'with respect to' the subjects that fall within the defined scope of the Article, but to '*any advantage*'; not to *some* products, but to '*any product*'; and not to like products from *some* other Members, but to like products originating in or destined for '*all other*' Members."[15]

(ii) Allocation of tariff quotas

13. In *EC – Bananas III*, the European Communities appealed the Panel's finding on the ground that the Panel erred in concluding that the European Communities violated Article I:1 by maintaining the so-called activity function rules. Under these rules, importers of bananas from certain countries qualified for allocation of the tariff quota only if they fulfilled requirements which differed from those imposed on importers of bananas from other countries. The Appellate Body stated:

"On the first issue, the Panel found that the procedural and administrative requirements of the activity function rules for importing third-country and non-traditional ACP bananas differ from, and go significantly beyond,

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[11] Appellate Body Report on *Canada – Autos*, para. 84.

[12] (*footnote original*) We note, though, that the measures examined in those reports differed from the measure in this case. Two of those reports dealt with "like" product issues: Panel Report on *Spain – Unroasted Coffee*; Panel Report on *Japan – SPF Dimension Lumber*. In this case, as we have noted, there is no dispute that the motor vehicles subject to the import duty exemption are "like" products. Furthermore, two other reports dealt with measures which, on their face, discriminated on a strict "origin" basis, so that, at any given time, either *every* product, or *no* product, of a particular origin was accorded an advantage. See Panel Report on *Belgium – Family Allowances*; Panel Report on *EEC – Imports of Beef*. In this case, motor vehicles imported into Canada are not disadvantaged in that same sense.

[13] Appellate Body Report on *Canada – Autos*, para. 78.

[14] Panel Report on *Indonesia – Autos*, para. 14.138. In *EC – Bananas III*, the Appellate Body stated as follows:

". . . Also, a broad definition has been given to the term "advantage" in Article I:1 of the GATT 1994 by the panel in *United States – Non-Rubber Footwear*. It may well be that there are considerations of EC competition policy at the basis of the activity function rules. This, however, does not legitimize the activity function rules to the extent that these rules discriminate among like products originating from different Members." See Appellate Body Report on *EC – Bananas III*, para. 206.

[15] Appellate Body Report on *Canada – Autos*, para. 79.

those required for importing traditional ACP bananas. This is a factual finding. Also, a broad definition has been given to the term 'advantage' in Article I:1 of the GATT 1994 by the panel in *United States – Non-Rubber Footwear*. It may well be that there are considerations of EC competition policy at the basis of the activity function rules. This, however, does not legitimize the activity function rules to the extent that these rules discriminate among like products originating from different Members. For these reasons, we agree with the Panel that the activity function rules are an 'advantage' granted to bananas imported from traditional ACP States, and not to bananas imported from other Members, within the meaning of Article I:1. Therefore, we uphold the Panel's finding that the activity function rules are inconsistent with Article I:1 of the GATT 1994."[16]

(iii) Reference to GATT practice

14. With respect to the practice under GATT 1947 concerning the term "any advantage, favour, privilege or immunity granted by any contracting party", see GATT Analytical Index, page 31.

(c) "like products"

15. In *Indonesia – Autos*, examining the consistency of the Indonesian National Car Programme with Article I:1, the Panel compared the concepts of "like products" under Articles I and III:

"We have found in our discussion of like products under Article III:2 that certain imported motor vehicles are like the National Car. The same considerations justify a finding that such imported vehicles can be considered like National Cars imported from Korea for the purpose of Article I."[17]

16. For the treatment of this subject-matter under GATT 1947, see GATT Analytical Index, pages 35–40.

(d) "any product originating in or destined for an other country"

17. In *EC – Bananas III*, the Appellate Body reviewed the Panel's finding that the EC import regime for bananas was inconsistent with Article XIII in that the European Communities allocated tariff quota shares to some Members without allocating such shares to other Members. Pointing out that "there [were] two separate EC import regimes for bananas, the preferential regime for traditional ACP bananas and the erga omnes regime for all other imports of bananas", the European Communities appealed that "the non-discrimination obligations of Article I:1, X:3(a) and XIII of GATT 1994 and Article 1.3 of the *Licensing Agreement* apply only *within* each of these separate regimes."[18] The Appellate Body responded as follows:

"The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to *all* imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only *within* regulatory regimes established by that Member."[19]

(e) "shall be accorded immediately and unconditionally"

(i) General

18. In *Indonesia – Autos*, the Panel found that the exemption of import duties and sales taxes to those automobiles which met certain origin-neutral requirements was inconsistent with Article I:1, because of the existence of a number of "conditions":

"Indeed, it appears that the design and structure of the June 1996 car programme is such as to allow situations where another Member's like product to a National Car imported by PT PTN from Korea will be subject to much higher duties and sales taxes than those imposed on such National Cars. . . . The distinction as to whether one product is subject to 0% duty and the other one is subject to 200% duty or whether one product is subject to 0% sales tax and the other one is subject to a 35% sales tax, depends on whether or not PT TPN had made a 'deal' with that exporting company to produce that National Car, and is covered by the authorization of June 1996 with specifications that correspond to those of the Kia car produced only in Korea. In the GATT/WTO, the right of Members cannot be made dependent upon, conditional on or even affected by, any private contractual obligations in place.[20] The existence of these condi-

[16] Appellate Body Report on *EC – Bananas III*, para. 206.
[17] Panel Report on *Indonesia – Autos*, para. 14.141.
[18] Appellate Body Report on *EC – Bananas III*, para. 189.
[19] Appellate Body Report on *EC – Bananas III*, para. 190.
[20] (*footnote original*) For instance in the *FIRA* case, the Panel rejected Canada's argument that the situation under examination was the consequence of a private contract with an investor: "5.6 The Panel carefully examined the Canadian view that the purchase undertakings should be considered as private contractual obligations of particular foreign investors vis-à-vis the Canadian government. The Panel recognized that investors might have an economic advantage in assuming purchase undertakings, taking into account the other conditions under which the investment was permitted. The Panel felt, however, that even if this were so, private contractual obligations entered into by investors should not adversely affect the rights which contracting parties, including contracting parties not involved in the dispute, possess under Article III:4 of the General Agreement and which they can exercise on behalf of their exporters." See Panel Report on *Canada – FIRA*, para. 5.6.

tions is inconsistent with the provisions of Article I:1 which provides that tax and customs duty benefits accorded to products of one Member (here on Korean products) be accorded to imported like products from other Members 'immediately and unconditionally'.[21]

We note also that under the February 1996 car programme the granting of customs duty benefits to parts and components is conditional to their being used in the assembly in Indonesia of a National Car. The granting of tax benefits is conditional and limited to the only Pioneer company producing National Cars. And there is also a third condition for these benefits: the meeting of certain local content targets. Indeed under all these car programmes, customs duty and tax benefits are conditional on achieving a certain local content value for the finished car. The existence of these conditions is inconsistent with the provisions of Article I:1 which provides that tax and customs duty advantages accorded to products of one Member (here on Korean products) be accorded to imported like products from other Members 'immediately and unconditionally'.

For the reasons discussed above, we consider that the June 1996 car programme which introduced discrimination between imports in the allocation of tax and customs duty benefits based on various conditions and other criteria not related to the imports themselves and the February 1996 car programme which also introduce discrimination between imports in the allocation of customs duty benefits based on various conditions and other criteria not related to the imports themselves, are inconsistent with the provisions of Article I of GATT."[22]

19. In *Canada – Autos*, the Canadian measure at issue was an exemption of import duties granted on certain motor vehicles. The exemption was granted only where an exporter of motor vehicles was affiliated with a manufacturer/importer in Canada that had been designated, contingent on compliance with other requirements which were also claimed to be inconsistent with WTO law, as eligible to import motor vehicles duty-free under the Motor Vehicle Tariff Order (MVTO) 1998 or under a so-called Special Remission Order (SRO). In practice, exporters of motor vehicles affiliated with a manufacturer/importer in Canada were located in a small number of countries. The Panel had found the Canadian measure to be inconsistent with Article I:1. On appeal, the Appellate Body first discussed the concepts of *de jure* and de facto discrimination under Article I:1 (see paragraph 10 above) and then held that, by granting an advantage to some products from some Members and not to others, the measure in question was inconsistent with Article I:1:

"[F]rom both the text of the measure and the Panel's conclusions about the practical operation of the measure, it is apparent to us that '[w]ith respect to customs duties . . . imposed on or in connection with importation . . .,' Canada has granted an 'advantage' to some products from some Members that Canada has not 'accorded immediately and unconditionally' to 'like' products 'originating in or destined for the territories of *all other Members*.' (emphasis added) And this, we conclude, is not consistent with Canada's obligations under Article I:1 of the GATT 1994.[23]

20. The Appellate Body on *Canada – Autos* added that the context and the "pervasive character" of the MFN principle supported its finding:

"The context of Article I:1 within the GATT 1994 supports this conclusion. Apart from Article I:1, several 'MFN-type' clauses dealing with varied matters are contained in the GATT 1994.[24] The very existence of these other clauses demonstrates the pervasive character of the MFN principle of non-discrimination."[25].

21. In the *Canada – Autos* dispute, the Panel further clarified the meaning of the term "unconditionally". With respect to this term, Japan argued that, by making the import duty exemption conditional upon criteria unrelated to the imported product itself, Canada failed to accord the import duty exemption immediately and unconditionally to like products originating in all WTO Members. By "criteria unrelated to the imported products themselves," Japan was referring to the various conditions which confined the eligibility for the exemption to certain motor vehicle manufacturers in Canada. The Panel, in a finding subsequently not reviewed by the Appellate Body, held that the term "unconditionally" could not be "determined independently of an examination of whether it involves discrimination between like products of different countries". The Panel emphasized the "important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other, whether an advantage, once it has been granted to the product of any country, is accorded 'unconditionally' to the like product of all other Members":

"[W]e believe that this interpretation of Japan does not accord with the ordinary meaning of the term 'unconditionally' in Article I:1 in its context and in light of the object and purpose of Article I:1. In our view, whether

[21] (*footnote original*) See *Working Party Report on the Accession of Hungary*, BISD 20S/34.

[22] Panel Report on *Indonesia – Autos*, paras. 14.145–14.147. Preceding the cited paragraphs, the Panel refers to the GATT Panel Report on *Belgium – Family Allowances*.

[23] Appellate Body Report on *Canada – Autos*, para. 81.

[24] (*footnote original*) These relate to such matters as internal mixing requirements (Article III:7); cinema films (Article IV(b)); transit of goods (Article V:2, 5, 6); marks of origin (Article IX:1); quantitative restrictions (Article XIII:1); measures to assist economic development (Article XVIII:20); and measures for goods in short supply (Article XX(j)).

[25] Appellate Body Report on *Canada – Autos*, para. 82.

an advantage within the meaning of Article I:1 is accorded 'unconditionally' cannot be determined independently of an examination of whether it involves discrimination between like products of different countries.

Article I:1 requires that, if a Member grants any advantage to any product originating in the territory of any other country, such advantage must be accorded 'immediately and unconditionally' to the like product originating in the territories of all other Members. We agree with Japan that the ordinary meaning of 'unconditionally' is 'not subject to conditions'. However, in our view Japan misinterprets the meaning of the word 'unconditionally' in the context in which it appears in Article I:1. The word 'unconditionally' in Article I:1 does not pertain to the granting of an advantage *per se*, but to the obligation to accord to the like products of all Members an advantage which has been granted to any product originating in any country. The purpose of Article I:1 is to ensure unconditional MFN treatment. In this context, we consider that the obligation to accord 'unconditionally' to third countries which are WTO Members an advantage which has been granted to any other country means that the extension of that advantage may not be made subject to conditions with respect to the situation or conduct of those countries. This means that an advantage granted to the product of any country must be accorded to the like product of all WTO Members without discrimination as to origin.

In this respect, it appears to us that there is an important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other, whether an advantage, once it has been granted to the product of any country, is accorded "unconditionally" to the like product of all other Members. An advantage can be granted subject to conditions without necessarily implying that it is not accorded "unconditionally" to the like product of other Members. More specifically, the fact that conditions attached to such an advantage are not related to the imported product itself does not necessarily imply that such conditions are discriminatory with respect to the origin of imported products. We therefore do not believe that, as argued by Japan, the word "unconditionally" in Article I:1 must be interpreted to mean that making an advantage conditional on criteria not related to the imported product itself is *per se* inconsistent with Article I:1, irrespective of whether and how such criteria relate to the origin of the imported products.

We thus find that Japan's argument is unsupported by the text of Article I:1."[26]

22. The Panel on *Canada – Autos* rejected Canada's defence that the Canadian import duty exemption, as described in paragraph 19 above, was a permitted exception under Article XXIV because, on the one hand, Canada was not granting the import duty exemption to *all* NAFTA manufacturers and because, on the other hand, manufacturers from countries *other* than the United States and Mexico were being provided duty-free treatment.[27] As this finding of the Panel was not appealed, the Appellate Body concluded:

"The drafters also wrote various exceptions to the MFN principle into the GATT 1947 which remain in the GATT 1994.[28] Canada invoked one such exception before the Panel, relating to customs unions and free trade areas under Article XXIV. This justification was rejected by the Panel, and the Panel's findings on Article XXIV were not appealed by Canada. Canada has invoked no other provision of the GATT 1994, or of any other covered agreement, that would justify the inconsistency of the import duty exemption with Article I:1 of the GATT 1994.

The object and purpose of Article I:1 supports our interpretation. That object and purpose is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis."[29]

23. In *US – Certain EC Products*, the United States increased the bonding requirements on imports from the European Communities in order to secure the payment of additional import duties to be imposed in retaliation for certain EC measures. Examining the consistency of the increased bonding requirements with GATT Article I, the Panel stated, with reference to the finding of the Panel on *Indonesia – Autos* referenced in paragraph 18 above:

"We find that the 3 March additional bonding requirements violated the most-favoured-nation clause of Article I of GATT, as it was applicable only to imports from the European Communities, although identical products from other WTO Members were not the subject of such an additional bonding requirements. The regulatory distinction (whether an additional bonding requirement is needed) was not based on any characteristic of the product but depended exclusively on the origin of the product and targeted exclusively some imports from the European Communities.[30]"[31]

24. In *EC – Tariff Preferences*, the Panel interpreted the term "unconditionally" as meaning "not limited by or subjected to any conditions":

[26] Panel Report on *Canada – Autos*, paras 10.22–10.25.
[27] Panel Report on *Canada – Autos*, paras. 10.55–10.56, which is referenced in para. 696 of this Chapter.
[28] (*footnote original*) Such as in Articles XX (general exceptions), XXI (security exceptions) and XXIV (customs unions and free trade areas).
[29] Appellate Body Report on *Canada – Autos*, paras. 83–84.
[30] (*footnote original*) Panel Report on *Indonesia – Autos*, para. 14.147.
[31] Panel Report on *US – Certain EC Products*, para. 6.54.

"In the Panel's view, moreover, the term 'unconditionally' in Article I:1 has a broader meaning than simply that of not requiring compensation. While the Panel acknowledges the European Communities' argument that conditionality in the context of traditional MFN clauses in bilateral treaties may relate to conditions of trade compensation for receiving MFN treatment, the Panel does not consider this to be the full meaning of 'unconditionally' under Article I:1. Rather, the Panel sees no reason not to give that term its ordinary meaning under Article I:1, that is, 'not limited by or subject to any conditions'.[32]

Because the tariff preferences under the Drug Arrangements are accorded only on the condition that the receiving countries are experiencing a certain gravity of drug problems, these tariff preferences are not accorded 'unconditionally' to the like products originating in all other WTO Members, as required by Article I:1. The Panel therefore finds that the tariff advantages under the Drug Arrangements are not consistent with Article I:1 of GATT 1994."[33]

(ii) Reference to GATT practice

25. With respect to the practice concerning the term "shall be accorded immediately and unconditionally" under GATT 1947, see GATT Analytical Index, pages 33–35.

D. EXCEPTIONS TO THE MFN PRINCIPLE

1. Anti-dumping and countervailing duties

(a) Article VI of GATT 1994

(i) Reference to GATT practice

26. With respect to GATT practice concerning anti-dumping and countervailing duties, see GATT Analytical Index, page 47.

2. Frontier traffic and customs unions

(a) Article XXIV of GATT 1994

27. In *Canada – Autos*, Canada invoked an Article XXIV exception with respect to a certain import duty exemption which had been found inconsistent with *GATT* Article I. The Panel rejected this defence, because, on the one hand, Canada was not granting the import duty exemption to *all* NAFTA manufacturers and because, on the other hand, manufacturers from countries *other* than the United States and Mexico were being provided duty-free treatment.[34] Since Canada did not appeal this finding of the Panel, the Appellate Body did not address the issue.

(b) Reference to GATT practice

28. With respect to GATT practice concerning frontier traffic and customs unions, see GATT Analytical Index, page 47.

3. Enabling Clause

(a) Text and adoption of the Enabling Clause

29. On 28 November 1979, the GATT Council adopted the Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (the "Enabling Clause").[35] The text of the Enabling Clause is set out below:

"Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries[36], without according such treatment to other contracting parties.

2. The provisions of paragraph 1 apply to the following:[37]

(a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,[38]

(b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

(c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;

(d) Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

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[32] (*footnote original*) *The New Shorter Oxford English Dictionary*, 4th Edition, p. 3465.
[33] Panel Report on *EC – Tariff Preferences*, paras. 7.59–7.60.
[34] Panel Report on *Canada – Autos*, paras. 10.55–10.56, which is referenced in para. 696 of this Chapter.
[35] BISD 26S/203.
[36] (*footnote original*) The words "developing countries" as used in this text are to be understood to refer also to developing territories.
[37] (*footnote original*) It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.
[38] (*footnote original*) As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

3. Any differential and more favourable treatment provided under this clause:

(a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

(b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

(c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:[39]

(a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

(b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement."

(b) Generalized System of Preferences

30. Pursuant to the Enabling Clause, notifications on the Generalized System of Preferences (GSP) schemes of developed country Members in favour of least-developed countries are to be sent to the Committee on Trade and Development. In contrast, under the Waiver on Preferential Tariff Treatment for Least-Developed Countries, which is referred to in paragraph 59 below, notifications on steps taken by developing country Members in favour of least-developed countries are to be sent to the Council on Trade in Goods. In order to allow for a unified consideration of both types of measures in one forum, at its meeting of 16 February 2001, the Committee on Trade and Development agreed *ad referendum* that any market access measures taken specifically in favour of the least-developed countries under the Enabling Clause and notified to the Committee be transmitted to the Sub-Committee on Least-developed Countries, for substantive consideration, and that the Sub-Committee report back to the Committee on its discussions.[40] A similar procedure was agreed to in the Council for Trade in Goods with respect to the treatment of notifications under the Waiver on Preferential Tariff Treatment for LDCs, see paragraph 59 below.

31. From the establishment of the WTO until 31 December 2004 the following Members have filed noti-

[39] (*footnote original*) Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

[40] WT/COMTD/M/32, section J.

fications with the Committee on Trade and Development on their GSP schemes:

(a) Canada[41];

(b) European Communities[42];

(c) Japan[43];

(d) New Zealand[44];

(e) Norway[45];

(f) Switzerland[46];

(g) United States[47];

(h) Iceland[48]; and

(i) Australia.[49]

32. With respect to the GSP schemes notified to the GATT, see GATT Analytical Index, page 50.

(c) Regional trade arrangements among developing country Members

33. To date, the Committee on Trade and Development has received notifications or communications of seven regional trade arrangements among developing country Members:[50]

Agreement	Date of entry into force	Date of notification	WTO document series
Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA)	8-Dec-94	29-Jun-95	WT/COMTD/N/3
Trade Agreement among the Melanesian Spearhead Group (MSG) countries	22-Jul-93	7-Oct-99	WT/COMTD/N/9 WT/COMTD/21
Treaty of West African Economic and Monetary Union (WAEMU)	1-Jan-00	3-Feb-00	WT/COMTD/N/11 WT/COMTD/23
Treaty Establishing the Economic and Monetary Community of Central Africa (CEMAC)	24-Jun-99	29-Sep-00	WT/COMTD/N13 WT/COMTD/24
Treaty for the Establishment of the East African Community (EAC)	7-Jul-00	11-Oct-00	WT/COMTD/N/14 WT/COMTD/25
Free Trade Agreement between the Republic of India and the Democratic Socialist Republic of Sri Lanka	15-Dec-01	27-Jun-02	WT/COMTD/N/16
Framework Agreement on comprehensive economic co-operation between the Association of South East Asian Nations (ASEAN) and the People's Republic of China	1-Jul-03	21-12-04	WT/COMTD/N/20 WT/COMTD/51

34. The Committee on Trade and Development has also received notifications with respect to four other regional trade arrangements which were previously notified to the GATT Committee on Trade and Development:

(a) Southern Common Market Agreement (MERCOSUR)[51], and the Memorandum of Understanding on Closer Relations between Bolivia and MERCOSUR;[52]

(b) Agreement on SAARC[53] Preferential Trading Arrangement (SAPTA)[54];

(c) Latin American Integration Association (LAIA) – the Membership of Cuba[55]; and

(d) Common Effective Preferential Tariffs (CEPT) scheme for the ASEAN[56] Free Trade Area (AFTA).[57]

[41] WT/COMTD/N/15 and addenda.
[42] WT/COMTD/N/4 and addenda.
[43] WT/COMTD/N/2 and addenda.
[44] WT/COMTD/N/5 and addenda.
[45] WT/COMTD/N/6 and addenda.
[46] WT/COMTD/N/7.
[47] WT/COMTD/N/1 and addenda.
[48] WT/COMTD/N/17 and Corr.1.
[49] WT/COMTD/N/18.
[50] With respect to the regional trade arrangements notified under the Enabling Clause within the GATT framework, see GATT Analytical Index, Article I, pp. 56–58. Also, with respect to the role of the GATT Committee on Trade and Development in the operation of the Enabling Clause, see GATT Analytical Index, pp. 1048–1049.
[51] The request for circulation of the updated text of this Agreement was given in WT/COMTD/1. The parties to this Agreement are: Argentina, Brazil, Paraguay and Uruguay.
[52] The Memorandum was notified in WT/COMTD/4.
[53] "SAARC" is the abbreviation of "South Asian Association for Regional Cooperation".
[54] This Agreement was notified in WT/COMTD/10. The parties to the Agreement are: Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.
[55] The status of this arrangement was notified in WT/COMTD/7 and WT/COMTD/11. The membership of Cuba was notified in WT/COMTD/N/10.
[56] "ASEAN" is the abbreviation of Association of South-East Asian Nations, whose members are: Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand.
[57] The information on this scheme was given in WT/COMTD/3.

35. On 30 April 2004, the Committee on Trade and Development received notification of China's accession to the Bangkok Agreement.[58]

36. Under paragraph 4(a) of the Enabling Clause, Members are required to notify arrangements taken under the Enabling Clause, and the modification or withdrawal thereof, to the Committee on Trade and Development. In this regard, in fulfilment of its mandate under item 1(b) of its terms of reference[59], at its meeting on 20 February 1998, the Committee on Regional Trade Agreements (Committee on RTAs) adopted recommendations to the Committee on Trade and Development with respect to how the required reporting on the operation of regional trade agreements, including those under the Enabling Clause, should be carried out.[60] At its meeting of 2 November 1998, the Committee on Trade and Development adopted the recommended procedures, as general guidelines with respect to information on regional trade agreements submitted to it.[61]

37. When an agreement is notified under the Enabling Clause, it is inscribed on the agenda of the Committee on Trade and Development. Subsequent actions of the Committee may include "noting" the agreement, requesting additional information, transferring it to the Committee on RTAs for examination, and reviewing reports made by members on changes to their agreements.

38. At its meeting of 14 September 1995, the Committee on Trade and Development adopted the following terms of reference for the Working Party on MERCOSUR[62]:

> "To examine the Southern Common Market Agreement (MERCOSUR) in the light of the relevant provisions of the Enabling Clause and of the GATT 1994, including Article XXIV, and to transmit a report and recommendations to the Committee on Trade and Development for submission to the General Council, with a copy of the report transmitted as well to the Council for Trade in Goods. The examination in the Working Party will be based on a complete notification and on written questions and answers."[63]

39. The review of MERCOSUR was later taken over by the Committee on RTAs.[64]

(d) Special treatment of the least-developed countries

40. As of 31 December 2004 the Committee on Trade and Development has received notifications under the Enabling Clause from the following Members of their special treatment in respect of the least-developed countries in the context of any general or specific measures in favour of developing countries:

(a) Canada[65];

(b) European Communities[66];

(c) Japan[67];

(d) Republic of Korea[68];

(e) Norway[69];

(f) New Zealand[70];

(g) Switzerland[71];

(h) United States[72];

(i) Iceland[73]; and

(j) Australia.[74]

(e) Interpretation

(i) The relationship between the Enabling Clause and Article I:1 of the GATT 1994

The Enabling Clause as an exception to Article I:1 of the GATT 1994

41. In *EC – Tariff Preferences*, the Appellate Body addressed the relationship between Article I:1 of the GATT 1994 and the Enabling Clause and upheld the Panel's characterization of the Enabling Clause as an exception to Article I:1 based on the ordinary meaning

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[58] The notification is contained in WT/COMTD/N/19. The Bangkok Agreement entered into force in 1976 as a preferential trading arrangement between developing countries in the Asia-Pacific region and was notified to GATT/WTO pursuant to the Enabling Clause. The five original participating states of the Agreement are Bangladesh, India, the Lao People's Democratic Republic, the Republic of Korea and Sri Lanka.

[59] WT/L/127, para. 1(b).

[60] WT/REG/M/16, Section B. The text of the recommendation can be found in WT/REG/6. See also para. 682 of this Chapter.

[61] WT/COMTD/M/22, section H. The text of the adopted procedures can be found in WT/COMTD/16.

[62] This is the only regional trade agreement among developing countries that the Committee on RTAs has dealt with.

[63] WT/COMTD/M/3, section A. The text of the adopted terms of reference can be found in WT/COMTD/5. With respect to the Working Party on the MERCOSUR, see also GATT Analytical Index, Article I, p. 58. See also WT/L/127, fn. 2.

[64] The tasks of those working parties which the Council for Trade in Goods had established for examination of regional trade arrangements entered into under Article XXIV of GATT 1947 and 1994 were taken over by the Committee on RTAs after its establishment on 6 February 1996. WT/GC/M/10, subsection 11. Also, WT/L/127, fn. 2. In this regard, see also Section XXV of this Chapter.

[65] WT/COMTD/N/15.

[66] WT/COMTD/N/4/Add.2.

[67] WT/COMTD/N/2/Add.10. See also WT/COMTD/29 and WT/LDC/SWG/IF/12.

[68] WT/COMTD/N/12.

[69] WT/COMTD/N/6.

[70] WT/COMTD/N/5/Add.2. See also WT/GC/36 and WT/COMTD/27.

[71] WT/COMTD/N/7.

[72] WT/COMTD/N/1/Add.2.

[73] WT/COMTD/N/17 and Corr.

[74] WT/COMTD/N18.

of paragraph 1 of the Enabling Clause. It also stated that such a characterization does not affect the importance of the policy objectives of the Enabling Clause:

> "By using the word 'notwithstanding', paragraph 1 of the Enabling Clause permits Members to provide 'differential and more favourable treatment' to developing countries 'in spite of' the MFN obligation of Article I:1. Such treatment would otherwise be inconsistent with Article I:1 because that treatment is not extended to all Members of the WTO 'immediately and unconditionally'.[75] Paragraph 1 thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an 'exception' to Article I:1.
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> In sum, in our view, the characterization of the Enabling Clause as an exception in no way diminishes the right of Members to provide or to receive 'differential and more favourable treatment'. The status and relative importance of a given provision does not depend on whether it is characterized, for the purpose of allocating the burden of proof, as a claim to be proven by the complaining party, or as a defence to be established by the responding party. Whatever its characterization, a provision of the covered agreements must be interpreted in accordance with the 'customary rules of interpretation of public international law', as required by Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the 'DSU').[76] Members' rights under the Enabling Clause are not curtailed by requiring preference-granting countries to establish in dispute settlement the consistency of their preferential measures with the conditions of the Enabling Clause. Nor does characterizing the Enabling Clause as an exception detract from its critical role in encouraging the granting of special and differential treatment to developing-country Members of the WTO."[77]

Order of analysis

42. The Appellate Body stated in *EC – Tariff Preferences* that the Enabling Clause does not exclude the applicability of Article I:1. Rather, it is a more specific rule [on GSP matters] that prevails over Article I:1. According to the Appellate Body, a panel should first examine the consistency of a challenged measure with Article I:1 and then proceed to examine the justifiability of the measure under the Enabling Clause:

> "It is well settled that the MFN principle embodied in Article I:1 is a 'cornerstone of the GATT' and 'one of the pillars of the WTO trading system', which has consistently served as a key basis and impetus for concessions in trade negotiations. However, we recognize that Members are entitled to adopt measures providing 'differential and more favourable treatment' under the Enabling Clause. Therefore, challenges to such measures, brought under Article I:1, cannot succeed where such measures are in accordance with the terms of the Enabling Clause. In our view, this is so because the text of paragraph 1 of the Enabling Clause ensures that, to the extent that there is a conflict between measures under the Enabling Clause and the MFN obligation in Article I:1, the Enabling Clause, as the more specific rule, prevails over Article I:1. In order to determine whether such a conflict exists, however, a dispute settlement panel should, as a first step, examine the consistency of a challenged measure with Article I:1, as the general rule. If the measure is considered at this stage to be inconsistent with Article I:1, the panel should then examine, as a second step, whether the measure is nevertheless justified by the Enabling Clause. It is only at this latter stage that a final determination of consistency with the Enabling Clause or inconsistency with Article I:1 can be made.
>
> In other words, the Enabling Clause 'does not exclude the applicability' of Article I:1 in the sense that, as a matter of procedure (or "order of examination", as the Panel stated), the challenged measure is submitted successively to the test of compatibility with the two provisions. But, as a matter of final determination – or *application* rather than *applicability* – it is clear that only one provision applies at a time . . .".[78]

(ii) Footnote 3 to paragraph 2

"generalized"

43. The Appellate Body addressed the meaning of the term "generalized" as context for the interpretation of the term "non-discriminatory" in *EC – Tariff Preferences* and found that its ordinary meaning is to "apply more generally". The Appellate Body also took note of the historical context leading to this requirement:

> "We continue our interpretive analysis by turning to the immediate context of the term 'non-discriminatory'. We note first that footnote 3 to paragraph 2(a) stipulates that, in addition to being 'non-discriminatory', tariff preferences provided under GSP schemes must be 'generalized'. According to the ordinary meaning of that

[75] (*footnote original*) GATT 1994, Art. I:1.

[76] (*footnote original*) In this regard, we recall the Appellate Body's statement in *EC – Hormones* that:

> . . . merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.

(Appellate Body Report, para. 104)

[77] Appellate Body Report on *EC – Tariff Preferences*, paras. 90 and 98.

[78] Appellate Body Report on *EC – Tariff Preferences*, paras. 101–102.

term, tariff preferences provided under GSP schemes must be 'generalized' in the sense that they 'apply more generally; [or] become extended in application'.[79] However, this ordinary meaning alone may not reflect the entire significance of the word "generalized" in the context of footnote 3 of the Enabling Clause, particularly because that word resulted from lengthy negotiations leading to the GSP. In this regard, we note the Panel's finding that, by requiring tariff preferences under the GSP to be "generalized", developed and developing countries together sought to eliminate existing "special" preferences that were granted only to certain designated developing countries.[80] Similarly, in response to our questioning at the oral hearing, the participants agreed that one of the objectives of the 1971 Waiver Decision and the Enabling Clause was to eliminate the fragmented system of special preferences that were, in general, based on historical and political ties between developed countries and their former colonies".[81]

"non-discriminatory"

44. In *EC – Tariff Preferences*, the European Communities appealed the Panel's findings based on the drafting history of the Generalized System of Preferences that the term "non-discriminatory" in footnote 3 to paragraph 2 of the Enabling Clause requires that identical tariff preferences be provided to all developing countries without differentiation, except as regards the implementation of *a priori* limitations.[82] While rejecting the Panel's findings, the Appellate Body interpreted the ordinary meaning of the term "non-discriminatory" as requiring that preference-giving countries make identical tariff preferences available to all similarly-situated beneficiary developing countries:

"[T]he ordinary meanings of 'discriminate' point in conflicting directions with respect to the propriety of according differential treatment. Under India's reading, any differential treatment of GSP beneficiaries would be prohibited, because such treatment necessarily makes a distinction between beneficiaries. In contrast, under the European Communities' reading, differential treatment of GSP beneficiaries would not be prohibited *per se*. Rather, distinctions would be impermissible only where the basis for such distinctions was improper. Given these divergent meanings, we do not regard the term 'non-discriminatory', on its own, as determinative of the permissibility of a preference-granting country according different tariff preferences to different beneficiaries of its GSP scheme.

Nevertheless, at this stage of our analysis, we are able to discern some of the content of the 'non-discrimination' obligation based on the ordinary meanings of that term. Whether the drawing of distinctions is *per se* discriminatory, or whether it is discriminatory only if done on an improper basis, the ordinary meanings of 'discriminate' converge in one important respect: they both suggest that distinguishing among similarly-situated beneficiaries is discriminatory. For example, India suggests that all beneficiaries of a particular Member's GSP scheme are similarly-situated, implicitly arguing that any differential treatment of such beneficiaries constitutes discrimination. . . .

Paragraph 2(a), on its face, does not explicitly authorize or prohibit the granting of different tariff preferences to different GSP beneficiaries. It is clear from the ordinary meanings of 'non-discriminatory', however, that preference-granting countries must make available identical tariff preferences to all similarly-situated beneficiaries."[83]

45. After taking into account the stated objectives of the Preamble to the *WTO Agreement*, Appellate Body stated in *EC – Tariff Preferences* that the interpretation of the term "non-discriminatory" in the Enabling Clause should allow the possibility of additional preferences to be given to developing countries with particular needs:

"We are of the view that the objective of improving developing countries' 'share in the growth in international trade', and their 'trade and export earnings', can be fulfilled by promoting preferential policies aimed at those interests that developing countries have in common, *as well as* at those interests shared by sub-categories of developing countries based on their particular needs. An interpretation of 'non-discriminatory' that does not require the granting of 'identical tariff preferences' allows not only for GSP schemes providing preferential market access to all beneficiaries, but also the possibility of additional preferences for developing countries with particular needs, provided that such additional preferences are not inconsistent with other provisions of the Enabling Clause, including the requirements that such preferences be 'generalized' and 'non-reciprocal'. We therefore consider such an interpretation to be consistent with the object and purpose of the *WTO Agreement* and the Enabling Clause."[84]

46. After considering its ordinary meaning, its context and the object and purpose of the *WTO Agreement*, the Appellate Body found in *EC – Tariff Preferences* that the term "non-discriminatory" in footnote 3 to paragraph 2 of the Enabling Clause requires that identical

[79] (*footnote original*) *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 1082.

[80] (*footnote original*) Panel Report, paras. 7.135–7.137. The Panel also observed that statements by developed and developing countries indicated the aim of providing GSP schemes with a broad scope, encompassing the granting of preferences by *all* developed countries to *all* developing countries. (*Ibid.*, paras. 7.131–7.132)

[81] Appellate Body Report on *EC – Tariff Preferences*, para.155.

[82] Panel Report on *EC – Tariff Preferences*, paras. 7.126–7.161.

[83] Appellate Body Report on *EC – Tariff Preferences*, paras. 152–154.

[84] Appellate Body Report on *EC – Tariff Preferences*, para. 169.

preference be made available to all similarly situated GSP beneficiaries that have the "development, financial and trade needs" to which the preference is intended to respond:

> "Having examined the text and context of footnote 3 to paragraph 2(a) of the Enabling Clause, and the object and purpose of the *WTO Agreement* and the Enabling Clause, we conclude that the term 'non-discriminatory' in footnote 3 does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term 'non-discriminatory', to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the 'development, financial and trade needs' to which the treatment in question is intended to respond."[85]

47. The Appellate Body further found in *EC – Tariff Preferences* that due to the closed nature of the beneficiary list and the lack of objective criteria or standards in its GSP Regulation, the European Communities failed to make its special preferences (i.e., the Drug Arrangements) available to all similarly situated beneficiaries:

> "We recall our conclusion that the term 'non-discriminatory' in footnote 3 of the Enabling Clause requires that identical tariff treatment be available to all similarly-situated GSP beneficiaries. We find that the measure at issue fails to meet this requirement for the following reasons. First, as the European Communities itself acknowledges, according benefits under the Drug Arrangements to countries other than the 12 identified beneficiaries would require an amendment to the Regulation. Such a 'closed list' of beneficiaries cannot ensure that the preferences under the Drug Arrangements are available to all GSP beneficiaries suffering from illicit drug production and trafficking.
>
> Secondly, the Regulation contains no criteria or standards to provide a basis for distinguishing beneficiaries under the Drug Arrangements from other GSP beneficiaries. Nor did the European Communities point to any such criteria or standards anywhere else, despite the Panel's request to do so. As such, the European Communities cannot justify the Regulation under paragraph 2(a), because it does not provide a basis for establishing whether or not a developing country qualifies for preferences under the Drug Arrangements. Thus, although the European Communities claims that the Drug Arrangements are available to all developing countries that are 'similarly affected by the drug problem', because the Regulation does not define the criteria or standards that a developing country must meet to qualify for preferences under the Drug Arrangements, there is no basis to determine whether those criteria or standards are discriminatory or not."[86]

48. The Appellate Body also stated in *EC – Tariff Preferences* that in addition to the non-discriminatory requirement in paragraph 2(a), the Enabling Clause also sets out other conditions in paragraph 3(c) and 3(a) that must be complied with by any particular GSP preference scheme. However, the Appellate Body did not examine *per se* the consistency of the Drug Arrangements with the conditions set out in paragraph 3(c) and 3(a) due to the fact that the Panel had not made findings in this regard:

> "Although paragraph 3(c) informs the interpretation of the term 'non-discriminatory' in footnote 3 to paragraph 2(a), as detailed above, paragraph 3(c) imposes requirements that are separate and distinct from those of paragraph 2(a). We have already concluded that, where a developed-country Member provides additional tariff preferences under its GSP scheme to respond positively to widely-recognized 'development, financial and trade needs' of developing countries within the meaning of paragraph 3(c) of the Enabling Clause, this 'positive response' would not, as such, fail to comply with the 'non-discriminatory' requirement in footnote 3 of the Enabling Clause, even if such needs were not common or shared by all developing countries. We have also observed that paragraph 3(a) requires that any positive response of a preference-granting country to the varying needs of developing countries not impose unjustifiable burdens on other Members. With these considerations in mind, and recalling that the Panel made no finding in this case as to whether the Drug Arrangements are inconsistent with paragraphs 3(a) and 3(c) of the Enabling Clause, we limit our analysis here to paragraph 2(a) and do not examine *per se* whether the Drug Arrangements are consistent with the obligation contained in paragraph 3(c) to 'respond positively to the development, financial and trade needs of developing countries' or with the obligation contained in paragraph 3(a) not to 'raise barriers' or 'create undue difficulties' for the trade of other Members."[87]

(iii) Paragraph 2: "developing countries"

49. Based on its findings on the term "non-discriminatory" in footnote 3 of paragraph 2 and on its discussion of paragraph 3(c), the Appellate Body found in *EC – Tariff Preferences* that the phrase "developing countries" in paragraph 2 of the Enabling Clause does not mean "all developing countries":

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[85] Appellate Body Report on *EC – Tariff Preferences*, para. 173.
[86] Appellate Body Report on *EC – Tariff Preferences*, paras. 187–188.
[87] Appellate Body Report on *EC – Tariff Preferences*, para. 179. Actually, in this case, India had not challenged the inconsistency of the Drug Arrangements with either paragraph 3(c) or paragraph 3(a) during the proceedings. *See*, Appellate Body Report on *EC – Tariff Preferences*, para. 178.

"We have concluded, contrary to the Panel, that footnote 3 and paragraph 3(c) do *not* preclude the granting of differential tariffs to different sub-categories of GSP beneficiaries, subject to compliance with the remaining conditions of the Enabling Clause. We find, therefore, that the term 'developing countries' in paragraph 2(a) should not be read to mean 'all' developing countries and, accordingly, that paragraph 2(a) does not prohibit preference-granting countries from according different tariff preferences to different sub-categories of GSP beneficiaries."[88]

(iv) Relationship between paragraph 2(a) and 2(d)

50. The Appellate Body stated in *EC – Tariff Preferences* that paragraph 2(d) is not an exception to paragraph 2(a) of the Enabling Clause. Rather, it found that by virtue of paragraph 2(d), preference-giving countries need not establish that the differentiation between developing and the least-developed countries is "non-discriminatory":

"We do not agree with the Panel that paragraph 2(d) is an 'exception' to paragraph 2(a), or that it is rendered redundant if paragraph 2(a) is interpreted as allowing developed countries to differentiate in their GSP schemes between developing countries. To begin with, we note that the terms of paragraph 2 do not expressly indicate that each of the four sub-paragraphs thereunder is mutually exclusive, or that any one is an exception to any other. Moreover, in our view, it is clear from several provisions of the Enabling Clause that the drafters wished to emphasize that least-developed countries form an identifiable sub-category of developing countries with 'special economic difficulties and . . . particular development, financial and trade needs'.[89] When a developed-country Member grants tariff preferences in favour of developing countries under paragraph 2(a), as we have already found, footnote 3 imposes a requirement that such preferences be 'non-discriminatory'. In the absence of paragraph 2(d), a Member granting preferential tariff treatment only to least-developed countries would therefore need to establish, under paragraph 2(a), that this preferential treatment did not 'discriminate' against other developing countries contrary to footnote 3. The inclusion of paragraph 2(d), however, makes clear that developed countries may accord preferential treatment to least-developed countries distinct from the preferences granted to other developing countries under paragraph 2(a). Thus, pursuant to paragraph 2(d), preference-granting countries need not establish that differentiating between developing and least-developed countries is 'non-discriminatory'. This demonstrates that paragraph 2(d) does have an effect that is different and independent from that of paragraph 2(a), even if the term 'non-discriminatory' does not require the granting of 'identical tariff preferences 'to all GSP beneficiaries."[90]

(v) Paragraph 3(a)

51. The Appellate Body found in *EC – Tariff Preferences* although there was a requirement of non-discrimination, this did not mean that identical tariff preferences should be granted to "all" developing countries. The Appellate Body concluded that the Enabling Clause contains sufficient other conditions on the granting of preferences, including those under paragraph 3(a), to guard against such a conclusion:

"It does not necessarily follow, however, that 'non-discriminatory' should be interpreted to require that preference-granting countries provide 'identical' tariff preferences under GSP schemes to 'all' developing countries. In concluding otherwise, the Panel assumed that allowing tariff preferences such as the Drug Arrangements would necessarily 'result [in] the collapse of the whole GSP system and a return back to special preferences favouring selected developing countries'.[91] To us, this conclusion is unwarranted. We observe that the term 'generalized' requires that the GSP schemes of preference-granting countries remain generally applicable.[92] Moreover, unlike the Panel, we believe that the Enabling Clause sets out sufficient conditions on the granting of preferences to protect against such an outcome. As we discuss below[93], provisions such as paragraphs 3(a) and 3(c) of the Enabling Clause impose specific conditions on the granting of different tariff preferences among GSP beneficiaries."[94]

52. The Appellate Body stated in *EC – Tariff Preferences* that paragraph 3(a) requires that any positive response of a preference-giving country to the varying needs of developing countries not impose unjustifiable burdens on other Members:

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[88] Appellate Body Report on *EC – Tariff Preferences*, para. 175.

[89] (*footnote original*) Enabling Clause, para. 6 (attached as Annex 2 to this Report). Similarly, paragraph 8 of the Enabling Clause refers to the "special economic situation and [the] development, financial and trade needs" of least-developed countries.

[90] Appellate Body Report on *EC – Tariff Preferences*, para. 172.

[91] (*footnote original*) Panel Report, para. 7.102.

[92] (*footnote original*) The European Communities argues in this respect that the GATT Contracting Parties and the WTO Members have granted a number of waivers, as mentioned in the Panel Report, for tariff preferences that are "confined *ab initio* and permanently to a limited number of developing countries located in a certain geographical region". (European Communities' appellant's submission, paras. 184–185 (referring to Panel Report, para. 7.160)) See also, Panel Report, footnote 31 to para. 4.32 (referring to Waiver Decision on the Caribbean Basin Economic Recovery Act, GATT Document L/5779, 15 February 1985, BISD 31S/20, renewed 15 November 1995, WT/L/104; Waiver Decision on CARIBCAN, GATT Document L/6102, 28 November 1986, BISD 33S/97, renewed 14 October 1996, WT/L/185; Waiver Decision on the United States – Andean Trade Preference Act, GATT Document L/6991, 19 March 1992, BISD 39S/385, renewed 14 October 1996, WT/L/184; Waiver Decision on The Fourth ACP-EEC Convention of Lomé, GATT Document L/7604, 9 December 1994, BISD 41S/26, renewed 14 October 1996, WT/L/186; and Waiver Decision on European Communities – The ACP-EC Partnership Agreement, WT/MIN (01)/15), 14 November 2001.

[93] (*footnote original*) *Infra*, paras. 157–168.

[94] Appellate Body Report on *EC – Tariff Preferences*, para. 156.

"Finally, we note that, pursuant to paragraph 3(a) of the Enabling Clause, any 'differential and more favourable treatment . . . shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties.' This requirement applies, *a fortiori*, to any preferential treatment granted to one GSP beneficiary that is not granted to another.[95] Thus, although paragraph 2(a) does not prohibit *per se* the granting of different tariff preferences to different GSP beneficiaries[96], and paragraph 3(c) even contemplates such differentiation under certain circumstances[97], paragraph 3(a) requires that any positive response of a preference-granting country to the varying needs of developing countries not impose unjustifiable burdens on other Members."[98]

(vi) Paragraph 3(c) "to respond positively to the development, financial and trade needs of developing countries"

53. The Appellate Body stated in *EC – Tariff Preferences* that in the light of one of the stated objectives of the Preamble to the *WTO Agreement*, the text of paragraph 3(c) authorizes preference-giving countries to treat different developing countries differently:

"[T]he Preamble to the *WTO Agreement*, which informs all the covered agreements including the GATT 1994 (and, hence, the Enabling Clause), explicitly recognizes the 'need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'. The word 'commensurate' in this phrase appears to leave open the possibility that developing countries may have different needs according to their levels of development and particular circumstances. The Preamble to the *WTO Agreement* further recognizes that Members' 'respective needs and concerns at different levels of economic development' may vary according to the different stages of development of different Members.

In sum, we read paragraph 3(c) as authorizing preference-granting countries to 'respond positively' to 'needs' that are *not* necessarily common or shared by all developing countries. Responding to the 'needs of developing countries' may thus entail treating different developing-country beneficiaries differently."[99]

54. The Appellate Body on *EC – Tariff Preferences* also stated that paragraph 3(c) requires that a response to a particular "development, financial and trade needs" based on objective standard. These standards could be those particular needs as broadly recognized and explicitly set out in the *WTO Agreement* or in multilateral instruments adopted by international organizations. It also stated that in order to make the "response" "positive", sufficient nexus should exist between the preferential treatment and the likelihood of alleviating the relevant need:

"At the outset, we note that the use of the word 'shall' in paragraph 3(c) suggests that paragraph 3(c) sets out obligations for developed-country Members in providing preferential treatment under a GSP scheme to 'respond positively' to the 'needs of developing countries'. . . .

. . .

However, paragraph 3(c) does not authorize *any* kind of response to *any* claimed need of developing countries. First, we observe that the types of needs to which a response is envisaged are limited to 'development, financial and trade needs'. In our view, a 'need' cannot be characterized as one of the specified 'needs of developing countries' in the sense of paragraph 3(c) based merely on an assertion to that effect by, for instance, a preference-granting country or a beneficiary country. Rather, when a claim of inconsistency with paragraph 3(c) is made, the existence of a 'development, financial [or] trade need' must be assessed according to an *objective* standard. Broad-based recognition of a particular need, set out in the *WTO Agreement* or in multilateral instruments adopted by international organizations, could serve as such a standard.

Secondly, paragraph 3(c) mandates that the response provided to the needs of developing countries be 'positive'. 'Positive' is defined as 'consisting in or characterized by constructive action or attitudes'. This suggests that the response of a preference-granting country must be taken with a view to *improving* the development, financial or trade situation of a beneficiary country, based on the particular need at issue. As such, in our view, the expectation that developed countries will 'respond positively' to the 'needs of developing countries' suggests that a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized by paragraph 2, and, on the other hand, the likelihood of alleviating the relevant 'development, financial [or] trade need'. In the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences. Therefore, only if a preference-granting country acts in the 'positive' manner suggested, in 'respon[se]' to a widely-recognized 'development, financial [or] trade need', can such action satisfy the requirements of paragraph 3(c)."[100]

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[95] (*footnote original*) We note in this respect that the language contained in paragraph 3(a) of the Enabling Clause is reflected in waivers referred to in *supra*, footnote 323.
[96] (*footnote original*) *Supra*, paras. 153–154.
[97] (*footnote original*) *Supra*, paras. 162–165.
[98] Appellate Body Report on *EC – Tariff Preferences*, para. 167.
[99] Appellate Body Report on *EC – Tariff Preferences*, paras. 161–162.
[100] Appellate Body Report on *EC – Tariff Preferences*, paras. 158, 163 and 164.

(vii) Burden of proof under the Enabling Clause

55. The Appellate Body stated in *EC – Tariff Preferences* that as an exception provision, the ultimate burden of proof under the Enabling Clause falls on the respondent party:

> "As a general rule, the burden of proof for an 'exception' falls on the respondent, that is, as the Appellate Body stated in *US – Wool Shirts and Blouses*, on the party 'assert[ing] the affirmative of a particular . . . defence'.[101] From this allocation of the burden of proof, it is normally for the respondent, first, to *raise* the defence and, second, to *prove* that the challenged measure meets the requirements of the defence provision.
>
> We are therefore of the view that the European Communities must *prove* that the Drug Arrangements satisfy the conditions set out in the Enabling Clause. Consistent with the principle of *jura novit curia*, it is not the responsibility of the European Communities to provide us with the legal interpretation to be given to a particular provision in the Enabling Clause; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause."[102]

56. However, the Appellate Body also found in *EC – Tariff Preferences* that the complainant bears the burden of raising the Enabling Clause in its panel request, although the ultimate burden of justifying the challenged measure under the Enabling Clause is with the respondent:

> "In our view, the special status of the Enabling Clause in the WTO system has particular implications for WTO dispute settlement. As we have explained, paragraph 1 of the Enabling Clause enhances market access for developing countries as a means of improving their economic development by authorizing preferential treatment for those countries, 'notwithstanding' the obligations of Article I. It is evident that a Member cannot implement a measure authorized by the Enabling Clause without according an 'advantage' to a developing country's products over those of a developed country. It follows, therefore, that every measure undertaken pursuant to the Enabling Clause would necessarily be inconsistent with Article I, if assessed on that basis alone, but it would be exempted from compliance with Article I because it meets the requirements of the Enabling Clause. Under these circumstances, we are of the view that a complaining party challenging a measure taken pursuant to the Enabling Clause must allege more than mere inconsistency with Article I:1 of the GATT 1994, for to do only that would not convey the 'legal basis of the complaint sufficient to present the problem clearly'. In other words, it is insufficient in WTO dispute settlement for a complainant to allege inconsistency with Article I:1 of the GATT 1994 if the complainant seeks also to argue that the measure is not justified under the Enabling Clause. This is especially so if the challenged measure, like that at issue here, is plainly taken pursuant to the Enabling Clause, as we discuss *infra*.
>
> . . .
>
> The responsibility of the complaining party in such an instance, however, should not be overstated. It is merely to *identify* those provisions of the Enabling Clause with which the scheme is allegedly inconsistent, without bearing the burden of *establishing* the facts necessary to support such inconsistency. That burden, as we concluded above, remains on the responding party invoking the Enabling Clause as a defence."[103]

(f) Reference to GATT practice

57. With respect to GATT practice concerning the Enabling Clause, see GATT Analytical Index, Article I, pages 53–59.

4. Waiver on Preferential Tariff Treatment for Least-Developed Countries

58. At its meeting of 15 June 1999, the General Council adopted a decision concerning the Preferential Tariff Treatment for Least-Developed Countries. This decision waives the provisions of GATT Article I:1[104] in order to provide a means for developing-country Members to offer preferential tariff treatment to products of least-developed countries. The decision sets forth:

> "1. Subject to the terms and conditions set out hereunder, the provisions of paragraph 1 of Article I of the GATT 1994 shall be waived until 30 June 2009, to the extent necessary to allow developing country Members to provide preferential tariff treatment to products of least-developed countries, designated as such by the United Nations, without being required to extend the same tariff rates to like products of any other Member.
>
> 2. Developing country Members wishing to take actions pursuant to the provisions of this Waiver shall notify to the Council on Trade in Goods the list of all products of least-developed countries for which preferential tariff treatment is to be provided on a generalized, non-reciprocal and non-discriminatory basis and the preference margins to be accorded. Subsequent modifications to the preferences shall similarly be notified.

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[101] (*footnote original*) Appellate Body Report, p. 14, DSR 1997:I, at 335. (See also, Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 133; and Appellate Body Report, *India – Quantitative Restrictions*, para. 136)

[102] Appellate Body Report on *EC – Tariff Preferences*, paras. 104–105.

[103] Appellate Body Report on *EC – Tariff Preferences*, paras. 110 and 115.

[104] WT/GC/M/40/Add.3, section 4(d)(i). The text of the adopted decision can be found in WT/L/304. The decision refers to the Comprehensive and Integrated WTO Plan of Action for the Least-Developed Countries. WT/L/304, para. 2. In this regard, see further Chapter on *WTO Agreement*, Section V.B(7)(iv).

3. Any preferential tariff treatment implemented pursuant to this Waiver shall be designed to facilitate and promote the trade of least-developed countries and not to raise barriers or create undue difficulties for the trade of any other Member. Such preferential tariff treatment shall not constitute an impediment to the reduction or elimination of tariffs on a most-favoured-nation basis.

4. In accordance with the provisions of paragraph 4 of Article IX of the WTO Agreement, the General Council shall review annually whether the exceptional circumstances justifying the Waiver still exist and whether the terms and conditions attached to the Waiver have been met.

5. The government of any Member providing preferential tariff treatment pursuant to this Waiver shall, upon request, promptly enter into consultations with any interested Member with respect to any difficulty or any matter that may arise as a result of the implementation of programmes authorized by this Waiver. Where a Member considers that any benefit accruing to it under GATT 1994 may be or is being impaired unduly as a result of such implementation, such consultation shall examine the possibility of action for a satisfactory adjustment of the matter. This Waiver does not affect Members' rights as set forth in the Understanding in Respect of Waivers of Obligations under GATT 1994.

6. This waiver does not affect in any way and is without prejudice to rights of Members in their actions pursuant to the provisions of the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries."[105]

59. Under the Decision on Waiver on Preferential Tariff Treatment for LDCs, which is referred to in paragraph 58 above, notifications on steps taken by developing country Members are to be sent to the Council on Trade in Goods. In contrast, pursuant to the Enabling Clause, which is referred to in paragraph 30 above, notifications on the GSP schemes of developed country Members in favour of LDCs are to be sent to the Committee on Trade and Development. In order to allow for a unified consideration of both types of measures in one forum, at its meeting of 14 March 2001, the Council for Trade in Goods agreed *ad referendum* that any market access measures taken specifically in favour of the least-developed countries under the Waiver on Preferential Tariff Treatment for LDCs and notified to the Council be transmitted to the Sub-Committee on Least-developed Countries, for substantive consideration, and that the Sub-Committee report back to the Council on its discussions.[106] A similar procedure was agreed in the Committee on Trade and Development with respect to the treatment of notifications under the Enabling Clause, see paragraph 30 above.

60. To date, only Morocco has notified its preferential tariff treatment for the least-developed countries to the Council for Trade in Goods.[107] In this regard, the following developing country Members notified their own tariff reduction or duty-free treatment for the least-developed countries to the Committee on Trade and Development, prior to the adoption of the Waiver on Preferential Tariff Treatment for LDCs: (i) Turkey[108]; (ii) Egypt[109]; and (iii) Mauritius.[110]

E. RELATIONSHIP WITH OTHER ARTICLES

1. Article III

61. In *US – Gasoline*, with respect to the relationship between Articles I and III, the Panel considered:

"[The Panel's] findings on treatment under the baseline establishment methods under Articles III:4 and XX (b), (d) and (g) would in any case have made unnecessary the examination of the 75 percent rule under Article I:1."[111]

(a) Reference to GATT practice

62. With respect to GATT practice regarding the relationship between Article I and Article III, see GATT Analytical Index, page 44.

2. Article VI

63. The Panel on *Brazil – Desiccated Coconut* found that because Article VI of the *GATT 1994* did not constitute applicable law for the purposes of the dispute, the claims made under Articles I and II of the *GATT 1994*, which were derived from claims of inconsistency with Article VI of the *GATT 1994*, could not succeed.[112] The Appellate Body on *Brazil – Desiccated Coconut* confirmed this finding.[113]

3. Article XI

64. In *US – Shrimp*, with respect to the relationship between Articles I and XI, the Panel stated:

"Given our conclusion in paragraph 7.17 above that Section 609 violates Article XI:1, we consider that it is not necessary for us to review the other claims of the complainants with respect to Articles I:1 and XIII:1. This is consistent with GATT[114] and WTO[115] panel practice and

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[105] WT/L/304.
[106] G/C/M/47, Section VII.
[107] G/C/6 and WT/LDC/SWG/IF/18. See further Chapter on *WTO Agreement*, Section V.B.7(a) with respect to preferential tariff treatment for the least-developed countries in general.
[108] WT/COMTD/W/39.
[109] WT/COMTD/W/47.
[110] WT/COMTD/W/53.
[111] Panel Report on *US – Gasoline*, para. 6.19. With respect to judicial economy in general, see Chapter on *DSU*, Section XXXVI.F.
[112] Panel Report on *Brazil – Desiccated Coconut*, para. 281.
[113] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 21.
[114] (*footnote original*) See, e.g., Panel Report on *Canada – FIRA*, para. 5.16.
[115] (*footnote original*) See, e.g., Panel Report on *Brazil – Desiccated Coconut*, para. 293.

has been confirmed by the Appellate Body in its report in the *Wool Shirts* case, where the Appellate Body mentioned that 'A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute'.[116]

Therefore we do not find it necessary to review the allegations of the complainants with respect to Articles I:1 and XIII:1. On the basis of our finding of violation of Article XI:1, we move to address the defence of the United States under Article XX."[117]

4. Article XIII

65. In *EC – Bananas III*, the European Communities argued that a violation of Article XIII in respect of its tariff regime for bananas was covered by the Lomé waiver, whereby the provisions of Article I:1 of the *GATT 1994* were waived in respect of the allocation of country-specific tariff quotas for bananas to certain countries. The Panel agreed with this argument, however on appeal, the Appellate Body reversed this conclusion, finding that the Lomé waiver waives only the provisions of Article I:1.[118] See Chapter on the *WTO Agreement*, Section X.3(a)(i).

5. Article XXIV

66. In *Canada – Autos*, Canada invoked an Article XXIV exception with respect to a certain import duty exemption, found to be inconsistent with Article I of the *GATT 1994*. The Panel rejected this defence, because, on the one hand, Canada was not granting the import duty exemption to *all* NAFTA manufacturers and because, on the other hand, manufacturers from countries *other* than the United States and Mexico were being provided duty-free treatment.[119] Canada did not appeal this finding of the Panel. In this regard, the Appellate Body noted:

"The drafters also wrote various exceptions to the MFN principle into the GATT 1947 which remain in the GATT 1994.[120] Canada invoked one such exception before the Panel, relating to customs unions and free trade areas under Article XXIV. This justification was rejected by the Panel, and the Panel's findings on Article XXIV were not appealed by Canada. Canada has invoked no other provision of the GATT 1994, or of any other covered agreement, that would justify the inconsistency of the import duty exemption with Article I:1 of the GATT 1994."[121]

6. Article XXVIII

67. In *EC – Poultry*, the Appellate Body addressed a complaint against the allocation of tariff quotas for certain poultry products by the European Communities, and rejected Brazil's appeal that Articles I and XIII of the *GATT 1994* were not applicable to the allocation of tariff quota resulting from negotiations under Article XXVIII of the *GATT 1994*. The Appellate Body first confirmed its finding in *EC – Bananas III* according to which Members may, in their concessions and commitments set out in their schedules annexed to the GATT 1994, yield rights but may not diminish their obligations.[122] The Appellate Body then held that: "[t]herefore, the concessions contained in Schedule LXXX pertaining to the tariff-rate quota for frozen poultry meat must be consistent with Article I and XIII of the GATT 1994."[123]

F. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. SCM Agreement

68. In *Indonesia – Autos*, the Panel rejected Indonesia's argument that the *SCM Agreement* was exclusively applicable to measures involving subsidies and referred to its finding on the relationship between the *SCM Agreement* and Article III of the *GATT 1994*.[124] With respect to the exemption of customs duties and domestic taxes, the Panel indicated:

"The customs duty benefits of the various Indonesian car programmes are explicitly covered by the wording of Article I. As to the tax benefits of these programmes, we note that Article I:1 refers explicitly to 'all matters referred to in paragraphs 2 and 4 of Article III'. We have already decided that the tax discrimination aspects of the National Car programme were matters covered by Article III:2 of GATT. Therefore, the customs duty and tax advantages of the February and June 1996 car programmes are of the type covered by Article I of GATT."[125]

III. ARTICLE II

A. TEXT OF ARTICLE II

Article II
Schedules of Concessions

1. (*a*) Each contracting party shall accord to the commerce of the other contracting parties treatment no less

[116] (*footnote original*) Appellate Body Report on *US – Wool Shirts and Blouses*, p. 19.
[117] Panel Report on *US – Shrimp*, paras. 7.22–7.23.
[118] Appellate Body Report on *EC – Bananas III*, paras. 183–187.
[119] Panel Report on *Canada – Autos*, paras. 10.55–10.56, which is referenced in para. 696 of this Chapter.
[120] (*footnote original*) Such as in Articles XX (general exceptions), XXI (security exceptions) and XXIV (customs unions and free trade areas).
[121] Appellate Body Report on *Canada – Autos*, para. 83.
[122] Appellate Body Report on *EC – Poultry*, para. 98, citing Appellate Body Report on *EC – Bananas III*, para. 154, which is referenced in para. 85 of this Chapter.
[123] Appellate Body Report on *EC – Poultry*, para. 99.
[124] See para. 303 of this Chapter.
[125] Panel Report on *Indonesia – Autos*, para. 14.139.

favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(*b*) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

(*c*) The products described in Part II of the Schedule relating to any contracting party which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates shall, on their importation into such territory, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly or mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. Nothing in this Article shall prevent any contracting party from maintaining its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty.

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(*a*) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III* in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

(*b*) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;*

(*c*) fees or other charges commensurate with the cost of services rendered.

3. No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

4. If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.*

5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such contracting party so as to permit the treatment contemplated in this Agreement, the two contracting parties, together with any other contracting parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.

6. (*a*) The specific duties and charges included in the Schedules relating to contracting parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such contracting parties, are expressed in the appropriate currency at the par value accepted or provisionally recognized by the Fund at the date of this Agreement. Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum, such specific duties and charges and margins of preference may be adjusted to take account of such reduction; *provided* that the CONTRACTING PARTIES (*i.e.*, the contracting parties acting jointly as provided for in Article XXV) concur that such adjustments will not impair the value of the concessions provided for in the appropriate Schedule or elsewhere in this Agreement, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

(*b*) Similar provisions shall apply to any contracting party not a member of the Fund, as from the date on which such contracting party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV.

7. The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement.

B. TEXT OF *AD* ARTICLE II

Ad Article II

Paragraph 2 (a)

The cross-reference, in paragraph 2 (*a*) of Article II, to paragraph 2 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.[1]

(*footnote original*) [1] This Protocol entered into force on 14 December 1948.

Paragraph 2 (b)

See the note relating to paragraph 1 of Article I.

Paragraph 4

Except where otherwise specifically agreed between the contracting parties which initially negotiated the concession, the provisions of this paragraph will be applied in the light of the provisions of Article 31 of the Havana Charter.

C. INTERPRETATION AND APPLICATION OF ARTICLE II

1. Article II:1(a)

(a) Bonding requirements

69. In *US – Certain EC Products*, the Appellate Body reversed the Panel's finding that the United States had acted inconsistently with Article II:1(a) and (b) of GATT 1994, first sentence, by increasing the bonding requirements on certain products imported from the European Communities in order to secure the collection of import duties whose imposition, however, had not yet been determined at the time that the increased bonding requirement was imposed. Referring to the increased bonding requirements as the "3 March Measure", the Panel stated, *inter alia*: "We have found that the bonding requirements should be assessed together with the rights/obligations they purport to protect, being in this case, the right to collect tariffs at bound levels. The 3 March Measure imposed additional bonding requirements to guarantee collection of 100 per cent tariff duty."[126] In contrast, the Appellate Body emphasized the distinction between the imposition of duties and the increased bonding requirements:

> "The task of the Panel . . . was . . . to examine the GATT-1994-consistency of the increased bonding requirements; the Panel's task was not to examine the GATT 1994-consistency of the imposition of 100 per cent duties.
>
> Nevertheless, the Panel examined the GATT 1994-consistency of the increased bonding requirements *in the light of* the GATT 1994–consistency of the imposition of 100 per cent duties, and concluded, on the basis of this examination, that the increased bonding requirements are inconsistent with Articles II:1(a) and II:1(b), first sentence, of the GATT 1994. As the Panel had previously concluded that the imposition of 100 per cent duties and the increased bonding requirements were legally distinct measures, and that the imposition of 100 per cent duties was not in the Panel's terms of reference, the Panel could not, based on this reasoning, have come to the conclusion that the increased bonding requirements are inconsistent with Articles II:1(a) and II:1(b), first sentence, of the GATT 1994."[127]

(b) Qualification in schedules

70. In *Korea – Various Measures on Beef*, the Panel ruled, in a finding not reviewed by the Appellate Body, that pursuant to Article II of the *GATT 1994* any other "terms, conditions or qualifications" that are added to import concessions, must be included in the schedules. The Panel went on to find that "[g]iven that Korea made no such qualification, and that imports of grass-fed beef by the LPMO are thus restricted, the Panel finds that imports of grass-fed beef are accorded less favourable treatment than that is provided for in Korea's Schedule, contrary to Article II:1(a)."[128]

(c) Implementation in WTO Schedules of HS changes

71. On 18 July 2001, the General Council approved new procedures to introduce HS2002 changes to schedules of concessions.[129]

(d) Database for tariffs

(i) Integrated Data Base (IDB) Project

72. At its meeting on 24 June 1997, the Committee on Market Access agreed to the restructuring of the existing Integrated Data Base (IDB) from a mainframe environment to a Personal Computer (PC)-based system, which would utilize new technology to improve the operation of the IDB.[130] At its meeting of 16 July 1997,

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[126] Panel Report on *US – Certain EC Products*, para. 6.58. On this issue, the following minority view was expressed:

> ". . . Any bonding requirements to cover the payment of tariffs above their bound levels cannot be viewed as a mechanism in place to secure compliance with WTO compatible tariffs and constituted, therefore, import restrictions for which there was no justification. The actual trade effects of the 3 March Measure . . . confirm its restrictive nature and effect. One Panelist found, therefore, that the 3 March Measure constituted a 'restriction', contrary to Article XI of GATT, rather than a duty or charge under Article II.", para. 6.61.

[127] Appellate Body Report on *US – Certain EC Products*, paras. 103–104.

[128] Panel Report on *Korea – Various Measures on Beef*, para. 779.

[129] WT/L/407.

[130] G/MA/M/10, para. 4. The agreement is outlined in G/MA/IDB/1/Rev. 1.

the General Council adopted the Decision on the Supply of Information to the Integrated Data Base for Personal Computers, which was approved and forwarded to the General Council by the Committee on Market Access at its meeting of 24 June 1997.[131] At its meeting of 2 December 1997, the Committee on Market Access further adopted two decisions concerning: (1) the deadlines for IDB submissions, pursuant to the decision adopted by the General Council on 16 July 1997 on the Supply of Information for the Integrated Data Base for Personal Computers, and (2) access to the IDB.[132] At its meeting on 31 May 1999, the Committee on Market Access further adopted the document entitled "Dissemination of the Integrated Data Base".[133] At its meeting of 18 December 2000, the Committee on Market Access adopted, on an *ad referendum* basis, the document entitled "Review of the Operation of the Integrated Data Base (IDB) and Related Technical Assistance Activities" and gave the Indian delegation until 22 January 2001 to provide comments.[134]

73. On 12 June 2002, the Committee on Market Access adopted the dissemination policy of the IDB.[135] Since then several organizations have been granted access to this database.[136]

(ii) Consolidated Tariff Schedule Data Base

74. At its meeting on 22 November 1995, the Committee on Market Access agreed to the establishment of consolidated loose-leaf schedules on the basis of a proposal by the Chairman contained in document G/MA/TAR/W/4/Rev.2.[137] At its meeting on 29 November 1996, the Council for Trade in Goods adopted the Decision on the "Establishment of Consolidated Loose-Leaf Schedules".[138] Earlier, at its meeting on 18 October 1996, the Committee on Market Access had approved the Decision and had agreed to forward it to the Council for Trade in Goods for approval.

75. At its meeting on 26 March 1998, the Committee on Market Access approved the project proposal on the Consolidated Tariff Schedules (CTS) Database.[139]

76. At its meeting on 28 July 2000, the Committee on Market Access adopted the format for inclusion of agricultural commitments into the CTS database on the understanding that the database has no legal basis and that the data contained therein would be available to all delegations at the same time.[140]

77. On 12 June 2002, the Committee on Market Access adopted the dissemination policy of the CTS database.[141] Several organizations have been granted access to this database.[142]

(iii) Review of the Understanding on the Interpretation of Article XXVIII of GATT 1994

78. With respect to the review by the Committee of the Understanding on the Interpretation of Article XXVIII of *GATT 1994*, see paragraph 733 below.

(e) Information technology products

(i) The Ministerial Declaration on Trade in Information Technology Products

79. In December 1996, the Singapore Ministerial Conference adopted the Ministerial Declaration on Trade in Information Technology Products.[143] The Declaration, initially agreed by 29 Members (including the 15 EC member States) and States or separate customs territories in the process of WTO accession, called on its participants to:

> "[B]ind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994, with respect to the following:
>
> '(a) all products classified (or classifiable) with Harmonized System (1996) ('HS') headings listed in Attachment A to the Annex to this Declaration; and
>
> (b) all products specified in Attachment B to the Annex to this Declaration, whether or not they are included in Attachment A;'
>
> through equal rate reductions of customs duties beginning in 1997 and concluding in 2000, recognizing that extended staging of reductions and, before implementation, expansion of product coverage may be necessary in limited circumstances."[144]

80. As of 31 December 2004, there were 38 participants (covering 63 Members and States or separate customs territories in the process of acceding to the WTO) representing approximately 97 per cent of world trade in information technology products.[145]

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131 G/MA/M/10, para. 4. The text of the agreement can be found in WT/L/225.
132 G/MA/M/12, para. 3. The text of the adopted decisions can be found in G/MA/IDB/1/Rev.1/Add.1.
133 G/MA/M/18, para. 2.7. The text of the adopted document can be found in G/MA/IDB/3.
134 G/MA/M/27, para. 1.
135 G/MA/115.
136 See G/MA/115/Add.1 and Add.2.
137 G/MA/M/4, para. 1.2.
138 See G/C/W/98/Rev.1, para. 9.1. The text of the adopted Decision can be found in G/L/138.
139 G/MA/M/13, para. 5.
140 G/MA/M/25, para. 1.
141 G/M/115.
142 See G/MA/115/Add.1 and Add.2.
143 WT/MIN(96)/16.
144 WT/MIN(96)/16, para. 2.
145 See G/IT/1/Rev.33.

(ii) The Committee of Participants on the Expansion of Trade in Information Technology Products

81. On 26 March 1997, the Participants established the Committee of Participants on the Expansion of Trade in Information Technology Products in order to monitor the provisions of paragraphs 3, 5, 6 and 7 of the Annex to the Declaration.[146]

82. At its meeting of 30 October 1997, the Committee of Participants adopted rules of procedure which are similar to those of other WTO bodies.[147]

83. At its meeting of 26 October 2000, the Committee of Participants agreed, on an *ad referendum* basis, to a Non-Tariff Measures Work Programme, subject to further consultations with capitals by 10 November 2000. Since no comments were received by this date, the Work Programme was deemed approved and issued as a formal document.[148]

2. Article II:1(b)

(a) First sentence

(i) "subject to the terms, conditions or qualifications set forth"

84. In *EC – Bananas III*, addressing the question as to whether the allocation of tariff quotas as inscribed in a Schedule was inconsistent with GATT Article XIII, the Appellate Body addressed the legal status of tariff concessions. The Appellate Body held that "a Member may yield rights and grant benefits, but it cannot diminish its obligations":

> "With respect to concessions contained in the Schedules annexed to the GATT 1947, the panel in *United States – Restrictions on Importation of Sugar* ("*United States – Sugar Headnote*") found that:
>
> '. . . Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement.[149]'
>
> This principle is equally valid for the market access concessions and commitments for agricultural products contained in the Schedules annexed to the GATT 1994. The ordinary meaning of the term 'concessions' suggests that a Member may yield rights and grant benefits, but it cannot diminish its obligations. This interpretation is confirmed by paragraph 3 of the *Marrakesh Protocol*, which provides:
>
> 'The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. This would be *without prejudice to the rights and obligations of Members under Agreements in Annex 1A of the WTO Agreement*. (emphasis added)'"[150]

85. In *EC – Poultry*, the Appellate Body rejected Brazil's argument that the MFN principle in Articles I and XIII of the *GATT 1994* does not necessarily apply to tariff-rate quotas resulting from compensation negotiations under Article XXVIII of the *GATT 1994*. In so doing, the Appellate Body confirmed its finding in *EC – Bananas III*, cited in paragraph 84 above, and again referred to paragraph 3 of the *Marrakesh Protocol*. The Appellate Body stated:

> "In *United States – Restrictions on Imports of Sugar*[151] the panel stated that Article II of the GATT permits contracting parties to incorporate into their Schedules acts yielding rights under the GATT, but not acts *diminishing* obligations under that Agreement. In our view, this is particularly so with respect to the principle of non-discrimination in Articles I and XIII of the GATT 1994. In *EC – Bananas*, we confirmed the principle that a Member may yield rights but not diminish its obligations and concluded that it is equally valid for the market access concessions and commitments for agricultural products contained in the Schedules annexed to the GATT 1994.[152] The ordinary meaning of the term 'concessions' suggests that a Member may yield or waive some of its own rights and grant benefits to other Members, but that it cannot unilaterally diminish its own obligations. This interpretation is confirmed by paragraph 3 of the *Marrakesh Protocol*, which provides:
>
> 'The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. This would be *without prejudice to the rights and obligations of Members under Agreements in Annex 1A of the WTO Agreement*. (emphasis added)'"[153]

86. In *Canada – Dairy*, Canada's Schedule established a quota of 64,500 tons, under which imports were subject to a certain duty, while out-of-quota imports were subject to a higher duty. Under the heading "Other terms and conditions", the Canadian Schedule stated: "This quantity [64,500] represents the estimated annual

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[146] G/L/160, para. 3. The Committee's rules of procedure provide for observer status in the Committee to WTO Members which are not parties, and governments that are observers to the Council for Trade in Goods. Furthermore, requests for observer status by international intergovernmental organizations would be considered on a case-by-case basis.

[147] G/IT/M/2, para. 1.5. The text of the Rules of Procedure can be found in G/IT/3.

[148] G/IT/19.

[149] (*footnote original*) Panel Report on *US – Sugar*, para. 5.2.

[150] Appellate Body Report on *EC – Bananas III*, para. 154.

[151] (*footnote original*) Adopted 22 June 1989, BISD 36S/331, para. 5.2.

[152] Adopted 25 September 1997, WT/DS27/AB/R, para. 154.

[153] Appellate Body Report on *EC – Poultry*, para. 98.

cross-border purchases imported by Canadian consumers." The United States argued that Canada violated Article II:1(b) in restricting access to tariff quotas for fluid milk to cross-border imports by Canadians of (i) consumer packaged milk for personal use, (ii) valued at less than Can$20. The United States argued that with respect to those two conditions, Canada was granting imports of fluid milk treatment less favourable than that provided for in its Schedule. The Panel found the language contained in Canada's Schedule under the heading "Other terms and conditions" to be a *description* of the way the size of the quota was determined, rather than a statement of the *conditions* as to the kind of imports qualified to enter Canada under this quota. The Panel found that ". . . the ordinary meaning of the word "represent" in this context does not, in our view, call to mind the setting out of specific restrictions or conditions".[154] The Panel added that "[e]ven if the phrase could be said to include restrictions on access to the tariff-rate quota, we do not see how the two conditions *at issue in this dispute* could be read into this phrase".[155] As a result, the Panel did not find any restriction to tariff quotas in Canada's relevant Schedule, and thus, agreed with the United States' argument.[156] The Appellate Body disagreed with the Panel's reading of the Schedule and presented the following interpretation of the term "subject to terms, conditions or qualifications" contained in Article II:1(b):

> "Under Article II:1(b) of the GATT 1994, the market access concessions granted by a Member are '*subject to*' the 'terms, conditions or qualifications set forth in [its] Schedule'. (emphasis added) In our view, the ordinary meaning of the phrase 'subject to' is that such concessions are without prejudice to and are *subordinated to*, and are, therefore, *qualified by*, any 'terms, conditions or qualifications' inscribed in a Member's Schedule. We believe that the relationship between the 64,500 tonnes tariff-rate quota and the 'Other Terms and Conditions' set forth in Canada's Schedule is of this nature. The phrase 'terms and conditions' is a composite one which, in its ordinary meaning, denotes the imposition of qualifying restrictions or conditions. A strong presumption arises that the language which is inscribed in a Member's Schedule under the heading, 'Other Terms and Conditions', has some *qualifying* or *limiting* effect on the substantive content or scope of the concession or commitment.[157]
>
> In interpreting the language in Canada's Schedule, the Panel focused on the verb 'represents' and opined that, because of the use of this verb, the notation was no more than a '*description*' of the 'way the size of the quota was determined'.[158] The net consequence of the Panel's interpretation is a failure to give the notation in Canada's Schedule *any* legal effect as a 'term and condition'. If the language is *merely* a 'description' or a 'narration' of how the quantity was arrived at, we do not see what purpose it serves in being inscribed in the Schedule. The Panel, in other words, acted upon the assumption that Canada projected no identifiably necessary or useful qualifying or limiting purpose in inscribing the notation in its Schedule. The Panel thus disregarded the principle of effectiveness in its interpretive effort.
>
> We note that the Panel also adopted an overly literal and narrow view of the words 'cross-border purchases imported by Canadian consumers' in the notation at issue. Moreover, the Panel erred in failing to give meaning to *all* of the words in that notation. On the basis of its ordinary meaning, the Panel stated that the language in the notation could *not* refer only to '*consumer packaged*' milk *'for personal use'*.[159] (emphasis in original) We do not agree that the ordinary meaning of that phrase in the notation is so unequivocal. We do not see anything in the text of the notation which necessarily *precludes* such an interpretation. The notation refers to 'cross-border purchases imported by Canadian consumers'. It seems, to us, that this language may well be taken to refer to imports of fluid milk made by Canadian consumers for personal use in the course of cross-border shopping."[160]

87. After making the findings referenced in paragraph 86 above, the Appellate Body in *Canada – Dairy* found that while the language contained in Canada's Schedule could be said to refer to the requirement of "consumer packaged milk for personal use", it could not refer to the Can$ 50 value limitation. As a result, the Appellate Body found the latter requirement not to be contained in Canada's Schedule and its existence to be inconsistent with Article II:1(b).[161]

88. In *US – Certain EC Products*, one of the issues was the consistency of increased bonding requirements imposed on imports with GATT Article II:1(b), first sentence. See paragraph 69 above.

(ii) Interpretation of tariff concessions in a Schedule

Applicable interpretative rules

89. In *EC – Computer Equipment*, the Appellate Body dealt with the complaint that the reclassification of

[154] Panel Report on *Canada – Dairy*, para.7.151.
[155] Panel Report on *Canada – Dairy*, para. 7.152.
[156] Panel Report on *Canada – Dairy*, paras. 7.151–7.155.
[157] (*footnote original*) The United States contends, on the basis of the panel report in *United States – Restrictions on Imports of Sugar* (*supra*, footnote 52), that "terms and conditions" may encompass "additional concessions". We take no position as to whether "terms and conditions" may encompass "additional concessions"; but we do, however, note that, even assuming that the United States is correct on this point, an "additional concession" may well embody a qualification to a concession by expanding its scope or adding to it.
[158] (*footnote original*) Panel Report, para. 7.151.
[159] (*footnote original*) *Ibid.*, para. 7.152.
[160] Appellate Body Report on *Canada – Dairy*, paras. 134–136.
[161] Appellate Body Report on *Canada – Dairy*, para. 143.

certain computer equipment was in violation of the relevant tariff concession of the European Communities, and therefore inconsistent with Article II. The Appellate Body set forth the interpretative rules on tariff concessions and, contrary to the Panel which had based its interpretation of the European Communities' tariff commitments on the "legitimate expectations" of the exporting Member[162], it emphasized the *common intentions* of the parties:

> "The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty. Tariff concessions provided for in a Member's Schedule – the interpretation of which is at issue here – are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*."[163]

Relevance of "legitimate expectations"

90. In *EC – Computer Equipment*, the European Communities appealed against the Panel's finding that "the meaning of the term 'ADP machines' in this context [of Article II:1(b)] may be determined in light of the legitimate expectations of an exporting Member."[164] In addition, the Panel found that the United States "was not required to clarify the scope of the European Communities' tariff concessions".[165] In rejecting the Panel's finding, the Appellate Body stated as follows:

> "Tariff negotiations are a process of reciprocal demands and concessions, of 'give and take'. It is only normal that importing Members define their offers (and their ensuing obligations) in terms which suit their needs. On the other hand, exporting Members have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed. There was a special arrangement made for this in the Uruguay Round. For this purpose, a process of verification of tariff schedules took place from 15 February through 25 March 1994, which allowed Uruguay Round participants to check and control, through consultations with their negotiating partners, the scope and definition of tariff concessions.[166] Indeed, the fact that Members' Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among *all* Members.
>
> For the reasons stated above, we conclude that the Panel erred in finding that 'the United States was not required to clarify the scope of the European Communities' tariff concessions on LAN equipment'.[167] We consider that any clarification of the scope of tariff concessions that may be required during the negotiations is a task for *all* interested parties."[168]

91. However, despite its rejection, referenced in paragraph 90 above, of the Panel's interpretative approach to the European Communities' tariff commitments, the Appellate Body in *EC – Computer Equipment* stated that "[w]e do not agree that the Panel has created and applied a new rule on the burden of proof. The rules on the burden of proof are those which we clarified in *United States – Shirts and Blouses*.[169]"[170] The Appellate Body opined that the Panel's findings on the "requirement of clarification" were linked to the Panel's reliance on "legitimate expectations" as a means of interpretation of the European Communities' tariff concessions and "serve[d] to complete and buttress the Panel's conclusion that 'the United States was entitled to legitimate expectations that LAN equipment would continue to be accorded tariff treatment as ADP machines in the European Communities'".[171]

Relevance of Harmonized System/WCO practices

92. On the relevance of the Harmonized System in interpreting tariff concessions, the Appellate Body in *EC – Computer Equipment* stated as follows:

> "We note that during the Uruguay Round negotiations, both the European Communities and the United States were parties to the *Harmonized System*. Furthermore, it appears to be undisputed that the Uruguay Round tariff negotiations were held on the basis of the *Harmonized System's* nomenclature and that requests for, and offers of, concessions were normally made in terms of this nomenclature. Neither the European Communities nor the United States argued before the Panel that the *Harmonized System* and its *Explanatory Notes* were

[162] Panel Report on *EC – Computer Equipment*, para. 8.60.
[163] Appellate Body Report on *EC – Computer Equipment*, para. 84. The Appellate Body confirmed this finding in *Canada – Dairy*. Appellate Body Report on *Canada – Dairy*, para. 131.
[164] Panel Report on *EC – Computer Equipment*, para. 8.31.
[165] Panel Report on *EC – Computer Equipment*, para. 8.60.
[166] (*footnote original*) MTN.TNC/W/131, 21 January 1994. See also *Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994*, para. 3.
[167] Panel Report on *EC – Computer Equipment*, para. 8.60.
[168] Appellate Body Report on *EC – Computer Equipment*, paras. 109–110. This finding was referred to by the Panel on *Korea – Procurement*, in relation to the interpretation of Annexes to the *Agreement on Government Procurement*, which specify the coverage of the Agreement for each Party. See Chapter on *Agreement on Government Procurement*, Section XXVI.
[169] (*footnote original*) Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14. See also, Appellate Body Report on *EC – Hormones*, paras. 97–109.
[170] Appellate Body Report on *EC – Computer Equipment*, para. 103.
[171] Appellate Body Report on *EC – Computer Equipment*, para. 104.

relevant in the interpretation of the terms of Schedule LXXX. We believe, however, that a proper interpretation of Schedule LXXX should have included an examination of the *Harmonized System* and its *Explanatory Notes*."[172]

93. The Appellate Body also discussed the relevance of decisions of the World Customs Organization ("WCO") for the interpretation of the tariff concessions at issue:

"A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines. Singapore, a third party in the panel proceedings, also referred to these decisions. The European Communities observed that it had introduced reservations with regard to these decisions and that, even if they were to become final as they stood, they would not affect the outcome of the present dispute for two reasons: first, because these decisions could not confirm that LAN equipment was classified as ADP machines in 1993 and 1994; and, second, because this dispute 'was about duty treatment and not about product classification'. We note that the United States agrees with the European Communities that this dispute is not a dispute on the *correct* classification of LAN equipment, but a dispute on whether the tariff treatment accorded to LAN equipment was less favourable than that provided for in Schedule LXXX. However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant; and, therefore, they should have been examined by the Panel."[173]

Relevance of prior practice in tariff classification

94. In *EC – Computer Equipment*, in its interpretation of the tariff concessions at issue, the Appellate Body found that the terms of the relevant Schedule were ambiguous. In continuing its analysis, the Appellate Body discussed the relevance of tariff classification practice of Members to the interpretation of tariff concessions as follows:

"In the light of our observations on 'the circumstances of [the] conclusion' of a treaty as a supplementary means of interpretation under Article 32 of the *Vienna Convention*, we consider that the classification practice in the European Communities during the Uruguay Round is part of 'the circumstances of [the] conclusion' of the *WTO Agreement* and may be used as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*."[174]

95. However, the Appellate Body added the following caveat regarding the relevance of prior practice on tariff classification:

"The purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty. To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance."[175]

96. Also, the Appellate Body in *EC – Computer Equipment* denied the relevance of inconsistent practice for the interpretation of tariff concessions. In addition, the Appellate Body pointed to the fact that the Panel on *EC – Computer Equipment* had focused on only two member States of the European Communities:

"Consistent prior classification practice may often be significant. Inconsistent classification practice, however, *cannot* be relevant in interpreting the meaning of a tariff concession. . . .

. . . [T]he Panel identified Ireland and the United Kingdom as the 'largest' and 'major' market for LAN equipment exported from the United States. On the basis of this assumption, the Panel gave special importance to the classification practice by customs authorities in these two Member States. However, the European Communities constitutes a customs union, and as such, once goods are imported into any Member State, they circulate freely within the territory of the entire customs union. The export market, therefore, is the European Communities, not an individual Member State."[176]

(iii) "ordinary customs duties"

97. As regards the concept of ordinary customs duty, the Appellate Body in *Chile – Price Band System*, reversed the Panel's interpretation of this concept with respect to Article 4 of the *Agreement on Agriculture* and Article II.1(b) first sentence of *GATT 1994*. See Section V.B.3 of the Chapter on the *Agreement on Agriculture*.

(iv) "in excess of"

Specific import duties under tariff concessions made on an ad valorem basis

98. In *Argentina – Textiles and Apparel*, the measure at issue was a minimum specific import duty (the so-called "DIEM") imposed by Argentina on footwear, textiles and apparel. Argentina's Schedule included a

[172] Appellate Body Report on *EC – Computer Equipment*, para. 89.
[173] Appellate Body Report on *EC – Computer Equipment*, para. 90.
[174] Appellate Body Report on *EC – Computer Equipment*, para. 92. This reasoning was reiterated and followed in *Canada – Dairy*, where the Appellate Body addressed a complaint that Canadian administration of tariff-rate quota on fluid milk was inconsistent with GATT Article II:1(b). Appellate Body Report on *Canada – Dairy*, para. 132.
[175] Appellate Body Report on *EC – Computer Equipment*, para. 93.
[176] Appellate Body Report on *EC – Computer Equipment*, paras. 95–96.

bound rate of duty of 35 per cent *ad valorem* with respect to the above-mentioned goods. In practice, textiles and apparel were subject to the higher of either (i) a 35 per cent *ad valorem* duty or (ii) the minimum specific duty. The Panel found the Argentine specific duty to be a violation of Article II for two reasons: First, the Panel found that Argentina had acted inconsistently with Article II simply by virtue of applying a different *type* of import duty than set out in its Schedule, independently of whether the *ad valorem* equivalent of the specific duty in fact exceeded the bound *ad valorem* rate.[177] In making this finding, the Panel relied on past GATT practice which it found to be "clear".[178] Second, the Panel found a violation of Article II in the fact that the minimum specific import duty in certain cases exceeded the bound 35 per cent *ad valorem* duty.[179] The Appellate Body modified the findings of the Panel. In so doing, the Appellate Body disagreed with the Panel about the clarity of past GATT practice and focused, in its analysis, on the terms of Article II. The Appellate Body first addressed the Panel's finding that merely by applying a *type* of duty different from the *type* provided for in a Member's Schedule, that Member acted inconsistently with Article II:

> "A tariff binding in a Member's Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to impose a duty that is less than that provided for in its Schedule. The principal obligation in the first sentence of Article II:1(b), as we have noted above, requires a Member to refrain from imposing ordinary customs duties *in excess of* those provided for in that Member's Schedule. However, the text of Article II:1(b), first sentence, does not address whether applying a *type* of duty different from the *type* provided for in a Member's Schedule is inconsistent, in itself, with that provision."[180]

99. After finding that the text of Article II:1(b) did not address the question whether a violation of Article II could result merely from the application a *type* of duty different from the *type* of duty provided for in a Member's Schedule, the Appellate Body in *Argentina – Textiles and Apparel* addressed the question whether Argentina had applied customs duties *in excess of* those provided for in its Schedule:

> "[T]he application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Article II:1(b), first sentence, of the GATT 1994 to the extent that it results in ordinary customs duties being levied in excess of those provided for in that Member's Schedule. In this case, we find that Argentina has acted inconsistently with its obligations under Article II:1(b), first sentence, of the GATT 1994, because the DIEM regime, by its structure and design, results, with respect to a certain range of import prices in any relevant tariff category to which it applies, in the levying of customs duties in excess of the bound rate of 35 per cent *ad valorem* in Argentina's Schedule."[181]

100. In reaching this conclusion, the Appellate Body in *Argentina – Textiles and Apparel* pointed out the possibility of a price sufficiently low to render the *ad valorem* equivalent of the DIEM greater than 35 per cent:

> "[W]e may generalize that under the Argentine system, whether the amount of the DIEM is determined by applying 35 per cent, or a rate less than 35 per cent, to the representative international price, there will remain the possibility of a price that is sufficiently low to produce an *ad valorem* equivalent of the DIEM that is greater than 35 per cent. In other words, the structure and design of the Argentine system is such that for any DIEM, no matter what *ad valorem* rate is used as the multiplier of the representative international price, the possibility remains that there is a 'break-even' price below which the *ad valorem* equivalent of the customs duty collected is in excess of the bound *ad valorem* rate of 35 per cent.
>
> We note that it is possible, under certain circumstances, for a Member to design a legislative 'ceiling' or 'cap' on the level of duty applied which would ensure that, even if the type of duty applied differs from the type provided for in that Member's Schedule, the *ad valorem* equivalents of the duties actually applied would not exceed the *ad valorem* duties provided for in the Member's Schedule. However, no such "ceiling" exists in this case. The measures at issue here, as we have already noted, specifically and expressly require Argentine customs officials to collect the *greater* of the *ad valorem* or the specific duties applicable, with no upper limit on the level of the *ad valorem* equivalent of the specific duty that may be imposed. Before the Panel, Argentina argued that its domestic challenge procedure (*recurso de impugnación*), in combination with the precedence and direct effect of international treaty obligations in the Argentine national legal system, operated as an effective legislative 'ceiling' to ensure that a duty in excess of the bound rate of 35 per cent *ad valorem* could never actually be imposed. The Panel did not accept this argument, and Argentina has not appealed from that finding of the Panel. In this case, therefore, there is no effective legislative 'ceiling' in the Argentine system which ensures that duties in excess of the bound rate of 35 per cent *ad valorem* will not be applied."[182]

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[177] Panel Report on *Argentina – Textiles and Apparel*, paras. 6.31–6.32.
[178] Panel Report on *Argentina – Textiles and Apparel*, para. 6.31.
[179] Panel Report on *Argentina – Textiles and Apparel*, para. 6.65.
[180] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 46.
[181] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 55.
[182] Appellate Body Report on *Argentina – Textiles and Apparel*, paras. 53–54.

(b) Article II:1(b) Second sentence

101. The Appellate Body on *Chile – Price Band System* reversed the Panel's finding that the duties resulting from Chile's price band system constituted a violation of the *second* sentence of Article II:1(b), because no claim had been made under that provision, and therefore the Panel had acted inconsistently with Article 11 of the DSU.[183] See Section XI.B(2)(a)(ii) of the Chapter on the *DSU*.

102. The Appellate Body on *Chile – Price Band System*, in examining the concept of ordinary customs duties under Article 4.2 of the Agreement on Agriculture, referred to Article II:1(b) second sentence of the GATT 1994. See Section V.B.2 of the Chapter on the *Agreement on Agriculture*.

3. Relationship between paragraphs 1(a) and 1(b)

103. In *Argentina – Textiles and Apparel*, in addressing the consistency with GATT Article II of certain minimum specific duties imposed on textiles and apparel, the Appellate Body described the relationship between paragraphs (a) and (b) of Article II:1 as follows:

> "The terms of Article II:1(a) require that a Member 'accord to the commerce of the other Members treatment no less favourable than that provided for' in that Member's Schedule. Article II:1(b), first sentence, states, in part: 'The products described in Part I of the Schedule . . . shall, on their importation into the territory to which the Schedule relates, . . . be exempt from ordinary customs duties in excess of those set forth and provided therein.' Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule. Because the language of Article II:1(b), first sentence, is more specific and germane to the case at hand, our interpretative analysis begins with, and focuses on, that provision."[184]

4. Article II:5

104. In *EC – Computer Equipment*, the Appellate Body rejected the Panel's finding that Article II:5 confirmed the relevance of "legitimate expectations" of the exporting Member for interpreting tariff concessions of the importing Member:

> "[W]e reject the Panel's view that Article II:5 of the GATT 1994 confirms that 'legitimate expectations are a vital element in the interpretation' of Article II:1 of the GATT 1994 and of Members' Schedules. It is clear from the wording of Article II:5 that it does not support the Panel's view. This paragraph recognizes the possibility that the treatment *contemplated* in a concession, provided for in a Member's Schedule, on a particular product, may differ from the treatment *accorded* to that product and provides for a compensatory mechanism to rebalance the concessions between the two Members concerned in such a situation. However, nothing in Article II:5 suggests that the expectations of *only* the exporting Member can be the basis for interpreting a concession in a Member's Schedule for the purposes of determining whether that Member has acted consistently with its obligations under Article II:1. In discussing Article II:5, the Panel overlooked the second sentence of that provision, which clarifies that the 'contemplated treatment' referred to in that provision is the treatment contemplated by *both* Members."[185]

5. Article II:7

105. In *EC – Computer Equipment*, the Appellate Body considered that "[a] Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994". The Appellate Body thus concluded that "the concessions provided for in that Schedule are part of the terms of the treaty".[186] In this regard, see paragraph 89 above.

D. RELATIONSHIP WITH OTHER ARTICLES

1. General

106. In *EC – Bananas III*, the Appellate Body, discussing whether tariff concessions for agricultural products can deviate from Article XIII of *GATT 1994*, emphasized that in their Schedules, Members may yield their rights, but may not diminish their obligations under *GATT 1994*. See paragraph 84 above.

2. Article III

107. In *EC – Bananas III*, the Appellate Body rejected the argument that Article III:4 of the *GATT 1994* did not cover the EC licensing system for the allocation of tariff quotas for imports of bananas because it was a border measure. See paragraphs 125 and 285 below.

108. In *Korea – Various Measures on Beef*, after finding that the practice of the Korean state trading agency for beef of treating grass-fed beef and grain-fed beef differently was inconsistent with GATT Articles XI and II:1(a), the Panel, in a finding not reviewed by the Appellate Body, did not "find it necessary to address Australia's claims that the same measures also violate Articles III:4 and XVII of GATT."[187]

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[183] Appellate Body Report on *Chile – Price Band System*, para. 285.
[184] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 45.
[185] Appellate Body Report on *EC – Computer Equipment*, para. 81.
[186] Appellate Body Report on *EC – Computer Equipment*, para. 84.
[187] Panel Report on *Korea – Various Measures on Beef*, para. 780. With respect to judicial economy in general, see Chapter on *DSU*, Section XXXVI.F.

3. Article XI

109. The majority of the Panel on *US – Certain EC Products* decided that the United States' bonding requirements on imports from the European Communities fell within the scope of Article II of *GATT 1994*; in a separate opinion, one panelist, whose identity remained confidential pursuant to Article 14.3 of the *DSU*, expressed the view that the increased bonding requirement was subject to, and inconsistent with, Article XI. The Appellate Body reversed the finding of the Panel. See paragraph 69 above, and footnote 126.

4. Article XIII

110. Following the finding referenced in paragraph 106 above, the Appellate Body in *EC – Bananas III* addressed whether the *Agreement on Agriculture* permits market access concessions on agricultural products to be inconsistent with Article XIII of *GATT 1994*. In so doing, the Appellate Body addressed the relationship between the *Agreement on Agriculture* and *GATT 1994* and found that Article XIII of *GATT 1994* was applicable to such concessions:

> "The question remains whether the provisions of the *Agreement on Agriculture* allow market access concessions on agricultural products to deviate from Article XIII of the GATT 1994. The preamble of the *Agreement on Agriculture* states that it establishes 'a basis for initiating a process of reform of trade in agriculture' and that this reform process 'should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines'. The relationship between the provisions of the GATT 1994 and of the *Agreement on Agriculture* is set out in Article 21.1 of the *Agreement on Agriculture*:
>
> > 'The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.'
>
> Therefore, the provisions of the GATT 1994, including Article XIII, apply to market access commitments concerning agricultural products, except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter."[188]

111. In *EC – Bananas III*, the Panel also found that the European Communities' import regime for bananas was inconsistent with Article XIII of *GATT 1994* in that the European Communities allocated tariff quota shares to some Members without allocating such shares to other Members. In doing so, with respect to the relationship between Articles II and XIII, the Panel stated as follows:

> "The panel in the *Sugar Headnote* case found that qualifications on tariff bindings do not override other GATT provisions after an analysis of the wording of Article II, its object, purpose and context, and the drafting history of the provision. Although it made no mention of the Vienna Convention, it seems to have followed closely Articles 31 and 32 thereof. . . .[189]
>
> . . .
>
> We agree with the analysis of the *Sugar Headnote* panel report and note that Article II was not changed in any relevant way as a result of the Uruguay Round. Thus, based on the *Sugar Headnote* case, we conclude that the EC's inclusion of allocations inconsistent with the requirements of Article XIII in its Schedule does not prevent them from being challenged by other Members. We note in this regard that the Uruguay Round tariff schedules were prepared with full knowledge of the *Sugar Headnote* panel report, which was adopted by the GATT CONTRACTING PARTIES in the middle of the Round (June 1989)."[190]

5. Article XVII

112. In *Korea – Various Measures on Beef*, after finding that the practice of the Korean state trading agency for beef of treating grass-fed beef and grain-fed beef differently was inconsistent with GATT Articles XI and II:1(a), the Panel, in a finding not reviewed by the Appellate Body, did not "find it necessary to address Australia's claims that the same measures also violate Article XVII of GATT"[191].

E. EXCEPTIONS AND DEROGATIONS FROM ARTICLE II

1. Waivers

113. A number of waivers of a "collective" or individual nature have been granted to enable Members to implement the HS changes domestically and undertake Article XXVIII negotiations, subsequently, if required. With respect to these waivers, see the Chapter on the *WTO Agreement*.

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[188] Appellate Body Report on *EC – Bananas III*, para. 155.

[189] Following this paragraph, the Panel cited Panel Report on *US – Sugar*, paras. 5.1–5.7.

[190] Panel Report on *EC – Bananas III*, paras. 7.113–7.114. In support of its finding, the Panel cited Appellate Body Report on *Japan – Alcoholic Beverages II*, p.15, as stating that "[a]dopted panel reports are an important part of the GATT *acquis*. They are often taken into account by subsequent panels. They create legitimate expectations among Members, and, therefore should be taken into account where they are relevant to any dispute".

[191] Panel Report on *Korea – Various Measures on Beef*, para. 780. With respect to judicial economy in general, see Chapter on *DSU*, Section XXXVI.F.

F. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Agreement on Agriculture

114. The Appellate Body on *Chile – Price Band System*, in examining the concept of ordinary customs duties under Article 4.2 of the *Agreement on Agriculture*, referred to Article II:1(b) of *GATT 1994*. See Section V.B.3 of the Chapter on the *Agreement on Agriculture*. The Appellate Body also indicated that if it were to find that Chile's price band system was inconsistent with Article 4.2 of the Agreement of Agriculture, it would not need to make a separate finding on whether Chile's price band system also results in a violation of Article II:1(b) of the GATT 1994 to resolve this dispute.[192]

2. Licensing Agreement

115. In *Canada – Dairy*, the Panel decided not to examine a claim that Canada violated Article 3 of the *Licensing Agreement* in that it restricted access to tariff-rate quotas for imports of fluid milk to Canadians of consumer packaged milk for personal use, valued less than Can$20, after having found the Canadian measure inconsistent with GATT Article II:1(b) (see paragraph 86 above).[193] See Chapter on the *Licensing Agreement*, paragraph 33.

PART II

IV. ARTICLE III

A. TEXT OF ARTICLE III

*Article III**
National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.*

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, 1948, at the option of that contracting party; *Provided* that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

8. (*a*) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

[192] Appellate Body Report on *Chile – Price Band System*, para. 190.
[193] Panel Report on *Canada – Dairy*, para. 7.157.

(*b*) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

B. TEXT OF *AD* ARTICLE III

Ad Article III

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

Paragraph 1

The application of paragraph 1 to internal taxes imposed by local governments and authorities with the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The term "reasonable measures" in the last-mentioned paragraph would not require, for example, the repeal of existing national legislation authorizing local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its spirit, if such repeal would result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term "reasonable measures" would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties.

Paragraph 2

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

Paragraph 5

Regulations consistent with the provisions of the first sentence of paragraph 5 shall not be considered to be contrary to the provisions of the second sentence in any case in which all of the products subject to the regulations are produced domestically in substantial quantities. A regulation cannot be justified as being consistent with the provisions of the second sentence on the ground that the proportion or amount allocated to each of the products which are the subject of the regulation constitutes an equitable relationship between imported and domestic products.

C. INTERPRETATION AND APPLICATION OF ARTICLE III

1. General

(a) Purpose of Article III

(i) Avoidance of protectionism in the application of internal measures

116. In examining the consistency of the Japanese taxation on liquor products with Article III, the Appellate Body in *Japan – Alcoholic Beverages II* explained the purpose of Article III in the following terms:

> "The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III 'is to ensure that internal measures "not be applied to imported or domestic products so as to afford protection to domestic production"'.[194] Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.[195] '[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given'.[196]"[197]

117. The Appellate Body repeatedly cited its finding referenced in paragraph 116 above.[198] Further, in *Korea – Alcoholic Beverages*, the Appellate Body added:

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[194] (*footnote original*) Panel Report on *US – Section 337*, para. 5.10.
[195] (*footnote original*) Panel Reports on *US – Superfund*, para. 5.1.9; and *Japan – Alcoholic Beverages II*, para. 5.5(b).
[196] (*footnote original*) Panel Report on *Italy – Agricultural Machinery*, para. 11.
[197] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 16.
[198] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 119; Appellate Body Report on *Chile – Alcoholic Beverages*, para. 67; and Appellate Body Report on *EC – Asbestos*, para. 97. See also Panel Report on *Indonesia – Autos*, para. 14.108.

"In view of the objectives of avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships, we decline to take a static view of the term 'directly competitive or substitutable'."[199]

118. Also, in *Canada – Periodicals*, the Appellate Body added:

"The fundamental purpose of Article III of the GATT 1994 is to ensure equality of competitive conditions between imported and like domestic products.[200]"[201]

119. In *Argentina – Hides and Leather*, the Panel referred to the findings of the Appellate Body referenced in paragraphs 116–118 above, and stated that "Article III:2, first sentence, is not concerned with taxes or changes as such or the policy purposes Members pursue with them, but with their economic *impact* on the competitive opportunities of imported and like domestic products."[202] See also paragraph 176 below.

(ii) Protection of tariff commitments under Article III/Relevance of tariff concessions

120. In *Japan – Alcoholic Beverages II*, the Panel held that "one of the main purposes of Article III is to guarantee that WTO Members will not undermine through internal measures their commitments under Article II."[203] Although the Appellate Body agreed about the significance of Article III with respect to tariff concessions, it emphasized that the purpose of Article III was broader:

"The broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the *WTO Agreement*. Although the protection of negotiated tariff concessions is certainly one purpose of Article III, the statement in Paragraph 6.13 of the Panel Report that 'one of the main purposes of Article III is to guarantee that WTO Members will not undermine through internal measures their commitments under Article II' should not be overemphasized. The sheltering scope of Article III is not limited to products that are the subject of tariff concessions under Article II. The Article III national treatment obligation is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production. This obligation clearly extends also to products not bound under Article II. This is confirmed by the negotiating history of Article III."[204]

(iii) Comparison with competition law

121. In *Korea – Alcoholic Beverages*, the Panel, in a statement subsequently not addressed by the Appellate Body, considered that it is not necessary to use the same criteria for defining markets under Article III:2 as under competition law. The Panel stated:

"While the specifics of the interaction between trade and competition law are still being developed, we concur that the market definitions need not be the same. Trade law generally, and Article III in particular, focuses on the promotion of economic opportunities for importers through the elimination of discriminatory governmental measures which impair fair international trade. Thus, trade law addresses the issue of the potentiality to compete. Antitrust law generally focuses on firms' practices or structural modifications which may prevent or restrain or eliminate competition. It is not illogical that markets be defined more broadly when implementing laws primarily designed to protect competitive opportunities than when implementing laws designed to protect the actual mechanisms of competition. In our view, it can thus be appropriate to utilize a broader concept of markets with respect to Article III:2, second sentence, than is used in antitrust law. We also take note of the developments under European Community law in this regard. For instance, under Article 95 of the Treaty of Rome, which is based on the language of Article III, distilled alcoholic beverages have been considered similar or competitive in a series of rulings by the European Court of Justice ('ECJ').[205] On the other hand, in examining a merger under the European Merger Regulation,[206] the Commission of the European Communities found that whisky constituted a separate market.[207] Similarly, in an Article 95 case, bananas were considered in competition with other fruits.[208] However, under EC competition law, bananas constituted a distinct product market.[209] We are mindful that the Treaty of Rome is different in scope and purpose from the General Agreement, the similarity of Article 95 and Article III, notwithstanding. Nonetheless, we observe that there is relevance in examining how the ECJ has defined markets in similar situations to assist in understanding the relationship between the

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[199] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 120.

[200] (*footnote original*) Panel Reports on *US – Tobacco*, para. 99; *US – Malt Beverages*, para. 5.6; *Canada – Provincial Liquor Boards (EEC)*, para. 5.6; *US – Section 337*, para. 5.13; *US – Superfund*, para. 5.1.9; *Brazil – Internal Taxes*, para. 15.

[201] Appellate Body Report on *Canada – Periodicals*, p. 18.

[202] Panel Report on *Argentina – Hides and Leather*, para. 11.182. (emphasis added)

[203] Panel Report on *Japan – Alcoholic Beverages II*, para. 6.13.

[204] Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 16–17.

[205] (*footnote original*) See *Commission v. France*, Case 168/78, 1980 ECR 347; *Commission v. Kingdom of Denmark*, Case 171/78, 1980 ECR 447; *Commission v. Italian Republic*, Case 319/81, 1983 ECR 601; *Commission v Hellenic Republic,* Case 230/89, 1991 ECR 1909.

[206] (*footnote original*) Council Regulation No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

[207] (*footnote original*) Case No. IV/M 938 – *Guinness/Grand Metropolitan.*

[208] (*footnote original*) *Commission v. Italy*, Case 184/85, 1987 ECR 2013.

[209] (*footnote original*) *United Brands v. Commission*, Case 27/76, 1978 ECR 207.

analysis of non-discrimination provisions and competition law.[210]"[211]

(iv) Reference to GATT practice

122. With respect to GATT practice on this subject-matter, see GATT Analytical Index, pages 125–127.

(b) Scope of application – measures imposed at the time or point of importation

123. In *Argentina – Hides and Leather*, the Panel addressed the question whether Argentine fiscal provisions concerning pre-payment of a value added tax, applied to imported goods at the time of their importation, were nevertheless to be considered "internal measures" within the meaning of Article III:2. The Panel addressed in particular Note *Ad* Article III, which sets forth that a measure applied to a product at the time of importation is nevertheless an internal measure within the meaning of Article III if this measure is also imposed on the like domestic product:

> "RG 3431 [the value-added tax measure applicable to imported goods] applies to definitive import transactions, but only if the products imported are subsequently re-sold in the internal Argentinean market. In other words, RG 3431 provides for the pre-payment of the IVA chargeable to an *internal* transaction. It should also be pointed out that the fact that RG 3431 is collected at the time and point of importation does not preclude it from qualifying as an internal tax measure."[212]

124. While the parties to the *Argentina – Hides and Leather* dispute agreed that RG 3543, another Argentine tax measure imposing a collection regime of income taxes with respect to import transactions, was an internal measure within the meaning of Article III, they disagreed with respect to the question whether the same tax regime existed for domestic goods, i.e. whether RG 2784, the income tax measure applicable with respect to domestic transactions, was the "internal analogue" of RG 3431. While RG 3543 established a *collection* regime and defined the *purchaser* as the taxable person, RG 2784 established a *withholding* regime and defined the *seller* as the taxable person. The Panel did not consider these differences significant enough for the Argentine regime to fall outside the scope the Note *Ad* Article III:

> "[I]t is clear that the fact that RG 3543 creates a collection regime and not a withholding regime does not establish, in itself, that RG 2784 is not equivalent to RG 3543. The use of a different method of taxation may be justified by objective reasons. In this regard, it seems logical to us to collect pre-payments of an income tax from the sellers of a product, as indeed RG 2784 envisages. As we understand it, RG 3543 does not do so, *inter alia*, because foreign sellers are not normally subject to income taxation in Argentina. In those circumstances, Argentina apparently saw fit to adjust for the adverse competitive effect of RG 2784 on domestic products by collecting pre-payments from importers in accordance with RG 3543.
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> . . .
>
> For these reasons, we find that RG 3543 establishes a mechanism for the collection of the IG at the border which is equivalent in nature to the IG withholding mechanism established by RG 2784. In accordance with the Note *Ad* Article III, we therefore conclude that RG 3543 is an internal measure within the meaning of Article III:2."[213]

125. In *EC – Bananas III*, the Appellate Body found the EC import licensing system for bananas inconsistent with Article III:4. The European Communities claimed that Article III:4 was not applicable to the import licensing system because it was a border measure. The Appellate Body replied as follows:

> "At issue in this appeal is not whether *any* import licensing requirement, as such, is within the scope of Article III:4, but whether the EC procedures and requirements for the *distribution* of import licences for imported bananas among eligible operators *within* the European Communities are within the scope of this provision. The EC licensing procedures and requirements include the operator category rules, under which 30 per cent of the import licences for third-country and non-traditional ACP bananas are allocated to operators that market EC or traditional ACP bananas, and the activity function rules, under which Category A and B licences are distributed among operators on the basis of their economic activities as importers, customs clearers or ripeners. These rules go far beyond the mere import licence requirements needed to administer the tariff quota for third-country and non-traditional ACP bananas or Lomé Convention requirements for the importation of bananas. These rules are intended, among other things, to cross-subsidize distributors of EC (and ACP) bananas and to ensure that EC banana ripeners obtain a share of the quota rents. As such, these rules affect 'the internal sale, offering for sale, purchase, . . .' within the meaning of Article III:4, and therefore fall within the scope of this provision. Therefore, we agree with the conclusion of the Panel on this point."[214]

(i) State trading enterprises

126. In *Korea – Various Measures on Beef*, the Panel recognized that where a state trading enterprise has a

[210] (*footnote original*) In finding the relationship of the provisions to each other relevant, we do not intend to imply that we have adopted the market definitions defined in these or other ECJ cases for purposes of this decision.
[211] Panel Report on *Korea – Alcoholic Beverages*, para. 10.81.
[212] Panel Report on *Argentina – Hides and Leather*, para. 11.145.
[213] Panel Report on *Argentina – Hides and Leather*, paras. 11.150 and 11.154.
[214] Appellate Body Report on *EC – Bananas III*, para. 211.

monopoly over both importation and distribution of goods, a blurring may occur of the traditional distinction between measures affecting imported products and measures affecting importation:

> "Based on the panel findings in the Canada – Marketing Agencies (1988) case, the Panel considers that to the extent that LPMO fully controls both the importation and distribution of its 30 per cent share of Korean beef quota, the distinction normally made in the GATT between restrictions affecting the importation of products (i.e. border measures) and restrictions affecting imported products (i.e. internal measures) loses much of its significance."[215]

(ii) Reference to GATT practice

127. With respect to GATT practice on this subject-matter, see GATT Analytical Index, pages 136–139.

(c) Relevance of policy purpose of internal measures / "aims-and-effects" test

128. With respect to the relevance of policy purposes of subject internal measures, in *Japan – Alcoholic Beverages II*, the Appellate Body stated as follows:

> "Members of the WTO are free to pursue their own domestic goals through internal taxation or regulation so long as they do not do so in a way that violates Article III or any of the other commitments they have made in the WTO Agreement."[216]

129. In this respect, in *Argentina – Hides and Leather*, the Panel stated that "[i]t must be stated ... that the applicability of Article III:2 is not conditional upon the policy purpose of a tax measure.[217]"[218] See also paragraph 119 above.

130. In *Japan – Alcoholic Beverages II*, the Panel, in a finding subsequently upheld by the Appellate Body, explicitly rejected the so-called "aims-and-effects" test. The Panel summarized the parties' arguments for the "aims-and-effects" test as follows:

> "Japan ... essentially argued that the Panel should examine the contested legislation in the light of its aim and effect in order to determine whether or not it is consistent with Article III:2. According to this view, in case the aim and effect of the contested legislation do not operate so as to afford protection to domestic production, no inconsistency with Article III:2 can be established. ... [T]he United States ... essentially argued that, in determining whether two products that were taxed differently under a Member's origin-neutral tax measure were nonetheless 'like products' for the purposes of Article III:2, the Panel should examine not only the similarity in physical characteristics and end-uses, consumer tastes and preferences, and tariff classifications for each product, but also whether the tax distinction in question was 'applied ... so as to afford protection to domestic production': that is, whether the aim and effect of that distinction, considered as a whole, was to afford protection to domestic production. According to this view, if the tax distinction in question is not being applied so as to afford protection to domestic production, the products between which the distinction is drawn are not to be deemed 'like products' for the purpose of Article III:2."[219]

131. In upholding the rejection by the Panel of the "aims-and-effects" test under Article III:2, first sentence, the Appellate Body, in *Japan – Alcoholic Beverages II*, found that the policy purpose of a tax measure (the "aim" of a measure") was not relevant for the purpose of Article III:2, first sentence:

> "Article III:2, first sentence does not refer specifically to Article III:1. There is no specific invocation in this first sentence of the general principle in Article III:1 that admonishes Members of the WTO not to apply measures 'so as to afford protection'. This omission must have some meaning. We believe the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence. However, this does not mean that the general principle of Article III:1 does not apply to this sentence. To the contrary, we believe the first sentence of Article III:2 is, in effect, an application of this general principle. ... If the imported and domestic products are 'like products', and if the taxes applied to the imported products are 'in excess of' those applied to the domestic like products, then the measure is inconsistent with Article III:2, first sentence."[220]

132. Also, in *EC – Bananas III*, the Appellate Body rejected the "aims-and-effects" test under both Article II and Article XVII of the *GATS*.[221] See Chapter on the *GATS*, Section XXI.B.3.

133. With respect to this topic, see also paragraph 219 below.

(i) Reference to GATT practice

134. With respect to GATT practice on this subject-matter, see GATT Analytical Index, page 127.

(d) Relevance of trade effects

135. In *Japan – Alcoholic Beverages II*, the Appellate Body addressed the relevance of the trade effects of measures falling under the scope of Article III:

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[215] Panel Report on *Korea – Various Measures on Beef*, para. 766.
[216] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 16.
[217] (*footnote original*) See the Panel Reports on *US – Superfund*, para. 5.2.4, *EEC – Parts and Components*, para. 5.6.
[218] Panel Report on *Argentina – Hides and Leather*, para. 11.144.
[219] Panel Report on *Japan – Alcoholic Beverages II*, para. 6.15.
[220] Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 18–19.
[221] Appellate Body Report on *EC – Bananas III*, paras. 216 and 241.

"[I]t is irrelevant that 'the trade effects' of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.[222]"[223]

136. The Appellate Body reiterated this approach in *Canada – Periodicals*:

"It is a well-established principle that the trade effects of a difference in tax treatment between imported and domestic products do not have to be demonstrated for a measure to be found to be inconsistent with Article III.[224]"[225]

(i) Reference to GATT practice

137. With respect to GATT practice on this subject-matter, see GATT Analytical Index, pages 128–130.

(e) State trading monopolies

138. In *Korea – Various Measures on Beef*, the Panel addressed the relationship between Article XVII, the provision on state trading enterprises, and Article III. Finding support for its conclusions in GATT practice, the Panel held:

"Article XVII.1(a) establishes the general obligation on state trading enterprises to undertake their activities in accordance with the GATT principles of non-discrimination. The Panel considers that this general principle of non-discrimination includes at least the provisions of Articles I and III of GATT.

. . .

. . . A conclusion that the principle of non-discrimination was violated would suffice to prove a violation of Article XVII."[226]

(i) Reference to GATT practice

139. With respect to GATT practice on this subject-matter, see also GATT Analytical Index, pages 131–133.

2. Article III:1

(a) Relationship between paragraph 1 and paragraphs 2, 4 and 5

140. In *US – Gasoline*, in a finding subsequently not addressed by the Appellate Body, the Panel examined whether a US gasoline regulation treated imported gasoline in a manner inconsistent with Article III:1. In response to the US argument that Article III:1 "could not form the basis of a violation"[227], the Panel answered as follows:

"The Panel examined first whether, after making a finding of inconsistency with Article III:4, it should make a finding under Article III:1. The Panel noted that the panel in the *Malt Beverages* case had examined a claim made under paragraphs 1, 2 and 4 of Article III. That panel had concluded that 'because Article III:1 is a more general provision than either Article III:2 or III:4, it would not be appropriate for the Panel to consider [the complainant's] Article III:1 allegations to the extent that the Panel were to find [the respondent's] measures to be inconsistent with the more specific provisions of Articles III:2 and III:4.'[228] The present Panel agreed with this reasoning, and therefore did not find it necessary to examine the consistency of the Gasoline Rule with Article III:1."[229]

141. In *Japan – Alcoholic Beverages II*, the Appellate Body examined the Panel's finding of inconsistency of the Japanese Liquor Tax Law with both sentences of Article III:2. With respect to the legal status of Article III:1, the Appellate Body invoked the principle of effective treaty interpretation and found that Article III:1 constitutes part of the context for Article III:2:

"The terms of Article III must be given their ordinary meaning – in their context and in the light of the overall object and purpose of the *WTO Agreement*. Thus, the words actually used in the Article provide the basis for an interpretation that must give meaning and effect to all its terms. The proper interpretation of the Article is, first of all, a textual interpretation. Consequently, the Panel is correct in seeing a distinction between Article III:1, which 'contains general principles', and Article III:2, which 'provides for specific obligations regarding internal taxes and internal charges'. Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs. In short, Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation. Consistent with this principle of effectiveness,

[222] (*footnote original*) Panel Report on *US – Superfund*, para. 5.1.9.
[223] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 16. This statement was endorsed in *Korea – Alcoholic Beverages*. Appellate Body Report on *Korea – Alcoholic Beverages*, para. 119. See also Panel Report on *Indonesia – Autos*, para. 14.108.
[224] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 16.
[225] Appellate Body Report on *Canada – Periodicals*, p. 18.
[226] Panel Report on *Korea – Various Measures on Beef*, paras. 753 and 757.
[227] Panel Report on *US – Gasoline*, para. 6.17.
[228] (*footnote original*) *US – Malt Beverages*, para. 5.2.
[229] Panel Report on *US – Gasoline*, para. 6.17.

> and with the textual differences in the two sentences, we believe that Article III:1 informs the first sentence and the second sentence of Article III:2 in different ways."[230]

142. In *EC – Asbestos*, the Appellate Body, in interpreting Article III:4 by comparing its terms with the terms used in Article III:2, referred to Article III:1. See paragraph 234 below.

143. The precise significance of Article III:1 for the interpretation of Article III:2, first sentence, was also addressed by the Panels on *Argentina – Hides and Leather*. See paragraph 154 below.[231]

(i) Reference to GATT practice

144. With respect to GATT practice on this subject-matter, see also GATT Analytical Index, pages 139–140.

3. Article III:2

(a) General

(i) General distinction between first and second sentences

145. In *Japan – Alcoholic Beverages II*, the Appellate Body described the distinction between the first and second sentences of Article III:2 as follows:

> "[T]he second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not 'like products' as contemplated by the first sentence . . .".[232]

146. In *Canada – Periodicals*, the Appellate Body, in reviewing the Panel's finding that the Canadian excise tax on magazines was inconsistent with Article III:2, first sentence, also addressed the distinction between the first and second sentence of Article III:2 :

> "[T]here are two questions which need to be answered to determine whether there is a violation of Article III:2 of the GATT 1994: (a) whether imported and domestic products are like products; and (b) whether the imported products are taxed in excess of the domestic products. If the answers to both questions are affirmative, there is a violation of Article III:2, first sentence. If the answer to one question is negative, there is a need to examine further whether the measure is consistent with Article III:2, second sentence."[233]

147. In *Canada – Periodicals*, the Appellate Body also reiterated its statement from *Japan – Alcoholic Beverages II* that Article III:2, second sentence, contemplates a "broader category of products" than Article III:2, first sentence:

> "Any measure that indirectly affects the conditions of competition between imported and like domestic products would come within the provisions of Article III:2, first sentence, or by implication, second sentence, given the broader application of the latter."[234]

148. Further, in *Canada – Periodicals*, the Appellate Body rejected Canada's argument that the imported and domestic periodicals in question were only imperfectly substitutable with each other and, therefore, did not fall under the term "directly competitive or substitutable product":

> "A case of perfect substitutability would fall within Article III:2, first sentence, while we are examining the broader prohibition of the second sentence."[235]

149. In *Korea – Alcoholic Beverages*, the Appellate Body examined the Panel's finding that Korean tax laws concerning liquor products were inconsistent with Article III:2. In rejecting Korea's appeal that "potential competition" was not enough to find that subject products were "directly competitive or substitutable products", the Appellate Body stated as follows:

> "The first sentence of Article III:2 also forms part of the context of the term. 'Like' products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all 'directly competitive or substitutable' products are 'like'.[236] The notion of like products must be construed narrowly[237] but the category of directly competitive or substitutable products is broader.[238] While perfectly substitutable products fall within Article III:2, first sentence, imperfectly substitutable products can be assessed under Article III:2, second sentence.[239]"[240]

(ii) Relationship with paragraph 1

150. With respect to the relationship with paragraph 1, see paragraphs 140–143 above.

(iii) Legal status of Ad Article III

151. In *Japan – Alcoholic Beverages II*, the Appellate Body defined the legal status of Interpretative Note Ad Article III:2 and its relevance for the interpretation of Article III:2, as follows:

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[230] Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 17–18.
[231] With respect to this issue, see also Panel Report on *Japan – Film*, para. 10.371.
[232] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 19.
[233] Appellate Body Report on *Canada – Periodicals*, pp. 22–23.
[234] Appellate Body Report on *Canada – Periodicals*, p. 19.
[235] Appellate Body Report on *Canada – Periodicals*, p. 28.
[236] (*footnote original*) Panel Report on *Japan – Alcoholic Beverages II*, para. 6.22, approved by the Appellate Body at p. 23 of its Report.
[237] (*footnote original*) Appellate Body Reports on *Japan – Alcoholic Beverages II*, p. 20, and *Canada – Periodicals*, p. 21.
[238] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 25.
[239] (*footnote original*) Appellate Body Report on *Canada – Periodicals*, p. 28.
[240] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 118.

"Article III:2, second sentence, and the accompanying *Ad* Article have equivalent legal status in that both are treaty language which was negotiated and agreed at the same time. The *Ad* Article does not replace or modify the language contained in Article III:2, second sentence, but, in fact, clarifies its meaning. Accordingly, the language of the second sentence and the *Ad* Article must be read together in order to give them their proper meaning."[241]

(b) Paragraph 2, first sentence

(i) General

Test under Article III:2, first sentence

152. In *Japan – Alcoholic Beverages II*, the Appellate Body clarified the two elements contained in the first sentence of Article III:2 – "like products" and "in excess of". The Appellate Body established that these requirements constitute, in and of themselves, an application of the general principle contained in Article III:1 and that, consequently, the presence of a protective application need not be established separately from the specific criteria of Article III:2, first sentence:

"Article III:1 informs Article III:2, first sentence, by establishing that if imported products are taxed in excess of like domestic products, then that tax measure is inconsistent with Article III. Article III:2, first sentence does not refer specifically to Article III:1. There is no specific invocation in this first sentence of the general principle in Article III:1 that admonishes Members of the WTO not to apply measures so as to afford protection'. This omission must have some meaning. We believe the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence. However, this does not mean that the general principle of Article III:1 does not apply to this sentence. To the contrary, we believe the first sentence of Article III:2 is, in effect, an application of this general principle. The ordinary meaning of the words of Article III:2, first sentence leads inevitably to this conclusion. Read in their context and in the light of the overall object and purpose of the *WTO Agreement*, the words of the first sentence require an examination of the conformity of an internal tax measure with Article III by determining, first, whether the taxed imported and domestic products are 'like' and, second, whether the taxes applied to the imported products are 'in excess of' those applied to the like domestic products. If the imported and domestic products are 'like products', and if the taxes applied to the imported products are 'in excess of' those applied to the like domestic products, then the measure is inconsistent with Article III:2, first sentence.

This approach to an examination of Article III:2, first sentence, is consistent with past practice under the GATT 1947. Moreover, it is consistent with the object and purpose of Article III:2, which the panel in the predecessor to this case dealing with an earlier version of the Liquor Tax Law, *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* . . ., rightly stated as 'promoting non-discriminatory competition among imported and like domestic products [which] could not be achieved if Article III:2 were construed in a manner allowing discriminatory and protective internal taxation of imported products in excess of like domestic products'."[242]

153. In *Canada – Periodicals*, the Appellate Body reiterated this two-tiered test:

"[T]here are two questions which need to be answered to determine whether there is a violation of Article III:2 of the GATT 1994: (a) whether imported and domestic products are like products; and (b) whether the imported products are taxed in excess of the domestic products. If the answers to both questions are affirmative, there is a violation of Article III:2, first sentence."[243]

154. In *Argentina – Hides and Leather*, Argentina, citing the finding of the Appellate Body in *Japan – Alcoholic Beverages II* referenced in paragraph 131 above, argued that the existence of a protective application must be determined together with the other specific requirements contained in Article III:2. The Panel rejected this argument:

"We are unable to agree with Argentina's interpretation of the Appellate Body's statement. As we understand it, the presence of a protective application need be established neither separately nor together with the specific requirements contained in Article III:2, first sentence. The quoted passage from the Appellate Body report in *Japan – Alcoholic Beverages II* makes clear that Article III:2, first sentence, is, in effect, an application of the general principle stated in Article III:1. Accordingly, whenever imported products from one Member's territory are subject to taxes in excess of those applied to like domestic products in the territory of another Member, this is deemed to 'afford protection to domestic production' within the meaning of Article III:1. It follows that, in applying Article III:2, first sentence, recourse to the general principle of Article III:1 is neither necessary nor appropriate.[244] The only requirements that need to be

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[241] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 24. Two panels cited this finding and stated that "*Ad* Article III has equal stature under international law as the GATT language to which it refers, pursuant to Article XXXIV." Panel Report on *Korea – Alcoholic Beverages*, footnote. 346; and Panel Report on *Chile – Alcoholic Beverages*, footnote. 349.

[242] Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 18–19.

[243] Appellate Body Report on *Canada – Periodicals*, pp. 22–23.

[244] (*footnote original*) We find further support for our view in the following statement made by the Appellate Body in its report on *EC – Bananas III*, *supra*, at para. 216:

"Article III:4 does *not* specifically refer to Article III:1. Therefore, a determination of whether there has been a

demonstrated by the complaining party are those contained in Article III:2, first sentence, itself.[245]"[246]

Burden of proof

155. In *Japan – Alcoholic Beverages II*, in a finding subsequently not addressed by the Appellate Body, the Panel stated that "complainants have the burden of proof to show first that products are like and second, that foreign products are taxed in excess of domestic ones."[247]

156. With respect to the issue of the burden of proof in general, see Section XXXVI.D of the Chapter on the *DSU*.

(ii) "like domestic products"

Relationship between "like products" and "directly competitive products" under Article III:2

157. In *Japan – Alcoholic Beverages II*, the Appellate Body analysed the scope of the first sentence of Article III:2 in relation to the second sentence of this Article. It held that the term "like products" in Article III:2, first sentence, should be construed narrowly. Subsequently, it considered the basic GATT approach for interpreting "like products" generally in the various provisions of the GATT 1947:

> "Because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not 'like products' as contemplated by the first sentence, we agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn. Consequently, we agree with the Panel also that the definition of 'like products' in Article III:2, first sentence, should be construed narrowly.
>
> How narrowly is a matter that should be determined separately for each tax measure in each case. We agree with the practice under the GATT 1947 of determining whether imported and domestic products are 'like' on a case-by-case basis. The Report of the Working Party on *Border Tax Adjustments*, adopted by the CONTRACTING PARTIES in 1970, set out the basic approach for interpreting 'like or similar products' generally in the various provisions of the GATT 1947:
>
> > '. . . the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality'.[248]
>
> This approach was followed in almost all adopted panel reports after *Border Tax Adjustments*.[249] This approach should be helpful in identifying on a case-by-case basis the range of 'like products' that fall within the narrow limits of Article III:2, first sentence in the GATT 1994. Yet this approach will be most helpful if decision makers keep ever in mind how narrow the range of 'like products' in Article III:2, first sentence is meant to be as opposed to the range of 'like' products contemplated in some other provisions of the GATT 1994 and other Multilateral Trade Agreements of the *WTO Agreement*. In applying the criteria cited in *Border Tax Adjustments* to the facts of any particular case, and in considering other criteria that may also be relevant in certain cases, panels can only apply their best judgement in determining whether in fact products are 'like'. This will always involve an unavoidable element of individual, discretionary judgement. We do not agree with the Panel's observation in paragraph 6.22 of the Panel Report that distinguishing between 'like products' and 'directly competitive or substitutable products' under Article III:2 is 'an arbitrary decision'. Rather, we think it is a discretionary decision that must be made in considering the various characteristics of products in individual cases."[250]

158. The consequence of the determination whether two products are or are not like was stated by the Appellate Body in *Japan – Alcoholic Beverages II*:

> "If imported and domestic products are not 'like products' for the narrow purposes of Article III:2, first sentence, then they are not subject to the strictures of that sentence and there is no inconsistency with the requirements of that sentence. However, depending on their

violation of Article III:4 does *not* require a separate consideration of whether a measure 'afford[s] protection to domestic production'."

While this statement relates to Article III:4 of the GATT, which is not at issue in the present case, it nevertheless provides useful clarification for purposes of analysing Argentina's argument in respect of Article III:2, first sentence. It clearly emerges from this statement that not only is there no requirement separately to establish the presence of a protective application, but that there is not even a requirement separately to consider whether there is a protective application.

[245] (*footnote original*) We note Argentina's contention that the GATT 1947 panel reports on *Japan – Alcoholic Beverages I*; *US – Section 337*, and *US – Malt Beverages*, lend support to its view that the presence of a protective application must be established for purposes of a claim under Article III:2, first sentence. See paras. 8.228 *et seq.* of this report. Since all of the aforementioned reports pre-date the Appellate Body reports on *Japan – Alcoholic Beverages II* and *EC – Bananas III* and since those Appellate Body reports directly address the issue before us, we see no need to further consider the GATT 1947 reports in this regard.

[246] Panel Report on *Argentina – Hides and Leather*, para. 11.137.

[247] Panel Report on *Japan – Alcoholic Beverages II*, para. 6.14.

[248] (*footnote original*) Report of the Working Party on *Border Tax Adjustments*, BISD 18S/97, para. 18.

[249] (*footnote original*) Panel Reports on *Australia – Ammonium Sulphate*; *EEC – Animal Proteins*; *Spain – Unroasted Coffee*; *Japan – Alcoholic Beverages I*; *US – Superfund*. Also see Panel Report on *US – Gasoline*.

[250] Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 19–21.

nature, and depending on the competitive conditions in the relevant market, those same products may well be among the broader category of 'directly competitive or substitutable products' that fall within the domain of Article III:2, second sentence."[251]

159. With respect to the nature of like products as a subset of the category of "directly competitive or substitutable products", see also paragraph 149 above.

Relationship with "like products" in Article III:4

160. In *EC – Asbestos*, the Appellate Body discussed the relationship between the term "like products" in Article III:4, and that in the first sentence of Article III:2. See paragraphs 237 and 239 below.

161. In *Japan – Alcoholic Beverages II*, the Panel discussed whether the term "like products" can be interpreted differently between GATT provisions, with a focus on the relationship between Article III:2, first sentence and Article III:4:

"The Panel noted that the term 'like product' appears in various GATT provisions. The Panel further noted that it did not necessarily follow that the term had to be interpreted in a uniform way. In this respect, the Panel noted the discrepancy between Article III:2, on the one hand, and Article III:4 on the other: while the former referred to Article III:1 and to like, as well as to directly competitive or substitutable products (see also Article XIX of GATT), the latter referred only to like products. If the coverage of Article III:2 is identical to that of Article III:4, a different interpretation of the term 'like product' would be called for in the two paragraphs. Otherwise, if the term 'like product' were to be interpreted in an identical way in both instances, the scope of the two paragraphs would be different. This is precisely why, in the Panel's view, its conclusions reached in this dispute are relevant only for the interpretation of the term 'like product' as it appears in Article III:2."[252]

Relationship with "like products" in other GATT provisions

162. In *Japan – Alcoholic Beverages II*, the Appellate Body explained the possible differences in the scope of "like products" depending on provisions. To illustrate that the term "like products" will vary between different provisions of the WTO Agreement, the Appellate Body evoked the image of an accordion:

"No one approach to exercising judgement will be appropriate for all cases. The criteria in *Border Tax Adjustments* should be examined, but there can be no one precise and absolute definition of what is 'like'. The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of 'likeness' is meant to be narrowly squeezed."[253]

Hypothetical "like products"

163. In *Canada – Periodicals*, the Panel found that the Canadian excise tax on magazines was inconsistent with Article III:2. Upon appeal, Canada argued that the Panel erred in basing its comparison upon a hypothetical example of periodicals. The Appellate Body endorsed the Panel's recourse to a hypothetical example of imported products:

"As Article III:2, first sentence, normally requires a comparison between imported products and like domestic products, and as there were no imports of split-run editions of periodicals because of the import prohibition in Tariff Code 9958, which the Panel found (and Canada did not contest on appeal) to be inconsistent with the provisions of Article XI of the GATT 1994, hypothetical imports of split-run periodicals have to be considered. As the Panel recognized, the proper test is that a determination of 'like products' for the purposes of Article III:2, first sentence, must be construed narrowly, on a case-by-case basis, by examining relevant factors including:

(i) the product's end-uses in a given market;

(ii) consumers' tastes and habits; and

(iii) the product's properties, nature and quality.[254]"[255]

164. In *Indonesia – Autos*, the Panel examined the consistency with Article III of measures contained in the Indonesian National Car Programme, including the luxury tax exemption given to certain domestically produced cars. On the issue of hypothetical "like products", the Panel referred to the finding of the Appellate Body in *Canada – Periodicals*, referenced in paragraph 163 above, and emphasized the significance of the fact that the Indonesian car programme distinguished between the products at issue on the grounds of nationality of the producer or the origin of the parts and components of the product:

"In *Periodicals*, the Appellate Body recognized the possibility of using hypothetical imports to determine whether a measure violates Article III:2, although in that case the Appellate Body rejected the hypothetical exam-

[251] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 25.
[252] Panel Report on *Japan – Alcoholic Beverages II*, para. 6.20.
[253] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 21.
[254] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 20.
[255] Appellate Body Report on *Canada – Periodicals*, pp. 20–21.

ple used by the Panel.[256] But this case is different. Under the Indonesian car programmes the distinction between the products for tax purposes is based on such factors as the nationality of the producer or the origin of the parts and components contained in the product. Appropriate hypotheticals are therefore easily constructed. An imported motor vehicle alike in all aspects relevant to a likeness determination would be taxed at higher rate simply because of its origin or lack of sufficient local content. Such vehicles certainly can exist (and, as demonstrated above, do in fact exist). In our view, such an origin-based distinction in respect of internal taxes suffices in itself to violate Article III:2, without the need to demonstrate the existence of actually traded like products. This is directly in accord with the broad purposes of Article III:2, as outlined by the Appellate Body . . .".[257]

165. In *Argentina – Hides and Leather*, referring to the finding of the Panel on *Indonesia – Autos* referenced in paragraph 164 above. The Panel reiterated this standard of varying "quantum and nature of the evidence" required for a finding under Article III:2, first sentence, depending on the "structure and design" of the measure at issue:

> "In the case before us, the European Communities has neither compared specific products nor addressed the criteria relevant to determining likeness. The European Communities considers that it is not incumbent upon it to do so. We agree. In circumstances such as those confronting us in this case no comparison of specific products is required. Logically, no examination of the various criteria relevant to determining likeness is then called for either.
>
> We consider that in the specific context of a claim under Article III:2, first sentence, the quantum and nature of the evidence required for a complaining party to discharge its burden of establishing a violation is dependent, above all, on the structure and design of the measure in issue.[258] The structure and design of RG 3431 and RG 3543 and their domestic counterparts RG 3337 and RG 2784 are such that the level of tax pre-payment is not determined by the physical characteristics or end-uses of the products subject to these resolutions, but instead is determined by factors which are not relevant to the definition of likeness, such as whether a particular product is definitively imported into Argentina or sold domestically as well as the characteristics of the seller or purchaser of the product.[259] It is therefore inevitable, in our view, that like products will be subject to RG 3431 and its domestic counterpart, RG 3337. The same holds true for RG 3543 and its domestic counterpart, RG 2784.[260] The European Communities has demonstrated this to our satisfaction, and, in our view, this is all it needs to establish in the present case as far as the 'like product' requirement contained in Article III:2, first sentence, is concerned.
>
> This view is consistent with that adopted by the panel in *Indonesia – Autos*. That panel was of the view that:
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> '. . . an origin-based distinction in respect of internal taxes suffices in itself to violate Article III:2, without the need to demonstrate the existence of actually traded like products.'[261]"[262]

Relevant factors for the determination of "likeness"

General

166. In *Japan – Alcoholic Beverages II*, the Appellate Body was called upon to examine the Panel's finding of inconsistency of the Japanese Liquor Tax Law with Article III:2. The Appellate Body analysed what factors to take into consideration in deciding whether two products in question were "like products":

> "We agree with the practice under the GATT 1947 of determining whether imported and domestic products are 'like' on a case-by-case basis. The Report of the Working Party on *Border Tax Adjustments,* adopted by the CONTRACTING PARTIES in 1970, set out the basic approach for interpreting 'like or similar products' generally in the various provisions of the GATT 1947:
>
> > . . . the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a 'similar' product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is 'similar': the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality.[263]

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[256] (*footnote original*) Appellate Body Report on *Canada – Periodicals*, pp. 20–21.

[257] Panel Report on *Indonesia – Autos*, para. 14.113.

[258] (*footnote original*) As the Appellate Body has stated in *US – Wool Shirts and Blouses*, p. 14:

> "In the context of the GATT 1994 and the *WTO Agreement*, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case."

[259] (*footnote original*) In our view, the mere fact that a product is of non-Argentinean origin or that it is being definitively imported into Argentina does not, *per se*, distinguish it – in terms of its physical characteristics and end-uses – from a product of Argentinean origin or a product which is being sold inside Argentina. Nor does likeness turn on whether the sellers or purchasers of the products under comparison qualify as registered or non-registered taxable persons or as *agentes de percepción* under Argentinean tax law.

[260] (*footnote original*) This view is unaffected by the fact that, according to the Appellate Body, the term "like products", as it appears in Article III:2, first sentence, is to be construed narrowly and on a case-by-case basis. See the Appellate Body Report on *Japan – Alcoholic Beverages*, pp. 19–20.

[261] (*footnote original*) Panel Report on *Indonesia – Autos*, para. 14.113. See also the Panel Reports on *Korea – Various Measures on Beef*, para. 627 (with respect to Article III:4 of the GATT 1994) and *US – Certain EC Products*, para. 6.54 (with respect to Article I:1 of the GATT 1994).

[262] Panel Report on *Argentina – Hides and Leather*, paras. 11.168–11.170.

[263] The Appellate Body cited Report of the Working Party on *Border Tax Adjustments*, BISD 18S/97, para. 18.

This approach was followed in almost all adopted panel reports after *Border Tax Adjustments*. This approach should be helpful in identifying on a case-by-case basis the range of 'like products' that fall within the narrow limits of Article III:2, first sentence in the GATT 1994."[264]

167. In *Canada – Periodicals*, the Appellate Body reiterated the aforementioned finding in *Japan – Alcoholic Beverages II*:

"[T]he proper test is that a determination of 'like products' for the purposes of Article III:2, first sentence, must be construed narrowly, on a case-by-case basis, by examining relevant factors including:

(i) the product's end-uses in a given market;

(ii) consumers' tastes and habits; and

(iii) the product's properties, nature and quality."[265]

168. With respect to the criteria of likeness, see also the Panel Report on *Argentina – Hides and Leather*, where the Panel referred to the Appellate Body's finding in *Canada – Periodicals* referenced in paragraph 167 above.[266]

Relevance of tariff classifications and bindings

169. In *Japan – Alcoholic Beverages II*, the Appellate Body addressed the relevance of tariff classification for establishing the "likeness" of products:

"A uniform tariff classification of products can be relevant in determining what are 'like products'. If sufficiently detailed, tariff classification can be a helpful sign of product similarity. Tariff classification has been used as a criterion for determining 'like products' in several previous adopted panel reports.[267] For example, in the *1987 Japan – Alcohol* Panel Report, the panel examined certain wines and alcoholic beverages on a 'product-by-product basis' by applying the criteria listed in the Working Party Report on *Border Tax Adjustments*,

> . . . as well as others recognized in previous GATT practice (see BISD 25S/49, 63), such as the Customs Cooperation Council Nomenclature (CCCN) for the classification of goods in customs tariffs which has been accepted by Japan.[268]"[269]

170. In *Japan – Alcoholic Beverages II*, in addition to tariff *classification*, the Appellate Body also examined the relevance of tariff *bindings* for the determination of "like products". In contrast to tariff classification, the Appellate Body expressed reservations about the reliability of tariff bindings as a criterion in establishing "likeness":

"Uniform classification in tariff nomenclatures based on the Harmonized System (the 'HS') was recognized in GATT 1947 practice as providing a useful basis for confirming 'likeness' in products. However, there is a major difference between tariff classification nomenclature and tariff bindings or concessions made by Members of the WTO under Article II of the GATT 1994. There are risks in using tariff bindings that are too broad as a measure of product 'likeness'. Many of the least-developed country Members of the WTO submitted schedules of concessions and commitments as annexes to the GATT 1994 for the first time as required by Article XI of the *WTO Agreement*. Many of these least-developed countries, as well as other developing countries, have bindings in their schedules which include broad ranges of products that cut across several different HS tariff headings. For example, many of these countries have very broad uniform bindings on non-agricultural products. This does not necessarily indicate similarity of the products covered by a binding. Rather, it represents the results of trade concessions negotiated among Members of the WTO.

It is true that there are numerous tariff bindings which are in fact extremely precise with regard to product description and which, therefore, can provide significant guidance as to the identification of 'like products'. Clearly enough, these determinations need to be made on a case-by-case basis. However, tariff bindings that include a wide range of products are not a reliable criterion for determining or confirming product 'likeness' under Article III:2."[270]

171. With respect to the purpose of Article III as it relates to tariff bindings, see paragraph 120 above.

Reference to GATT practice

172. With respect to the interpretation of the "like products" under Article III:2, see also GATT Analytical Index, pages 155–159.

(iii) "internal tax or other internal charge of any kind"

173. In *Argentina – Hides and Leather*, the Panel examined whether the measures at issue, establishing a mechanism for the collection of certain taxes, were covered by Article III:2. The Panel found that the measures provide for the imposition of charges and create a liability and, as such, fall under the scope of Article III:2:

"We consider that RG 3431 and RG 3543 are properly viewed not as taxes in their own right, but as mecha-

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[264] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 20. In *Indonesia – Autos*, the Panel followed this finding of the Appellate Body. Panel Report on *Indonesia – Autos*, para. 14.109.
[265] Appellate Body Report on *Canada – Periodicals*, pp. 21–22.
[266] Panel Report on *Argentina – Hides and Leather*, para. 11.167.
[267] (*footnote original*) Panel Reports on *EEC – Animal Proteins*; *Japan – Alcoholic Beverages I*; and *US – Gasoline*.
[268] (*footnote original*) Panel Report on *Japan – Alcoholic Beverages I*, para. 5.6.
[269] Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 21–22.
[270] Appellate Body Report on *Japan – Alcoholic Beverages II*, p.22.

nisms for the collection of the IVA [value-added tax] and IG [income tax]. What is special, however, about RG 3431 and RG 3543 as mechanisms for the collection of the IVA and IG is that they provide for the imposition of charges. We recall that Article III:2 covers 'charges *of any kind*' (emphasis added). The term 'charge' denotes, *inter alia*, a 'pecuniary burden' and a 'liability to pay money laid on a person . . .'. There can be no doubt, in our view, that both RG 3431 and RG 3543 impose a pecuniary burden and create a liability to pay money. Moreover, the charges provided for in RG 3431 and RG 3543 represent advance payments of the IVA and IG. RG 3431 and RG 3543 in effect impose on importers part of their definitive IVA and IG liability. It is clear to us, therefore, that the charges in question qualify as tax measures. As such, they fall to be assessed under Article III:2.

With regard to Argentina's argument that RG 3431 and RG 3543 are measures designed to achieve efficient tax administration and collection and as such do not fall under Article III:2, it should be noted that Argentina has provided no support for this argument, except to say that it is up to Members to decide how best to achieve efficient tax administration. We agree that Members are free, within the outer bounds defined by such provisions as Article III:2, to administer and collect internal taxes as they see fit. However, if, as here, such 'tax administration' measures take the form of an internal charge and are applied to products, those measures must, in our view, be in conformity with Article III:2. There is nothing in the provisions of Article III:2 to suggest a different conclusion. If it were accepted that 'tax administration' measures are categorically excluded from the ambit of Article III:2, this would create a potential for abuse and circumvention of the obligations contained in Article III:2. It must be stated, moreover, that the applicability of Article III:2 is not conditional upon the policy purpose of a tax measure.[271] On that basis, we cannot agree with Argentina that charges intended to promote efficient tax administration or collection *a priori* fall outside the scope of Article III:2."[272]

Reference to GATT practice

174. With respect to practice on this subject-matter under GATT, see GATT Analytical Index, pages 141–150.

(iv) "in excess of those applied"

General

175. In *Japan – Alcoholic Beverages II*, the Appellate Body established a strict standard for the term "in excess of" under Article III:2, first sentence:

"The only remaining issue under Article III:2, first sentence, is whether the taxes on imported products are 'in excess of' those on like domestic products. If so, then the Member that has imposed the tax is not in compliance with Article III. Even the smallest amount of 'excess' is too much. 'The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a "trade effects test" nor is it qualified by a *de minimis* standard.'"[273]

Methodology of comparison – "individual import transactions" basis

176. In *Argentina – Hides and Leather*, the Panel explained the method of comparison, for the purposes of Article III:1, first sentence, of the tax burdens imposed on imports and on domestic like products. In the case before it, the Panel emphasized that Article III:2, first sentence, requires a comparison of *actual* tax burdens rather than merely of *nominal* tax burdens:

"[I]t is necessary to recall the purpose of Article III:2, first sentence, which is to ensure 'equality of competitive conditions between imported and like domestic products'[274]. Accordingly, Article III:2, first sentence, is not concerned with taxes or charges as such or the policy purposes Members pursue with them, but with their economic impact on the competitive opportunities of imported and like domestic products. It follows, in our view, that what must be compared are the tax burdens imposed on the taxed products.

We consider that Article III:2, first sentence, requires a comparison of actual tax burdens rather than merely of nominal tax burdens. Were it otherwise, Members could easily evade its disciplines. Thus, even where imported and like domestic products are subject to identical tax rates, the actual tax burden can still be heavier on imported products. This could be the case, for instance, where different methods of computing tax bases lead to a greater actual tax burden for imported products. In this regard, the GATT 1947 panel in *Japan – Alcoholic Beverages I* has stated that:

> . . . in assessing whether there is tax discrimination, account is to be taken not only of the rate of the applicable internal tax but also of the taxation methods (e.g. different kinds of internal taxes, direct taxation of the finished product or indirect taxation by taxing the raw materials used in the product during the various stages of its production) and of the rules for the tax collection (e.g. basis of assessment).[275]

It may thus be stated, in more general terms, that a determination of whether an infringement of Article

[271] (*footnote original*) See the Panel Reports on *US – Superfund*, para. 5.2.4, *EEC – Parts and Components*, para. 5.6.

[272] Panel Report on *Argentina – Hides and Leather*, paras. 11.143–11.144.

[273] Appellate Body Report on *Japan – Alcoholic Beverages II*, p.23. This finding was followed by the Panel on *Argentina – Hides and Leather*. Panel Report on *Argentina – Hides and Leather*, para. 11.243.

[274] (*footnote original*) Appellate Body Report on *Canada – Periodicals*, p. 18.

[275] (*footnote original*) Panel Report on *Japan – Alcoholic Beverages I*, para. 5.8.

III:2, first sentence, exists must be made on the basis of an overall assessment of the actual tax burdens imposed on imported products, on the one hand, and like domestic products, on the other hand."[276]

177. In *Argentina – Hides and Leather*, the measure at issue was, *inter alia*, an income tax provision under which customs authorities collected a certain amount of tax when foreign goods were definitively *imported* into Argentina. The normal applicable tax rate was 3 per cent. The corresponding provision for *internal* sales provided for a withholding rate of 2 or 4 per cent, depending on whether the payment, on which the tax was being withheld, was made to a registered or non-registered taxpayer. Argentina argued that the measure applicable to imported goods was consistent with Article III:2, first sentence because, "the 3 percent rate applicable to imports is lower than the 4 percent rate applicable to like domestic products". The Panel explained:

"Article III:2, first sentence, is applicable to each individual import transaction. It does not permit Members to balance more favourable tax treatment of imported products in some instances against less favourable tax treatment of imported products in other instances.[277]"[278]

178. In *Canada – Periodicals*, the Appellate Body also addressed the issue of "balancing more favourable treatment in some instances against less favourable treatment in other instances" under Article III:2, second sentence. See paragraph 217 below.

179. With respect to the methodology of comparison used to examine the requirement of "no less favourable treatment" under Article III:4, see paragraphs 270–275 below.[279]

Relevance of duration of tax differentials

180. In *Argentina – Hides and Leather*, the measure at issue provided for the pre-payment of taxes on import sales, while exempting certain types of internal sales from such pre-payment; thus, although a tax liability would arise for every sale, certain internal sales were not subject to the tax *pre-payment* requirement. The Panel held that the loss of interest on the part of the taxpayer due to the pre-payment requirement constituted a tax differential (even if the same nominal tax rates were imposed). The Panel then rejected Argentina's justification that the tax burden differential was limited to a 30–day period and therefore was *de minimis*:

"The terms of Article III:2, first sentence, prohibit tax burden differentials irrespective of whether they are of limited duration. Moreover, since we have found above that even the smallest tax burden differential is in violation of Article III:2, first sentence, it would be inconsistent for us to allow tax burden differentials on the basis that their impact is limited to a 30–day period."[280]

Relevance of differences among sellers of goods

181. In *Argentina – Hides and Leather*, the Panel addressed Argentina's tax collection mechanism which required the pre-payment of taxes only with respect to internal sales made by certain taxable persons, so-called *agentes de percepción*, whilst in respect of import transactions, a pre-payment obligation would arise without regard to who made them. See also paragraph 180 above. Finding this mechanism inconsistent with Article III:2, first sentence, the Panel stated:

"As a further consideration, we add that, in the context of an inquiry under Article III:2, first sentence, the mere fact that a domestic product is sold by a non-*agente de percepción* does not, in our view, render a product which is otherwise like an imported product 'unlike' that product.[281]

. . .

The identity and circumstances of the persons involved in sales transactions cannot, in our view, serve as a justification for tax burden differentials.[282]"[283]

Relevance of distinction based upon nationality of producers or parts and components

182. In *Indonesia – Autos*, the Panel found that tax differences are necessarily inconsistent with Article III:2, first sentence, if they are based only upon the nationality of producers or the origin of the parts and components contained in the products:

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[276] Panel Report on *Argentina – Hides and Leather*, paras. 11.182–11.184.

[277] (*footnote original*) See Panel Report on *US – Tobacco*, para. 98. For reports with respect to Article III:4 of the GATT 1994, see the Panel Reports on *US – Section 337*, para. 5.14; *US – Gasoline*, para. 6.14.

[278] Panel Report on *Argentina – Hides and Leather*, para. 11.260.

[279] Further, with respect to the methodology of comparison in identifying "directly competitive and substitutable products" under the second sentence of Article III:2, see paras. 194–210 of this Chapter.

[280] Panel Report on *Argentina – Hides and Leather*, para. 11.245.

[281] (*footnote original*) See also the Panel Reports on *US – Gasoline*, *supra*, para. 6.11; *United States – Alcoholic Beverages*, para. 5.19. These panels held that differential regulatory or tax treatment of imported and like domestic products cannot be maintained, consistently with Article III, on the basis that the characteristics and circumstances of the producers of those products are different. The same logic must apply, in our view, to cases where tax distinctions between like imported and domestic products are based on the characteristics and circumstances of the sellers or purchasers of those products.

[282] (*footnote original*) See the Panel Reports on *US – Gasoline*, para. 6.11; *United States – Alcoholic Beverages*, para. 5.19. See also footnote 499 of this report. The disciplines of Article III:2, first sentence, are of course subject to whatever exceptions a Member may justifiably invoke.

[283] Panel Report on *Argentina – Hides and Leather*, paras. 11.210 and 11.220.

"[B]ecause of the structure of the tax regime under examination, any imported like products would necessarily be taxed in excess of domestic like products. In considering the broader arguments put forward by the complainants that the tax measures in dispute violate Article III:2 because they discriminate not on the basis of factors affecting the properties, nature, qualities or end use of the products, but on origin-related criteria, we recall that the Appellate Body decisions in *Alcoholic Beverages (1996)* and *Periodicals* suggest that the term 'like products' as used in Article III:2 should be interpreted narrowly.[284] We note, however, that in this case the 'like products' issue is not the same as the 'like products' issue in the *Alcoholic Beverages (1996)* case. There, the internal tax imposed on domestic shochu was the same as that imposed on imported shochu; the higher tax imposed on imported vodka was also imposed on domestic vodka. Identical products (not considering brand differences) were taxed identically. The issue was whether the differences between the two products shochu and vodka, as defined for tax purposes, were so minor that shochu and vodka should be considered to be like products and therefore subject to the requirement of Article III:2, first sentence, that one should not be taxed in excess of the other. Here, the situation is quite different. The distinction between the products, which results in different levels of taxation, is not based on the products *per se*, but rather on such factors as the nationality of the producer or the origin of the parts and components contained in the product. As such, an imported product identical in all respects to a domestic product, except for its origin or the origin of its parts and components or other factors not related to the product itself, would be subject to a different level of taxation."[285]

Reference to GATT practice

183. With respect to the interpretation of "in excess of those applied" under Article III:2, see also GATT Analytical Index, pages 150–155.

Relevance of regulatory objectives

184. In *Japan – Alcoholic Beverages II*, the Appellate Body made a general statement on the relevance of regulatory objectives of a measure at issue, finding that Members may pursue, through their tax measures, any given policy objective, provided they do so in compliance with Article III:2. See paragraph 128 above.

185. In *Argentina – Hides and Leather*, the Panel rejected Argentina's argument that the measures in question were designed to achieve efficient tax administration and collection and as such did not fall under Article III:2. The Panel stated:

"We agree that Members are free, within the outer bounds defined by such provisions as Article III:2, to administer and collect internal taxes as they see fit. However, if, as here, such 'tax administration' measures take the form of an internal charge and are applied to products, those measures must, in our view, be in conformity with Article III:2. There is nothing in the provisions of Article III:2 to suggest a different conclusion. If it were accepted that 'tax administration' measures are categorically excluded from the ambit of Article III:2, this would create a potential for abuse and circumvention of the obligations contained in Article III:2."[286]

186. With respect to the relevance of regulatory objectives in relation to the "aims-and-effect" test, see paragraphs 128–132 above.

(v) Applied, "directly or indirectly", to like domestic products

187. In *Canada – Periodicals*, the Appellate Body reviewed the Panel's finding that the Canadian excise tax on magazines was inconsistent with Article III:2. The Panel had found that the relevant tax provision was a measure affecting the trade in goods, as it applied to so-called split-run editions of periodicals which were distinguished from foreign non-split-run editions by virtue of their advertising content directed at the Canadian market. Canada argued that its measure regulated trade in services (advertising) "in their own right", therefore did not "indirectly" affect imported products and, as a result, was subject to GATS and *not* to GATT 1994. The Appellate Body rejected Canada's argument:

"An examination of Part V.1 of the Excise Tax Act demonstrates that it is an excise tax which is applied on a good, a split-run edition of a periodical, on a 'per issue' basis. By its very structure and design, it is a tax on a periodical. It is the publisher, or in the absence of a publisher resident in Canada, the distributor, the printer or the wholesaler, who is liable to pay the tax, not the advertiser.

Based on the above analysis of the measure, which is essentially an excise tax imposed on split-run editions of periodicals, we cannot agree with Canada's argument that this internal tax does not 'indirectly' affect imported products."[287]

188. In *Argentina – Hides and Leather*, Argentina argued that, since an income tax is not a tax on products, its measure establishing the collection regime for such a tax ("RG 3543") could not be subject to the provisions of Article III:2. Citing the finding of the Appellate Body in *Canada – Periodicals* as support[288], the Panel rejected this argument:

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[284] The footnote to this sentence refers to Appellate Body Report on *Alcoholic Beverages*, pp. 19–20; Appellate Body Report on *Canada – Periodicals*, p. 22.
[285] Panel Report on *Indonesia – Autos*, para. 14.112.
[286] Panel Report on *Argentina – Hides and Leather*, para. 11.144.
[287] Appellate Body Report on *Canada – Periodicals*, p. 18.
[288] Panel Report on *Argentina – Hides and Leather*, para. 11.160, which refers to the Appellate Body Report on *Canada – Periodicals*, p. 20.

"We . . . agree that income taxes, because they are taxes not normally directly levied on products, are generally considered not to be subject to Article III:2.[289] It is not obvious to us, however, how the fact that the IG is an income tax outside the scope of Article III:2 logically leads to the conclusion that RG 3543 does not fall within the ambit of Article III:2, even though RG 3543 is a tax measure applied to products. Not only do we see nothing in the provisions of Article III:2 which would preclude the applicability of these provisions to RG 3543 merely because of the latter's linkage to the IG. Were we to accept Argentina's argument, it would also not be difficult for Members to introduce measures designed to circumvent the disciplines of Article III:2."[290]

Reference to GATT practice

189. With respect to the practice on this subject-matter, see GATT Analytical Index, page 141.

(c) Paragraph 2, second sentence

(i) General

Legal status of *Ad* Article III:2

190. In *Japan – Alcoholic Beverages II*, the Appellate Body discussed the legal status of Note *Ad Article III:2* in the interpretation of Article III:2 and held that the Note must always be read together with Article III. See paragraph 151 above.

Test under Article III:2, second sentence

191. In *Japan – Alcoholic Beverages II*, the Appellate Body explained the test to be used under Article III:2, second sentence, and distinguished this test from the test applicable under the first sentence. This distinction, in the view of the Appellate Body, is a result of the explicit reference to Article III:1 in the second sentence of Article III:2:

"Unlike that of Article III:2, first sentence, the language of Article III:2, second sentence, specifically invokes Article III:1. The significance of this distinction lies in the fact that whereas Article III:1 acts implicitly in addressing the two issues that must be considered in applying the first sentence, it acts explicitly as an entirely separate issue that must be addressed along with two other issues that are raised in applying the second sentence. Giving full meaning to the text and to its context, three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III:2, second sentence. These three issues are whether:

(1) the imported products and the domestic products are *'directly competitive or substitutable products'* which are in competition with each other;

(2) the directly competitive or substitutable imported and domestic products are *'not similarly taxed'*; and

(3) the dissimilar taxation of the directly competitive or substitutable imported domestic products *is 'applied . . . so as to afford protection to domestic production'*.

Again, these are three separate issues. Each must be established separately by the complainant for a panel to find that a tax measure imposed by a Member of the WTO is inconsistent with Article III:2, second sentence."[291]

Burden of proof

192. In *Japan – Alcoholic Beverages II*, the Panel, in a finding not expressly addressed by the Appellate Body, allocated the burden of proof under Article III:2, second sentence, to the complaining party:

"[T]he complainants have the burden of proof to show first, that the products concerned are directly competitive or substitutable and second, that foreign products are taxed in such a way so as to afford protection to domestic production".[292]

193. In *Korea – Alcoholic Beverages*, the Panel followed the approach to the allocation of burden of proof according to the standard set out by the Panel on *Japan – Alcoholic Beverages II*, referred to in paragraph 192 above. The Appellate Body rejected Korea's appeal against this allocation of the burden of proof:

"[T]he Panel properly understood and applied the rules on allocation of the burden of proof. First, the Panel insisted that it could make findings under Article III:2, second sentence, only with respect to products for which a *prima facie* case had been made out on the basis of evidence presented. Second, it declined to establish a presumption concerning all alcoholic beverages within HS 2208. Such a presumption would be inconsistent with the rules on the burden of proof because it would prematurely shift the burden of proof to the defending party. The Panel, therefore, did not consider alleged violations of Article III:2, second sentence, concerning products for which evidence was not presented. Thus, the Panel examined tequila because evidence was presented for it, but did not examine mescal and certain other alcoholic beverages included in HS 2208 for which no evidence was presented. Third, contrary to Korea's assertions, the Panel did consider the evidence presented by Korea in rebuttal, but concluded that there was 'sufficient *unrebutted* evidence'

[289] (*footnote original*) See the Working Party Report on Border Tax Adjustments, adopted on 2 December 1970, BISD 18S/97, at para. 14.
[290] Panel Report on *Argentina – Hides and Leather*, para. 11.159.
[291] Appellate Body Report on *Japan – Alcoholic Beverages II*, p.24. This part has been later cited and endorsed by the Appellate Body, in Appellate Body Report on *Canada – Periodicals*, pp. 24–25, and in Appellate Body Report on *Chile – Alcoholic Beverages*, para. 47.
[292] Panel Report on *Japan – Alcoholic Beverages II*, para. 6.28.

for it to make findings of inconsistency."[293] (emphasis added)

(ii) "directly competitive or substitutable products"

Relevance of market competition/cross-price elasticity

General

194. In interpreting the term "directly competitive or substitutable" products, the Appellate Body in *Japan – Alcoholic Beverages II* found that it was "not inappropriate" to consider the competitive conditions in the relevant market, as manifested in the cross-price elasticity in particular:

> "The GATT 1994 is a commercial agreement, and the WTO is concerned, after all, with markets. It does not seem inappropriate to look at competition in the relevant markets as one among a number of means of identifying the broader category of products that might be described as 'directly competitive or substitutable'.
>
> Nor does it seem inappropriate to examine elasticity of substitution as one means of examining those relevant markets. The Panel did not say that cross-price elasticity of demand is '*the* decisive criterion' for determining whether products are 'directly competitive or substitutable'."[294]

195. The Appellate Body developed this finding – contained in *Japan – Alcoholic Beverages II* – in the *Korea – Alcoholic Beverages dispute:*

> "We observe that studies of cross-price elasticity, which in our Report in *Japan – Alcoholic Beverages* were regarded as one means of examining a market,[295] involve an assessment of latent demand. Such studies attempt to predict the change in demand that would result from a change in the price of a product following, *inter alia*, from a change in the relative tax burdens on domestic and imported products."[296]

196. In its approach to cross-price elasticity between domestic and imported products, the Panel on *Korea – Alcoholic Beverages* emphasized the "quality" or "nature" of competition, rather than the "quantitative overlap of competition". Upon appeal, Korea argued that through its reliance on the "nature of competition" the Panel had created a "vague and subjective element" not found in Article III:2, second sentence. The Appellate Body, however, shared the Panel's scepticism towards reliance upon the "quantitative overlap of competition":

> "In taking issue with the use of the term 'nature of competition', Korea, in effect, objects to the Panel's sceptical attitude to quantification of the competitive relationship between imported and domestic products. For the reasons set above, we share the Panel's reluctance to rely unduly on quantitative analyses of the competitive relationship.[297] In our view, an approach that focused solely on the quantitative overlap of competition would, in essence, make cross-price elasticity *the* decisive criterion in determining whether products are 'directly competitive or substitutable'."[298]

Relevance of the market situation in other countries

197. In *Korea – Alcoholic Beverages*, the Appellate Body addressed whether the market situation in *other* Members should be taken into consideration in evaluating whether subject products are directly competitive or substitutable products. The Appellate Body held that although not every other market would be relevant, evidence from other markets may nevertheless be pertinent to the analysis of the market at issue:

> "It is, of course, true that the 'directly competitive or substitutable' relationship must be present in the market at issue[299], in this case, the Korean market. It is also true that consumer responsiveness to products may vary from country to country.[300] This does not, however, preclude consideration of consumer behaviour in a country other than the one at issue. It seems to us that evidence from other markets may be pertinent to the examination of the market at issue, particularly when demand on that market has been influenced by regulatory barriers to trade or to competition. Clearly, not every other market will be relevant to the market at issue. But if another market displays characteristics similar to the market at issue, then evidence of consumer demand in that other market may have some relevance to the market at issue. This, however, can only be determined on a case-by-case basis, taking account of all relevant facts."[301]

"directly competitive or substitutable"

198. In *Korea – Alcoholic Beverages*, the Appellate Body considered the "object and purpose" of Article III in its interpretation of the term "directly competitive or substitutable":

> "[T]he object and purpose of Article III is the maintenance of equality of competitive conditions for imported and domestic products. It is, therefore, not only legitimate, but even necessary, to take account of this

[293] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 156. With respect to the burden of proof in general, see Chapter on the *DSU*, Section XXXVI.D.
[294] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 25.
[295] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, fn. 20.
[296] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 121.
[297] (*footnote original*) Appellate Body Report on *Korea – Alcoholic Beverages*, para. 120.
[298] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 134.
[299] (*footnote original*) Appellate Body Reports on *Japan – Alcoholic Beverages II*, fn. 20 and *Canada – Periodicals*, fn. 91.
[300] (*footnote original*) Panel Report on *Japan – Alcoholic Beverages II*, fn. 16, with reference to Working Party Report on *Border Tax Adjustments*, L/3464, BISD 18S/97, para. 18, approved by the Appellate Body Report on *Japan – Alcoholic Beverages II*, fn. 20.
[301] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 137.

purpose in interpreting the term 'directly competitive or substitutable product'."[302]

Latent, extant and potential demand

199. In *Korea – Alcoholic Beverages*, the Appellate Body considered that competition in the market place is a dynamic, evolving process and thus the concept of "directly competitive or substitutable" implies that "the competitive relationship between products is *not* to be analyzed *exclusively* by reference to *current* consumer preferences". Following this line of argumentation, the Appellate Body concluded that the term "directly competitive or substitutable" may include the analysis of *latent* as well as *extant* demand:

> "The term 'directly competitive or substitutable' describes a particular type of relationship between two products, one imported and the other domestic. It is evident from the wording of the term that the essence of that relationship is that the products are in competition. This much is clear both from the word 'competitive' which means 'characterized by competition', and from the word 'substitutable' which means 'able to be substituted'. The context of the competitive relationship is necessarily the marketplace since this is the forum where consumers choose between different products. Competition in the market place is a dynamic, evolving process. Accordingly, the wording of the term 'directly competitive or substitutable' implies that the competitive relationship between products is *not* to be analyzed *exclusively* by reference to *current* consumer preferences. In our view, the word 'substitutable' indicates that the requisite relationship *may* exist between products that are not, at a given moment, considered by consumers to be substitutes but which are, nonetheless, *capable* of being substituted for one another.
>
> Thus, according to the ordinary meaning of the term, products are competitive or substitutable when they are interchangeable[303] or if they offer, as the Panel noted, 'alternative ways of satisfying a particular need or taste'. Particularly in a market where there are regulatory barriers to trade or to competition, there may well be latent demand."[304] The words 'competitive or substitutable' are qualified in the *Ad* Article by the term 'directly'. In the context of Article III:2, second sentence, the word 'directly' suggests a degree of proximity in the competitive relationship between the domestic and the imported products. The word 'directly' does not, however, prevent a panel from considering both latent and extant demand."[305]

200. In support of its proposition that the term "directly competitive or substitutable" required a dynamic interpretation of both latent and extant demand, the Appellate Body in *Korea – Alcoholic Beverages* rejected an attempt by one of the parties to read a prohibition of considering "potential competition" into the text of Note *Ad* Article III:

> "Our reading of the ordinary meaning of the term 'directly competitive or substitutable' is supported by its context as well as its object and purpose. As part of the context, we note that the *Ad* Article provides that the second sentence of Article III:2 is applicable 'only in cases where competition *was* involved'. (emphasis added) According to Korea, the use of the past indicative 'was' prevents a panel taking account of 'potential' competition. However, in our view, the use of the word 'was' does not have any necessary significance in defining the temporal scope of the analysis to be carried out. The *Ad* Article describes the circumstances in which a hypothetical tax '*would* be considered to be inconsistent with the provisions of the second sentence'. (emphasis added) The first part of the clause is cast in the conditional mood ('would') and the use of the past indicative simply follows from the use of the word 'would'. It does not place any limitations on the temporal dimension of the word 'competition'."[306]

201. The Appellate Body subsequently referred to the context of Article III:2 to support its dynamic approach to the notion of "directly competitive or substitutable":

> "The context of Article III:2, second sentence, also includes Article III:1 of the GATT 1994. As we stated in our Report in *Japan – Alcoholic Beverages*, Article III:1 informs Article III:2 through specific reference.[307] Article III:1 sets forth the principle 'that internal taxes . . . should not be applied to imported or domestic products so as to afford protection to domestic production.' It is in the light of this principle, which embodies the object and purpose of the whole of Article III, that the term 'directly competitive and substitutable' must be read. As we said in *Japan – Alcoholic Beverages*:
>
> > 'The broad and fundamental purpose of Article III is to *avoid protectionism* in the application of internal tax and regulatory measures. . . . Toward this end, Article III obliges Members of the WTO to *provide equality of competitive conditions* for imported products in relation to domestic products. . . . Moreover, it is irrelevant that the "trade effects" of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III *protects expectations* not of any particular trade volume but rather of the *equal competitive relationship* between imported and domestic products.' (emphasis added)."[308]

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[302] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 127.
[303] (*footnote original*) Appellate Body Report on *Canada – Periodicals*.
[304] Appellate Body Report on *Korea – Alcoholic Beverages*, paras. 114–115.
[305] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 116.
[306] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 117.
[307] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, footnote 20.
[308] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 119.

202. The Panel on *Japan – Alcoholic Beverages II* held that "a tax system that discriminates against imports has the consequence of creating and even freezing preferences for domestic goods. In the Panel's view, this meant that consumer surveys in a country with such a tax system would likely understate the degree of potential competitiveness between substitutable products."[309] The Appellate Body on *Korea – Alcoholic Beverages* confirmed this approach and emphasized the importance of an analysis of "latent" or "potential" demand by pointing out that current consumer behaviour itself could be influenced by protectionist taxation. It concluded that if only "current instances of substitution" could be taken into account, Article III:2 would, in effect, be confirming the very protective taxation it aims to prohibit:

> "In view of the objectives of avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships, we decline to take a static view of the term 'directly competitive or substitutable'. The object and purpose of Article III confirms that the scope of the term 'directly competitive or substitutable' cannot be limited to situations where consumers *already* regard products as alternatives. If reliance could be placed only on current instances of substitution, the object and purpose of Article III:2 could be defeated by the protective taxation that the provision aims to prohibit. Past panels have, in fact, acknowledged that consumer behaviour might be influenced, in particular, by protectionist internal taxation. Citing the panel in *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* . . .[310], the panel in *Japan – Alcoholic Beverages* observed that 'a tax system that discriminates against imports has the consequence of creating and even freezing preferences for domestic goods'.[311] The panel in *Japan – Alcoholic Beverages* also stated that 'consumer surveys in a country with . . . a [protective] tax system would likely understate the degree of *potential* competitiveness between substitutable products'.[312] (emphasis added) Accordingly, in some cases, it may be highly relevant to examine latent demand."[313]

203. The Appellate Body on *Korea – Alcoholic Beverages* concluded its analysis of why "latent" demand had to be considered in the interpretation of "directly competitive or substitutable products" by emphasizing the need for such an analysis particularly in the product sector in the case before it:

> "We note, however, that actual consumer demand may be influenced by measures other than internal taxation. Thus, demand may be influenced by, *inter alia*, earlier protectionist taxation, previous import prohibitions or quantitative restrictions. Latent demand can be a particular problem in the case of 'experience goods', such as food and beverages, which consumers tend to purchase because they are familiar with them and with which consumers experiment only reluctantly.
>
> [T]he term 'directly competitive or substitutable' does not prevent a panel from taking account of evidence of latent consumer demand as one of a range of factors to be considered when assessing the competitive relationship between imported and domestic products under Article III:2, second sentence, of the GATT 1994."[314]

204. In *Canada – Periodicals*, the Appellate Body reiterated the need for the consideration of latent demand in assessing whether products are "directly competitive or substitutable". In this dispute, the Appellate Body rejected Canada's argument that the market shares of foreign and domestic magazines on the Canadian periodicals market had remained constant over an extended period of time and that this fact pointed to a lack of competition or substitutability between domestic and foreign periodicals:

> "We are not impressed either by Canada's argument that the market share of imported and domestic magazines has remained remarkably constant over the last 30–plus years, and that one would have expected some variation if competitive forces had been in play to the degree necessary to meet the standard of 'directly competitive' goods. This argument would have weight only if Canada had not protected the domestic market of Canadian periodicals through, among other measures, the import prohibition of Tariff Code 9958 and the excise tax of Part V.1 of the Excise Tax Act."[315]

205. In *Korea – Alcoholic Beverages*, the Panel elaborated on the meaning of the term "*directly* competitive or substitutable products":

> "[W]e must first decide how the term 'directly competitive or substitutable' should be interpreted. . . .
>
> The Appellate Body on *Japan – Taxes on Alcoholic Beverages II* stated that 'like product' should be narrowly construed for purposes of Article III:2. It then noted that directly competitive or substitutable is a broader category, saying: 'How much broader that category of "directly competitive or substitutable products" may be in a given case is a matter for the panel to determine based on all the relevant facts in that case.'[316] Article 32

[309] Panel Report on *Japan – Alcoholic Beverages II*, para. 6.28.
[310] (*footnote original*) Panel Report on *Japan – Alcoholic Beverages I*. The panel in *Japan – Alcoholic Beverages II* cited para. 5.9 of this panel report.
[311] (*footnote original*) Panel Report on *Japan – Alcoholic Beverages II*, footnote 16, para. 6.28. This excerpt was expressly approved by the Appellate Body in its Report in this case (p. 25).
[312] (*footnote original*) Panel Report on *Japan – Alcoholic Beverages II*, footnote 16, para. 6.28.
[313] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 120.
[314] Appellate Body Report on *Korea – Alcoholic Beverages*, paras. 122–124.
[315] Appellate Body Report on *Canada – Periodicals*, p. 28.
[316] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 25.

of the Vienna Convention provides that it is appropriate to refer to the negotiating history of a treaty provision in order to confirm the meaning of the terms as interpreted pursuant to the application of Article 31. A review of the negotiating history of Article III:2, second sentence and the *Ad* Article III language confirms that the product categories should not be so narrowly construed as to defeat the purpose of the anti-discrimination language informing the interpretation of Article III. The Geneva session of the Preparatory Committee provided an explanation of the language of the second sentence by noting that apples and oranges could be directly competitive or substitutable. Other examples provided were domestic linseed oil and imported tung oil and domestic synthetic rubber and imported natural rubber. There was discussion of whether such products as tramways and busses or coal and fuel oil could be considered as categories of directly competitive or substitutable products. There was some disagreement with respect to these products.

This negotiating history illustrates the key question in this regard. It is whether the products are *directly* competitive or substitutable. Tramways and busses, when they are not directly competitive, may still be indirectly competitive as transportation systems. Similarly even if most power generation systems are set up to utilize either coal or fuel oil, but not both, these two products could still compete indirectly as fuels. Thus, the focus should not be exclusively on the quantitative extent of the competitive overlap, but on the methodological basis on which a panel should assess the competitive relationship.

At some level all products or services are at least indirectly competitive. Because consumers have limited amounts of disposable income, they may have to arbitrate between various needs such as giving up going on a vacation to buy a car or abstaining from eating in restaurants to buy new shoes or a television set. However, an assessment of whether there is a direct competitive relationship between two products or groups of products requires evidence that consumers consider or could consider the two products or groups of products as alternative ways of satisfying a particular need or taste."[317]

Factors relevant to "directly competitive or substitutable"

206. In *Japan – Alcoholic Beverages II*, the Appellate Body agreed with the Panel's illustrative enumeration of the factors to be considered in deciding whether two subject products are "directly competitive or substitutable"; for example, the nature of the compared products, and the competitive conditions in the relevant market, in addition to their physical characteristics, common end-use, and tariff classifications.[318]

207. In *Korea – Alcoholic Beverages*, the Panel evaluated whether the subject products were "directly competitive or substitutable products" by discussing the various characteristics of the products. The Appellate Body implicitly endorsed this approach in the context of upholding the Panel's approach of grouping certain products into categories:[319]

"We next will consider the various characteristics of the products to assess whether there is a competitive or substitutable relationship between the imported and domestic products and draw conclusions as to whether the nature of any such relationship is direct. We will review the physical characteristics, end-uses including evidence of advertising activities, channels of distribution, price relationships including cross-price elasticities, and any other characteristics."[320]

208. With respect to the "grouping" methodology, see also paragraph 209 below:

Methodology of comparison – grouping of products

209. In *Korea – Alcoholic Beverages*, the Appellate Body agreed with the Panel's comparison method of domestic and imported products, where under both types of *soju* (Korean traditional liquor), i.e. distilled and diluted *soju*, were compared with imported liquor products on a group basis, rather than on an item-by-item basis. The Appellate Body rejected Korea's appeal of this methodology :

"We consider that Korea's argument raises two distinct questions. The first question is whether the Panel erred in its 'analytical approach'. The second is whether, on the facts of this case, the Panel was entitled to group the products in the manner that it did. Since the second question involves a review of the way in which the Panel assessed the evidence, we address it in our analysis of procedural issues.

The Panel describes 'grouping' as an 'analytical tool'. It appears to us, however, that whatever else the Panel may have seen in this 'analytical tool', it used this 'tool' as a practical device to minimize repetition when examining the competitive relationship between a large number of differing products. Some grouping is almost always necessary in cases arising under Article III:2, second sentence, since generic categories commonly include products with *some* variation in composition, quality, function and price, and thus commonly give rise to sub-categories. From a slightly different perspective, we note that 'grouping' of products involves at least a preliminary characterization by the treaty interpreter that certain products are sufficiently similar as to, for instance, composition, quality, function and price, to warrant treating them as a group for convenience in analysis. But, the use of such 'analytical tools' does not

[317] Panel Report on *Korea – Alcoholic Beverages*, paras. 10.37–10.40.
[318] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 25.
[319] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 144.
[320] Panel Report on *Korea – Alcoholic Beverages*, para. 10.61.

relieve a panel of its duty to make an objective assessment of whether the components of a group of imported products are directly competitive or substitutable with the domestic products. We share Korea's concern that, in certain circumstances, such 'grouping' of products *might* result in individual product characteristics being ignored, and that, in turn, *might* affect the outcome of a case. However, as we will see below, the Panel avoided that pitfall in this case.

Whether, and to what extent, products can be grouped is a matter to be decided on a case-by-case basis. In this case, the Panel decided to group the imported products at issue on the basis that:

> . . . on balance, all of the imported products specifically identified by the complainants have sufficient common characteristics, end-uses and channels of distribution and prices. . . .[321]

As the Panel explained in the footnote attached to this passage, the Panel's subsequent analysis of the physical characteristics, end-uses, channels of distribution and prices of the imported products confirmed the correctness of its decision to group the products for analytical purposes. Furthermore, where appropriate, the Panel did take account of individual product characteristics. It, therefore, seems to us that the Panel's grouping of imported products, complemented where appropriate by individual product examination, produced the same outcome that individual examination of each imported product would have produced.[322] We, therefore, conclude that the Panel did not err in considering the imported beverages together."[323]

210. In *Argentina – Hides and Leather*, the Panel discussed the methodology of comparison to be applied with respect to the term "in excess of those applied" under the first sentence of Article III:2. See paragraphs 176–177 above. See also the Appellate Body's finding in *Canada – Periodicals* on the methodology of comparison for "dissimilar taxation". See paragraph 217 below. Also, with respect to the methodology of comparison applicable to the term "no less favourable treatment" under Article III:4, see paragraphs 270–275 below.

Like products as a subset of directly competitive or substitutable products

211. In *Korea – Alcoholic Beverages*, the Appellate Body defined "like products" as a subset of "directly competitive or substitutable" products:

> "The first sentence of Article III:2 also forms part of the context of the term. 'Like' products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all 'directly competitive or substitutable' products are 'like'.[324] The notion of like products must be construed narrowly[325] but the category of directly competitive or substitutable products is broader.[326] While perfectly substitutable products fall within Article III:2, first sentence, imperfectly substitutable products can be assessed under Article III:2, second sentence.[327]"[328]

Reference to GATT practice

212. With respect to the interpretation of "directly competitive or substitutable products" under GATT, see also GATT Analytical Index, pages 159–161.

Relationship with "like products"

213. In *Japan – Alcoholic Beverages II* and *Korea – Alcoholic Beverages*, the Appellate Body compared the term "like products" with the term "directly competitive or substitutable products". See paragraphs 157–159 above.

(iii) "not similarly taxed"

General

"de minimis" standard

214. In *Japan – Alcoholic Beverages II*, the Appellate Body interpreted the term "not similarly taxed" as requiring excessive taxation more than "*de minimis*":

> "To give due meaning to the distinctions in the wording of Article III:2, first sentence, and Article III:2, second sentence, the phrase 'not similarly taxed' in the *Ad* Article to the second sentence must not be construed so as to mean the same thing as the phrase 'in excess of' in the first sentence. On its face, the phrase 'in excess of' in the first sentence means *any* amount of tax on imported products 'in excess of' the tax on domestic 'like products'. The phrase 'not similarly taxed' in the *Ad* Article to the second sentence must therefore mean something else. It requires a different standard, just as 'directly competitive or substitutable products' requires a different standard as compared to 'like products' for these same interpretive purposes."[329]

215. The Appellate Body found support for the above approach in *Japan – Alcoholic Beverages II* also in the

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[321] (*footnote original*) Panel Report on *Korea – Alcoholic Beverages*, para. 10.60.
[322] (*footnote original*) We note that the panels in *Japan – Alcohol Beverages I* and in *Japan – Alcoholic Beverages II*, followed the same approach. This approach was implicitly approved in our Report on *Japan – Alcoholic Beverages II*.
[323] Appellate Body Report on *Korea – Alcoholic Beverages*, paras. 141–144.
[324] (*footnote original*) Panel Report on *Japan – Alcoholic Beverages II*, footnote 16, approved by the Appellate Body at p. 23 of its Report.
[325] (*footnote original*) Appellate Body Reports on *Japan – Alcoholic Beverages II*, footnote 20, and *Canada – Periodicals*, footnote 91.
[326] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, footnote 20.
[327] (*footnote original*) Appellate Body Report on *Canada – Periodicals*, footnote 91.
[328] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 118.
[329] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 26.

distinction between "like products" in the first sentence and "directly competitive or substitutable products" in Note *Ad* Article III:

> "Reinforcing this conclusion is the need to give due meaning to the distinction between 'like products' in the first sentence and 'directly competitive or substitutable products' in the *Ad* Article to the second sentence. If 'in excess of' in the first sentence and 'not similarly taxed' in the *Ad* Article to the second sentence were construed to mean one and the same thing, then 'like products' in the first sentence and 'directly competitive or substitutable products' in the *Ad* Article to the second sentence would also mean one and the same thing. This would eviscerate the distinctive meaning that must be respected in the words of the text.
>
> To interpret 'in excess of' and 'not similarly taxed' identically would deny any distinction between the first and second sentences of Article III:2. Thus, in any given case, there may be some amount of taxation on imported products that may well be 'in excess of' the tax on domestic 'like products' but may not be so much as to compel a conclusion that 'directly competitive or substitutable' imported and domestic products are 'not similarly taxed' for the purposes of the *Ad* Article to Article III:2, second sentence. In other words, there may be an amount of excess taxation that may well be more of a burden on imported products than on domestic 'directly competitive or substitutable products' but may nevertheless not be enough to justify a conclusion that such products are 'not similarly taxed' for the purposes of Article III:2, second sentence. We agree with the Panel that this amount of differential taxation must be more than *de minimis* to be deemed 'not similarly taxed' in any given case. And, like the Panel, we believe that whether any particular differential amount of taxation is *de minimis* or is not *de minimis* must, here too, be determined on a case-by-case basis. Thus, to be 'not similarly taxed', the tax burden on imported products must be heavier than on 'directly competitive or substitutable' domestic products, and that burden must be more than *de minimis* in any given case."[330]

Distinction from "so as to afford protection"

216. With respect to the distinction between "not similarly taxed" and "so as to afford protection" by the Appellate Body in *Japan – Alcoholic Beverages II*, see paragraphs 219–227 below.

Methodology of comparison – treatment of dissimilar taxation of some imported products

217. In *Canada – Periodicals*, referring to its Report on *Japan – Alcoholic Beverages II*[331], the Appellate Body stated:

> "[D]issimilar taxation of even some imported products as compared to directly competitive or substitutable domestic products is inconsistent with the provisions of the second sentence of Article III:2. In *United States – Section 337*, the panel found:
>
> > . . . that the 'no less favourable' treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products.[332]"[333]

218. The issue of balancing more favourable treatment of some imported products against less favourable treatment of other imported products was also addressed by the Panel on *Argentina – Hides and Leather* with respect to Article III:2, first sentence (see paragraphs 176–177 above, and by the Panel on *US – Gasoline* (see paragraph 275 below).[334]

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

General

Relationship with Ad Article – distinction from "not similarly taxed"

219. In *Japan – Alcoholic Beverages II*, the Appellate Body drew a distinction between the term "not similarly taxed" and the term "so as to afford protection to domestic production" as follows:

> "[T]he Panel erred in blurring the distinction between that issue and the entirely separate issue of whether the tax measure in question was applied 'so as to afford protection'. Again, these are separate issues that must be addressed individually. If 'directly competitive or substitutable products' are *not* 'not similarly taxed', then there is neither need nor justification under Article III:2, second sentence, for inquiring further as to whether the tax has been applied 'so as to afford protection'. But if such products are 'not similarly taxed', a further inquiry must necessarily be made."[335]

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[330] Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 26–27. This "*de minimis*" standard was endorsed by the Appellate Body in *Canada – Periodicals* (Appellate Body Report on *Canada – Periodicals*, p. 29); in *Chile – Alcoholic Beverages* (Appellate Body Report on *Chile – Alcoholic Beverages*, para. 49.). Also, the Panel on *Indonesia Autos* followed it. Panel Report on *Indonesia – Auto*, para. 14.115.

[331] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 27.

[332] (*footnote original*) GATT Panel Report on *US – Section 337*, BISD 36S/345, para. 5.14.

[333] Appellate Body Report on *Canada – Periodicals*, p. 29.

[334] Further, with respect to the methodology of comparison in identifying "directly competitive and substitutable products" under the second sentence of Article III:2, see paras. 194–210 of this Chapter. Also with respect to this issue under Article III:4, see paras. 242–247 of this Chapter.

[335] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 27.

Relevant factors

General

220. In *Japan – Alcoholic Beverages II*, the Appellate Body indicated as follows:

> "As in [GATT Panel Report on *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83], we believe that an examination in any case of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products. We believe it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products.
>
> Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure."[336]

Relevance of tax differentials

221. In *Japan – Alcoholic Beverages II*, the Appellate Body held that the very magnitude of the tax differentials may be evidence of the protective application of a national fiscal measure:

> "The very magnitude of the dissimilar taxation in a particular case may be evidence of such a protective application, as the Panel rightly concluded in this case. Most often, there will be other factors to be considered as well. In conducting this inquiry, panels should give full consideration to all the relevant facts and all the relevant circumstances in any given case.
>
> . . .
>
> . . . The dissimilar taxation must be more than *de minimis*. It may be so much more that it will be clear from that very differential that the dissimilar taxation was applied 'so as to afford protection'. In some cases, that may be enough to show a violation. In this case, the Panel concluded that it was enough. Yet in other cases, there may be other factors that will be just as relevant or more relevant to demonstrating that the dissimilar taxation at issue was applied 'so as to afford protection'. In any case, the three issues that must be addressed in determining whether there is such a violation must be addressed clearly and separately in each case and on a case-by-case basis. And, in every case, a careful, objective analysis, must be done of each and all relevant facts and all the relevant circumstances in order to determine 'the existence of protective taxation'.[337]"[338]

222. The Appellate Body on *Japan – Alcoholic Beverages II* supported its interpretation of the various elements of Article III:2, second sentence, by emphasizing the consistency of its analysis with the customary rules of interpretation of public international law:

> "Our interpretation of Article III is faithful to the 'customary rules of interpretation of public international law'. WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system'."[339]

Relevance of tariffs on subject products

223. The Panel's approach in *Japan – Alcoholic Beverages II* reveals the possible roles of tariffs in a finding that a national measure has been applied "so as to afford protection to domestic production". The Appellate Body agreed with the following finding of the Panel:[340]

> "The Panel took note, in this context, of the statement by Japan that the 1987 Panel Report erred when it concluded that shochu is essentially a Japanese product. The Panel accepted the evidence submitted by Japan according to which a shochu-like product is produced in various countries outside Japan, including the Republic of Korea, the People's Republic of China and Singapore. The Panel noted, however, that Japanese import duties on shochu are set at 17.9 per cent. At any rate what is at stake, in the Panel's view, is the market share of the domestic shochu market in Japan that was occupied by Japanese-made shochu. The high import duties on foreign-produced shochu resulted in a significant share of the Japanese shochu market held by Japanese shochu producers. Consequently, in the Panel's view, the combination of customs duties and internal taxation in Japan has the following impact: on the one hand, it makes it difficult for foreign-produced shochu to penetrate the Japanese market and, on the other, it does not guarantee equality of competitive conditions between shochu and the rest of 'white' and 'brown' spirits. Thus, through a combination of high import duties and differentiated internal taxes, Japan manages to 'isolate' domestically produced shochu from foreign competition, be it foreign produced shochu or any other of the mentioned white and brown spirits."[341]

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[336] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 29.
[337] (*footnote original*) Panel Report on *Japan – Alcoholic Beverages I*, para. 5.11. See also Appellate Body Report on *Canada – Periodicals*, p. 30.
[338] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 33.
[339] Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 29–31.
[340] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 31.
[341] Panel Report on *Japan – Alcoholic Beverages II*, para. 6.35.

Relevance of the intent of legislators/regulators

224. In *Japan – Alcoholic Beverages II*, the Appellate Body considered that the subjective intent of legislators and regulators in the drafting and the enactment of a particular measure is irrelevant for ascertaining whether a measure is applied "so as to afford protection to domestic production":

> "This third inquiry under Article III:2, second sentence ['so as to afford protection'], must determine whether 'directly competitive or substitutable products' are 'not similarly taxed' in a way that affords protection. This is not an issue of intent. It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent. If the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure. It is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless, to echo Article III:*1, 'applied* to imported or domestic products so as to afford protection to domestic production'. This is an issue of how the measure in question is *applied*."[342]

225. In contrast to its statements in *Japan – Alcoholic Beverages II*, the Appellate Body in *Canada – Periodicals* did ascribe some significance to the statements of representatives of the Canadian executive about the policy objectives of the part of the Excise Tax Act at issue. The Appellate Body did so after finding that "the magnitude of the dissimilar taxation between imported split-run periodicals and domestic non-split-run periodicals is beyond excessive, indeed, it is prohibitive" and that "[t]here is also ample evidence that the very design and structure of the measure is such as to afford protection to domestic periodicals":[343]

> "The Canadian policy which led to the enactment of Part V.1 of the Excise Tax Act had its origins in the *Task Force Report*. It is clear from reading the *Task Force Report* that the design and structure of Part V.1 of the Excise Tax Act are to prevent the establishment of split-run periodicals in Canada, thereby ensuring that Canadian advertising revenues flow to Canadian magazines. Madame Monique Landry, Minister Designate of Canadian Heritage at the time the *Task Force Report* was released, issued the following statement summarizing the Government of Canada's policy objectives for the Canadian periodical industry:
>
> 'The Government reaffirms its commitment to protect the economic foundations of the Canadian periodical industry, which is a vital element of Canadian cultural expression. To achieve this objective, the Government will continue to use policy instruments that encourage the flow of advertising revenues to Canadian magazines and discourage the establishment of split-run or "Canadian" regional editions with advertising aimed at the Canadian market. We are committed to ensuring that Canadians have access to Canadian ideas and information through genuinely Canadian magazines, while not restricting the sale of foreign magazines in Canada.'
>
> Furthermore, the Government of Canada issued the following response to the *Task Force Report*:
>
> 'The Government reaffirms its commitment to the long-standing policy of protecting the economic foundations of the Canadian periodical industry. To achieve this objective, the Government uses policy instruments that encourage the flow of advertising revenues to Canadian periodicals, since a viable Canadian periodical industry must have a secure financial base.'
>
> During the debate of Bill C-103, An Act to Amend the Excise Tax Act and the Income Tax Act, the Minister of Canadian Heritage, the Honourable Michel Dupuy, stated the following:
>
> '. . . the reality of the situation is that we must protect ourselves against split-runs coming from foreign countries and, in particular, from the United States.'
>
> Canada also admitted that the objective and structure of the tax is to insulate Canadian magazines from competition in the advertising sector, thus leaving significant Canadian advertising revenues for the production of editorial material created for the Canadian market. With respect to the actual application of the tax to date, it has resulted in one split-run magazine, Sports Illustrated, to move its production for the Canadian market out of Canada and back to the United States. Also, Harrowsmith Country Life, a Canadian-owned split-run periodical, has ceased production of its United States' edition as a consequence of the imposition of the tax."[344]

226. In *Korea – Alcoholic Beverages*, Korea appealed the Panel's finding that the Korea tax measures were inconsistent with Article III:2, second sentence, on the ground that the Panel ignored the explanation provided by Korea of the structure of the subject Korean taxation on liquor products. The Appellate Body rejected Korea's argument and expressed its agreement with the Panel's approach:

> "Although [the Panel] considered that the magnitude of the tax differences was sufficiently large to support a finding that the contested measures afforded protection to domestic production, the Panel also considered

[342] Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 27–28.
[343] Appellate Body Report on *Canada – Periodicals*, p. 32.
[344] Appellate Body Report on *Canada – Periodicals*, pp. 30–32.

the structure and design of the measures. In addition, the Panel found that, in practice, '[t]here is virtually no imported soju so the beneficiaries of this structure are almost exclusively domestic producers'. In other words, the tax operates in such a way that the lower tax brackets cover almost exclusively domestic production, whereas the higher tax brackets embrace almost exclusively imported products. In such circumstances, the reasons given by Korea as to *why* the tax is structured in a particular way do not call into question the conclusion that the measures are applied 'so as to afford protection to domestic production'. Likewise, the reason why there is very little imported soju in Korea does not change the pattern of application of the contested measures."[345]

227. In *Chile – Alcoholic Beverages*, the Appellate Body examined Chile's claim that the subject taxation on alcoholic beverages was aimed at, among others, reducing the consumption of alcoholic beverages with higher alcohol content. The Appellate Body again refused to accept explanations of policy objectives which were not ascertainable from the objective design, architecture and structure of the measure and supported the Panel's attempts to "relate the observable structural features of the measure with its declared purposes":

"We recall once more that, in *Japan – Alcoholic Beverages*, we declined to adopt an approach to the issue of 'so as to afford protection' that attempts to examine 'the many reasons legislators and regulators often have for what they do'.[346] We called for examination of the design, architecture and structure of a tax measure precisely to permit identification of a measure's objectives or purposes as revealed or objectified in the measure itself. Thus, we consider that a measure's purposes, objectively manifested in the design, architecture and structure of the measure, *are* intensely pertinent to the task of evaluating whether or not that measure is applied so as to afford protection to domestic production. In the present appeal, Chile's explanations concerning the structure of the New Chilean System – including, in particular, the truncated nature of the line of progression of tax rates, which effectively consists of two levels (27 per cent *ad valorem* and 47 per cent *ad valorem*) separated by only 4 degrees of alcohol content – might have been helpful in understanding what *prima facie* appear to be anomalies in the progression of tax rates. The conclusion of protective application reached by the Panel becomes very difficult to resist, in the absence of countervailing explanations by Chile. The mere statement of the four objectives pursued by Chile does not constitute effective rebuttal on the part of Chile.

At the same time, we agree with Chile that it would be inappropriate, under Article III:2, second sentence, of the GATT 1994, to examine whether the tax measure is *necessary* for achieving its stated objectives or purposes. The Panel did use the word 'necessary' in this part of its reasoning. Nevertheless, we do not read the Panel Report as showing that the Panel did, in fact, conduct an examination of whether the measure is necessary to achieve its stated objectives. It appears to us that the Panel did no more than try to relate the observable structural features of the measure with its declared purposes, a task that is unavoidable in appraising the application of the measure as protective or not of domestic production."[347]

Reference to GATT practice

228. For GATT practice on this subject-matter, see also GATT Analytical Index, pages 139–140.

4. Article III:4

(a) General

(i) Test under paragraph 4

229. In *Korea – Various Measures on Beef*, the Appellate Body explained the three elements of a violation of Article III:4:

"For a violation of Article III:4 to be established, three elements must be satisfied: that the imported and domestic products at issue are 'like products'; that the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use'; and that the imported products are accorded 'less favourable' treatment than that accorded to like domestic products."[348]

230. In *EC – Bananas III*, the Appellate Body reviewed the Panel's finding that the EC's allocation method of tariff quota for bananas was inconsistent with Article III:4. The Appellate Body considered that an independent consideration of the phrase "so as [to] afford protection to domestic production" is not necessary under Article III:4:

"Article III:4 does *not* specifically refer to Article III:1. Therefore, a determination of whether there has been a violation of Article III:4 does *not* require a separate consideration of whether a measure 'afford[s] protection to domestic production'."[349]

(ii) Burden of proof

231. In *Japan – Film*, the Panel allocated the burden of proof under Article III:4 according to the general

[345] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 150.
[346] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, fn. 20.
[347] Appellate Body Report on *Chile – Alcoholic Beverages*, paras. 71–72.
[348] Appellate Body Report on *Korea – Various Measures on Beef*, para. 133.
[349] Appellate Body Report on *EC – Bananas III*, para. 216. In this regard, see Panel Report on *Canada – Periodicals*, para. 5.38, where the Panel examined whether a measure at issue "afford[ed] protection to domestic production."

principle that it is for the party asserting a fact or claim to bear the burden of proving this fact or claim:

> "As for the burden of proof . . . we note that it is for the party asserting a fact, claim or defence to bear the burden of providing proof thereof. Once that party has put forward sufficient evidence to raise a presumption that what is claimed is true, the burden of producing evidence shifts to the other party to rebut the presumption.[350] Thus, in this case, including the claims under Articles III . . ., it is for the United States to bear the burden of proving its claims. Once it has raised a presumption that what it claims is true, it is for Japan to adduce sufficient evidence to rebut any such presumption."[351]

232. The Appellate Body confirmed this approach by the Panel on *Japan – Film* to the allocation of the burden of proof in its report in *EC – Asbestos*. In so doing, the Appellate Body referred to its finding on *US – Wool Shirts and Blouses*:[352]

> "Applying these rules, it is our opinion that Canada, as the complaining party, should normally provide sufficient evidence to establish a presumption that there are grounds for each of its claims. If it does so, it will then be up to the EC to adduce sufficient evidence to rebut the presumption. When the EC puts forward a particular method of defence in the affirmative, it is up to them to furnish sufficient evidence, just as Canada must do for its own claims. If both parties furnish evidence that meets these requirements, it is the responsibility of the Panel to assess these elements as a whole. Where the evidence concerning a claim or a particular form of defence is, in general, equally balanced, a finding has to be made against the party on which the burden of proof relating to this claim or this form of defence is incumbent."[353]

(iii) Relationship with other paragraphs of Article III

Relationship with paragraph 1

233. With respect to the relationship between Paragraphs 1 and 4 of Article III, see paragraphs 140–143 above. Also, in *EC – Bananas III*, the Appellate Body touched on this issue in discussing whether the independent consideration of "so as to afford protection to domestic production" is necessary under Article III:4. See paragraph 230 above. Further, this issue was touched upon by the Appellate Body in *EC – Asbestos* in relation to the interpretation of the term "like products" under paragraph 4. See paragraphs 237 and 239 below.

Relationship with paragraph 2

234. In *EC – Asbestos*, the Appellate Body considered that Article III:2 constitutes part of the context of Article III:4, and examined the relationship between these paragraphs. However, the Appellate Body concluded that Article III:1, rather than Article III:2, had "particular contextual significance" for the interpretation of Article III:4:

> "To begin to resolve these [interpretative] issues, we turn to the relevant context of Article III:4 of the GATT 1994. In that respect, we observe that Article III:2 of the GATT 1994, which deals with the internal tax treatment of imported and domestic products, prevents Members, through its first sentence, from imposing internal taxes on imported products 'in excess of those applied . . . to *like* domestic products.' (emphasis added) In previous Reports, we have held that the scope of 'like' products in this sentence is to be construed 'narrowly'.[354] This reading of 'like' in Article III:2 might be taken to suggest a similarly narrow reading of 'like' in Article III:4, since both provisions form part of the same Article. However, both of these paragraphs of Article III constitute specific expressions of the overarching, 'general principle', set forth in Article III:1 of the GATT 1994.[355] As we have previously said, the 'general principle' set forth in Article III:1 'informs' the rest of Article III and acts 'as a guide to understanding and interpreting the specific obligations contained' in the other paragraphs of Article III, including paragraph 4.[356] Thus, in our view, Article III:1 has particular contextual significance in interpreting Article III:4, as it sets forth the 'general principle' pursued by that provision. Accordingly, in interpreting the term 'like products' in Article III:4, we must turn, first, to the 'general principle' in Article III:1, rather than to the term 'like products' in Article III:2."[357]

235. After emphasizing the significance of Article III:1 for the interpretation of Article III:4, the Appellate Body in *EC – Asbestos* considered the different respective structures of Articles III:2 and III:4:

> "In addition, we observe that, although the obligations in Articles III:2 and III:4 both apply to 'like products', the text of Article III:2 differs in one important respect from the text of Article III:4. Article III:2 contains *two separate* sentences, each imposing *distinct* obligations: the first lays down obligations in respect of 'like products', while the second lays down obligations in respect of 'directly competitive or substitutable' products.[358] By contrast,

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[350] (*footnote original*) Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14.
[351] Panel Report on *Japan – Film*, para. 10.372.
[352] Panel Report on *EC – Asbestos*, para. 8.78.
[353] Panel Report on *EC – Asbestos*, para. 8.79. With respect to burden of proof in general, see Chapter on the *DSU*, Section XXXVI.D.
[354] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 112 and 113. See, also, Appellate Body Report on *Canada – Periodicals*, p. 473.
[355] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 111.
[356] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 111.
[357] Appellate Body Report on *EC – Asbestos*, para. 94.
[358] (*footnote original*) The meaning of the second sentence of Article III:2 is elaborated upon in the Interpretative Note to that provision. This note indicates that the second sentence of Article III:2 applies to "directly competitive or substitutable product[s]".

Article III:4 applies only to 'like products' and does not include a provision equivalent to the second sentence of Article III:2. We note that, in this dispute, the Panel did not examine, at all, the significance of this textual difference between paragraphs 2 and 4 of Article III."[359]

236. The Appellate Body on *EC – Asbestos* also recalled its report in *Japan – Alcoholic Beverages II*, where it had emphasized the need to interpret the two sentences of Article III:2 and the separate obligations contained therein in the light of the structure of Article III:2:

"For us, this textual difference between paragraphs 2 and 4 of Article III has considerable implications for the meaning of the term 'like products' in these two provisions. In *Japan – Alcoholic Beverages,* we concluded, in construing Article III:2, that the two separate obligations in the two sentences of Article III:2 must be interpreted in a harmonious manner that gives meaning to *both* sentences in that provision. We observed there that the interpretation of one of the sentences necessarily affects the interpretation of the other. Thus, the scope of the term 'like products' in the first sentence of Article III:2 affects, and is affected by, the scope of the phrase 'directly competitive or substitutable' products in the second sentence of that provision. We said in *Japan – Alcoholic Beverages*:

> 'Because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not 'like products' as contemplated by the first sentence, we agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn. Consequently, we agree with the Panel also that the definition of 'like products' in Article III:2, first sentence, should be construed narrowly.'[360]

In construing Article III:4, the same interpretive considerations do not arise, because the 'general principle' articulated in Article III:1 is expressed in Article III:4, not through two distinct obligations, as in the two sentences in Article III:2, but instead through a single obligation that applies solely to 'like products'. Therefore, the harmony that we have attributed to the two sentences of Article III:2 need not and, indeed, cannot be replicated in interpreting Article III:4. Thus, we conclude that, given the textual difference between Articles III:2 and III:4, the 'accordion' of 'likeness' stretches in a different way in Article III:4."[361]

(b) "like products"

(i) General

Relationship with "like products" under Article III:2, first sentence

237. In *EC – Asbestos*, the Appellate Body interpreted the term "like" in Article III:4 by comparing the same term as used in Article III:2. The Appellate Body emphasized the need for consistency between the general principle of Article III, contained in paragraph 1, and the interpretation of Article III:4. The Appellate Body then interpreted the term "like products" to refer to products which are in a competitive relationship:

"[T]here must be consonance between the objective pursued by Article III, as enunciated in the 'general principle' articulated in Article III:1, and the interpretation of the specific expression of this principle in the text of Article III:4. This interpretation must, therefore, reflect that, in endeavouring to ensure 'equality of competitive conditions', the 'general principle' in Article III seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, *between the domestic and imported products involved*, 'so as to afford protection to domestic production.'

As products that are in a competitive relationship in the marketplace could be affected through treatment of *imports* 'less favourable' than the treatment accorded to *domestic* products, it follows that the word 'like' in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship. Thus, a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. In saying this, we are mindful that there is a spectrum of degrees of 'competitiveness' or 'substitutability' of products in the marketplace, and that it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word 'like' in Article III:4 of the GATT 1994 falls. We are not saying that *all* products which are in *some* competitive relationship are 'like products' under Article III:4. In ruling on the measure at issue, we also do not attempt to define the precise scope of the word 'like' in Article III:4. Nor do we wish to decide if the scope of 'like products' in Article III:4 is co-extensive with the combined scope of 'like' and 'directly competitive or substitutable' products in Article III:2. However, we recognize that the relationship between these two provisions is important, because there is no sharp distinction between fiscal regulation, covered by Article III:2, and non-fiscal regulation, covered by Article III:4. Both forms of regulation can often be used to achieve the same ends. It would be incongruous if, due to a significant difference in the product scope of these two provisions, Members were prevented from using one form of regulation – for instance, fiscal – to protect domestic production of certain products, but were able to use another form of regulation – for instance, non-fiscal – to achieve those ends. This would frustrate a consistent application of the 'general principle' in Article III:1. For

[359] Appellate Body Report on *EC – Asbestos*, para. 94.
[360] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 112 and 113.
[361] Appellate Body Report on *EC – Asbestos*, paras. 95–96.

these reasons, we conclude that the scope of 'like' in Article III:4 is broader than the scope of 'like' in Article III:2, first sentence. Nonetheless, we note, once more, that Article III:2 extends not only to 'like products', but also to products which are 'directly competitive or substitutable', and that Article III:4 extends only to 'like products'. In view of this different language, and although we need not rule, and do not rule, on the precise product scope of Article III:4, we do conclude that the product scope of Article III:4, although broader than the *first* sentence of Article III:2, is certainly *not* broader than the *combined* product scope of the *two* sentences of Article III:2 of the GATT 1994."[362]

238. The Appellate Body acknowledged that its interpretation resulted in giving Article III:4 "a relatively broad product scope". Nevertheless the Appellate Body pointed out that mere "likeness" of products and distinctions between "like products" in and of themselves would not lead to inconsistency with Article III:4; rather, "less favourable treatment" would also have to be established in order to find a violation of Article III:4:

"We recognize that, by interpreting the term 'like products' in Article III:4 in this way, we give that provision a relatively broad product scope – although no broader than the product scope of Article III:2. In so doing, we observe that there is a second element that must be established before a measure can be held to be inconsistent with Article III:4. Thus, even if two products are 'like', that does not mean that a measure is inconsistent with Article III:4. A complaining Member must still establish that the measure accords to the group of 'like' *imported* products 'less favourable treatment' than it accords to the group of 'like' *domestic* products. The term 'less favourable treatment' expresses the general principle, in Article III:1, that internal regulations 'should not be applied . . . so as to afford protection to domestic production'. If there is 'less favourable treatment' of the group of 'like' imported products, there is, conversely, 'protection' of the group of 'like' domestic products. However, a Member may draw distinctions between products which have been found to be 'like', without, for this reason alone, according to the group of 'like' *imported* products 'less favourable treatment' than that accorded to the group of 'like' *domestic* products. In this case, we do not examine further the interpretation of the term 'treatment no less favourable' in Article III:4, as the Panel's findings on this issue have not been appealed or, indeed, argued before us."[363]

239. Further, in *EC – Asbestos*, the Appellate Body also referred to the Report of the Working Party on *Border Tax Adjustment*. It confirmed that the criteria listed in this Report provide a framework for analysing the "likeness" of products on a case-by-case basis. However, the Appellate Body emphasized that these criteria were not treaty language nor did they constitute a "closed list" and that "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence":

"We turn to consideration of how a treaty interpreter should proceed in determining whether products are 'like' under Article III:4. As in Article III:2, in this determination, '[n]o one approach . . . will be appropriate for all cases.'[364] Rather, an assessment utilizing 'an unavoidable element of individual, discretionary judgement'[365] has to be made on a case-by-case basis. The Report of the Working Party on *Border Tax Adjustments* outlined an approach for analyzing 'likeness' that has been followed and developed since by several panels and the Appellate Body.[366] This approach has, in the main, consisted of employing four general criteria in analyzing 'likeness': (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products.[367] We note that these four criteria comprise four categories of 'characteristics' that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.

These general criteria, or groupings of potentially shared characteristics, provide a framework for analyzing the 'likeness' of particular products on a case-by-case basis. These criteria are, it is well to bear in mind, simply tools to assist in the task of sorting and examining the relevant evidence. They are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products. More important, the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence. In addition, although each criterion addresses, in principle, a different aspect of the products involved, which should be examined separately, the different criteria are interre-

[362] Appellate Body Report on *EC – Asbestos*, paras. 98–99.
[363] Appellate Body Report on *EC – Asbestos*, para. 100.
[364] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 114.
[365] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 113.
[366] (*footnote original*) See, further, Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 113 and, in particular, fn. 46 See, also, Panel Report on *US – Gasoline*, para. 6.8, where the approach set forth in the *Border Tax Adjustment* case was adopted in a dispute concerning Article III:4 of the GATT 1994 by a panel. This point was not appealed in that case.
[367] (*footnote original*) The fourth criterion, tariff classification, was not mentioned by the Working Party on *Border Tax Adjustments*, but was included by subsequent panels (see, for instance, [Panel Reports on] *EEC – Animal Proteins*, para. 4.2, and *Japan – Alcoholic Beverages I*, para. 5.6).

lated. For instance, the physical properties of a product shape and limit the end-uses to which the products can be devoted. Consumer perceptions may similarly influence – modify or even render obsolete – traditional uses of the products. Tariff classification clearly reflects the physical properties of a product.

The kind of evidence to be examined in assessing the 'likeness' of products will, necessarily, depend upon the particular products and the legal provision at issue. When all the relevant evidence has been examined, panels must determine whether that evidence, as a whole, indicates that the products in question are 'like' in terms of the legal provision at issue. We have noted that, under Article III:4 of the GATT 1994, the term 'like products' is concerned with competitive relationships between and among products. Accordingly, whether the *Border Tax Adjustments* framework is adopted or not, it is important under Article III:4 to take account of evidence which indicates whether, and to what extent, the products involved are – or could be – in a competitive relationship in the marketplace."[368]

240. In *Japan – Alcoholic Beverages II*, the Appellate Body found that the term "like product" evoked the image of an accordion whose width would vary depending on the provision under which the term was being interpreted. See paragraph 162 above.

Relationship with "like products" in other GATT provisions

241. With respect to the interpretation of "like products" under GATT Article I, see paragraphs 15–16 above.

(ii) Relevant factors

General

242. In *EC – Asbestos*, the Appellate Body reviewed the Panel's approach to its "likeness" analysis, and criticised the Panel for not taking into account *all* of the relevant criteria:

"It is our view that, having adopted an approach based on the four criteria set forth in *Border Tax Adjustments*, the Panel should have examined the evidence relating to *each* of those four criteria and, then, weighed *all* of that evidence, along with any other relevant evidence, in making an *overall* determination of whether the products at issue could be characterized as 'like'. Yet, the Panel expressed a 'conclusion' that the products were 'like' after examining only the *first* of the four criteria. The Panel then repeated that conclusion under the second criterion – without further analysis – before dismissing altogether the relevance of the third criterion and also before rejecting the differing tariff classifications under the fourth criterion. In our view, it was inappropriate for the Panel to express a 'conclusion' after examining only one of the four criteria. By reaching a 'conclusion' without examining all of the criteria it had decided to examine, the Panel, in reality, expressed a conclusion after examining only some of the evidence. Yet, a determination on the 'likeness' of products cannot be made on the basis of a partial analysis of the evidence, after examination of just one of the criteria the Panel said it would examine. For this reason, we doubt whether the Panel's overall approach has allowed the Panel to make a proper characterization of the 'likeness' of the fibres at issue."[369]

243. In *EC – Asbestos*, the Appellate Body also disagreed with the Panel's findings with respect to the examination of the first criteria of likeness – product properties. More specifically, the Appellate Body held that toxicity was a physical difference to be taken into account in the determination of "likeness" and linked this criterion to the criterion of competitive relationship between the products at issue:

"Panels must examine fully the physical properties of products. In particular, panels must examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace. . . .

. . .

This carcinogenicity, or toxicity, constitutes, as we see it, a defining aspect of the physical properties of chrysotile asbestos fibres. The evidence indicates that PCG fibres, in contrast, do not share these properties, at least to the same extent. We do not see how this highly significant physical difference *cannot* be a consideration in examining the physical properties of a product as part of a determination of "likeness" under Article III:4 of the GATT 1994."[370]

244. Also, in *EC – Asbestos*, with respect to the criteria of end-use and consumer tastes and habits, the Appellate Body again established an explicit link to the criterion of a competitive relationship between products:

"Before examining the Panel's findings under the second and third criteria, we note that these two criteria involve certain of the key elements relating to the competitive relationship between products: first, the extent to which products are capable of performing the same, or similar, functions (end-uses), and, second, the extent to which consumers are willing to use the products to perform these functions (consumers' tastes and habits). Evidence of this type is of particular importance under Article III of the GATT 1994, precisely because that provision is concerned with competitive relationships in the marketplace.

[368] Appellate Body Report on *EC – Asbestos*, paras. 101–103.
[369] Appellate Body Report on *EC – Asbestos*, para. 109.
[370] Appellate Body Report on *EC – Asbestos*, para. 114. In this regard, see also para. 278 of this Chapter. With respect to the minority's opinion on this point, see Appellate Body Report on *EC – Asbestos*, paras. 151–154.

> If there is – or could be – *no* competitive relationship between products, a Member cannot intervene, through internal taxation or regulation, to protect domestic production. Thus, evidence about the extent to which products can serve the same end-uses, and the extent to which consumers are – or would be – willing to choose one product instead of another to perform those end-uses, is highly relevant evidence in assessing the 'likeness' of those products under Article III:4 of the GATT 1994."[371]

245. After having found that the (degree of) toxicity of a product was a physical characteristic to be taken into account for the determination of likeness under Article III:4, the Appellate Body emphasized the significance of the toxicity of a subject product also in relation to consumers' behaviour:

> "In this case especially, we are also persuaded that evidence relating to consumers' tastes and habits would establish that the health risks associated with chrysotile asbestos fibres influence consumers' behaviour with respect to the different fibres at issue.[372] We observe that, as regards *chrysotile asbestos and PCG fibres*, the consumer of the fibres is a *manufacturer* who incorporates the fibres into another product, such as cement-based products or brake linings. We do not wish to speculate on what the evidence regarding these consumers would have indicated; rather, we wish to highlight that consumers' tastes and habits regarding *fibres*, even in the case of commercial parties, such as manufacturers, are very likely to be shaped by the health risks associated with a product which is known to be highly carcinogenic. A manufacturer cannot, for instance, ignore the preferences of the ultimate consumer of its products. If the risks posed by a particular product are sufficiently great, the ultimate consumer may simply cease to buy that product. This would, undoubtedly, affect a manufacturer's decisions in the marketplace. Moreover, in the case of products posing risks to human health, we think it likely that manufacturers' decisions will be influenced by other factors, such as the potential civil liability that might flow from marketing products posing a health risk to the ultimate consumer, or the additional costs associated with safety procedures required to use such products in the manufacturing process."[373]

246. In *EC – Asbestos*, the Appellate Body rejected Canada's argument that consumers' tastes and habits were irrelevant in this dispute because "the existence of the measure has disturbed normal conditions of competition between the products":[374]

> "In our Report in *Korea – Alcoholic Beverages*, we observed that, '[p]articularly in a market where there are regulatory barriers to trade or to competition, there may well be latent demand' for a product.[375] We noted that, in such situations, 'it may be highly relevant to examine latent demand' that is suppressed by regulatory barriers.[376] In addition, we said that 'evidence from other markets may be pertinent to the examination of the market at issue, particularly when demand on that market has been influenced by regulatory barriers to trade or to competition.'[377] We, therefore, do not accept Canada's contention that, in markets where normal conditions of competition have been disturbed by regulatory or fiscal barriers, consumers' tastes and habits cease to be relevant. In such situations, a Member may submit evidence of latent, or suppressed, consumer demand in that market, or it may submit evidence of substitutability from some relevant third market. In making this point, we do not wish to be taken to suggest that there *is* latent demand for chrysotile asbestos fibres. Our point is simply that the existence of the measure does not render consumers' tastes and habits irrelevant, as Canada contends."[378]

247. Further, in *EC – Asbestos*, the Appellate Body acknowledged that an analysis of the various criteria for establishing "likeness" can produce "conflicting indications"; however, it emphasized that the fact that the analysis of a particular criterion may produce an unclear result does not relieve a panel of its duty to inquire into the relevant evidence:

> "In many cases, the evidence will give conflicting indications, possibly within each of the four criteria. For instance, there may be some evidence of similar physical properties and some evidence of differing physical properties. Or the physical properties may differ completely, yet there may be strong evidence of similar end-uses and a high degree of substitutability of the products from the perspective of the consumer. A panel cannot decline to inquire into relevant evidence simply because it suspects that evidence may not be 'clear' or, for that matter, because the parties agree that certain evidence is not relevant. In any event, we have difficulty seeing how the Panel could conclude that an examination of consumers' tastes and habits 'would not provide clear results', given that the Panel did not examine *any* evidence relating to this criterion."[379]

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[371] Appellate Body Report on *EC – Asbestos*, para. 117.
[372] (*footnote original*) We have already noted the health risks associated with chrysotile asbestos fibres in our consideration of properties (*supra*, para. 114).
[373] Appellate Body Report on *EC – Asbestos*, para. 122.
[374] Appellate Body Report on *EC – Asbestos*, para. 123.
[375] (*footnote original*) Appellate Body Report on *Korea – Alcoholic Beverages*, para. 115.
[376] (*footnote original*) Appellate Body Report on *Korea – Alcoholic Beverages*, para. 120. We added that "studies of cross-price elasticity . . . involve an assessment of latent demand" (para. 121).
[377] (*footnote original*) Appellate Body Report on *Korea – Alcoholic Beverages*, para. 137.
[378] Appellate Body Report on *EC – Asbestos*, para. 123.
[379] Appellate Body Report on *EC – Asbestos*, para. 120.

"the situation of the parties dealing in [subject products]"

248. In *US – Gasoline*, the Panel addressed the respondent's argument that with respect to the treatment of the imported and domestic products, the situation of the parties dealing in gasoline must be taken into consideration:

> "The Panel observed first that the United States did not argue that imported gasoline and domestic gasoline were not like *per se*. It had argued rather that with respect to the treatment of the imported and domestic products, the situation of the parties dealing in the gasoline must be taken into consideration. The Panel, recalling its previous discussion of the factors to be taken into account in the determination of like product, noted that chemically-identical imported and domestic gasoline by definition have exactly the same physical characteristics, end-uses, tariff classification, and are perfectly substitutable. The Panel found therefore that chemically-identical imported and domestic gasoline are like products under Article III:4."[380]

Likeness of products when origin is the sole distinctive criterion

249. In *India – Autos*, the Panel declared that, when origin is the sole distinguishing criterion, it is correct to treat products as "alike" within the meaning of Article III:4:

> "The Panel notes that the only factor of distinction under the 'indigenization' condition between products which contribute to fulfilment of the condition and products which do not, is the origin of the product as either imported or domestic. India has not disputed the likeness of the relevant automotive parts and components of domestic or foreign origin for the purposes of Article III:4 of the GATT 1994. Origin being the sole criterion distinguishing the products, it is correct to treat such products as like products within the meaning of Article III:4."[381]

250. The Panel on *Canada – Wheat Exports and Grain Imports* confirmed this jurisprudence relying also on the Panel report in *Argentina – Hides and Leather*:

> "In *Argentina – Hides and Leather*, in dealing with a claim under Article III:2 of the GATT 1994, the panel found that where a Member draws an origin-based distinction in respect of internal taxes, a comparison of specific products is not required and, consequently, it is not necessary to examine the various likeness criteria. . . . While this finding is pertained to Article III:2, we consider that the same reasoning is applicable in this case *mutatis mutandi*."[382]

(iii) Reference to GATT practice

251. With respect to GATT practice on this subject-matter, see also GATT Analytical Index, pages 171–172.

(c) "laws, regulations or requirements"

(i) Differences from "measures" under Article XXIII:1(b)

252. In *Japan – Film*, the Panel examined the relationship between the term "laws, regulations or requirements" under Article III:4 and the term "measures" under Article XXIII:1(b). The Panel opined that the concept of "measure" for the purposes of Article XXIII:1(b) is "equally applicable to the definitional scope of 'all laws, regulations and requirements' in Article III:4:

> "A literal reading of the words *all laws, regulations and requirements* in Article III:4 could suggest that they may have a narrower scope than the word *measure* in Article XXIII:1(b). However, whether or not these words should be given as broad a construction as the word *measure*, in view of the broad interpretation assigned to them in the cases cited above, we shall assume for the purposes of our present analysis that they should be interpreted as encompassing a similarly broad range of government action and action by private parties that may be assimilated to government action. In this connection, we consider that our previous discussion of GATT cases on administrative guidance in relation to what may constitute a 'measure' under Article XXIII:1(b), specifically the panel reports on *Japan – Semi-conductors* and *Japan – Agricultural Products*, is equally applicable to the definitional scope of "all laws, regulations and requirements" in Article III:4."[383]

(ii) Non-mandatory measures

253. In *Canada – Autos*, the Panel, in a finding subsequently not addressed by the Appellate Body, held that a measure can be subject to Article III:4 even if its compliance is not mandatory, and noted as follows:

> "We note that it has not been contested in this dispute that, as stated by previous GATT and WTO panel and appellate body reports, Article III:4 applies not only to mandatory measures but also to conditions that an enterprise accepts in order to receive an advantage,[384] including in cases where the advantage is in the form of a benefit with respect to the conditions of importation of a product.[385] The fact that compliance with the CVA

[380] Panel Report on *US – Gasoline*, para. 6.9.
[381] Panel Report on *India – Autos*, para. 7.174.
[382] Panel Report on *Canada – Wheat Exports and Grain Imports*, footnote 246 to para. 6.164.
[383] Panel Report on *Japan – Film*, para. 10.376.
[384] The footnote to this sentence refers to, as an example, Panel Report on *EEC – Parts and Components*, para. 5.21.
[385] (*footnote original*) See, e.g., Appellate Body Report on *EC – Bananas III*, para. 211.

requirements is not mandatory but a condition which must be met in order to obtain an advantage consisting of the right to import certain products duty-free therefore does not preclude application of Article III:4."[386]

254. In *Canada – Wheat Exports and Grain Imports*, Canada argued that the measure at issue could only be found inconsistent if it mandated or required less favourable treatment. Making reference to the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*[387], the Panel made the following finding which was not challenged on appeal:

"Canada is of the view that since the United States in this case is challenging Section 57(c), as such, Section 57(c) would, under GATT/WTO practice, be inconsistent with Article III:4 only if it mandated, or required, less favourable treatment of foreign grain. Canada is referring here to the so-called "mandatory/discretionary" distinction which has been applied by numerous GATT and WTO panels. The United States did not specifically address this point. We note that the Appellate Body has not, as yet, expressed a view on whether the mandatory/discretionary distinction is a legally appropriate analytical tool for panels to use. In this case, our ultimate conclusion with respect to the United States' challenge to Section 57(c) does not depend on whether or not the mandatory/discretionary distinction is valid. This said we will continue on the assumption that Section 57(c) is inconsistent with Article III:4 only if it mandates, or requires, less favourable treatment of imported grain."[388]

(iii) Action of private parties

255. In *Canada – Autos*, the Panel examined the GATT-consistency of commitments undertaken by Canadian motor vehicle manufacturers in their letters addressed to the Canadian Government to increase Canadian value added in the production of motor vehicles. Referring to the GATT Panel Reports on *Canada – FIRA* and *EEC – Parts and Components*[389], the Panel analysed whether the action of private parties is subject to Article III:4. The Panel found that "[n]either legal enforceability [n]or the existence of a link between a private action and an advantage conferred by a government is a necessary condition in order for an action by a private party to constitute a 'requirement'":

"It is evident from the reasoning of the Panel Reports in *Canada – FIRA* and in *EEC – Parts and Components* that these Reports do not attempt to state general criteria for determining whether a commitment by a private party to a particular course of action constitutes a 'requirement' for purposes of Article III:4. While these cases are instructive in that they confirm that both legally enforceable undertakings and undertakings accepted by a firm to obtain an advantage granted by a government can constitute 'requirements' within the meaning of Article III:4, we do not believe that they provide support for the proposition that either legal enforceability or the existence of a link between a private action and an advantage conferred by a government is a necessary condition in order for an action by a private party to constitute a 'requirement.' To qualify a private action as a 'requirement' within the meaning of Article III:4 means that in relation to that action a Member is bound by an international obligation, namely to provide no less favourable treatment to imported products than to domestic products.

A determination of whether private action amounts to a 'requirement' under Article III:4 must therefore necessarily rest on a finding that there is a nexus between that action and the action of a government such that the government must be held responsible for that action. We do not believe that such a nexus can exist only if a government makes undertakings of private parties legally enforceable, as in the situation considered by the Panel on *Canada – FIRA*, or if a government conditions the grant of an advantage on undertakings made by private parties, as in the situation considered by the Panel on *EEC – Parts and Components*. We note in this respect that the word 'requirement' has been defined to mean '1. The action of requiring something; a request. 2. A thing required or needed, a want, a need. Also the action or an instance of needing or wanting something. 3. Something called for or demanded; a condition which must be complied with.' The word 'requirements' in its ordinary meaning and in light of its context in Article III:4 clearly implies government action involving a demand, request or the imposition of a condition but in our view this term does not carry a particular connotation with respect to the legal form in which such government action is taken. In this respect, we consider that, in applying the concept of 'requirements' in Article III:4 to situations involving actions by private parties, it is necessary to take into account that there is a broad variety of forms of government of action that can be effective in influencing the conduct of private parties."[390]

(iv) The term "requirement"

256. In *India – Autos*, the Panel analysed the notion of "requirement" within Article III:4:

"An ordinary meaning of the term 'requirement', as articulated in the New Shorter Oxford Dictionary, is 'Something called for or demanded; a condition which

[386] Panel Report on *Canada – Autos*, para. 10.73.

[387] In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body, in the context of an anti-dumping dispute, had expressly abstained from pronouncing generally on the continuing relevance or significance of the mandatory/discretionary distinction. Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

[388] Panel Report on *Canada – Wheat Exports and Grain Imports*, para 6.184.

[389] GATT Panel Reports on *Canada – FIRA*, para. 5.4 and *EEC – Parts and Components*, para. 5.21.

[390] Panel Report on *Canada – Autos*, paras. 10.106–10.107.

must be complied with'. The *Canada – FIRA* panel further suggested that there must be a distinction between 'regulations' and 'requirements' and that requirements could not be assumed to mean the same, i.e. 'mandatory rules applying across the board'."[391]

257. In *India – Autos*, the Panel recalled that GATT jurisprudence "suggests two distinct situations which would satisfy the term 'requirement' in Article III:4: (i) obligations which an enterprise is 'legally bound to carry out'; [and (ii)] those which an enterprise voluntarily accepts in order to obtain an advantage from the government." It therefore stated that:

"A binding enforceable condition seems to fall squarely within the ordinary meaning of the word 'requirement', in particular as 'a condition which must be complied with'.[392] The enforceability of the measure in itself, independently of the means actually used or not to enforce it, is a sufficient basis for a measure to constitute a requirement under Article III:4 . . ."[393]

(v) Reference to GATT practice

258. With respect to GATT practice on this subject-matter, see also GATT Analytical Index, pages 173–174.

(d) "affecting the internal sale, offering for sale, purchase . . ."

259. In *EC – Bananas III*, the Appellate Body upheld the Panel's finding that the EC import licensing requirements concerning import quotas for bananas were inconsistent with Article III:4. The Panel had found that in answering the question whether Article III:4 was applicable to the EC import licensing requirements, it was important to distinguish between, on the one hand, the mere requirement to present a licence upon importation of a product as such and, on the other hand, the procedures applied by the European Communities in the context of the licence allocation. The latter procedures, in the view of the Panel, were internal laws, regulations and requirements affecting the internal sale of imported products.[394] In this context, the Panel opined that the scope of application of Articles I and III was not necessarily mutually exclusive.[395] The Appellate Body, in examining whether the measure at issue was subject to Article III:4, attached significance to the fact that the measure at issue went beyond "mere import licence requirements" and that the "intention" of the measure was to "cross-subsidize distributors of [certain] bananas":

"At issue in this appeal is not whether *any* import licensing requirement, as such, is within the scope of Article III:4, but whether the EC procedures and requirements for the *distribution* of import licences for imported bananas among eligible operators *within* the European Communities are within the scope of this provision. . . . These rules go far beyond the mere import licence requirements needed to administer the tariff quota for third-country and non-traditional ACP bananas or Lomé Convention requirements for the importation of bananas. These rules are intended, among other things, to cross-subsidize distributors of EC (and ACP) bananas and to ensure that EC banana ripeners obtain a share of the quota rents. As such, these rules affect 'the internal sale, offering for sale, purchase, . . .' within the meaning of Article III:4, and therefore fall within the scope of this provision."[396]

260. In *Canada – Autos*, the Panel, in a finding subsequently not addressed by the Appellate Body, interpreted the term "affecting" as having a broad scope of application and as referring to measures which have an effect on imported goods:

"With respect to whether the CVA requirements affect the 'internal sale, . . . or use' of products, we note that, as stated by the Appellate Body, the ordinary meaning of the word 'affecting' implies a measure that has 'an effect on' and thus indicates a broad scope of application.[397] The word 'affecting' in Article III:4 of the GATT has been interpreted to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products.[398]

. . .

The idea that a measure which distinguishes between imported and domestic products can be considered to affect the internal sale or use of imported products only if such a measure is shown to have an impact under current circumstances on decisions of private firms with respect to the sourcing of products is difficult to reconcile with the concept of the 'no less favourable treatment' obligation in Article III:4 as an obligation addressed to governments to ensure effective equality of competitive opportunities between domestic and imported products, and with the principle that a showing of trade effects is not necessary to establish a violation of this obligation. In this respect, it should be emphasized that, contrary to what has been argued by Canada, the present case does not involve 'the possibility of a future change in circumstances creating the potential for discrimination' or 'discrimination that

[391] Panel Report on *India – Autos*, para. 7.174.
[392] (*footnote original*) New Oxford English Dictionary, as cited above.
[393] Panel Report on *India – Autos*, paras. 7.190–7.191.
[394] Panel Report on *EC – Bananas III*, para. 7.181.
[395] Panel Report on *EC – Bananas III*, para. 7.176.
[396] Appellate Body Report on *EC – Bananas III*, para. 211.
[397] (*footnote original*) Appellate Body Report on *EC – Bananas III*, para. 220.
[398] (*footnote original*) Panel Report on *Italy – Agricultural Machinery*, para. 12.

might exist after a change in circumstances that could occur at some unspecified time in the future.' Rather, the present case clearly involves formally different treatment of imported and domestic products albeit that the actual trade effects of this different treatment may be minimal under current circumstances. We therefore disagree with Canada's assertion that the CVA requirements do not entail a 'current potential for discrimination under present circumstances.' As a consequence, whether or not in practice motor vehicle manufacturers can easily meet the CVA requirements of the MVTO 1998 and the SROs on the basis of labour costs alone does not alter our finding that the CVA requirements affect the internal sale or use of products. We therefore do not consider it necessary to examine the factual issues raised by the parties in support of their different views on this matter.

In light of the foregoing considerations, we find that the CVA requirements affect the internal sale or use in Canada of imported parts, materials and non-permanent equipment for use in the production of motor vehicles. We further consider that the CVA requirements accord less favourable treatment within the meaning of Article III:4 to imported parts, materials and non-permanent equipment than to like domestic products because, by conferring an advantage upon the use of domestic products but not upon the use of imported products, they adversely affect the equality of competitive opportunities of imported products in relation to like domestic products."[399]

261. In the *Canada – Autos* case, the Panel found that the Canadian value added requirements, which stipulated that the amount of Canadian value added in the manufacturer's local production of motor vehicles must be equal to or greater than the amount of Canadian value added in the production of motor vehicles, by the same manufacturer, during an earlier reference period, were in violation of Article III:4 of GATT 1994. The Panel also addressed another aspect of the Canadian measures, the so-called "ratio requirements". Under these measures, the ratio of the net sales value of the vehicles *produced* in Canada to the net sales value of the vehicles *sold* for consumption in Canada during the relevant period had to be at least equal to the ratio in a reference year. The Panel found that the "ratio requirements" did not affect the sale of imported products:

"For purposes of Article III, the manner in which the ratio requirements affect the treatment accorded to motor vehicles with respect to the conditions of their importation is irrelevant. That there is a limitation on the net sales value of vehicles which can be imported duty-free therefore cannot constitute a grounds for finding a violation of Article III:4. The fact that internal sales of domestic vehicles are not subject to a 'similar' limitation is also without relevance. By definition, a violation of Article III cannot be established on the basis of a comparison between the conditions of internal sale of domestic products with the conditions of importation of imported products."[400]

262. In *India – Autos*, the Panel considered that, in order to rule on whether certain "indigenization" requirements were inconsistent with Article III:4 of GATT 1994, it had to determine, *inter alia*, whether the measures "affected" the "internal sale, purchase, transportation, distribution or use" of the products concerned. In that regard, the Panel recalled that the ordinary meaning of the term "affecting" has been understood to imply "a measure that has an effect on". It went on to state that:

"[T]he fact that the measure applies only to imported products need not [be], in itself, an obstacle to its falling within the purview of Article III.[401] For example, an internal tax, or a product standard conditioning the sale of the imported but not of the like domestic product, could nonetheless 'affect' the conditions of the imported product on the market and could be a source of less favorable treatment. Similarly, the fact that a requirement is imposed as a condition on importation is not necessarily in itself an obstacle to its falling within the scope of Article III:4.[402]"[403]

263. In *US – FSC (Article 21.5 – EC)*, the Appellate Body shared the view that the word "affecting" in Article III:4 of the GATT 1994 has a "broad scope of application":

"We observe that the clause in which the word 'affecting' appears – 'in respect of all laws, regulations and requirements *affecting* their internal sale, offering for sale, purchase, transportation, distribution or use' – serves to define the scope of application of Article III:4. (emphasis added) Within this phrase, the word 'affecting' operates as a link between identified types of gov-

[399] Panel Report on *Canada – Autos*, paras. 10.80 and 10.84–10.85.

[400] Panel Report on *Canada – Autos*, para. 10.149.

[401] (*footnote original*) Article III:1 refers to the application of measures "to imported *or* domestic products", which suggests that application to both is not necessary.

[402] (*footnote original*) Thus, the "advantage" to be obtained could consist in a right to import a product. See for instance, the Report of the second GATT panel on *EC – Bananas II* as cited and endorsed in *EC – Bananas III*, WT/DS27/R/USA, adopted on 25 September 1997, as modified by the Appellate Body Report, para. 4.385 (DSR 1997:II, 943:

"The Panel further noted that previous panels had found consistently that this obligation applies to any requirement imposed by a contracting party, including requirements 'which an enterprise voluntarily accepts to obtain an advantage from the government.' In the view of the Panel, a requirement to purchase a domestic product in order to obtain the right to import a product at a lower rate of duty under a tariff quota is therefore a requirement affecting the purchase of a product within the meaning of Article III:4."

[403] Panel Report on *India – Autos*, para. 7.306.

ernment action ('laws, regulations and requirements') and specific transactions, activities and uses relating to products in the marketplace ('internal sale, offering for sale, purchase, transportation, distribution or use'). It is, therefore, not *any* 'laws, regulations and requirements' which are covered by Article III:4, but only those which '*affect*' the specific transactions, activities and uses mentioned in that provision. Thus, the word 'affecting' assists in defining the types of measure that must conform to the obligation not to accord 'less favourable treatment' to like imported products, which is set out in Article III:4.

The word 'affecting' serves a similar function in Article I:1 of the *General Agreement on Trade in Services* (the 'GATS'), where it also defines the types of measure that are subject to the disciplines set forth elsewhere in the GATS but does not, in itself, impose any obligation.[404] In *EC – Bananas III*, we considered the meaning of the word 'affecting' in that provision of GATS. We stated:

> [t]he ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a *broad scope of application*. This interpretation is further reinforced by the conclusions of previous panels that the term 'affecting' in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing'.[405] (emphasis added, footnote omitted)."[406]

(i) Reference to GATT practice

264. With respect to GATT practice on this subject-matter, see also GATT Analytical Index, pages 175–182.

(e) "treatment no less favourable"

(i) General

Equality of competitive opportunities

265. In *US – Gasoline*, the Panel, in a finding subsequently not addressed by the Appellate Body, found that the measure in question afforded to imported products less favourable treatment than that afforded to domestic products because sellers of domestic gasoline were authorized to use an individual baseline, while sellers of imported gasoline had to use the more onerous statutory baseline:

> "The Panel observed that domestic gasoline benefited in general from the fact that the seller who is a refiner used an individual baseline, while imported gasoline did not. This resulted in less favourable treatment to the imported product, as illustrated by the case of a batch of imported gasoline which was chemically-identical to a batch of domestic gasoline that met its refiner's individual baseline, but not the statutory baseline levels. In this case, sale of the imported batch of gasoline on the first day of an annual period would require the importer over the rest of the period to sell on the whole cleaner gasoline in order to remain in conformity with the Gasoline Rule. On the other hand, sale of the chemically-identical batch of domestic gasoline on the first day of an annual period would not require a domestic refiner to sell on the whole cleaner gasoline over the period in order to remain in conformity with the Gasoline Rule. The Panel also noted that this less favourable treatment of imported gasoline induced the gasoline importer, in the case of a batch of imported gasoline not meeting the statutory baseline, to import that batch at a lower price. This reflected the fact that the importer would have to make cost and price allowances because of its need to import other gasoline with which the batch could be averaged so as to meet the statutory baseline. Moreover, the Panel recalled an earlier panel report which stated that 'the words "treatment no less favourable" in paragraph 4 call for effective equality of opportunities for imported products in respect of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products.'[407] The Panel found therefore that since, under the baseline establishment methods, imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline."[408]

266. In *Japan – Film*, the Panel reiterated the standard of equality of competitive conditions as a benchmark for establishing "no less favourable treatment":

> "Recalling the statement of the Appellate Body in *Japan – Alcoholic Beverages* that 'Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products'[409], we consider that this standard of effective equality of competitive conditions on the internal market is the standard of national treatment that is required, not only with regard to Article III generally, but also more particularly with regard to the 'no less favourable treatment' standard in Article III:4. We note in this regard that the interpretation of equal treatment in terms of effective equality of competitive opportunities, first clearly enunciated by the panel on *US – Section 337*[410], has been followed consistently in subsequent GATT and

[404] (*footnote original*) Article I:1 of the GATS provides that "[t]his Agreement applies to measures by Members *affecting* trade in services." (emphasis added)

[405] (*footnote original*) Appellate Body Report, *supra*, footnote 47, para. 220. We made the same statement regarding the word "affecting" in Article I:1 of the GATS in our Report in *Canada – Autos, supra*, footnote 56, para. 150.

[406] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 208.

[407] (*footnote original*) Panel Report on *US – Section 337*, para. 5.11.

[408] Panel Report on *US – Gasoline*, para. 6.10.

[409] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 16, citing Panel Reports on *US – Superfund*, para. 5.1.9 and *Japan – Alcoholic Beverages I*, para. 5.5(b).

[410] (*footnote original*) Panel Report on *US – Section 337*, para. 5.11.

WTO panel reports.[411] The panel report on *US – Section 337* explains the test in very clear terms, noting that

> 'the "no less favourable" treatment requirement set out in Article III:4, is unqualified. These words are to be found throughout the General Agreement and later Agreements negotiated in the GATT framework as *an expression of the underlying principle of equality of treatment* of imported products as compared to the treatment given either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Article III. The words "treatment no less favourable" in paragraph 4 call for *effective equality of opportunities* for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis' (emphasis added).[412]"[413]

267. In *Korea – Various Measures on Beef*, the measure at issue established a dual retail distribution system for the sale of beef. *Inter alia*, imported beef was to be sold either in specialized stores selling only imported beef or, in the case of larger department stores, in separate sales. The Appellate Body first held that such different treatment of imported products did not necessarily lead to less favourable treatment:

> "We observe . . . that Article III:4 requires only that a measure accord treatment to imported products that is 'no less favourable' than that accorded to like domestic products. A measure that provides treatment to imported products that is *different* from that accorded to like domestic products is not necessarily inconsistent with Article III:4, as long as the treatment provided by the measure is 'no less favourable'. According 'treatment no less favourable' means, as we have previously said, according *conditions of competition* no less favourable to the imported product than to the like domestic product.[414]
>
> This interpretation, which focuses on the *conditions of competition* between imported and domestic like products, implies that a measure according formally *different* treatment to imported products does not *per se*, that is, necessarily, violate Article III:4. In *United States – Section 337*, this point was persuasively made. In that case, the panel had to determine whether United States patent enforcement procedures, which were formally different for imported and for domestic products, violated Article III:4. That panel said:
>
> > 'On the one hand, contracting parties may apply to imported products *different* formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognised that there may be cases where the application of formally *identical* legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable. For these reasons, the mere fact that imported products are subject under Section 337 to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4.'[415] (emphasis added)
>
> A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated 'less favourably' than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products."[416]

268. In *EC – Asbestos*, the Appellate Body interpreted the term "no less favourable treatment" as requiring that the *group* of imported products not be accorded less favourable treatment than that accorded to the *group* of domestic like products:

> "A complaining Member must still establish that the measure accords to the group of 'like' *imported* products 'less favourable treatment' than it accords to the group of 'like' *domestic* products. The term 'less favourable treatment' expresses the general principle, in Article III:1, that internal regulations 'should not be applied . . . so as to afford protection to domestic production'. If there is 'less favourable treatment' of the group of 'like' imported products, there is, conversely, 'protection' of the group of 'like' domestic products. However, a Member may draw distinctions between products which have been found to be 'like', without, for this reason alone, according to the group of 'like' *imported* products

[411] (*footnote original*) See e.g. Panel Report on *Canada – Provincial Liquor Boards*, paras. 5.12–5.14 and 5.30–5.31; and Panel Report on *US – Malt Beverages*, para. 5.30; Panel Report on *US – Gasoline*, para. 6.10; Panel Report on *Canada – Periodicals*, p. 75; and Panel Report on *EC – Bananas III*, paras. 7.179–7.180.

[412] (*footnote original*) Panel Report on *US – Section 337*, paras. 5.11.

[413] Panel Report on *Japan – Film*, para. 10.379.

[414] This statement of the Appellate Body was made with respect to the following finding of the Panel:

> "Any regulatory distinction that is based exclusively on criteria relating to the nationality or the origin of the products is incompatible with Article III and this conclusion can be reached even in the absence of any imports (as hypothetical imports can be used to reach this conclusion) confirming that there is no need to demonstrate the actual and specific trade effects of a measure for it to be found in violation of Article III. The object of Article III:4 is, thus, to guarantee effective market access to imported products and to ensure that the latter are offered the same market opportunities as domestic products."

Panel Report on *Korea – Various Measures on Beef*, para. 627.

[415] (*footnote original*) Panel Report on *US – Section 337*, para. 5.11.

[416] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 135–137.

'less favourable treatment' than that accorded to the group of 'like' *domestic* products. In this case, we do not examine further the interpretation of the term 'treatment no less favourable' in Article III:4, as the Panel's findings on this issue have not been appealed or, indeed, argued before us."[417]

Relationship with "upsetting the competitive relationship" under Article XXIII:1(b)

269. In *Japan – Film*, the Panel equated the standards of "upsetting effective equality of competitive opportunities" under Article III:4 and "upsetting the competitive relationship" under Article XXIII:1(b).

(ii) Methodology of comparison

Relevance of formal differences between imported and domestic products in legal requirements

270. In *Korea – Various Measures on Beef*, the Appellate Body addressed the relevance of formal regulatory differences between domestic and imported products and held that formally different treatment of imported and domestic goods did not, in and of itself, necessarily lead to less favourable treatment. See paragraph 267 above.

271. The Panel on *US – Gasoline* examined the consistency with Article III:4 of a United States environmental regulation on gasoline and its potential to result in formally different regulation for imported and domestic products. The Panel stated as follows:

"Although such a scheme could result in formally different regulation for imported and domestic products, the Panel noted that previous panels had accepted that this could be consistent with Article III:4.[418] The requirement under Article III:4 to treat an imported product no less favourably than the like domestic product is met by granting formally different treatment to the imported product, if that treatment results in maintaining conditions of competition for the imported product no less favourable than those of the like domestic product."[419]

272. In *EC – Bananas III*, the Appellate Body agreed with the Panel's finding that the EC allocation method of tariff quota for bananas was inconsistent with Article III:4. The Appellate Body addressed, among other things, so-called hurricane licences, which authorize operators who include or represent European Communities' and African, Caribbean and Pacific (ACP) producers, or producer organizations "to import in compensation third-country bananas and non-traditional ACP bananas for the benefit of the operators who directly suffered damage as a result of the impossibility of the supplying the Community market with bananas originating in affected producer regions"[420] because of the impact of tropical storms:

"Although [the] issuance [of subject import licences] results in increased exports from those countries, we note that hurricane licences are issued exclusively to EC producers and producer organizations, or to operators including or directly representing them. We also note that, as a result of the EC practice relating to hurricane licences, these producers, producer organizations or operators can expect, in the event of a hurricane, to be compensated for their losses in the form of 'quota rents' generated by hurricane licences. Thus, the practice of issuing hurricane licences constitutes an incentive for operators to market EC bananas to the exclusion of third-country and non-traditional ACP bananas. This practice therefore affects the competitive conditions in the market in favour of EC bananas. We do not dispute the right of WTO Members to mitigate or remedy the consequences of natural disasters. However, Members should do so in a manner consistent with their obligations under the GATT 1994 and the other covered agreements."[421]

273. In *US – FSC (Article 21.5 – EC)*, the Appellate Body declared that the examination of whether a measure involves "less favourable treatment" of imported products within the meaning of Article III:4 cannot rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace:

"The examination of whether a measure involves 'less favourable treatment' of imported products within the meaning of Article III:4 of the GATT 1994 must be grounded in close scrutiny of the 'fundamental thrust and effect of the measure itself'.[422] This examination cannot rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace. At the same time, however, the examination need not be based on the *actual effects* of the contested measure in the marketplace.[423]

. . .

In our view, the above conclusion is not nullified by the fact that the fair market value rule will not give rise to less favourable treatment for like imported products in each and every case . . . Even so, the fact remains that in an indefinite number of other cases, the fair market value rule operates, by its terms, as a significant constraint upon the use of imported input products. We are not entitled to disregard that fact."[424]

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[417] Appellate Body Report on *EC – Asbestos*, para. 100.
[418] (*footnote original*) Panel Report on *US – Section 337*, para. 5.11.
[419] Panel Report on *US – Gasoline*, para. 6.25.
[420] Panel Report on *EC – Bananas III*, para. 7.243.
[421] Appellate Body Report on *EC – Bananas III*, para. 213.
[422] (*footnote original*) Appellate Body Report, *Korea – Various Measures on Beef*, *supra*, footnote 44, para. 142.
[423] (*footnote original*) Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra*, footnote 116, at 110.
[424] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 215, 221.

Relevance of "treatment accorded to similarly situated domestic parties"

274. In *US – Gasoline*, the Panel, in a finding subsequently not addressed by the Appellate Body, "rejected the US argument that the requirements of Article III:4 are met because imported gasoline is treated similarly to domestic gasoline from *similarly situated* domestic parties".[425] In addition to pointing out that "[the] wording [of Article III:4] does not allow less favourable treatment dependent on the characteristics of the producer and the nature of the data held by it"[426], the Panel held that even if the approach of the United States were followed, there would be great uncertainty and indeterminacy of the basis of treatment:

> "Apart from being contrary to the ordinary meaning of the terms of Article III:4, any interpretation of Article III:4 in this manner would mean that the treatment of imported and domestic goods concerned could no longer be assured on the objective basis of their likeness as products. Rather, imported goods would be exposed to a highly subjective and variable treatment according to extraneous factors. This would thereby create great instability and uncertainty in the conditions of competition as between domestic and imported goods in a manner fundamentally inconsistent with the object and purpose of Article III.
>
> [E]ven if the US approach were to be followed, under any approach based on similarly situated parties' the comparison could just as readily focus on whether imported gasoline from an identifiable *foreign* refiner was treated more or less favourably than gasoline from an identifiable US refiner. There were ... many key respects in which these refineries could be deemed to be the relevant similarly situated parties, and the Panel could find no inherently objective criteria by means of which to distinguish which of the many factors were relevant in making a determination that any particular parties were 'similarly situated'. Thus, although these refineries were similarly situated, the Gasoline Rule treated the products of these refineries differently by allowing only gasoline produced by the domestic entity to benefit from the advantages of an individual baseline. This consequential uncertainty and indeterminacy of the basis of treatment underlined ... the rationale of remaining within the terms of the clear language, object and purpose of Article III:4 as outlined above ...".[427]

Relevance of "more favourable treatment of some imported products"

275. In *US – Gasoline*, the Panel rejected the US argument that the subject regulation treated imported products "equally overall"[428], stating as follows:

> "The Panel noted that, in these circumstances, the argument that on average the treatment provided was equivalent amounted to arguing that less favourable treatment in one instance could be offset provided that there was correspondingly more favourable treatment in another. This amounted to claiming that less favourable treatment of particular imported products in some instances would be balanced by more favourable treatment of particular products in others."[429]

Relationship with other methodologies of comparison

276. With respect to the methodology of comparison for "in excess of those applied" under the first sentence of Article III:2, see paragraphs 175–186 above. With respect to the methodology of comparison in identifying "directly competitive or substitutable products" under the second sentence of Article III:2, see paragraph 209 above. With respect to the methodology of comparison in examining the "dissimilar taxation" under the second sentence of Article III:2, see paragraphs 217–218 above.

(f) Relationship with other GATT provisions

(i) Relationship with Article XX

277. In *US – Gasoline*, the Appellate Body discussed the relationship between Article III:4 and Article XX in interpreting Article XX(g). The Appellate Body stated:

> "Article XX(g) and its phrase, 'relating to the conservation of exhaustible natural resources,' need to be read in context and in such a manner as to give effect to the purposes and objects of the *General Agreement*. The context of Article XX(g) includes the provisions of the rest of the *General Agreement*, including in particular Articles I, III and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phrase 'relating to the conservation of exhaustible natural resources' may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, *e.g.*, Articles I, III and XI, and the policies and interests embodied in the 'General Exceptions' listed in Article XX, can be given meaning within the framework of the *General Agreement* and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose."[430]

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[425] Panel Report on *US – Gasoline*, para. 6.11.
[426] Panel Report on *US – Gasoline*, para. 6.11.
[427] Panel Report on *US – Gasoline*, paras. 6.12–6.13.
[428] Panel Report on *US – Gasoline*, para. 6.14.
[429] Panel Report on *US – Gasoline*, para. 6.14. In support of its proposition, the Panel cited GATT Panel Report on *US – Section 337*, BISD 36S/345, para. 5.14.
[430] Appellate Body Report on *US – Gasoline*, p. 18.

278. In *EC – Asbestos*, the Appellate Body found that "carcinogenicity, or toxicity, constitutes ... a defining aspect of the physical properties of [the subject products]". See paragraph 243 above. The Appellate Body disagreed with the Panel's finding that considering the health risks associated with a product under Article III:4 would negate the effect of Article XX(b):

> "We do not agree with the Panel that considering evidence relating to the health risks associated with a product, under Article III:4, nullifies the effect of Article XX(b) of the GATT 1994. Article XX(b) allows a Member to 'adopt and enforce' a measure, *inter alia*, necessary to protect human life or health, even though that measure is inconsistent with another provision of the GATT 1994. Article III:4 and Article XX(b) are distinct and independent provisions of the GATT 1994 each to be interpreted on its own. The scope and meaning of Article III:4 should not be broadened or restricted beyond what is required by the normal customary international law rules of treaty interpretation, simply because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4. The fact that an interpretation of Article III:4, under those rules, implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of *effet utile*. Article XX(b) would only be deprived of *effet utile* if that provision could *not* serve to allow a Member to 'adopt and enforce' measures 'necessary to protect human ... life or health'. Evaluating evidence relating to the health risks arising from the physical properties of a product does not prevent a measure which is inconsistent with Article III:4 from being justified under Article XX(b). We note, in this regard, that, different inquiries occur under these two very different Articles. Under Article III:4, evidence relating to health risks may be relevant in assessing the *competitive relationship in the marketplace* between allegedly 'like' products. The same, or similar, evidence serves a different purpose under Article XX(b), namely, that of assessing whether a *Member* has a sufficient basis for 'adopting or enforcing' a WTO-inconsistent measure on the grounds of human health."[431]

(ii) Relationship with Article XXIII:1(b)

279. In *Japan – Film*, the Panel did not find a significant distinction between the standard it had set out for Article XXIII:1(b) and the standard of "upsetting effective equality of competitive opportunities" under Article III:4:

> "We recall our earlier findings that none of the eight distribution 'measures' cited by the United States had been shown to discriminate against imported products, either in terms of a *de jure* discrimination (a measure that discriminates *on its face* as to the origin of products) or in terms of a *de facto* discrimination (a measure that in its application upsets the relative competitive position between domestic and imported products, as it existed at the time when a relevant tariff concession was granted). In this connection, it could be argued that the standard we enunciated and applied under Article XXIII:1(b) – that of 'upsetting the competitive relationship' – may be different from the standard of 'upsetting effective equality of competitive opportunities' applicable to Article III:4. However, we do not see any significant distinction between the two standards apart from the fact that this Article III:4 standard calls for no less favourable treatment for imported products in general, whereas the Article XXIII:1(b) standard calls for a comparison of the competitive relationship between foreign and domestic products at two specific points in time, i.e., when the concession was granted and currently."[432]

(g) Reference to GATT practice

280. With respect to GATT practice on this subject-matter, see GATT Analytical Index, pages 162–171.

5. Article III:8

(a) Item (b)

(i) "the payment of subsidies exclusively to domestic producers"

281. In the *Canada – Periodicals* dispute, one of the measures at issue related to postal rates charged by the Canadian Post Corporation, a Crown Corporation controlled by the Canadian Government. Canada Post applied reduced postal rates to Canadian-owned and Canadian-controlled periodicals meeting certain requirements. These lower postal rates were funded by the Department of Canadian Heritage, which provided funds to Canada Post so that this agency could in turn offer the reduced postal rates to eligible Canadian periodicals. Canada argued that the reduced postal rate was exempted from the strictures of Article III:4 by virtue of Article III:8(b), because the reduced postal rate represented "payment of subsidies exclusively to domestic producers". The Panel agreed with Canada and found that the funds provided by the Department of Canadian Heritage passed through Canada Post directly to the eligible Canadian publishers and that therefore, Canada's funded rate scheme on periodicals qualified under Article III:8 (b). The Appellate Body reversed the Panel's finding and found that Article III:8(b) applied only to the payment of subsidies which involves the expenditure of revenue by a government:

> "In examining the text of Article III:8(b), we believe that the phrase, 'including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases

[431] Appellate Body Report on *EC – Asbestos*, para. 115.
[432] Panel Report on *Japan – Film*, para. 10.380.

of domestic products' helps to elucidate the types of subsidies covered by Article III:8(b) of the GATT 1994. It is not an exhaustive list of the kinds of programmes that would qualify as 'the payment of subsidies exclusively to domestic producers', but those words exemplify the kinds of programmes which are exempted from the obligations of Articles III:2 and III:4 of the GATT 1994.

Our textual interpretation is supported by the context of Article III:8(b) examined in relation to Articles III:2 and III:4 of the GATT 1994. Furthermore, the object and purpose of Article III:8(b) is confirmed by the drafting history of Article III. In this context, we refer to the following discussion in the Reports of the Committees and Principal Sub-Committees of the Interim Commission for the International Trade Organization concerning the provision of the Havana Charter for an International Trade Organization that corresponds to Article III:8(b) of the GATT 1994:

> 'This sub-paragraph was redrafted in order to make it clear that nothing in Article 18 could be construed to sanction the exemption of domestic products from internal taxes imposed on like imported products or the remission of such taxes. At the same time the Sub-Committee recorded its view that nothing in this sub-paragraph or elsewhere in Article 18 would override the provisions of Section C of Chapter IV.'[433]

We do not see a reason to distinguish a reduction of tax rates on a product from a reduction in transportation or postal rates. Indeed, an examination of the text, context, and object and purpose of Article III:8(b) suggests that it was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government."[434]

282. In *Indonesia – Autos*, the Panel examined the consistency of certain tax exemption to domestically produced automobiles. The Panel rejected Indonesia's argument that tax exemptions are excluded from the scope of Article III by virtue of Article III:8(b), stating:

> "In line with its two previous arguments, Indonesia maintains the view that 'the payment of subsidies' in Article III:8(b) of GATT must refer to all subsidies identified in Article 1 of the SCM Agreement, not merely to the subset of 'direct' subsidies. Under this approach, any measure which constitutes a subsidy within the meaning of the SCM Agreement would not be subject to Article III of GATT. In Indonesia's view, only this interpretation avoids rendering the SCM Agreement meaningless.
>
> . . .
>
> We consider that the purpose of Article III:8(b) is to confirm that subsidies to producers do not violate Article III, so long as they do not have any component that introduces discrimination between imported and domestic products. In our view the wording 'payment of subsidies exclusively to domestic producers' exists so as to ensure that only subsidies provided to producers, and not tax or other forms of discrimination on products, be considered subsidies for the purpose of Article III:8(b) of GATT. This is in line with previous GATT panels[435] and WTO Appellate Body[436] reports.
>
> We recall also that the type of interpretation sought by Indonesia was explicitly excluded by the drafters of Article III:8(b) when they rejected a proposal by Cuba at the Havana Conference to amend the Article so as to read:
>
> > 'The provisions of this Article shall not preclude the exemption of domestic products from internal taxes as a means of indirect subsidization in the cases covered under Article [XVI]'.[437]
>
> The arguments submitted by Indonesia that its measures are only governed by the SCM Agreement clearly do not find any support in the wording of Article III:8(b) of GATT. On the contrary, Article III:8(b) confirms that the obligations of Article III and those of Article XVI (and the SCM Agreement) are different and complementary: subsidies to producers are subject to the national treatment provisions of Article III when they discriminate between imported and domestic products."[438]

(b) Reference to GATT practice

283. With respect to GATT practice on this subject-matter, see also GATT Analytical Index, pages 194–197.

D. RELATIONSHIP WITH OTHER ARTICLES

1. Article I

284. The Panel on *US – Gasoline* did not examine a claim under GATT Article I, considering that it was unnecessary in view of the findings it had reached on the violation of Article III:4 for the subject measure.[439]

2. Article II

285. In *EC – Bananas III*, the Appellate Body found the EC import licensing system for bananas inconsistent with Article III:4. The European Communities claimed that Article III:4 was not applicable to the import licens-

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[433] (*footnote original*) The Appellate Body cited Interim Commission for the International Trade Organization, Reports of the Committees and Principal Sub-Committees: ICITO I/8, Geneva, September 1948, p. 66. Article 18 and Section C of Chapter IV of the Havana Charter for an International Trade Organization correspond, respectively, to Article III and Article XVI of the GATT 1947.

[434] Appellate Body Report on *Canada – Periodicals*, pp. 33–34.

[435] (*footnote original*) Panel Reports on *EEC – Oilseeds*; *Italy – Agriculture Machinery*; and *US – Malt Beverages*.

[436] (*footnote original*) Appellate Body Report on *Canada – Periodicals*.

[437] (*footnote original*) E/CONF.2/C.3/6, page 17; E/CONF.2/C.3/A/W.32, page 2.

[438] Panel Report on *Indonesia – Autos*, paras. 14.41– 14.45. Also, the Panel referred to the finding of the Appellate Body in *Japan – Alcoholic Beverages II* referenced in para. 300 of this Chapter. Panel Report on *Indonesia – Autos*, para. 14.28.

[439] Panel Report on *US – Gasoline*, para. 6.19.

ing system because it was a border measure. The Appellate Body noted the existence of the "operator category rules" and the "activity function rules", which both affected the allocation of licences. The Appellate Body held that "these rules go far beyond the mere import licence requirements needed to administer the tariff quota . . . and therefore fall within the scope of [Article III:4]". See paragraph 125 above.

286. Exercising judicial economy, the Panel on *Korea – Various Measures on Beef* did not examine claims regarding a certain practice of the Korean state trading agency for beef under Articles III:4 and XVII after having found a violation of Articles XI and II:1(a) for that practice. See paragraph 477 below.

(a) Reference to GATT practice

287. With respect to GATT practice on this subject, see also GATT Analytical Index, pages 198–202.

3. Article VI

288. In *US – 1916 Act (EC)*, exercising judicial economy, the Panel found that the subject United States act was inconsistent with *GATT* Article VI and did not examine the EC claim that it was also inconsistent with *GATT* Article III. The Appellate Body did not address the issue upon appeal. The Panel first stated that Article VI was, with respect to the 1916 Act, the more specific provision, such that it had to be addressed first:

> "It is a general principle of international law that, when applying a body of norms to a given factual situation, one should consider that factual situation under the norm which most specifically addresses it.[440] As a result, one way to reply to the question above is to determine which article more specifically addresses the 1916 Act. We agree that this will require us to touch upon the substance of the case, but we recall that this test is used here for purely procedural reasons, that is to determine the order of our review. Such a *prima facie* analysis is, of course, without prejudice to the final findings on the issue of the applicability of Articles III:4 and VI, to be reached after a more detailed review of the scope of each provision, as necessary.
>
> As mentioned above, our understanding is that Article III:4 and Article VI are based on two different premises. The applicability of Article III:4 seems to depend primarily on whether the measure applied pursuant to the law at issue is an internal measure or not. In contrast, the applicability of Article VI seems to be based on the nature of the trade practice which is addressed. Under Article VI, the type of sanction eventually applied does not seem to be relevant for a measure to be considered as an anti-dumping measure, or not. We note in this respect that, for the EC, the fact that the 1916 Act imposes other sanctions than duties is insufficient to make that law fall outside the scope of Article VI and, for the United States, under Article VI, dumping does not have to be counteracted exclusively with duties. Consequently, it seems to us that the fact that a law imposes measures that can be qualified as 'internal measures', such as fines, damages or imprisonment, does not appear to be sufficient to conclude that Article VI is not applicable to that law.
>
> We also note that the parties agree that the 1916 Act deals with transnational price discrimination. Furthermore, the United States argues that it does not merely address dumping, and that other requirements under the 1916 Act make that law fall outside the scope of Article VI. We note that Article III:4 states that imported products
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> > 'shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.'"[441]

289. The Panel held that damages, fines or imprisonment could theoretically accord less favourable treatment to imported products, but opined that the terms of Article III:4 were less specific than Article VI with respect to the case before it:

> "Determining that damages, fines or imprisonment, which are imposed on persons, may accord less favourable treatment to imported products with respect to their internal sale, offering for sale, purchase, transportation, distribution or use, is not *a priori* impossible and has actually been done by previous panels. However, a preliminary examination of the scope of application of Article III:4 (i.e. internal sale, offering for sale, purchase, transportation, distribution or use) would tend to show that the terms of Article III:4 are less specific than those of Article VI when it comes to the notion of transnational price discrimination.
>
> In application of the principle recalled by the Appellate Body *in European Communities – Bananas* and by the Permanent Court of International Justice in the *Serbian Loans* case, there would be reasons to reach the preliminary conclusion that we should review the applicability of Article VI to the 1916 Act in priority, as that article apparently applies to the facts at issue more specifically. This preliminary conclusion is based on our understanding of the arguments of the parties and on a preliminary review of the terms of Articles III:4 and VI. Since the fact

[440] (*footnote original*) See Appellate Body Report on *EC – Bananas III*, para. 204, and the judgement of the Permanent Court of International Justice in the *Serbian Loans* case (1929), where the PCIJ stated that "the special words, according to elementary principles of interpretation, control the general expression" (PCIJ, Series A, No. 20/21, at p. 30). See also György Haraszti, *Some Fundamental Problems of the Law of Treaties* (1973), p. 191.

[441] Panel Report on *US – 1916 Act (EC)*, paras. 6.76–6.78; Panel Report on *US – 1916 Act (Japan)*, paras. 6.75–6.76.

that the 1916 Act provides for the imposition of internal measures does not seem to be sufficient as such to differentiate the scope of application of Article III:4 and that of Article VI, we had to consider the other terms of these articles."[442]

290. The Panel on *US – 1916 Act (EC)* then held, after finding that the 1916 Act fell under the scope, and was in violation of, Article VI, that it was no longer necessary to consider whether some elements of the 1916 Act could also be subject to Article III:4:

"We recall that we decided to proceed first with a review of whether Article VI applied to the 1916 Act because Article VI seemed to address more specifically the terms of the 1916 Act. We found that the 1916 Act, because it targets 'dumping' within the meaning of Article VI of the GATT 1994, was fully subject to the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement and could not evade the disciplines of Article VI by the mere fact that it had anti-trust objectives or included requirements of an anti-trust nature. We therefore find it unnecessary to determine whether some elements of the 1916 Act could be subject to Article III:4.

We also found that the 1916 Act violates the provisions of Article VI and certain provisions of the Anti-Dumping Agreement. We consider these findings sufficiently complete to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance 'in order to ensure effective resolution of disputes to the benefit of all Members.'[443] Therefore, we are entitled to exercise judicial economy in accordance with WTO panel and Appellate Body practice and decide not to review the EC claims under Article III:4."[444]

291. The Panel on *US – 1916 Act (Japan)* further elaborated on the precise relationship between Article VI and Article III:

"When we considered the relationship between Article VI and Article III:4 of the GATT 1994, we noted that Article VI seemed to address the basic feature of the 1916 Act (i.e. transnational price discrimination) more directly than Article III:4. In our findings, we concluded that Article VI applies to a measure whenever that measure objectively addresses a situation of transnational price discrimination, as defined in Article VI:1. Thus, we found that the 1916 Act was *fully* subject to the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement and could not escape the disciplines of Article VI by the mere fact that it had anti-trust objectives, did not address *injurious dumping* as such, included additional requirements of an anti-trust nature or led to the imposition of measures other than anti-dumping duties that were not border adjustment measures.

However, even though we considered that Article VI deals specifically with the type of price discrimination at issue, we did not address the question whether Article VI applied to the 1916 Act *to the exclusion* of Article III:4. In this regard, we recall that, in its report on *European Communities – Bananas*, the Appellate Body noted that:

'Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.'[445]"[446]

292. After recalling the findings of the Appellate Body in *EC – Bananas III*, the Panel on *US – 1916 Act* went on to distinguish the subject-matter at issue in that case from the case before it. The Appellate Body did not address the finding of the Panel that it was entitled to exercise judicial economy with respect to the claims under Article III:4:

"We are mindful of the fact that Article X:3(a) of the GATT 1994 deals with the way domestic trade laws in general should be applied, whereas Article 1.3 of the Agreement on Import Licensing Procedures deals with the way rules should be applied in the specific sector of import licensing. In contrast, it may be said that Articles III:4 and VI do not share the same purpose. However, we view the Appellate Body statement as applying the general principle of international law *lex specialis derogat legi generali*. This is particularly clear from its remark that the *Agreement* on Import Licensing Procedures 'deals specifically, and in detail, with the administration of import licensing procedures'. In our opinion, Article VI and the Anti-Dumping Agreement 'deals specifically, and in detail, with the administration of' anti-dumping. In the present case, the question of the applicability of Article III:4 was essentially raised by the type of measures imposed under the 1916 Act. On the basis of the reasoning of the Appellate Body, we conclude that, even assuming that Article III:4 is applicable, in light of our findings under Article VI and the Anti-Dumping Agreement, we do not need to make findings under Article III:4 of the GATT 1994.

We nevertheless recall that, as stated by the Appellate Body in its report on *Australia – Measures Affecting Importation of Salmon*,[447] our findings must be complete enough to enable the DSB to make sufficiently pre-

[442] Panel Report on *US – 1916 Act (EC)*, paras. 6.78–6.79; Panel Report on *US – 1916 Act (Japan)*, paras. 6.76–6.77. With respect to judicial economy in general, see Chapter on *DSU*, Section XXXVI.F.

[443] (*footnote original*) See Appellate Body Report on *Australia – Salmon*, para. 223.

[444] Panel Report on *US – 1916 Act (EC)*, paras. 6.219–6.220.

[445] (*footnote original*) Appellate Body Report on *EC – Bananas III*, para. 204.

[446] Panel Report on *US – 1916 Act (Japan)*, paras. 6.268–6.269; Panel Report on *US – 1916 Act (EC)*, para. 6.219.

[447] (*footnote original*) Appellate Body Report on *Australia – Salmon*, para. 223.

cise recommendations and rulings so as to allow for prompt compliance 'in order to ensure effective resolution of disputes to the benefit of all Members.'

Having regard to our findings under Article VI and the Anti-Dumping Agreement, and keeping in mind that, in our view, Article VI and the Anti-Dumping Agreement deal specifically and in detail with laws addressing dumping as such, we do not consider that making *additional* findings under Article III:4 is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow prompt compliance by the United States in order to ensure an effective resolution of this dispute.

Therefore, we find that we are entitled to exercise judicial economy and decide not to review the claims of Japan under Article III:4 of the GATT 1994."[448]

4. Article XI

293. Exercising judicial economy, the Panel on *Korea – Various Measures on Beef* did not examine claims regarding a certain practice of the Korean state trading agency for beef under Articles III:4 and XVII after having found a violation of Articles XI and II:1(a) for that practice. See paragraph 477 below.

294. In *EC – Asbestos*, the Panel rejected Canada's argument that the French ban on the manufacture, imports and exports, and domestic sales and transfer of certain asbestos and asbestos-containing products was not covered by *Note Ad Article III*, and thus, subject to Article XI:1 as well as Article III:4.[449] See paragraphs 401–402 below.

295. In *India – Autos*, the Panel recalled the Panel Report on *Canada – FIRA* when it stated that Articles III and XI of GATT 1994 have distinct scopes of application. It quoted from that Panel that "the General Agreement distinguishes between measures affecting the 'importation' of products, which are regulated in Article XI:1, and those affecting 'imported products', which are dealt with in Article III. If Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous.[450]"[451]

296. In *India – Autos*, the Panel did, however, consider that under certain circumstances, specific measures may have an impact upon both the importation of products (Article XI) and the competitive conditions of imported products on the internal market (Article III):

"[I]t therefore cannot be excluded *a priori* that different aspects of a measure may affect the competitive opportunities of imports in different ways, making them fall within the scope either of Article III (where competitive opportunities on the domestic market are affected) or of Article XI (where the opportunities for importation itself, i.e. entering the market, are affected), or even that there may be, in perhaps exceptional circumstances, a potential for overlap between the two provisions, as was suggested in the case of state trading. . .

. . .

. . . there may be circumstances in which specific measures may have a range of effects. In appropriate circumstances they may have an impact both in relation to the conditions of importation of a product and in respect of the competitive conditions of imported products on the internal market within the meaning of Article III:4.[452] This is also in keeping with the well established notion that different aspects of the same measure may be covered by different provisions of the covered Agreements."[453]

(a) Reference to GATT practice

297. With respect to GATT practice on this subject-matter, see also GATT Analytical Index, pages 201–204.

5. Article XVII

298. The Panel on *Korea – Various Measures on Beef* discussed the relationship between GATT Articles III and XVII. See paragraphs 138 above and 477 below.

(a) Reference to GATT practice

299. With respect to GATT practice, see GATT Analytical Index, page 204.

E. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. General

300. In *Japan – Alcoholic Beverages II*, in discussing the purpose of Article III, the Appellate Body stated:

"The broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the *WTO Agreement*."[454]

2. SPS Agreement

301. In *EC – Hormones (US)*, the Panel examined the consistency of certain sanitary measures of the European

[448] Panel Report on *US – 1916 Act (Japan)*, paras. 6.269–6.272.
[449] Panel Report on *EC – Asbestos*, para. 8.91.
[450] (*footnote original*) Panel Report, L/5504, adopted on 7 February 1987, para. 5.14.
[451] Panel Report on *India – Autos*, para. 7.220.
[452] (*footnote original*) The Panel notes that the TRIMS Agreement Illustrative List envisages measures relating to export requirements both in the context of Article XI:1, as noted above in the context of our analysis under Article XI:1, and in the context of Article III:4 of the GATT 1994, by listing as inconsistent with that provision measures which require "that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports" TRIMS Illustrative List, Item 1 (b).
[453] Panel Report on *India – Autos*, paras. 7.224 and 7.296.
[454] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 16.

Communities with Articles I and III of the *GATT 1994* and certain provisions of the *SPS Agreement*. With respect to the relationship between Article III of the *GATT 1994* and *SPS Agreement*, the Panel, in a finding subsequently not addressed by the Appellate Body, stated as follows:

> "Since we have found that the EC measures in dispute are inconsistent with the requirements of the SPS Agreement, we see no need to further examine whether the EC measures in dispute are also inconsistent with Article I or III of GATT.
>
> As noted above in paragraph 8.42, if we were to find an inconsistency with Article I or III of GATT, we would then need to examine whether this inconsistency could be justified, as argued by the European Communities, under Article XX(b) of GATT and would thus necessarily need to revert to the SPS Agreement under which we have already found inconsistencies. Since the European Communities has not invoked any defence under GATT other than Article XX(b), an inconsistency with Article I or III of GATT would, therefore, in any event, not be justifiable."[455]

3. TBT Agreement

302. In *EC – Sardines*, the Panel considered that, in this case, the analysis of the claims under the *TBT Agreement* would precede any examination of the claims under Article III:4 of *GATT 1994*. In doing so, the Panel recalled the Appellate Body's statement in *EC – Bananas III* which declared "that the panel 'should' have applied the Licensing Agreement first because this agreement deals 'specifically, and in detail' with the administration of import licensing procedures". In the Panel's view, the Appellate Body is suggesting that where two agreements apply simultaneously, a panel should normally consider the more specific agreement before the more general agreement."[456] Using that same rationale, the Panel concluded that since "[a]rguably, the TBT Agreement deals 'specifically, and in detail' with technical regulations", and considering the parties claims, "then the analysis under the TBT Agreement would precede any examination under [Article III:4 of] the GATT 1994."[457]

4. SCM Agreement

303. In *Indonesia – Autos*, the Panel examined the consistency with Article III of measures contained in the Indonesian National Car Programme, including a luxury tax exemptions given to certain domestically produced cars. Indonesia argued that the challenged measures were subsidies, which were exclusively governed by Article XVI of GATT and the *SCM Agreement*. Referring to the finding of the Appellate Body in *Japan – Alcoholic Beverages II* referenced in paragraph 300 above[458], the Panel concluded that there is no general conflict between Article III and the *SCM Agreement* for the following reasons:

> "[W]e think that Article III of GATT 1994 and the WTO rules on subsidies remain focused on different problems. Article III continues to prohibit discrimination between domestic and imported products in respect of internal taxes and other domestic regulations, including local content requirements. It does not 'proscribe' nor does it 'prohibit' the provision of any subsidy *per se*. By contrast, the SCM Agreement prohibits subsidies which are conditional on export performance and on meeting local content requirements, provides remedies with respect to certain subsidies where they cause adverse effects to the interests of another Member and exempts certain subsidies from actionability under the SCM Agreement. In short, Article III prohibits discrimination between domestic and imported products while the SCM Agreement regulates the provision of subsidies to enterprises.
>
> Contrary to what Indonesia claims, the fact that a government gives a subsidy to a firm does not imply that the subsidy itself will necessarily discriminate between imported and domestic products in contravention of Article III of GATT. Article III:8(b) of GATT makes clear that a government may use the proceeds of taxes collected equally on all imported and domestic products in order to provide a subsidy to domestic producers (to the exclusion of producers abroad).
>
> Finally, the fact that, as a result of the Uruguay Round, the SCM Agreement to some extent covers subject matters that were already covered by other GATT disciplines is not unique. This situation is similar to the relationship between GATT 1994 and GATS. In *Periodicals* and in *Bananas III*, the defending parties argued that since a set of rules on services exists now in GATS, the provisions of Article III:4 of GATT on distribution and transportation have ceased to apply. Twice the Appellate Body has ruled that the scope of Article III:4 was not reduced by the fact that rules on trade in services are found in GATS: 'The entry into force of the GATS, as Annex 1B of the WTO Agreement, does not diminish the scope of application of the GATT 1994.'
>
> Accordingly, we consider that Article III and the SCM Agreement have, generally, different coverage and do not impose the same type of obligations.[459] Thus there

[455] Panel Report on *EC – Hormones (US)*, paras. 8.272–8.273; Panel Report on *EC – Hormones (Canada)*, paras. 8.275–8.276.
[456] Panel Report on *EC – Sardines*, para. 7.15.
[457] Panel Report on *EC – Sardines*, para. 7.16.
[458] Panel Report on *Indonesia – Autos*, para. 14.28.
[459] (*footnote original*) This conclusion is confirmed, amongst other provisions, by the footnote to Article 32.1 of the SCM Agreement which recognizes that actions against subsidies remain possible under GATT 1994. Article 32.1 of the SCM Agreement reads as follows: "No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement". The footnote 56 to this Article reads as follows: "This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate".

is no general conflict between these two sets of provisions."[460]

304. The Panel on *Indonesia – Autos*, in the context of discussing the relationship between Article III and the *SCM Agreement*, considered in which manner "direct" taxes (taxes on individuals and economic entities) and "indirect" taxes (taxes on products) are covered by Article III of *GATT 1994*:

> "When subsidies to producers result from exemptions or reductions of indirect taxes on products, Article III:2 of GATT is relevant. In contrast, subsidies granted in respect of direct taxes are generally not covered by Article III:2, but may infringe Article III:4 to the extent that they are linked to other conditions which favour the use, purchase, etc. of domestic products."[461]

305. The Panel on *Indonesia – Autos* also rejected Indonesia's argument that if Article III applied to the subject measures, the *SCM Agreement* would be reduced to "inutility":

> "This is to say that the only subsidies that would be affected by the provisions of Article III are those that would involve discrimination between domestic and imported products. While Article III of GATT and the SCM Agreement may appear to overlap in respect of certain measures, the two sets of provisions have different purposes and different coverage. Indeed, they also offer different remedies, different dispute settlement time limits and different implementation requirements. Thus, we reject Indonesia's argument that the application of Article III to subsidies would reduce the SCM Agreement to 'inutility'.
>
> We note further that Indonesia's argument would imply that every time a measure involves tax discrimination in respect of products, that measure should be considered a subsidy governed exclusively by the SCM Agreement to the exclusion of Article III:2. It appears to us that this line of argument would reduce Article III:2 to 'inutility', since the very explicit (and arguably only) purpose of Article III:2 is to deal with tax discrimination in respect of products."[462]

306. In *Indonesia – Autos*, the Panel also addressed the significance of Article III:8(b) in the context of the relationship between Article III and the *SCM Agreement*. See paragraph 282 above.

5. TRIMs Agreement

307. The Panel on *Indonesia – Autos* addressed claims that certain Indonesian local content requirements for import duty exemptions to automobiles and their parts and components were inconsistent with the *TRIMs Agreement* and Article III:4 of the *GATT 1994*:

> "The complainants have claimed that the local content requirements under examination, and which we find are inconsistent with the TRIMs Agreement, also violate the provisions of Article III:4 of GATT. Under the principle of judicial economy,[463] a panel only has to address the claims that must be addressed to resolve a dispute or which may help a losing party in bringing its measures into conformity with the WTO Agreement. The local content requirement aspects of the measures at issue have been addressed pursuant to the claims of the complainants under the TRIMs Agreement. We consider therefore that action to remedy the inconsistencies that we have found with Indonesia's obligations under the TRIMs Agreement would necessarily remedy any inconsistency that we might find with the provisions of Article III:4 of GATT. We recall our conclusion that non applicability of Article III would not affect as such the application of the TRIMs Agreement. We consider therefore that we do not have to address the claims under Article III:4, nor any claim of conflict between Article III:4 of GATT and the provisions of the SCM Agreement."[464]

308. In *Canada – Autos*, following the finding of a violation of Article III:4, the Panel opined that a finding under the *TRIMs Agreement* was not necessary. The Appellate Body did not address this issue:

> "[W]e do not consider it necessary to make a specific ruling on whether the CVA requirements provided for in the MVTO 1998 and the SROs are inconsistent with Article 2.1 of the TRIMs Agreement. We believe that the Panel's reasoning in *EC – Bananas III* as to why it did not make a finding under the TRIMs Agreement after it had found that certain aspects of the EC' licensing procedures were inconsistent with Article III:4 of the GATT also applies to the present case.[465] Thus, on the one hand, a finding in the present case that the CVA requirements are not trade-related investment measures for the purposes of the TRIMs Agreement would not affect our finding in respect of the inconsistency of these requirements with Article III:4 of the GATT since the scope of that provision is not limited to trade-related investment measures. On the other hand, steps taken by Canada to bring these measures into conformity with Article III:4 would also eliminate the alleged inconsistency with obligations under the TRIMs Agreement."[466]

309. In *India – Autos*, the Panel was dealing with separate claims under both the GATT 1994 and the TRIMs Agreement. It noted that previous panels confronted with concurrent claims concerning these two agreements had taken differing approaches to the choice of order of analysis of such claims. The Panel recognized

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[460] Panel Report on *Indonesia – Autos*, paras. 14.33–14.36.
[461] Panel Report on *Indonesia – Autos*, para. 14.38. As to the context of this paragraph, see paras. 303–306 of this Chapter.
[462] Panel Report on *Indonesia – Autos*, paras. 14.39–14.40.
[463] (*footnote original*) Appellate Body Report on *US – Shirts and Blouses*, pp. 17–20.
[464] Panel Report on *Indonesia – Autos*, para. 14.93.
[465] (*footnote original*) Panel Report on *EC – Bananas III*, para. 7.186.
[466] Panel Report on *Canada – Autos*, para. 10.91.

that, in some circumstances, there may be a practical significance in determining a particular order for the examination of claims based on the TRIMS and GATT 1994; for example if a party claimed as a defence that a measure had been notified under the TRIMs Agreement. Since that was not the case in this dispute, the Panel did not find any particular reason to start its examination on any particular order, nor did it consider that the end result would be affected by either determination of order of analysis. In fact, the Panel was not persuaded that, as a general matter, the TRIMs Agreement could inherently be characterized as more specific than the relevant GATT provisions, and stated:

> "As a general matter, even if there was some guiding principle to the effect that a specific covered Agreement might appropriately be examined before a general one where both may apply to the same measure, it might be difficult to characterize the TRIMs Agreement as necessarily more 'specific' than the relevant GATT provisions. Although the TRIMS Agreement 'has an autonomous legal existence', independent from the relevant GATT provisions, as noted by the *Indonesia – Autos* panel,[467] the substance of its obligations refers directly to Articles III and XI of the GATT, and clarifies their meaning, *inter alia*, through an Illustrative list. On one view, it simply provides additional guidance as to the identification of certain measures considered to be inconsistent with Articles III:4 and XI:1 of the GATT 1994. On the other hand, the TRIMs Agreement also introduces rights and obligations that are specific to it, through its notification mechanism and related provisions. An interpretative question also arises in relation to the TRIMs Agreement as to whether a complainant must separately prove that the measure in issue is a 'trade-related investment measure'. For either of these reasons, the TRIMs Agreement might be arguably more specific in that it provides additional rules concerning the specific measures it covers.[468] The Panel is therefore not convinced that, as a general matter, the TRIMs Agreement could inherently be characterized as more specific than the relevant GATT provisions."[469]

310. The Panel on *India – Autos* ultimately decided to examine the GATT claims first, since both complainants had addressed their claims under GATT 1994 prior to their claims under the TRIMS Agreement, and the order selected for examination of the claims could have an impact on the potential to apply judicial economy. In effect, the Panel stated:

> "It seems that an examination of the GATT provisions in this case would be likely to make it unnecessary to address the TRIMs claims, but not vice-versa. If a violation of the GATT claims was found, it would be justifiable to refrain from examining the TRIMs claims under the principle of judicial economy. Even if no violation was found under the GATT claims, that also seems an efficient starting point since it would be difficult to imagine that if no violation has been found of Articles III or XI, a violation could be found of Article 2 of the TRIMs Agreement, which refers to the same provisions. Conversely, if no violation of the TRIMs Agreement were found, this would not necessarily preclude the existence of a violation of GATT Articles III:4 or XI:1 because the scope of the GATT provisions is arguably broader if India's argument was accepted that there is a need to prove that a measure is an investment measure and its assertion that this is not the case with the measures before this Panel."[470]

6. GATS

311. In *Canada – Periodicals*, the Appellate Body examined the Panel's finding that Canada was in violation of Article III:2 in imposing an excise tax on split-run editions of periodicals, i.e. those editions which "contain[...] an advertisement that is primarily directed to a market in Canada and that does not appear in identical form in all editions of that issue of the periodical[s] that were distributed in the periodical[s'] country of origin."[471] Canada claimed that the excise tax was subject to the *GATS*, and thus, not subject to Article III:2 of the *GATT 1994*.[472] Rejecting this argument, the Appellate Body stated:

> "The entry into force of the GATS, as Annex 1B of the *WTO Agreement*, does not diminish the scope of application of the GATT 1994. . . .
>
> We agree with the Panel's statement:
>
> > 'The ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other.'"[473]

312. In *EC – Bananas III*, the Appellate Body also addressed the question of "whether the GATS and the GATT 1994 are mutually exclusive agreements", as follows:

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[467] (*footnote original*) Panel Report on *Indonesia – Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 14.63 (DSR 1998:VI, 2201).

[468] (*footnote original*) To say, for instance, that the TRIMs Agreement is more specific because it contains a specific criterion of the presence or absence of a trade-related investment measure depends upon whether that is a distinct criterion and whether the lack of such a criterion in Articles III and XI of GATT 1994 makes these provisions more general as opposed to merely having a broader range of coverage on the same criteria. The only practical difference and potential advantage in looking at the TRIMs agreement first in this instance seems to be the possible utilization of the Illustrative List, to the extent that it would be relevant to the claims at issue and may facilitate the identification of a violation of Articles III:4 or XI:1 of GATT 1994.

[469] Panel Report on *India – Autos*, para. 7.157.

[470] Panel Report on *India – Autos*, para. 7.161.

[471] Panel Report on *Canada – Periodicals*, para. 2.2.

[472] Appellate Body Report on *Canada – Periodicals*, p. 17.

[473] Appellate Body Report on *Canada – Periodicals*, p. 19.

"The GATS was not intended to deal with the same subject matter as the GATT 1994. The GATS was intended to deal with a subject matter not covered by the GATT 1994, that is, with trade in services. Thus, the GATS applies to the supply of services. It provides, *inter alia*, for both MFN treatment and national treatment for services and service suppliers. Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis. This was also our conclusion in the Appellate Body Report in *Canada – Periodicals.*[474]"[475]

313. The finding that the scope of application of *GATT* and *GATS*, respectively, may or may not overlap, was reiterated by the Appellate Body in *Canada – Autos.*[476]

V. ARTICLE IV

A. TEXT OF ARTICLE IV

Article IV
Special Provisions relating to Cinematograph Films

If any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas which shall conform to the following requirements:

(*a*) Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theatre per year or the equivalent thereof;

(*b*) With the exception of screen time reserved for films of national origin under a screen quota, screen time including that released by administrative action from screen time reserved for films of national origin, shall not be allocated formally or in effect among sources of supply;

(*c*) Notwithstanding the provisions of subparagraph (*b*) of this Article, any contracting party may maintain screen quotas conforming to the requirements of subparagraph (*a*) of this Article which reserve a minimum proportion of screen time for films of a specified origin other than that of the contracting party imposing such screen quotas; *Provided* that no such minimum proportion of screen time shall be increased above the level in effect on April 10, 1947;

(*d*) Screen quotas shall be subject to negotiation for their limitation, liberalization or elimination.

B. INTERPRETATION AND APPLICATION OF ARTICLE IV

No jurisprudence or decision of a competent WTO body.

1. Reference to GATT practice

314. With respect to GATT practice concerning Article IV, see GATT Analytical Index, page 210.

VI. ARTICLE V

A. TEXT OF ARTICLE V

Article V
Freedom of Transit

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without transshipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article "traffic in transit".

2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No

[474] (*footnote original*) Appellate Body Report on *Canada – Periodicals*, p. 19.
[475] Appellate Body Report on *EC – Bananas III*, para. 221.
[476] Appellate Body Report on *Canada – Autos*, para. 159.

distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.

5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.*

6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.

7. The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage).

B. TEXT OF *AD* ARTICLE V

Ad Article V
Paragraph 5

With regard to transportation charges, the principle laid down in paragraph 5 refers to like products being transported on the same route under like conditions.

C. INTERPRETATION AND APPLICATION OF ARTICLE V

No jurisprudence or decision of a relevant WTO body.

1. Reference to GATT practice

315. With respect to GATT practice concerning Article V, see GATT Analytical Index, pages 214–217.

VII. ARTICLE VI

A. TEXT OF ARTICLE VI

Article VI
Anti-dumping and Countervailing Duties

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(*a*) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(*b*) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.*

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.*

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly,

on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.*

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (*a*) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(*b*) The CONTRACTING PARTIES may waive the requirement of subparagraph (*a*) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of subparagraph (*a*) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.*

(*c*) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in subparagraph (*b*) of this paragraph without the prior approval of the CONTRACTING PARTIES; *Provided* that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

(*a*) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

(*b*) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

B. TEXT OF *AD* ARTICLE VI

Ad Article VI
Paragraph 1

1. Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Paragraphs 2 and 3

1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

2. Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments.

Paragraph 6 (b)

Waivers under the provisions of this subparagraph shall be granted only on application by the contracting party proposing to levy an anti-dumping or countervailing duty, as the case may be.

C. INTERPRETATION AND APPLICATION OF ARTICLE VI

1. Scope of Article VI

(a) Investigation initiated before entry into force of *WTO Agreement*

316. In *Brazil – Desiccated Coconut*, the Appellate Body upheld the Panel's finding that Article VI of *GATT 1994* does not apply to countervailing duty measures imposed as a result of an investigation initiated pursuant to an application made before the entry into force of the *WTO Agreement*. Having found that pursuant to Article 28 of the Vienna Convention on the Law of Treaties, "[a]bsent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force", the Appellate Body based its finding on the interpretation of Article 32.3 of the *SCM Agreement*, which sets forth that "the provisions of this Agreement shall apply to investigations . . . initiated pursuant to applications have been made on or after the date of entry into force for a WTO Agreement of the WTO Agreement". The Appellate Body stated that "[i]f Article 32.3 is read in conjunction with Articles 10 and 32.1 of the *SCM Agreement*, it becomes clear that the term 'this Agreement' in Article 32.3 means 'this [SCM] Agreement and Article VI of the GATT 1994'."[477] With reference to Articles 10 and 32.1 of the SCM Agreement, the Appellate Body went on to state:

> "From reading Article 10, it is clear that countervailing duties may only be imposed in accordance with Article VI of the GATT 1994 and the *SCM Agreement*. A countervailing duty being a specific action against a subsidy of another WTO Member, pursuant to Article 32.1, it can only be imposed 'in accordance with the provisions of GATT 1994, as interpreted by this Agreement'. The ordinary meaning of these provisions taken in their context leads us to the conclusion that the negotiators of the *SCM Agreement* clearly intended that, under the integrated *WTO Agreement*, countervailing duties may only be imposed in accordance with the provisions of Part V of the *SCM Agreement* and Article VI of the GATT 1994, taken together."[478]

317. After making the finding quoted in paragraph 316 above, the Appellate Body referred to the omission of note 2 to the preamble of the Tokyo Round SCM Code, which states "[w]herever in this Agreement there is reference to 'the terms of this Agreement' or the 'articles' or 'provisions of this Agreement' it shall be taken to mean, as the context requires, the provisions of the General Agreement as interpreted and applied by this Agreement", from the *SCM Agreement*. The Preamble, together with footnote 2, had not been retained in the new *SCM Agreement*. The Philippines argued that this omission was evidence that the term "this Agreement" in Article 32.3 was to be understood to refer only to the *SCM Agreement*. The Appellate Body was unconvinced:

> "This note related to a provision in the preamble to the *Tokyo Round SCM Code* which demonstrated the Tokyo Round signatories' desire 'to apply fully and to interpret the provisions of Articles VI, XVI and XXIII' of the GATT 1947. The preamble was not retained in the new text of the *SCM Agreement*. Consequently, the note also disappeared. The *SCM Agreement* contains a set of rights and obligations that go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the GATT 1947. The title to the *SCM Agreement* was also modified in this respect. Like the Panel, 'we do not consider that the exclusion of this provision from the SCM Agreement sheds much light on the question before us'.[479]"[480]

318. In further support of its view that the term "this Agreement" referred to both the *SCM Agreement* and Article VI of the *GATT 1994*, the Appellate Body cited the following finding of the Panel, with the understanding that "the Panel's reference to '*SCM Agreements*' in this paragraph referred to the *SCM Agreement* and the Tokyo Round SCM Code":[481]

> "Article VI of GATT 1947 and the Tokyo Round SCM Code represent, as among Code signatories, a package of rights and obligations regarding the use of countervailing measures, and Article VI of GATT 1994 and the SCM Agreement represent a new and different package of rights and obligations, as among WTO Members, regarding the use of countervailing duties. Thus, Article VI and the respective SCM Agreements impose obligations on a potential user of countervailing duties, in the form of conditions that have to be fulfilled in order to impose a duty, but they also confer the right to impose a countervailing duty when those conditions are satisfied. The SCM Agreements do not merely impose additional substantive and procedural obligations on a potential user of countervailing measures. Rather, the SCM Agreements and Article VI together define, clarify and in some cases modify the whole package of rights

[477] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 17. Appellate Body later noted that Article 18.3 of the *Anti-Dumping Agreement* is an identical provision to Article 32.3 of the *SCM Agreement*. Appellate Body Report on *Brazil – Desiccated Coconut*, fn. 23.
[478] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 16.
[479] (*footnote original*) Panel Report on *Brazil – Desiccated Coconut*, fn. 62.
[480] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 17.
[481] Appellate Body Report on *Brazil – Desiccated Coconut*, fn. 21.

and obligations of a potential user of countervailing measures."[482]

319. In this regard, the Appellate Body noted that "[t]he fact that Article VI of the GATT 1947 could be invoked independently of the Tokyo Round SCM Code under the previous GATT system[483] does not mean that Article VI of GATT 1994 can be applied independently of the *SCM Agreement* in the context of the WTO."[484] The Appellate Body went on to state that "[t]he authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system"[485], referring to the preamble and Article II:2 of the Marrakesh Agreement. Further, the Appellate Body stated that "... the Uruguay Round negotiators expressed an explicit intention to draw the line of application of the new *WTO Agreement* to countervailing duty investigations and reviews[486] at a different point in time from that for other general measures.[487]"[488]

320. In addition, the Appellate Body rejected the Philippines' argument that that "the transitional decisions[489] [of the Tokyo Round SCM Code signatories] recognize the right of WTO Members to invoke WTO norms even in situations involving elements that occurred prior to the entry into force of the *WTO Agreement*."[490] The Appellate Body opined that "[a]t the time the *Tokyo Round SCM Code* signatories agreed to these decisions, they were fully cognizant of the implications of the operation of Article 32.3 of the *SCM Agreement*."[491]

321. Lastly, the Appellate Body noted that its finding on the scope of Article VI of *GATT 1994* would not result in leaving Members without a right of action against those countervailing duty measures which are not covered by Article 32.3 of the *SCM Agreement*.[492] Rather, the Decision on Consequences of Withdrawal from or Termination of the Tokyo Round SCM Code, adopted by the Tokyo Round Subsidies and Countervailing Measures Committee, extended dispute settlement under the Tokyo Round SCM Code for two years, one year beyond the legal termination of the Tokyo Round SCM Code which occurred on 31 December 1995.

(b) Anti-dumping measures other than anti-dumping duties

322. In *US – 1916 Act*, the Appellate Body reviewed the Panels' finding that the United States' 1916 Antidumping Act was inconsistent with Article VI, and rejected the United States' appeal to the Panels' finding that the Act was to counteract "dumping" and thus, fell under the scope of Article VI. The Appellate Body considered that the issue depended on "whether Article VI regulates all possible measures Members can take in response to dumping."[493] In answering this question, the Appellate Body noted that "Article VI of the GATT 1994 must be read together with the provisions of the *Anti-Dumping Agreement*"[494] and referred to the text of Article 1 of the *Anti-Dumping Agreement*; specifically, the Appellate Body stated that "[s]ince 'an anti-dumping measure' must, according to Article 1 of the *Anti-Dumping Agreement*, be consistent with Article VI of the GATT 1994 and the provisions of the *Anti-Dumping Agreement*, it seems to follow that Article VI would apply to 'an anti-dumping measure', i.e., a measure against dumping."[495] The Appellate Body went on to state that "the scope of application of Article VI is clarified, in particular, by Article 18.1 of the *Anti-Dumping Agreement*"[496], and indicated that "... Article VI is applicable to any 'specific action against dumping' of exports, i.e., action

[482] Panel Report on *Brazil – Desiccated Coconut*, para. 246.
[483] (*footnote original*) As demonstrated by the *US – Canadian Pork* panel.
[484] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 18.
[485] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 18.
[486] (*footnote original*) There is an identical provision to Article 32.3 of the *SCM Agreement* contained in Article 18.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"). Similarly, there are mirror transitional decisions approved by the Tokyo Round Committee on Anti-dumping Measures, in the Decision on Transitional Co-Existence of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization, ADP/131, 16 December 1994; and the Decision on Consequences of Withdrawal from or Termination of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, ADP/132, 16 December 1994.
[487] (*footnote original*) In its appellant's submission dated 9 January 1997, at p. 37, para. 59, the Philippines argues that in *United States – Gasoline*, both the panel and the Appellate Body assessed the pre-WTO domestic regulatory process that led to the imposition of the United States' environmental measure at issue in that dispute. We note that, in that case, there was no issue with respect to the temporal application of the measure in dispute, nor did the panel or the Appellate Body examine the applicability of the *Agreement on Technical Barriers to Trade*.
[488] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 18.
[489] (*footnote original*) By "transitional decisions", we refer to the Decision on Transitional Co-Existence of the GATT 1947 and the WTO Agreement, PC/12–L/7583, 13 December 1994; the Decision on Transitional Co-Existence of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization (the "Decision on Transitional Co-existence of the Tokyo Round SCM Code and the WTO Agreement"), SCM/186, 16 December 1994; and the Decision on Consequences of Withdrawal from or Termination of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the "Decision on Consequences of Withdrawal from or Termination of the Tokyo Round SCM Code"), SCM/187, 16 December 1994.
[490] Appellate Body Report on *Brazil – Desiccated Coconut*, pp. 4–5.
[491] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 20.
[492] Appellate Body Report on *Brazil – Desiccated Coconut*, pp. 20–21.
[493] Appellate Body Report on *US – 1916 Act*, para. 109.
[494] Appellate Body Report on *US – 1916 Act*, para. 118.
[495] Appellate Body Report on *US – 1916 Act*, para. 120.
[496] Appellate Body Report on *US – 1916 Act*, para. 121.

that is taken in response to situations presenting the constituent elements of 'dumping'":

> "[T]he ordinary meaning of the phrase 'specific action against dumping' of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of 'dumping'. 'Specific action against dumping' of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of 'dumping' are present. Since intent is not a constituent element of 'dumping', the *intent* with which action against dumping is taken is not relevant to the determination of whether such action is 'specific action against dumping' of exports within the meaning of Article 18.1 of the *Anti-Dumping Agreement*.
>
> Footnote 24 to Article 18.1 of the *Anti-Dumping Agreement* states:
>
> > 'This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.'
>
> We note that footnote 24 refers generally to 'action' and not, as does Article 18.1, to 'specific action against dumping' of exports. 'Action' within the meaning of footnote 24 is to be distinguished from 'specific action against dumping' of exports, which is governed by Article 18.1 itself.
>
> Article 18.1 of the *Anti-Dumping Agreement* contains a prohibition on the taking of any 'specific action against dumping' of exports when such specific action is not 'in accordance with the provisions of GATT 1994, as interpreted by this Agreement'. Since the only provisions of the GATT 1994 'interpreted' by the *Anti-Dumping Agreement* are those provisions of Article VI concerning dumping, Article 18.1 should be read as requiring that any 'specific action against dumping' of exports from another Member be in accordance with the relevant provisions of *Article VI* of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*.
>
> We recall that footnote 24 to Article 18.1 refers to '*other* relevant provisions of GATT 1994' (emphasis added). These terms can only refer to provisions other than the provisions of Article VI concerning dumping. Footnote 24 thus confirms that the 'provisions of GATT 1994' referred to in Article 18.1 are in fact the provisions of Article VI of the GATT 1994 concerning dumping.
>
> We have found that Article 18.1 of the *Anti-Dumping Agreement* requires that any 'specific action against dumping' be in accordance with the provisions of Article VI of the GATT 1994 concerning dumping, as those provisions are interpreted by the *Anti-Dumping Agreement*. It follows that Article VI is applicable to any 'specific action against dumping' of exports, i.e., action that is taken in response to situations presenting the constituent elements of 'dumping'."[497]

323. The Appellate Body on *US – 1916 Act* rejected the United States' argument that the term "may" in Article VI:2 indicates that Members may choose to impose other types of anti-dumping measures than anti-dumping duties, in which case they are not bound by the rules of Article VI, stating as follows:

> "[I]t is not obvious to us, based on the wording of Article VI:2 alone, that the verb 'may' also implies that a Member is permitted to impose a measure other than an anti-dumping duty.
>
> We believe that the meaning of the word 'may' in Article VI:2 is clarified by Article 9 of the *Anti-Dumping Agreement* on the 'Imposition and Collection of Anti-dumping Duties'. Article VI of the GATT 1994 and the *Anti-Dumping Agreement* are part of the same treaty, the *WTO Agreement*. As its full title indicates, the *Anti-Dumping Agreement* is an 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994'. Accordingly, Article VI must be read in conjunction with the provisions of the *Anti-Dumping Agreement*, including Article 9.
>
> . . .
>
> In light of this provision, the verb 'may' in Article VI:2 of the GATT 1994 is, in our opinion, properly understood as giving Members a choice between imposing an anti-dumping duty *or not*, as well as a choice between imposing an anti-dumping duty equal to the dumping margin or imposing a lower duty. We find no support in Article VI:2, read in conjunction with Article 9 of the *Anti-Dumping Agreement*, for the United States' argument that the verb 'may' indicates that Members, to counteract dumping, are permitted to take measures other than the imposition of anti-dumping duties."[498]

324. The Appellate Body further elaborated upon this jurisprudence in *US – Offset Act (Byrd Amendment)*. With regard to the term "specific" in the phrase "specific action against dumping or a subsidy", the Appellate Body made reference to its report in *US – 1916 Act* (see paragraph 322 above) and further specified that "the measure must be inextricably linked to, or have a strong correlation with, the constituent elements of dumping or of a subsidy. Such link or correlation may, as in the 1916 Act, be derived from the text of the measure itself."[499] With regard to the specific measure at issue in *US – Offset Act (Byrd Amendment)*, the Appellate Body agreed with the Panel's finding that the Offset Act was a

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[497] Appellate Body Report on *US – 1916 Act*, paras. 122–126. In addition to the foregoing reasoning of the Appellate Body, the Panel, which reached the same conclusion on the scope of Article VI:2, discussed the object and purpose of the *GATT 1994*, of the *Anti-Dumping Agreement*, or of the *WTO Agreement*, and the preparatory work for Article VI:2. Panel Report on *US – 1916 Act (Japan)*, paras. 6.223–6.229 *See also* Panel Report on *US – 1916 Act (EC)*, paras. 6.200–6.203.

[498] Appellate Body Report on *US – 1916 Act*, paras. 113–116.

[499] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, paras. 238–239.

specific action related to dumping as defined in Article VI:1 of the *GATT 1994* and Article 18.1 of the *Anti-Dumping Agreement*:

> "It is clear from the text of the CDSOA [the Offset Act], in particular from Section 754(a) of the Tariff Act[500], that the CDSOA offset payments are inextricably linked to, and strongly correlated with, a determination of dumping, as defined in Article VI:1 of the GATT 1994 and in the *Anti-Dumping Agreement*, or a determination of a subsidy, as defined in the *SCM Agreement*. The language of the CDSOA is unequivocal. *First*, CDSOA offset payments can be made *only* if anti-dumping duties or countervailing duties have been collected. *Second*, such duties can be collected *only* pursuant to an anti-dumping duty order or countervailing duty order. *Third*, an anti-dumping duty order can be imposed *only* following a determination of dumping, as defined in Article VI:1 of the GATT 1994 and in the *Anti-Dumping Agreement*. *Fourth*, a countervailing duty order can be imposed only following a determination that exports have been subsidized, according to the definition of a subsidy in the *SCM Agreement*. In the light of the above elements, we agree with the Panel that 'there is a clear, direct and unavoidable connection between the determination of dumping and CDSOA offset payments', and we believe the same to be true for subsidization. In other words, it seems to us unassailable that CDSOA offset payments can be made only following a determination that the constituent elements of dumping or subsidization are present. Therefore, consistent with the test established in *US – 1916 Act*, we find that the CDSOA is 'specific action' related to dumping or a subsidy within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*."[501]

325. In *US – Offset Act (Byrd Amendment)*, the Appellate Body further rejected the United States' argument, that an action that falls within the scope of footnote 24 of the *Anti-Dumping Agreement* cannot be characterized as a "specific action" within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and therefore would not be prohibited. The Appellate Body made reference to its interpretation of footnote 24 in *US – 1916 Act (*see paragraph 322 above), where it found that "action" in the sense of footnote 24 has to be distinguished from "specific action against dumping" as in Article 18.1 of the *Anti-Dumping Agreement*[502] and continued to say:

> "The United States' reasoning is tantamount to treating footnotes 24 [of the *Anti-Dumping Agreement*] and 56 [of the *SCM Agreement*] as the primary provisions, while according Articles 18.1 [of the *Anti-Dumping Agreement*] and 32.1 [of the *SCM Agreement*] residual status. This not only turns the normal approach to interpretation on its head, but it also runs counter to our finding in *US – 1916 Act*. In that case, we provided guidance for determining whether an action is specific to dumping (or to a subsidy): an action is specific to dumping (or a subsidy) when it may be taken *only* when the constituent elements of dumping (or a subsidy) are present, or, put another way, when the measure is inextricably linked to, or strongly correlates with, the constituent elements of dumping (or of a subsidy). This approach is based on the *texts* of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*, and not on the accessory footnotes. Footnotes 24 and 56 are clarifications of the main provisions, added to avoid ambiguity; they confirm what is implicit in Article 18.1 of the *Anti-Dumping Agreement* and in Article 32.1 of the *SCM Agreement*, namely, that an action that is *not* 'specific' within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*, but is nevertheless related to dumping or subsidization, is not prohibited by Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*."[503]

326. With regard to the term "against" in the phrase "specific action against dumping or a subsidy", the Appellate Body agreed with the Panel that "there is no requirement that the measure must come into direct contact with the imported product, or entities connected to, or responsible for, the imported good such as the importer, exporter or foreign producer" and further agreed with the Panel that the test should focus on dumping or subsidization "as *practices*". The Appellate Body further specified that for determining the meaning of "against" in the present context:

> "[I]t is necessary to assess whether the design and structure of a measure is such that the measure is 'opposed to', has an adverse bearing on, or, more specifically, has the effect of dissuading the practice of dumping or the practice of subsidization, or creates an incentive to terminate such practices. In our view, the CDSOA [Offset Act] has exactly those effects because of its design and structure. The CDSOA effects a transfer of financial resources from the producers/exporters of dumped or subsidized goods to their domestic competitors. This is demonstrated by the following elements of the CDSOA regime. *First*, the CDSOA offset payments are financed from the anti-dumping or countervailing duties paid by the foreign producers/exporters. *Second*, the CDSOA

[500] (*footnote original*) Section 754(a) of the Tariff Act provides:

> "Duties assessed pursuant to a countervailing duty order, an anti-dumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures. Such distribution shall be known as the "continued dumping and subsidy offset."

[501] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 242.

[502] See above, para. 322.

[503] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 262.

offset payments are made to an 'affected domestic producer', defined in Section 754(b) of the Tariff Act as 'a petitioner or interested party in support of the petition with respect to which an anti-dumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered' and that 'remains in operation'. In response to our questioning at the oral hearing, the United States confirmed that the 'affected domestic producers' which are eligible to receive payments under the CDSOA, are necessarily competitors of the foreign producers/exporters subject to an anti-dumping or countervail order. *Third*, under the implementing regulations issued by the United States Commissioner of Customs ('Customs') on 21 September 2001, the 'qualifying expenditures' of the affected domestic producers, for which the CDSOA offset payments are made, 'must be related to the production of the same product that is the subject of the related order or finding, with the exception of expenses incurred by associations which must relate to a specific case.' *Fourth*, Customs has confirmed that there is no statutory or regulatory requirement as to how a CDSOA offset payment to an affected domestic producer is to be spent, thus indicating that the recipients of CDSOA offset payments are entitled to use this money to bolster their competitive position *vis-à-vis* their competitors, including the foreign competitors subject to anti-dumping or countervailing duties. All these elements lead us to conclude that the CDSOA has an adverse bearing on the foreign producers/exporters in that the imports into the United States of the dumped or subsidized products (besides being subject to anti-dumping or countervailing duties) result in the financing of United States competitors – producers of like products – through the transfer to the latter of the duties collected on those exports. Thus, foreign producers/exporters have an incentive not to engage in the practice of exporting dumped or subsidized products or to terminate such practices. Because the CDSOA has an adverse bearing on, and, more specifically, is designed and structured so that it dissuades the practice of dumping or the practice of subsidization, and because it creates an incentive to terminate such practices, the CDSOA is undoubtedly an action 'against' dumping or a subsidy, within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*."

327. The Appellate Body on *US – Offset Act (Byrd Amendment)* rejected the United States' argument that contrary to *US – 1916 Act*, the language of the Offset Act does not refer to the constituent elements of dumping and clarified that the finding in *US – 1916 Act* was not to be interpreted as to "*require* that the language of the measure include the constituent elements of dumping". On the contrary, the test established in *US – 1916 Act* "is met not only when constituent elements of dumping are 'explicitly built into' the actions at issue, but also where . . . they are implicit in the express conditions for taking such action."[504]

2. Reference to GATT practice

328. With respect to the further treatment of this subject-matter under GATT 1947, see GATT Analytical Index, pages 237–238.

3. Interpretative materials

(a) Tokyo Round Agreements

329. In *Brazil – Desiccated Coconut*, the Panel considered that Article VI of *GATT 1994* does not apply, in isolation from the *SCM Agreement*, to countervailing duty cases where the investigation has been initiated pursuant to an application made before the entry into force of the *WTO Agreement*. The Panel's finding and reasoning were subsequently upheld by the Appellate Body. See paragraphs 316–321 above. The Appellate Body, however, found it unnecessary to address one particular reason the Panel had given for its finding, namely that if Article VI were to apply independently from the *SCM Agreement*, Members might be subject to "a package of rights and obligations that were potentially more onerous than those to which they were subject under Article VI in conjunction with the Tokyo Round SCM Code when they initiated the investigation."[505] The Panel noted that the Tokyo Round SCM Code did not only impose additional *obligations* on a contracting party imposing countervailing duties, but also clarified and added some *rights* for such contracting party, such that certain obligations imposed by Article VI in conjunction with either the Tokyo Round SCM Code or the *SCM Agreement* were less stringent and easier to meet than obligations imposed by Article VI in isolation.[506] In this regard, the Panel also rejected the argument by the Philippines that Article VI of *GATT 1994*, as opposed to Article VI of *GATT 1947*, could be interpreted in the light of the Tokyo Round SCM Code and practice of the Code signatories; the Philippines were arguing that this interpretation would avoid the risk that Members would, through the application of Article VI of *GATT 1994* in isolation, be subject to obligations beyond those imposed by Article VI of *GATT 1947* in

[504] Appellate Body Report on *United States – Offset Act (Byrd Amendment)*, para. 244 quoting the European Communities', India's, Indonesia's and Thailand's appellee's submission at para. 14.

[505] Panel Report on *Brazil – Desiccated Coconut*, para. 253. The Appellate Body upheld the Panel's conclusion on the applicability of Article VI of GATT 1994 to this dispute, however, on different grounds, and thus, stated that "it is not necessary to determine whether applying Article VI of the GATT 1994 independently of the *SCM Agreement* would be more onerous than applying them together." Appellate Body Report on *Brazil – Desiccated Coconut*, p. 21.

[506] Panel Report on *Brazil – Desiccated Coconut*, paras. 246–253.

conjunction with the Tokyo Round SCM Code. The Panel noted:

> "[W]e do not consider that it would be appropriate to interpret Article VI of GATT 1994 in light of the Tokyo Round SCM Code. Article 31:3(a) of the Vienna Convention on the Law of Treaties ('the Vienna Convention'), which is generally held to reflect customary principles of international law regarding treaty interpretation, provides that 'any subsequent agreement between the parties to a treaty regarding its interpretation or the application of its provisions' may be taken into account when interpreting a treaty. The Tokyo Round SCM Code may constitute such a subsequent agreement among Tokyo Round SCM Code signatories regarding the interpretation of Article VI of GATT 1947. However, Article II:4 of the WTO Agreement provides that the GATT 1994 is 'legally distinct' from the GATT 1947. While GATT 1994 consists of, *inter alia*, 'decisions of the CONTRACTING PARTIES to GATT 1947,' the Tokyo Round SCM Code is not a 'decision' of the CONTRACTING PARTIES. Thus, the Tokyo Round SCM Code does not represent a subsequent agreement regarding interpretation of Article VI of GATT 1994. For the Panel to conclude to the contrary would in effect convert that Code into a 'covered agreement' under Appendix 1 of the DSU. If such an approach were followed, WTO Members that were Tokyo Round Code signatories would find that their Code obligations were now enforceable under the WTO dispute settlement system.
>
> Article XVI:1 of the WTO Agreement provides that, '[e]xcept as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947'. We recognize that the Pork [i.e. *US – Canadian Pork*] Panel had indicated, in passing, that the Tokyo Round SCM Code represents 'practice' under Article VI of GATT 1947. Article 31.3(b) of the Vienna Convention provides that there may be taken into account, when interpreting a treaty, '[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. Article 31.3 clearly distinguishes between the use of subsequent agreements and of subsequent practice as interpretive tools. The Tokyo Round SCM Code is, in our view, in the former category and cannot itself reasonably be deemed to represent 'customary practice' of the GATT 1947 CONTRACTING PARTIES. In any event, while the practice of Code signatories might be of some interpretive value in establishing their agreement regarding the interpretation of the Tokyo Round SCM Code (and arguably through Article XVI:1 of the WTO Agreement in interpreting provisions of that Code that were carried over into the successor SCM Agreement), it is clearly not relevant to the interpretation of Article VI of GATT 1994 itself; rather, only practice under Article VI of GATT 1947 is legally relevant to the interpretation of Article VI of GATT 1994."[507]

330. The relationships between Article VI, and the Tokyo Round SCM Agreement and the *SCM Agreement* were discussed by the Appellate Body in *Brazil – Desiccated Coconut*. See paragraphs 316–319 above.

(b) Anti-Dumping Agreement

331. In *US – 1916 Act (EC)*, the Panel examined whether the US 1916 Antidumping Act was consistent with Article VI, and emphasized the "close link" between Article VI and the *Anti-Dumping Agreement*:

> "The official title of the Anti-Dumping Agreement is 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994'. This agreement is essential for the interpretation of Article VI. Articles 1 and 18.1 confirm the close link between Article VI and the Anti-Dumping Agreement. Moreover, as was recalled by the Appellate Body in the *Brazil – Coconut* case, the WTO Agreement is a single treaty instrument which was accepted by the WTO Members as a single undertaking. As a result, Article 18.1 of the Anti-Dumping Agreement is part of the context of Article VI since Article 31.2 of the Vienna Convention provides that 'the context for the purpose of the interpretation of a treaty shall comprise, [. . .] the text [of the treaty], including its preamble and annexes . . .'. We are therefore not only entitled to consider Articles 1 and 18.1 of the Anti-Dumping Agreement even though the European Communities did not mention those provisions as part of its claims in its request for establishment of a panel, but we are also *required* to do so under the general principles of interpretation of public international law.[508]"[509]

332. With respect to the finding of the Appellate Body in *Brazil – Desiccated Coconut* concerning the relationship between the *SCM Agreement* and GATT Article VI as referenced in paragraph 316 above, see the Chapter on the *WTO Agreement*, Section III.B.1(a), which deals with the issue of the "single undertaking".

(c) SCM Agreement

333. In *Brazil – Desiccated Coconut*, the Appellate Body referred to the *SCM Agreement* in the context of clarifying the scope of Article VI. See the excerpts referenced in paragraphs 316 and 318 above.

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[507] Panel Report on *Brazil – Desiccated Coconut*, paras. 255–256.

[508] (*footnote original*) Like the panel in *India – Quantitative Restrictions*, our intention is not to make findings under Articles 1 and 18.1 of the Anti-Dumping Agreement in this context. As a result, the requirements of Article 6.2 and 7 of the DSU are not relevant in that situation.

[509] Panel Report on *US – 1916 Act (EC)*, para. 6.195.

4. Challenge against a law as such under Article VI

334. In *US – 1916 Act*, the Appellate Body rejected the United States' argument that the Panels had no jurisdiction to consider the claims that the Act as such was inconsistent with Article VI. Noting that the complainants had brought their claims of inconsistency with Article VI of the *GATT 1994* and the *Anti-Dumping Agreement* pursuant to Article XXIII of the *GATT 1994* and Article 17 of the *Anti-Dumping Agreement*, the Appellate Body explained:

> "Articles XXII and XXIII of the GATT 1994 serve as the basis for consultations and dispute settlement under the GATT 1994 and, through incorporation by reference, under most of the other agreements in Annex 1A to the *WTO Agreement*.[510] According to Article XXIII:1(a) of the GATT 1994, a Member can bring a dispute settlement claim against another Member when it considers that a benefit accruing to it under the GATT 1994 is being nullified or impaired, or that the achievement of any objective of the GATT 1994 is being impeded, as a result of the failure of that other Member to carry out its obligations under that Agreement.
>
> Prior to the entry into force of the *WTO Agreement*, it was firmly established that Article XXIII:1(a) of the GATT 1947 allowed a Contracting Party to challenge legislation as such, independently from the application of that legislation in specific instances. While the text of Article XXIII does not expressly address the matter, panels consistently considered that, under Article XXIII, they had the *jurisdiction* to deal with claims against legislation as such.[511] In *examining* such claims, panels developed the concept that mandatory and discretionary legislation should be distinguished from each other, reasoning that only legislation that mandates a violation of GATT obligations can be found as such to be inconsistent with those obligations. We consider the application of this distinction to the present cases in section IV(B) below.
>
> Thus, that a Contracting Party could challenge legislation as such before a panel was well-settled under the GATT 1947. We consider that the case law articulating and applying this practice forms part of the GATT *acquis* which, under Article XVI:1 of the *WTO Agreement,* provides guidance to the WTO and, therefore, to panels and the Appellate Body. Furthermore, in Article 3.1 of the DSU, Members affirm 'their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947'. We note that, since the entry into force of the *WTO Agreement*, a number of panels have dealt with dispute settlement claims brought against a Member on the basis of its legislation as such, independently from the application of that legislation in specific instances.[512]"[513]

335. In this connection, in *US – 1916 Act*, the Appellate Body examined whether challenge against a law as such is permissible under the Anti-Dumping Agreement. See the Chapter on the *Anti-Dumping Agreement*, Section XVII.B.1(b).

336. In *Guatemala – Cement I*, the Appellate Body discussed the specificity requirements for the terms of reference under Article 17.4 of the Anti-Dumping Agreement. See the Chapter on the *Anti-Dumping Agreement*, Section XVII.B.5(a).

5. Article VI:1

(a) Elements of Paragraph 1

337. In *US – 1916 Act*, in discussing the United States' appeal to the Panels' finding that the Act was to counteract "dumping" and thus, fell under the scope of Article VI, the Appellate Body noted as follows:

> "[U]nder Article VI:1 of the GATT 1994 and Article 2 of the *Anti-Dumping Agreement*, neither the intent of the persons engaging in 'dumping' nor the injurious effects that 'dumping' may have on a Member's domestic industry are constituent elements of 'dumping'."[514]

(b) Material injury

338. In *US – 1916 Act (EC)*, the Panel stated that "Article VI:1 of the GATT 1994 requires the establishment of material injury or a threat thereof."[515]

6. Paragraph 2

(a) Permissible responses to dumping

339. In *US – 1916 Act*, the Appellate Body interpreted Article VI:2 in addressing the question of whether Members may choose to impose other types of anti-dumping measures than anti-dumping duties. The

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[510] (*footnote original*) We note, however, that, as discussed in our Report in *Guatemala – Cement I*, the *Anti-Dumping Agreement* does not incorporate by reference Articles XXII and XXIII of the GATT 1994: Appellate Body Report on *Guatemala – Cement I*, para. 64 and footnote 43.

[511] (*footnote original*) See, for example, Panel Report on *US – Superfund*; Panel Report on *US – Section 337*; Panel Report on *Thailand – Cigarettes*; Panel Report on *US – Malt Beverages*; and Panel Report on *US – Tobacco*. See also Panel Report on *US – Wine and Grape Products*, examining this issue in the context of a claim brought under the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement of Tariffs and Trade.

[512] (*footnote original*) See, for example, Panel Report on *Japan – Alcoholic Beverages II*, as modified by the Appellate Body Report; Panel Report on *Canada – Periodicals*, as modified by the Appellate Body Report; Panel Report on *EC – Hormones*, as modified by the Appellate Body Report; Panel Report on *Korea – Alcoholic Beverages*, as modified by the Appellate Body Report; Panel Report on *Chile – Alcoholic Beverages*, as modified by the Appellate Body Report; Panel Report on *US – FSC*, as modified by the Appellate Body Report; and Panel Report on *US – Section 110(5) Copyright Act*.

[513] Appellate Body Report on *US – 1916 Act*, paras. 59–61.

[514] Appellate Body Report on *US – 1916 Act*, para. 107.

[515] Panel Report on *US – 1916 Act (EC)*, para. 6.180. See also Panel Report on *US – 1916 Act (Japan)*, para. 6.252.

Appellate Body stated that "Article VI, and, in particular, Article VI:2, read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings."[516] See also paragraph 323 above, with respect to the discussion concerning the term "may" contained in Article VI:2. Further, the Panel on *US – 1916 Act (Japan)* discussed this issue taking into consideration preparatory works of the WTO Agreement.[517]

(b) Methodology of investigation

340. In *EC – Tube or Pipe Fittings* the issue arose whether Article VI:2 of the *GATT 1994* prescribes a certain methodology for the investigation of dumping under the *Anti-Dumping Agreement*. In this particular case, the European Communities used a period of investigation of one year in its investigation of imports from Brazil. Towards the end of this year, the Brazilian Real was devalued by 42 per cent. Brazil argued that the devaluation of the Real had "eliminated dumping by the Brazilian exporter" and that the Commission had failed to consider whether dumping existed "in the present". The Panel concluded that events occurring during the period of investigation did not require investigation authorities to reassess a determination. The Appellate Body upheld the Panel's finding and rejected Brazil's argument that Article VI:2 of the *GATT 1994* required investigation authorities to "anticipate the level of anti-dumping duty that is strictly necessary to prevent dumping in the future [by making] a reasonable assumption for the future on the basis of the data collected in the [Period of Investigation]". According to the Appellate Body, the words "in order to offset or prevent dumping" in Article VI:2 of the *GATT 1994* do not prescribe the selection of a particular methodology in the anti-dumping investigation.

> "We are unable to see an obligation flowing from the opening phrase of Article VI:2 of the GATT 1994 to Article 2 of the *Anti-Dumping Agreement* that the determination of dumping must be based on the standard of a 'reasonable assumption for the future', or that this, in turn, would require that a particular methodology be chosen under Article 2.4.2."[518]

D. RELATIONSHIP WITH OTHER ARTICLES

1. Article I

341. The Panel on *Brazil – Desiccated Coconut* found that because Article VI of *GATT 1994* did not constitute applicable law for the purposes of the dispute, the claims made under Article I (and II) of *GATT 1994*, which were derived from claims of inconsistency with Article VI of *GATT 1994*, could not succeed.[519] The Appellate Body on *Brazil – Desiccated Coconut* confirmed this finding.[520]

2. Article II

342. The Panel on *Brazil – Desiccated Coconut* found that because Article VI of *GATT 1994* did not constitute applicable law for the purposes of the dispute, the claims made under Article II (and I) of *GATT 1994*, which were derived from claims of inconsistency with Article VI of *GATT 1994*, could not succeed.[521] The Appellate Body on *Brazil – Desiccated Coconut* confirmed this finding.[522]

3. Article III

343. In *US – 1916 Act (EC)* and *US – 1916 (Japan)*, exercising judicial economy, the Panel found that the United States' 1916 Act was inconsistent with Article VI of the *GATT 1994*. However, the Panel did not also examine the EC claim that it was inconsistent with Article III of *GATT 1994*. See paragraph 288 above.

4. Article XI

344. In *US – 1916 Act (Japan)*, exercising judicial economy, the Panel did not examine a claim under Article XI of *GATT 1994*, after having found a violation of Article VI. See paragraph 420 below.

E. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Anti-Dumping Agreement

345. As the complainant had not established a *prima facie* case of a violation of Articles 2.1 and 2.2 of the *Anti-Dumping Agreement*, the Panel on *US – 1916 Act (EC)* stated that "[t]he fact that we found a violation of Article VI:1 of the GATT 1994 is not as such sufficient to conclude that Articles 2.1 and 2.2 of the Anti-Dumping Agreement have been breached, in the absence of more specific arguments and evidence."[523]

346. In *US – 1916 Act (Japan)*, the Panel was faced with the question whether it could make findings under Article VI, without, at the same time, making a finding under a provision of the *Anti-Dumping Agreement* or whether "the link between Article VI and the Anti-Dumping Agreement is such as to make impossible a finding under Article VI only". The Panel referred

[516] Appellate Body Report on *US – 1916 Act*, para. 137.
[517] Panel Report on *US – 1916 Act (Japan)*, paras. 6.226–6.229.
[518] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 76. For further arguments to in support of this finding see paras. 78 – 82.
[519] Panel Report on *Brazil – Desiccated Coconut*, para. 281.
[520] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 21.
[521] Panel Report on *Brazil – Desiccated Coconut*, para. 281.
[522] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 21.
[523] Panel Report on *US – 1916 Act (EC)*, para. 6.209.

to the findings of the Panel on *India – Quantitative Restrictions* and of the Appellate Body in *Brazil – Desiccated Coconut* and distinguished these two cases from the issue before it. The Panel then concluded that it could "make findings under Article VI without, at the same time, having to make findings under the provisions of the Anti-Dumping Agreement, and *vice-versa*":

> "Regarding the relationship between Article VI and the Anti-Dumping Agreement and, in particular, the question whether we could make findings regarding Article VI independently from the Anti-Dumping Agreement, we note that the issue addressed by the panel and the Appellate Body in *Brazil – Desiccated Coconut*, to which the United States refers, must be differentiated from the one before us. In *Brazil – Desiccated Coconut*, the question was one of application of Article VI of the GATT when the WTO Agreement on Subsidies and Countervailing Measures did not apply. In the present case, the issue is whether the Panel can make findings in relation to Article VI only or whether the link between Article VI and the Anti-Dumping Agreement is such as to make impossible a finding under Article VI only.
>
> We note that the panel in the *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*[524] case did not make findings under Article XVIII:11 of the GATT 1994 in isolation from the Understanding on Balance-of-Payments Provisions of the GATT 1994. Likewise, we have no intention to address Article VI in isolation from the Anti-Dumping Agreement. In the present case, the complainant has made claims based on the violation of provisions of Article VI and the Anti-Dumping Agreement. In our opinion, if the panel in *Brazil – Desiccated Coconut* confirmed that Article VI and the Agreement on Subsidies and Countervailing Measures were an 'inseparable package of rights and obligations', this is because the solution proposed by the complainant would have led to apply Article VI in total disregard of the Agreement on Subsidies and Countervailing Measures. Such a solution cannot even be considered in our case. Article VI and the Anti-Dumping Agreement are part of the same treaty: the WTO Agreement. In application of the customary rules of interpretation of international law, we are bound to interpret Article VI of the GATT 1994 as part of the WTO Agreement and, pursuant to Article 31 of the Vienna Convention, the Anti-Dumping Agreement forms part of the context of Article VI. This implies that we must look at Article VI and the Anti-Dumping Agreement as part of an 'inseparable package of rights and obligations' and that Article VI should not be interpreted in a way that would deprive either Article VI or the Anti-Dumping Agreement of meaning.[525] However, this obligation does not prevent us from making findings in relation to Article VI only, as the panel did in its report on *India – Quantitative Restrictions*.
>
> We conclude that we can make findings under Article VI without, at the same time, having to make findings under the provisions of the Anti-Dumping Agreement, and *vice-versa*. However, the fact that Article VI and the Anti-Dumping Agreement represent an inseparable package of rights and disciplines requires that we interpret each of the provisions invoked by Japan in its claims in conjunction with the other relevant provisions of this 'inseparable package', so as to give meaning to all of them."[526]

347. Also, the Panel on *US – 1916 Act (EC)* explained its exercise of judicial economy with respect to Article 3 as follows:

> "Since we found above that the 1916 Act violated Article VI:1 by not providing for an injury test compatible with the terms of that Article and since Article 3 simply addresses in more detail the requirement of 'material injury' contained in Article VI:1, we do not find it necessary to make specific findings under Article 3 and therefore exercise judicial economy, as we are entitled to do under GATT panel practice and WTO panel and Appellate Body practice."[527]

2. Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade

348. The Panel on *Brazil – Desiccated Coconut* discussed the legal relevance of the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade to Article VI of the *GATT 1994*. See paragraphs 317–321 above.

3. SCM Agreement

349. In the *Brazil – Desiccated Coconut* dispute, the Panel was faced with the question "whether Article VI creates rules which are separate and distinct from those of the SCM Agreement, and which can be applied without reference to that Agreement, or whether Article VI of GATT 1994 and the SCM Agreement represent an inseparable package of rights and disciplines that must be considered in conjunction."[528] In phrasing this issue, the Panel on *Brazil – Desiccated Coconut* made clear that the *SCM Agreement* did not supersede Article VI of *GATT 1994* as the basis for the WTO discipline of countervailing measures. The Panel stated:

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[524] (*footnote original*) Panel Report on *India – Quantitative Restrictions*, paras. 5.18–5.19.
[525] (*footnote original*) Appellate Body Report on *Brazil – Desiccated Coconut*, paras. 74 and 81–83.
[526] Panel Report on *US – 1916 Act (Japan)*, paras. 6.92–6.94.
[527] Panel Report on *US – 1916 Act (EC)* para. 6.211. See also Panel Report on *US – 1916 Act (Japan)*, para. 6.254.
[528] Panel Report on *Brazil – Desiccated Coconut*, para. 227.

"It is evident that both Article VI of GATT 1994 and the SCM Agreement have force, effect, and purpose within the WTO Agreement. That GATT 1994 has not been superseded by other Multilateral Agreements on Trade in Goods . . . is demonstrated by a general interpretive note to Annex 1A of the WTO Agreement. The fact that certain important provisions of Article VI of GATT 1994 are neither replicated nor elaborated in the SCM Agreement further demonstrates this point. Thus, the question for consideration is not whether the SCM Agreement supersedes Article VI of GATT 1994."[529]

350. The Appellate Body on *Brazil – Desiccated Coconut* confirmed the statement by the Panel that the *SCM Agreement* did not supersede Article VI of *GATT 1994*[530], and stated:

"The relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis. Although the provisions of the GATT 1947 were incorporated into, and became a part of the GATT 1994, they are not the sum total of the rights and obligations of WTO Members concerning a particular matter. For example, with respect to subsidies on agricultural products, Articles II, VI and XVI of the GATT 1994 alone do not represent the total rights and obligations of WTO Members. The *Agreement on Agriculture* and the *SCM Agreement* reflect the latest statement of WTO Members as to their rights and obligations concerning agricultural subsidies. The general interpretative note to Annex 1A was added to reflect that the other goods agreements in Annex 1A, in many ways, represent a substantial elaboration of the provisions of the GATT 1994, and to the extent that the provisions of the other goods agreements conflict with the provisions of the GATT 1994, the provisions of the other goods agreements prevail. This does not mean, however, that the other goods agreements in Annex 1A, such as the *SCM Agreement*, supersede the GATT 1994."[531]

351. The Appellate Body on *Brazil – Desiccated Coconut*, in addressing the issue of the scope of Article VI of the *GATT 1994*, noted that "[t]he relationship between the *SCM Agreement* and Article VI of *GATT 1994* is set out in Articles 10 and 32.1 of the *SCM Agreement*."[532] See paragraph 316 above. With respect to the Appellate Body's other findings on this issue, see the excerpts referenced in the Chapter on the *SCM Agreement*, Section X.B.3.

352. In *Brazil – Desiccated Coconut*, the Appellate Body further touched on the relationship between Article VI of the *GATT 1994* and the *SCM Agreement* in clarifying the scope of Article VI. See paragraphs 318–319 above.

VIII. ARTICLE VII

A. TEXT OF ARTICLE VII

Article VII
Valuation for Customs Purposes

1. The contracting parties recognize the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties or other charges* or restrictions on importation and exportation based upon or regulated in any manner by value. Moreover, they shall, upon a request by another contracting party review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles. The CONTRACTING PARTIES may request from contracting parties reports on steps taken by them in pursuance of the provisions of this Article.

2. (*a*) The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.*

(*b*) "Actual value" should be the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. To the extent to which the price of such or like merchandise is governed by the quantity in a particular transaction, the price to be considered should uniformly be related to either (i) comparable quantities, or (ii) quantities not less favourable to importers than those in which the greater volume of the merchandise is sold in the trade between the countries of exportation and importation.*

(*c*) When the actual value is not ascertainable in accordance with subparagraph (*b*) of this paragraph, the value for customs purposes should be based on the nearest ascertainable equivalent of such value.*

3. The value for customs purposes of any imported product should not include the amount of any internal tax, applicable within the country of origin or export, from which the imported product has been exempted or has been or will be relieved by means of refund.

4. (*a*) Except as otherwise provided for in this paragraph, where it is necessary for the purposes of paragraph 2 of this Article for a contracting party to convert into its own currency a price expressed in the currency of another country, the conversion rate of exchange to be used shall be based, for each currency involved, on the

[529] Panel Report on *Brazil – Desiccated Coconut*, para. 227.
[530] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 14.
[531] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 14.
[532] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 16.

par value as established pursuant to the Articles of Agreement of the International Monetary Fund or on the rate of exchange recognized by the Fund, or on the par value established in accordance with a special exchange agreement entered into pursuant to Article XV of this Agreement.

(*b*) Where no such established par value and no such recognized rate of exchange exist, the conversion rate shall reflect effectively the current value of such currency in commercial transactions.

(*c*) The CONTRACTING PARTIES, in agreement with the International Monetary Fund, shall formulate rules governing the conversion by contracting parties of any foreign currency in respect of which multiple rates of exchange are maintained consistently with the Articles of Agreement of the International Monetary Fund. Any contracting party may apply such rules in respect of such foreign currencies for the purposes of paragraph 2 of this Article as an alternative to the use of par values. Until such rules are adopted by the Contracting Parties, any contracting party may employ, in respect of any such foreign currency, rules of conversion for the purposes of paragraph 2 of this Article which are designed to reflect effectively the value of such foreign currency in commercial transactions.

(*d*) Nothing in this paragraph shall be construed to require any contracting party to alter the method of converting currencies for customs purposes which is applicable in its territory on the date of this Agreement, if such alteration would have the effect of increasing generally the amounts of duty payable.

5. The bases and methods for determining the value of products subject to duties or other charges or restrictions based upon or regulated in any manner by value should be stable and should be given sufficient publicity to enable traders to estimate, with a reasonable degree of certainty, the value for customs purposes.

B. TEXT OF *AD* ARTICLE VII

Ad Article VII
Paragraph 1

The expression "or other charges" is not to be regarded as including internal taxes or equivalent charges imposed on or in connection with imported products.

Paragraph 2

1. It would be in conformity with Article VII to presume that "actual value" may be represented by the invoice price, plus any non-included charges for legitimate costs which are proper elements of "actual value" and plus any abnormal discount or other reduction from the ordinary competitive price.

2. It would be in conformity with Article VII, paragraph 2 *(b)*, for a contracting party to construe the phrase "in the ordinary course of trade . . . under fully competitive conditions", as excluding any transaction wherein the buyer and seller are not independent of each other and price is not the sole consideration.

3. The standard of "fully competitive conditions" permits a contracting party to exclude from consideration prices involving special discounts limited to exclusive agents.

4. The wording of subparagraphs *(a)* and *(b)* permits a contracting party to determine the value for customs purposes uniformly either (1) on the basis of a particular exporter's prices of the imported merchandise, or (2) on the basis of the general price level of like merchandise.

C. INTERPRETATION AND APPLICATION OF ARTICLE VII

No jurisprudence or decision of a relevant WTO body.

1. Reference to GATT practice

353. With respect to GATT practice concerning Article VII, see GATT Analytical Index, pages 259–265.

IX. ARTICLE VIII

A. TEXT OF ARTICLE VIII

Article VIII
*Fees and Formalities connected with Importation and Exportation**

1. (*a*) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.

(*b*) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in subparagraph (*a*).

(*c*) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.*

2. A contracting party shall, upon request by another contracting party or by the CONTRACTING PARTIES, review the operation of its laws and regulations in the light of the provisions of this Article.

3. No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without

fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.

4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:

(*a*) consular transactions, such as consular invoices and certificates;

(*b*) quantitative restrictions;

(*c*) licensing;

(*d*) exchange control;

(*e*) statistical services;

(*f*) documents, documentation and certification;

(*g*) analysis and inspection; and

(*h*) quarantine, sanitation and fumigation.

B. TEXT OF *AD* ARTICLE VIII

Ad Article VIII

1. While Article VIII does not cover the use of multiple rates of exchange as such, paragraphs 1 and 4 condemn the use of exchange taxes or fees as a device for implementing multiple currency practices; if, however, a contracting party is using multiple currency exchange fees for balance of payments reasons with the approval of the International Monetary Fund, the provisions of paragraph 9 *(a)* of Article XV fully safeguard its position.

2. It would be consistent with paragraph 1 if, on the importation of products from the territory of a contracting party into the territory of another contracting party, the production of certificates of origin should only be required to the extent that is strictly indispensable.

C. INTERPRETATION AND APPLICATION OF ARTICLE VIII

1. Article VIII:1(a)

354. In *Argentina – Textiles and Apparel*, the Panel addressed an Argentine *ad valorem* tax on imports of 3 per cent, called a "statistical tax", described by Argentina as designed to cover the cost of providing a statistical service in the form of a reliable database for foreign trade operators. The Panel found that this statistical tax was inconsistent with the substantive requirements of Article VIII:1(a) of *GATT 1994*. (Argentina subsequently did not appeal this finding, but claimed that the Panel had failed to take properly into account a relevant obligation by Argentina towards the IMF.) The Panel emphasized that an *ad valorem* tax, by its very design, is not "limited in amount to the approximate cost of services rendered", as required by Article VIII:1(a):

> "The meaning of Article VIII was examined in detail in the Panel Report on *United States – Customs User Fee*.[533] The panel found that Article VIII's requirement that the charge be 'limited in amount to the approximate cost of services rendered' is 'actually a dual requirement, because the charge in question must first involve a "service" rendered, and then the level of the charge must not exceed the approximate cost of that "service"'.[534] According to the panel report, the term 'services rendered' means 'services rendered to the individual importer in question'.[535] In the present case Argentina states that the service is not rendered to the individual importer, or to the specific importer associated with a particular operation, but to foreign trade operators in general and foreign trade as an activity per se.
>
> An *ad valorem* duty with no fixed maximum fee, by its very nature, is not 'limited in amount to the approximate cost of services rendered'. For example, high-price items necessarily will bear a much greater tax burden than low-price goods, yet the service accorded to both is essentially the same. An unlimited *ad valorem* charge on imported goods violates the provisions of Article VIII because such a charge cannot be related to the cost of the service rendered. For example, in the *Customs User Fee* report, the panel examined the consistency with Article VIII of 0.22 and 0.17 per cent *ad valorem* customs merchandise processing fees with no upper limits. The panel concluded that 'the term "cost of services rendered" . . . in Article VIII:1(a) must be interpreted to refer to the cost of the customs processing for the individual entry in question and accordingly that the *ad valorem* structure of the United States merchandise processing fee was inconsistent with Article VIII:1(a) to the extent that it caused fees to be levied in excess of such costs'[536]."[537]

355. In support of its finding that an *ad valorem* tax could not be said to be commensurate with the "cost of services rendered", the Panel on *Argentina – Textiles and Apparel* refered to the Report of the Working Party on *Accession of the Democratic Republic of the Congo*.[538] The Panel also rejected Argentina's argument that its tax had been enacted for "fiscal purposes":

> "Argentina's statistical tax is levied on an *ad valorem* basis with no ceiling. As described in paragraph 6.70 above, Argentina's tax is clearly not related to the cost of a service rendered to the specific importers concerned. The tax as assessed on many goods is not in proportion

[533] (*footnote original*) Panel Report on *US – Customs User Fee*.
[534] (*footnote original*) Panel Report on *US – Customs User Fee*, para. 69.
[535] (*footnote original*) Panel Report on *US – Customs User Fee*, para. 80.
[536] (*footnote original*) Panel Report on *US – Customs User Fee*, para. 86.
[537] Panel Report on *Argentina – Textiles and Apparel*, paras. 6.74–6.75.
[538] (*footnote original*) Adopted on 29 June 1971, BISD 18S/89, para. 5.

to the cost of any service rendered. The tax purportedly raises revenue for the purpose of financing customs activities related to the registration, computing and data processing of information on both imports and exports. While the gathering of statistical information concerning imports may benefit traders in general, Article VIII bars the levying of any tax or charge on importers to support the related costs 'for the individual entry in question' since it will also benefit exports and exporters.[539]

As to Argentina's argument that it was collecting this tax for 'fiscal' purposes in the context of its undertakings with the IMF, we note that not only does Article VIII of GATT expressly prohibit such measures for fiscal purposes but that clearly a measure for fiscal purposes will normally lead to a situation where the tax results in charges being levied in excess of the approximate costs of the statistical services rendered."[540]

356. Argentina did not appeal the findings of the Panel on *Argentina – Textiles and Apparel*, quoted in paragraphs 354–355 above. However, before the Appellate Body, Argentina argued that the Panel erred in law in failing to take account Argentina's obligations to the IMF in the Panel's interpretation of Article VIII. Specifically, Argentina claimed that a "Memorandum of Understanding" between Argentina and the IMF included an "undertaking" or an "obligation" on the part of Argentina to collect a specified amount in the form of a statistical tax. Argentina pointed to a statement in the aforementioned memorandum according to which the fiscal measures to be adopted by Argentina include ". . . increases in import duties, including a temporary 3 per cent surcharge on imports". Argentina also argued that paragraph 10 of the Agreement between the IMF and the WTO[541] and paragraph 5 of the so-called Declaration on Coherence[542] require that the imposition on governments of "cross-conditionality or additional conditions" must be avoided. The Appellate Body found that Argentina had failed to demonstrate an "irreconcilable conflict between its 'Memorandum of Understanding' with the IMF and its obligations under Article VIII of GATT":

"[T]the Panel does not appear to have been convinced that Argentina had a legally binding agreement with the IMF at all. From the panel record in this case, it does not appear possible to determine the precise legal nature of this Memorandum on Economic Policy, nor the extent to which commitments undertaken by Argentina in this Memorandum constitute legally binding obligations. We note that page 7 of the Memorandum on Economic Policy refers to "a temporary 3 percent surcharge on imports", which is not necessarily the same thing as the 3 per cent statistical tax levied on imports. Argentina did not show an irreconcilable conflict between the provisions of its "Memorandum of Understanding" with the IMF and the provisions of Article VIII of the GATT 1994. We thus agree with the Panel's implicit finding that Argentina failed to demonstrate that it had a legally binding commitment to the IMF that would somehow supersede Argentina's obligations under Article VIII of the GATT 1994."[543]

357. The Panel on *US – Certain EC Products* examined the consistency with several GATT provisions of the increased bonding requirements imposed by the United States on imports from the European Communities in order to secure the collection of additional import duties that were only later authorized by the DSB. The Panel considered that the costs relating to the bonding requirements upon importation could not constitute the "approximate cost of services rendered" in the sense of Article VIII:

"The meaning of Article VIII was examined in the adopted Panel Report on *United States – Customs Users Fee*[544] and in the adopted Appellate Body and Panel Reports on *Argentina – Textiles*. It was found that Article VIII's requirement that the charge be 'limited in amount to the approximate cost of services rendered' is 'actually a dual requirement, because the charge in question must first involve a "service" rendered, and then the level of the charge must not exceed the approximate cost of that "service".'[545] The term 'services rendered' means 'services rendered to the individual importer in question.'[546]

Although very briefly in its rebuttals, the United States argued that bonding requirements could be viewed as a form of fee for services rendered (the services being the 'early release of merchandise') and therefore should benefit from the carve-out of Article II:2(c) of GATT, the United States has not submitted any data on the second requirement. There is no evidence that what was required from importers represented any such approximate costs of any service. It is also difficult to understand why the costs of such service would have suddenly increased on 3 March (did the United States provide more services to importers on 3 March?), and then only for listed imports from the European Communities."[547]

2. Reference to GATT practice

358. With respect to GATT practice concerning Article VIII:1, see GATT Analytical Index, pages 268–281.

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[539] (*footnote original*) Panel Report on *US – Customs User Fee*, paras. 84–86.

[540] Panel Report on *Argentina – Textiles and Apparel*, paras. 6.77–6.78.

[541] Agreement between the International Monetary Fund and the World Trade Organization, WT/L/195, Annex I.

[542] Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking.

[543] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 69.

[544] (*footnote original*) Panel Report on *US – Customs User Fee.*

[545] (*footnote original*) Panel Report on *US – Customs User Fee*, para. 69.

[546] (*footnote original*) Panel Report on *US – Customs User Fee*, para. 80.

[547] Panel Report on *US – Certain EC Products*, paras. 6.69–6.70.

D. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. WTO Agreement

359. In *Argentina – Textiles and Apparel*, the Appellate Body agreed that that there is nothing in the Agreement between the IMF and the WTO, the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund or the so-called Declaration on Coherence[548] which justifies a conclusion that a Member's commitments to the IMF shall prevail over its obligations under Article VIII of the GATT 1994.[549] See Chapter on the *WTO Agreement*, Section IV.B.5(iii).

2. Agreement between the IMF and the WTO

360. In *Argentina – Textiles and Apparel*, the Appellate Body agreed that that there is nothing in the Agreement between the IMF and the WTO, the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund which justifies a conclusion that a Member's commitments to the IMF shall prevail over its obligations under Article VIII of the GATT 1994.[550] See Chapter on the *WTO Agreement*, Section IV.B.5(iii).

3. Declaration on Coherence

361. In *Argentina – Textiles and Apparel*, the Appellate Body agreed that that there is nothing in the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking (Declaration on Coherence) which would justify a conclusion that a Member's commitments to the IMF shall prevail over its obligations under Article VIII of the *GATT 1994*.[551] See Chapter on the *WTO Agreement*, Section IV.B.5(iii).

X. ARTICLE IX

A. TEXT OF ARTICLE IX

Article IX
Marks of Origin

1. Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.

2. The contracting parties recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.

3. Whenever it is administratively practicable to do so, contracting parties should permit required marks of origin to be affixed at the time of importation.

4. The laws and regulations of contracting parties relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost.

5. As a general rule, no special duty or penalty should be imposed by any contracting party for failure to comply with marking requirements prior to importation unless corrective marking is unreasonably delayed or deceptive marks have been affixed or the required marking has been intentionally omitted.

6. The contracting parties shall co-operate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation. Each contracting party shall accord full and sympathetic consideration to such requests or representations as may be made by any other contracting party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other contracting party.

B. INTERPRETATION AND APPLICATION OF ARTICLE IX

No jurisprudence or decision of a competent WTO body.

1. Reference to GATT Practice

362. With respect to GATT practice concerning Article VIII:1, see GATT Analytical Index, pages 288–289.

XI. ARTICLE X

A. TEXT OF ARTICLE X

Article X
Publication and Administration of Trade Regulations

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements,

[548] With respect to the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policy-making, see Chapter on *WTO Agreement*, Section XIX

[549] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 70.

[550] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 70.

[551] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 70.

restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

3. (*a*) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

(*b*) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

(*c*) The provisions of subparagraph (*b*) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph.

B. INTERPRETATION AND APPLICATION OF ARTICLE X

1. General

363. In *EC – Poultry*, the Appellate Body rejected Brazil's claim that the retroactive application of transitional safeguard measures under the Agreement on Textiles and Clothing was prohibited by Article X. The Appellate Body briefly discussed the scope of Article X as follows:

> "Article X relates to the *publication* and *administration* of 'laws, regulations, judicial decisions and administrative rulings of general application', rather than to the *substantive content* of such measures.[552] . . .
>
> Thus, to the extent that Brazil's appeal relates to the *substantive content* of the EC rules themselves, and not to their *publication* or *administration*, that appeal falls outside the scope of Article X of the GATT 1994."[553]

2. Article X:1

(a) "of general application"

(i) Interpretation

364. In *US – Hot-Rolled Steel*, the Panel was confronted with an alleged violation of Article X:3(a). However, before addressing this question the Panel ruled, in a preliminary finding not reviewed by the Appellate Body, that the anti-dumping measure did not constitute a measure "of general application" within the meaning of Article X:1. The Panel held:

> "[F]inally, we have been presented with arguments alleging violation of Article X:3(a) of GATT 1994 which relate to the actions of the United States in the context of a single anti-dumping investigation. We doubt whether the final anti-dumping measure before us in this dispute can be considered a measure of 'general application'. In this context, we note that Japan has not even alleged, much less established, a pattern of decision-making with respect to the specific matters it is raising which would suggest a lack of uniform, impartial and reasonable administration of the US anti-dumping law. While it is not inconceivable that a Member's actions in a single instance might be evidence of lack of uniform, impartial, and reasonable administration of its laws, regulations, decisions and rulings, we consider that the actions in question would have to have a significant impact on the overall administration of the law, and not simply on the outcome in the single case in question. Moreover, we consider it unlikely that such a conclusion could be reached where the actions in the single case in question were, themselves, consistent

[552] Following this sentence, the Appellate Body cited the Appellate Body Report on *EC – Bananas III*, para. 200, which is referenced in para. 373 of this Chapter.

[553] Appellate Body Report on *EC – Poultry*, para. 115.

with more specific obligations under other WTO Agreements."[554]

365. In *US – Underwear*, the Appellate Body agreed with the following finding of the Panel on the term "of general application":[555]

> "We note that Article X:1 of GATT 1994, which also uses the language 'of general application', includes 'administrative rulings' in its scope. The mere fact that the restraint at issue was an administrative order does not prevent us from concluding that the restraint was a measure of general application. Nor does the fact that it was a country-specific measure exclude the possibility of it being a measure of general application. If, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers, we find it to be a measure of general application."[556]

366. In *EC – Poultry*, the Appellate Body reviewed the Panel's finding that certain import licensing of the European Communities on certain poultry products was not inconsistent with Article X because "the information which Brazil claims the EC should have made available concerns a specific shipment, which is outside the scope of Article X of GATT."[557] In upholding the Panel's finding, the Appellate Body discussed the term "of general application" as follows:

> "Article X:1 of the GATT 1994 makes it clear that Article X does not deal with specific transactions, but rather with rules 'of general application'. It is clear to us that the EC rules pertaining to import licensing set out in Regulation 1431/94 are rules 'of general application'. . . .
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> . . .
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> . . . Although it is true, as Brazil contends, that any measure of general application will always have to be applied in specific cases, nevertheless, the particular treatment accorded to each individual shipment cannot be considered a measure 'of general application' within the meaning of Article X. The Panel cited the following passage from the panel report in *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*:
>
> > 'The mere fact that the restraint at issue was an administrative order does not prevent us from concluding that the restraint was a measure of general application. Nor does the fact that it was a country-specific measure exclude the possibility of it being a measure of general application. If, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers, we find it to be a measure of general application.'"[558]
>
> We agree with the Panel that "conversely, licences issued to a specific company or applied to a specific shipment cannot be considered to be a measure 'of general application' within the meaning of Article X."[559]

367. In *Japan – Film*, the Panel, referring to the Panel Report on *US – Underwear* referenced in paragraph 364 above, interpreted the term "of general application" as follows:

> "[I]t stands to reason that inasmuch as the Article X:1 requirement applies to all administrative rulings of general application, it also should extend to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases. At the same time, we consider that it is incumbent upon the United States in this case to clearly demonstrate the existence of such unpublished administrative rulings in individual matters which establish or revise principles applicable in future cases."[560]

(ii) Reference to GATT practice

368. For GATT practice on this subject-matter, see GATT Analytical Index, pages 294–295.

3. Article X:2

(a) General

369. In *US – Underwear*, the Appellate Body described the policy underlying Article X:2 as pertaining to transparency and due process:

> "Article X:2, *General Agreement*, may be seen to embody a principle of fundamental importance – that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures."[561]

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[554] Panel Report on *US – Hot-Rolled Steel*, para. 7.268.
[555] Appellate Body Report on *US – Underwear*, p. 21.
[556] Panel Report on *US – Underwear*, para. 7.65.
[557] Panel Report on *EC – Poultry*, para. 269.
[558] (*footnote original*) Panel Report on *US – Underwear*, para. 7.65. In that case, we agreed with the panel's finding that the safeguard measure restraint imposed by the United States was "a measure of general application" within the contemplation of Article X:2 of the GATT 1994. See Appellate Body Report on *US – Underwear*, p. 21.
[559] Appellate Body Report on *EC – Poultry*, paras. 111 and 113.
[560] Panel Report on *Japan – Film*, para. 10.388.
[561] Appellate Body Report on *US – Underwear*, p. 21.

370. The Panel on *US – Underwear* was called on to find whether a Member is entitled, when taking transitional safeguard measures under Article 6 of the ATC, to backdate the application of such measures to the date of publication of its request for consultations. The Panel opined that Article 6.10 of the ATC, the relevant provision, was "silent" as to this question and turned to Article X of the GATT. The Panel concluded that "if the importing country publishes the proposed restraint period and restraint level after the request for consultations, it can later set the initial date of the restraint period as the date of the publication of the proposed restraint".[562] Upon review, the Appellate Body disagreed with the Panel's finding that Article 6.10 of the ATC was "silent" as to whether a transitional safeguard measure could be backdated or not and found that Article 6.10 prohibited such backdating. With respect to the Panel's finding that Article X of GATT permitted such backdating, the Appellate Body held that prior publication of a measure, as required under Article X of GATT, could not, in and of itself, justify the retroactive effect of a restrictive governmental measure:

> "[W]e are bound to observe that Article X:2 of the *General Agreement*, does not speak to, and hence does not resolve, the issue of permissibility of giving retroactive effect to a safeguard restraint measure. The presumption of prospective effect only does, of course, relate to the basic principles of transparency and due process, being grounded on, among other things, these principles. But prior publication is required for all measures falling within the scope of Article X:2, not just *ATC* safeguard restraint measures sought to be applied retrospectively. Prior publication may be an autonomous condition for giving effect at all to a restraint measure. Where no authority exists to give retroactive effect to a restrictive governmental measure, that deficiency is not cured by publishing the measure sometime before its actual application. The necessary authorization is not supplied by Article X:2 of the *General Agreement*."[563]

4. Article X:3

(a) General

371. In *US – Shrimp*, the Appellate Body ruled that that the lack of transparency of the disputed legislation was contrary to the spirit of Article X:3. The Appellate Body held:

> "[T]he provision of Article X:3 of the GATT 1994 bear upon this matter. In our view, Section 609 falls within the "laws, regulations, judicial decisions and administrative rulings of general application" described in Article X:1. Inasmuch there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the member imposing the measure and which effectively results in a suspension *pro hac vice* of the treaty rights of other members.
>
> It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and ex parte nature of the internal governmental procedures applied by the competent officials in the Office of Marine Conservation, the Department of State, and the United States National Marine Fisheries Service throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994."[564]

(i) Scope of paragraph 3

372. In *EC – Bananas III*, the Panel rejected the EC argument that Article X:3 applies only to internal measures, but not to licensing regulations for tariff quotas. In its finding, the Panel referred to Article X:1 and held that it "defines the coverage of Article X:3(a)".[565]

(b) Article X:3(a)

(i) Scope of Article X:3(a)

373. In *EC – Bananas III*, the Appellate Body examined the European Communities' appeal against the Panel's finding that the imposition of different import licensing systems on like products imported from different Members was inconsistent with Article X:3(a). In upholding the Panel's finding, the Appellate Body defined the scope of paragraph 3(a) by drawing a distinction between laws, regulations, decisions and rulings *themselves* and their *administration*:

> "The text of Article X:3(a) clearly indicates that the requirements of 'uniformity, impartiality and reasonableness' do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is entitled 'Publication and Administration of Trade Regulations', and a reading of the other paragraphs of Article X, make it clear that Article X applies to the *administration* of

[562] Panel Report on *US – Underwear*, para. 7.69.
[563] Appellate Body Report on *US – Underwear*, p. 21.
[564] (Original footnote omitted) Appellate Body Report on *US – Shrimp*, paras. 182 – 183.
[565] Panel Report on *EC – Bananas III*, para. 7.206. Also, Panel Report on *EC – Bananas III*, para. 7.225.

laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994."[566]

374. The Appellate Body on *EC – Poultry* confirmed the above line of interpretation and found that "to the extent that Brazil's appeal relates to the *substantive content* of the EC rules themselves, and not to their *publication* or *administration*, that appeal falls outside the scope of Article X of the GATT 1994. The WTO-consistency of such substantive content must be determined by reference to provisions of the covered agreements other than Article X of the GATT 1994."[567]

375. The Panel on *Argentina – Hides and Leather* rejected Argentina's argument that Article X:3(a) only applies in situations when there is discrimination in treatment with respect to, for example, exports to two or more Members. The Panel stated:

"In our view, there is no requirement that Article X:3(a) be applied only in situations where it is established that a Member has applied its Customs laws and regulations in an inconsistent manner with respect to the imports of or exports to two or more Members.

Furthermore, Article X:3(a), by its terms, calls for a uniform, impartial and reasonable administration of trade-related regulations. Nowhere does it refer to Members or products originating in or destined for certain Members' territories, as is explicitly contained in other GATT 1994 Articles such as I, II and III. Indeed, Article X:1 requires the prompt publication of trade-related regulations 'so as to enable governments and *traders* to become acquainted with them.' Similarly, Article X:3(b) requires Members to provide for domestic review procedures relating to customs matters to which normally only private traders, not Members would have access.[568] These references undercut Argentina's argument that Article X can only apply in situations where there is discrimination between WTO *Members*."[569]

376. Further, in *Argentina – Hides and Leather*, the Panel disagreed with Argentina's argument that a violation of Article X:3(a) can be found not in the substance of a regulation but in its administration. The Panel was reviewing an Argentine measure which authorized the presence of representatives of certain industrial associations during customs controls of bovine raw hides and certain other hides before export. The Panel found that Article X:3(a) applied to the measure at issue, because it did not contain "substantive Customs rules for enforcement of export laws", but rather "provide[d] for a certain manner of applying those substantive rules":

"If the substance of a rule could not be challenged, even if the rule was administrative in nature, it is unclear what could ever be challenged under Article X. First, there is no requirement in Article X:3(a) that it apply only to 'unwritten' rules. Again, this would be contrary to that provision's own language linking it to Article X:1. Second, such an approach would also likely run counter to the other aspect of the Appellate Body's holding in *European Communities – Poultry* regarding Article X, to the effect that it applies to rules of general application and not to specific shipments.[570] Looking only to individual Customs officers' enforcement actions, rather than measures such as Resolution 2235, as Argentina implies, would almost certainly require a review of a specific instance of abuse rather than the general rule applicable.[571] This would effectively write Article X:3(a) out of existence, which we cannot agree with.[572]

Thus, we are left with a situation where we have a written provision, Resolution 2235, and we need to determine whether this Resolution is substantive or administrative. In our view it is administrative in nature and therefore properly subject to review under Article X:3(a). Resolution 2235 does not establish substantive Customs rules for enforcement of export laws. Argentina has pointed out that those are contained primarily in the Customs Code (Law No. 22415), Resolution (ANA) No. 1284/95 and Resolution (ANA) No. 125/97.[573] Rather, Resolution 2235 provides for a means to involve private persons in assisting Customs officials in the application and enforcement of the substantive rules, namely, the rules on classification and export duties. Resolution 2235 does not create the classification requirements; it does not provide for export refunds; it does not impose export duties. It merely provides for a certain manner of applying those substantive rules. This measure clearly is administrative in nature."[574]

377. In *US – Corrosion-Resistant Steel Sunset Review*, Japan argued that the United States' sunset review laws were administrative in nature and consequently could be challenged under Article X:3(a) of the *GATT 1994*.

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[566] Appellate Body Report on *EC – Bananas*, para. 200. See also Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.289.

[567] Appellate Body Report on *EC – Poultry*, para. 115.

[568] (*footnote original*) In fact, Article X:3(b), in its second sentence, uses the word "importer".

[569] Panel Report on *Argentina – Hides and Leather*, paras. 11.67–11.68.

[570] (*footnote original*) In *EC – Poultry*, the Appellate Body further stated that Article X is relevant only to measures "of general application" and not to the particular treatment of each individual shipment. See Appellate Body Report on *EC – Poultry*, paras. 111 and 113.

[571] (*footnote original*) We make this statement *arguendo* and do not imply agreement with Argentina's implicit assumption of no violation in such instances.

[572] (*footnote original*) See Appellate Body Reports on *US – Gasoline*, p. 23; *Japan – Alcoholic Beverages II*, p. 12; *Argentina – Footwear (EC)*, para. 81.

[573] (*footnote original*) Even some of these provisions arguably are procedural in nature.

[574] Panel Report on *Argentina – Hides and Leather*, paras. 11.71–11.72.

Japan had asserted that the United States' administration of its sunset review laws was inconsistent with Article X:3(a) as the United States legislation mandated self-initiation of sunset reviews without sufficient evidence. Japan also claimed that the United States' administration of sunset review laws was not uniform with different approaches with regard to Article 11.2 reviews and sunset reviews being taken. The Panel ruled, in a finding not reviewed by the Appellate Body, that Japan's allegations under Article X:3(a) related to United States laws and regulations rather than its administration and accordingly was not within the scope of Article X:3(a):

"On the first point, i.e. self-initiation of sunset reviews without any, or sufficient, evidence, Japan argues that the US statute and regulations, which mandate such self-initiation, are 'unreasonable' because they allow the DOC to disregard the substantive requirements for the initiation. Japan further submits that such self-initiation renders the administration of US law 'partial' because it favours the US domestic industry. We note that Japan made a substantive claim challenging both the US law as such and its application in this particular sunset review regarding self-initiation of sunset reviews without sufficient evidence. We recall our finding above that self-initiation of sunset reviews under Article 11.3 is not subject to the evidentiary requirements of Article 5.6. This indicates that the substantive content of this aspect of US law, i.e. evidentiary standards applicable to the self-initiation of sunset reviews, can be, and in fact has in this case been, challenged by Japan. Therefore, deriving guidance from the ruling of the Appellate Body, in *EC – Poultry*, we find that this aspect of US law cannot be challenged under Article X:3(a) of GATT 1994 because it relates to the *substance* rather than the administration of US law.

With regard to the second 'as such' allegation of Japan, i.e., different approaches taken by the United States regarding Article 11.2 and 11.3 reviews, even assuming that this argument legitimately falls within the scope of application of Article X:3(a), we understand that Japan has based its "as such" allegations here exclusively upon the Sunset Policy Bulletin. We have found above that the Sunset Policy Bulletin is not challengeable as such under the *WTO Agreement*. We therefore examine no further Japan's 'as such' allegations relying solely on the Sunset Policy Bulletin.

We therefore conclude that the administration of the US sunset review law as such was not inconsistent with Article X:3(a) of GATT 1994."[575]

378. In *US – Corrosion-Resistant Steel Sunset Review* Japan argued that the application of the US laws and regulations with regard to the sunset reviews was unreasonable and partial, and hence inconsistent with Article X:3(a). Japan based its contention on that less information was required from United States domestic producers compared with exporters. The Panel recalled WTO case law that matters relating to the substantive nature of laws and regulations go beyond the scope of Article X:3(a):

"Japan further argues that the fact that not as much information is requested from domestic producers renders the administration of US law partial.

The nature and quantity of the information that will be in the possession of foreign exporters and producers will necessarily differ from the information possessed by the domestic industry, and this information will be used for different purposes by the investigating authority. This is because generally, in investigations (and reviews), foreign exporters will be the main source of information regarding the dumping, or likelihood of continuation or recurrence of dumping, component of the determination that must be made, while domestic producers will possess more information relevant to the injury component of the determination that must be made. Consequently, we find that this aspect of Japan's claim also falls outside the scope of Article X:3(a)."[576]

379. In *US – Hot-Rolled Steel*, the Panel pointed out that, for a Member's action to violate Article X:3(a) that action should have a significant impact on the overall administration of that Member's law and not simply on the outcome of the single case in question.[577]

(ii) "administer in a uniform, impartial and reasonable manner"

380. In *Argentina – Hides and Leather*, the Panel explained the nature of the obligation under Article X:3(a) by distinguishing between transparency between WTO Members and transparency with respect to individual traders:

"In applying these tests, it is important to recall that we are not to duplicate the substantive rules of the GATT 1994. Thus, for example, the test generally will not be whether there has been discriminatory treatment in favor of exports to one Member relative to another. Indeed, the focus is on the treatment accorded by government authorities to the traders in question. This is explicit in Article X:1 which requires, *inter alia*, that all provisions 'shall be published promptly in such a manner as to enable governments and *traders* to become acquainted with them.' (emphasis added). While it is normal that the GATT 1994 should require this sort of transparency between Members, it is significant that Article X:1 goes further and specifically refer-

[575] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.293–7.295.
[576] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.305–7.306.
[577] Panel Report on *US – Hot-Rolled Steel*, para. 7.268. See also, Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.307.

ences the importance of transparency to individual traders."[578]

381. In *Argentina – Hides and Leather*, the Panel addressed the concept of "uniformity" with respect to the requirement in Article X:3(a) that laws and regulations shall be administered "in a uniform, impartial and reasonable manner". The Panel opined "that this provision should not be read as a broad anti-discrimination provision." Rather, the Panel read this requirement to stipulate "uniform administration of Customs laws and procedures between individual shippers and even with respect to the same person at different times and different places":

"The term 'uniform' appears in the GATT 1994 only with respect to administration of Customs laws. Article VII:2(b) provides that when assessing Customs valuation on the basis of 'actual value' variations may exist based on quantities provided that such prices are uniformly related to quantities in other transactions.

In addition to the term appearing in paragraph 3(a) of Article X, it also appears in paragraph 2 of that Article requiring uniform practices for certain changes in applying Customs laws. Finally, *Ad* Article I, paragraph 4, provides for uniform practices in re-application of tariff classifications and imposition of certain new classifications at the time of the provisional applications of the GATT 1947.

It is obvious from these uses of the terms that it is meant that Customs laws should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with respect to other persons. Uniform administration requires that Members ensure that their laws are applied consistently and predictably and is not limited, for instance, to ensuring equal treatment with respect to WTO Members. That would be a substantive violation properly addressed under Article I. This is a requirement of uniform administration of Customs laws and procedures between individual shippers and even with respect to the same person at different times and different places.

We are of the view that this provision should not be read as a broad anti-discrimination provision. We do not think this provision should be interpreted to require all products be treated identically. That would be reading far too much into this paragraph which focuses on the day to day application of Customs laws, rules and regulations. There are many variations in products which might require differential treatment and we do not think this provision should be read as a general invitation for a panel to make such distinctions."[579]

382. In *Argentina – Hides and Leather*, the Panel addressed an argument put forward by the European Communities based on the interpretation of the terms "impartial", contained in Article X:3(a). The European Communities argued that the Argentine measure authorizing the presence of representatives of domestic industrial associations at customs controls of bovine raw hides and certain other hides before export, persons which according to the European Communities were "partial and interested", was not an impartial application of the relevant custom rules. The Panel agreed with the European Communities:

"Much as we are concerned in general about the presence of private parties with conflicting commercial interests in the Customs process, in our view the requirement of impartial administration in this dispute is not a matter of mere presence of representatives [of the relevant industrial associations] in such processes. It all depends on what that person is permitted to do. In our view, the answer to this question is related directly to the question of access to information as part of the product classification process as discussed in the previous Section. Our concern here is focussed on the need for safeguards to prevent the inappropriate flow of one private person's confidential information to another as a result of the administration of the Customs laws, in this case the implementing Resolution 2235.

Whenever a party with a contrary commercial interest, but no relevant legal interest, is allowed to participate in an export transaction such as this, there is an inherent danger that the Customs laws, regulations and rules will be applied in a partial manner so as to permit persons with adverse commercial interests to obtain confidential information to which they have no right.

While this situation could be remedied by adequate safeguards, we do not consider that such safeguards presently are in place. Therefore, Resolution 2235 cannot be considered an impartial administration of the Customs laws, regulations and rules described in Article X:1 and, thus, is inconsistent with Article X:3(a) of the GATT 1994.[580]

383. With respect to the same Argentine measure, described in paragraph 381 above, the European Communities was also claiming that the requirement of "reasonableness" under Article X:3(a) was infringed. The Panel on *Argentina – Hides and Leather* again agreed with the European Communities:

"[W]e must conclude that a process aimed at assuring the proper classification of products, but which inherently contains the possibility of revealing confidential business information, is an unreasonable manner of administering the laws, regulations and rules identified in Article X:1 and therefore is inconsistent with Article X:3(a)."[581]

[578] Panel Report on *Argentina – Hides and Leather*, para. 11.76.
[579] Panel Report on *Argentina – Hides and Leather*, paras. 11.81–11.84.
[580] Panel Report on *Argentina – Hides and Leather*, para. 11.99–11.101.
[581] Panel Report on *Argentina – Hides and Leather*, para. 11.94.

384. In *US – Stainless Steel*, the Panel rejected Korea's claim that the United States violated Article X:3(a) by departing from its own established policy with respect to the determination of the prices of local sales which are to be compared to alleged dumping exports. The Panel held that Article X:3(a) was not "intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice":

> "We note at the outset of our examination that we have grave doubts as to whether Article X:3(a) can or should be used in the manner advocated by Korea. As the United States correctly points out, the WTO dispute settlement system 'serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements'.[582] It was not in our view intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system,[583] and a function WTO panels would be particularly ill-suited to perform. An incautious adoption of the approach advocated by Korea could however effectively convert every claim that an action is inconsistent with domestic law or practice into a claim under the *WTO Agreement*.
>
> In any event, we do not consider that the DOC in this investigation committed the 'unprecedented departure' from 'established policy' alleged by Korea such that its behaviour was either non-uniform or unreasonable. In our view, the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts differ. Nor do we consider that the requirement of reasonable administration of laws and regulations is violated merely because, in the administration of those laws and regulations, different conclusions were reached based upon differences in the relevant facts."[584]

(iii) Reference to GATT practice

385. With respect to GATT practice on this subject-matter, see GATT Analytical Index, pages 297–298.

(c) Article X:3(c)

(i) "the date of this Agreement"

386. With respect to GATT practice concerning the phrase "the date of this Agreement", see GATT Analytical Index, page 298.

C. RELATIONSHIP WITH OTHER ARTICLES

1. General

387. In *EC – Bananas III*, the Appellate Body explained the relationship between Article X and other GATT provisions. See the excerpt referenced in paragraph 373 above. This finding of the Appellate Body was also cited by the Panel on *Argentina – Hides and Leather*.[585]

2. Article I

388. In *Indonesia – Autos*, the Panel examined whether a series of measures taken by Indonesia to develop its domestic automobile industry was inconsistent with Article X as well as Articles I and III. After having found that the Indonesian National Car Programme violated "the provisions of Article I and/or Article III of GATT", the Panel did not consider it necessary to examine Japan's claims under Article X of GATT.[586]

389. In *Argentina – Hides and Leather*, the Panel rejected Argentina's argument that Article X:3(a) only applies in situations when there is discrimination in treatment with respect to, for example, exports to two or more Members. See the excerpt referenced in paragraph 374 above.

3. Article III

390. In *Indonesia – Autos*, the Panel discussed the relationship between Articles III and X. See the excerpt referenced in paragraph 388 above.

4. Reference to GATT practice

391. With respect to GATT practice in the context of the relationship between Article X of GATT and other Articles, see GATT Analytical Index, pages 298–299.

D. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Licensing Agreement

392. In *EC – Bananas III*, the Appellate Body reviewed the Panel's finding that the EC import licensing system on imports of bananas was in violation of Article X as well as Article 1.3 of the *Licensing Agreement*. The Appellate Body stated that "the provisions of Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* have identical coverage":

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[582] (*footnote original*) *DSU* Article 3.2.

[583] (*footnote original*) It is for this reason that both Article X:3(b) of *GATT 1994* and Article 13 of the *AD Agreement* require Members to maintain appropriate judicial, arbitral or administrative tribunals or procedures.

[584] Panel Report on *US – Stainless Steel*, paras. 6.50–6.51.

[585] Panel Report on *Argentina – Hides and Leather*, para. 11.60. The Panel went on to state:

> "See also the Appellate Body Report on *European Communities – Poultry*, *supra*, at para. 115, wherein the Appellate Body emphasized that to the extent Brazil's appeal related to the substantive content of the EC rules rather than to their publication or administration, it fell outside of Article X."

Panel Report on *Argentina – Hides and Leather*, fn. 366.

[586] Panel Report on *Indonesia – Autos*, para. 14.152.

"Article X:3(a) of the GATT 1994 applies to all 'laws, regulations, decisions and rulings of the kind described in paragraph 1' of Article X, which includes those, *inter alia*, 'pertaining to . . . requirements, restrictions or prohibitions on imports . . .'. The EC import licensing procedures are clearly regulations pertaining to requirements on imports and, therefore, are within the scope of Article X:3(a) of the GATT 1994. As we have concluded, the *Licensing Agreement* also applies to the EC import licensing procedures. We agree, therefore, . . . that *both* the *Licensing Agreement* and the relevant provisions of the GATT 1994, in particular, Article X:3(a), apply to the EC import licensing procedures. In comparing the language of Article 1.3 of the *Licensing Agreement* and of Article X:3(a) of the GATT 1994, we note that there are distinctions between these two articles. The former provides that 'the rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner'. The latter provides that each Member shall 'administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions or rulings of the kind described in paragraph 1 of [Article X]'.

We attach no significance to the difference in the phrases 'neutral in application and administered in a fair and equitable manner' in Article 1.3 of the *Licensing Agreement* and 'administer in a uniform, impartial and reasonable manner' in Article X:3(a) of the GATT 1994. In our view, the two phrases are, for all practical purposes, interchangeable. We agree, therefore, . . . that the provisions of Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* have identical coverage.

Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994."[587]

2. Anti-Dumping Agreement

393. In *US – DRAMS*, Korea, the complainant, claimed that a particular United States anti-dumping duty order was in violation of Article X of GATT as well as several Articles of the *Anti-Dumping Agreement*. Having already found a violation of Article 11.2 of the *Anti-Dumping Agreement*, the Panel exercised judicial economy with respect to Articles I and X of the *GATT 1994*.[588]

394. In *US – Stainless Steel*, Korea, the complainant, argued that the United States violated Article X:3(a) of GATT as well as Article 2.4.1 of the *Anti-Dumping Agreement* by performing an unnecessary "double conversion" in calculating the prices of certain local sales which are to be compared to the alleged dumping exports. After having found a violation of Article 2.4.1 in this regard, the Panel exercised judicial economy with respect to Korea's claim under Article X:3(a).[589]

XII. ARTICLE XI

A. TEXT OF ARTICLE XI

*Article XI**
General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

2. The provisions of paragraph 1 of this Article shall not extend to the following:

(*a*) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

(*b*) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;

(*c*) Import restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or

(ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

[587] Appellate Body Report on *EC – Bananas III*, paras. 203–204.
[588] Panel Report on *US – DRAMS*, para. 6.92.
[589] Panel Report on *US – Stainless Steel*, para. 6.55.

(iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors* which may have affected or may be affecting the trade in the product concerned.

B. TEXT OF *AD* ARTICLE XI

Ad Articles XI, XII, XIII, XIV and XVIII

Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations.

Ad Article XI
Paragraph 2 (c)

The term "in any form" in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective.

Paragraph 2, last subparagraph

The term "special factors" includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement.

C. INTERPRETATION AND APPLICATION OF ARTICLE XI

1. General

(a) Status of Article XI in GATT

395. The Panel on *Turkey – Textiles*, in a finding not reviewed by the Appellate Body, elaborated on the systemic significance of Article XI in the GATT framework. The Panel first stressed that Article XI was a reflection of the preference of the GATT system for tariffs over quotas among forms of border protection; it then considered the historical evolution of quantitative restrictions since the early years of GATT and emphasized the effort of the Uruguay Round to establish mechanisms to phase-out quantitative restrictions in the sectors of agriculture and textiles and clothing:

"The prohibition on the use of quantitative restrictions forms one of the cornerstones of the GATT system. A basic principle of the GATT system is that tariffs are the preferred and acceptable form of protection. Tariffs, to be reduced through reciprocal concessions, ought to be applied in a non-discriminatory manner independent of the origin of the goods (the 'most-favoured-nation' (MFN) clause). Article I, which requires MFN treatment, and Article II, which specifies that tariffs must not exceed bound rates, constitute Part I of GATT. Part II contains other related obligations, *inter alia* to ensure that Members do not evade the obligations of Part I. Two fundamental obligations contained in Part II are the national treatment clause and the prohibition against quantitative restrictions. The prohibition against quantitative restrictions is a reflection that tariffs are GATT's border protection 'of choice'. Quantitative restrictions impose absolute limits on imports, while tariffs do not. In contrast to MFN tariffs which permit the most efficient competitor to supply imports, quantitative restrictions usually have a trade distorting effect, their allocation can be problematic and their administration may not be transparent.

Notwithstanding this broad prohibition against quantitative restrictions, GATT contracting parties over many years failed to respect completely this obligation. From early in the GATT, in sectors such as agriculture, quantitative restrictions were maintained and even increased to the extent that the need to restrict their use became central to the Uruguay Round negotiations. In the sector of textiles and clothing, quantitative restrictions were maintained under the Multifibre Agreement (further discussed below). Certain contracting parties were even of the view that quantitative restrictions had gradually been tolerated and accepted as negotiable and that Article XI could not be and had never been considered to be, a provision prohibiting such restrictions irrespective of the circumstances specific to each case. This argument was, however, rejected in an adopted panel report *EEC – Imports from Hong Kong*.[590]

Participants in the Uruguay Round recognized the overall detrimental effects of non-tariff border restrictions (whether applied to imports or exports) and the need to favour more transparent price-based, i.e. tariff-based, measures; to this end they devised mechanisms to phase-out quantitative restrictions in the sectors of agriculture and textiles and clothing. This recognition is reflected in the GATT 1994 Understanding on Balance-

[590] (*footnote original*) Panel Report on *EEC – Imports Restrictions*.

of-Payments Provisions[591], the Agreement on Safeguards [592], the Agreement on Agriculture where quantitative restrictions were eliminated[593] and the Agreement on Textiles and Clothing (further discussed below) where MFA derived restrictions are to be completely eliminated by 2005."[594]

(b) Burden of proof

396. In *India – Quantitative Restrictions*, the Panel examined whether the Indian import licensing system was inconsistent with Article XI and, in case of inconsistency, whether it was justified by Article XVIII. Referring to the Appellate Body Report on *US – Wool Shirts and Blouses* and the Appellate Body Report on *EC – Hormones*, the Panel stated on the issue of the burden of proof under Article XI:

"In all instances, each party has to provide evidence in support of each of its particular assertions. This implies that the United States has to prove any of its claims in relation to the alleged violation of Article XI:1 and XVIII:11. Similarly, India has to support its assertion that its measures are justified under Article XVIII:B. We also view the rules stated by the Appellate Body as requiring that the United States as the complainant cannot limit itself to stating its claim. It must present a *prima facie* case that the Indian balance-of-payments measures are not justified by reference to Articles XI:1 and XVIII:11 of GATT 1994.[595] Should the United States do so, India would have to respond in order to rebut the claim."[596]

(c) Reference to GATT practice

397. With respect to GATT practice on this subject-matter, see the GATT Analytical Index, pages 317–319.

2. Article XI:1

(a) General

398. In *Canada – Periodicals*, the Panel found a complete ban on imports of a certain product to be inconsistent with Article XI:1 of GATT:

"Since the importation of certain foreign products into Canada is completely denied under Tariff Code 9958, it appears that this provision by its terms is inconsistent with Article XI:1 of GATT 1994."[597]

399. In *India – Autos*, India had argued that since Article XI of the *GATT 1994* dealt with border measures and the disputed Public Notice No. 60 did not deal with any such measure, it could not violate Article XI. However, the Panel found that as it required acceptance of the so-called "trade balancing condition" it imposed a restriction on imports and therefore was inconsistent with Article XI:1 of the *GATT 1994*:

"[I]n determining whether Public Notice No. 60 is inconsistent with Article XI:1 of the GATT 1994, the Panel recalls its earlier analysis of the trade balancing condition as contained in the previous section.

First, it recalls its conclusion that Public Notice No. 60, as a governmental measure requiring manufacturers to accept certain conditions in order to be allowed to import restricted automotive kits and components, constituted a 'measure' within the meaning of Article XI:1. This conclusion remains relevant to this analysis and the Panel confirms its earlier conclusion in this respect.

Second, in order to establish whether Public Notice No. 60, in itself, can be considered to be inconsistent with Article XI:1, it has to be established that it constitutes a 'restriction . . . on importation' within the meaning of that provision. The Panel recalls in this respect its earlier conclusion that the trade balancing condition, as contained both in Public Notice No. 60 and in the MOUs signed thereunder, constituted a restriction on importation contrary to Article XI:1 in that it effectively limits the amount of imports that a manufacturer may make by linking imports to commitment to undertake a certain amount of exports. Under such circumstance, an importer is not free to import as many restricted kits or components as he otherwise might so long as there is a finite limit to the amount of possible exports.

. . .

The Panel therefore concludes that Public Notice No. 60 in itself, to the extent that it requires the acceptance of the trade balancing condition in order to gain the advantage of importing the restricted products, imposes a restriction on imports and is inconsistent with Article XI:1 of the GATT 1994."[598]

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[591] As an example, the footnote to this sentence refers to paras. 2 and 3 of the GATT 1994 Understanding on the Balance-of-Payments Provisions, which both, according to the Panel, "provide that Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes."

[592] (*footnote original*) The Agreement on Safeguards also evidences a preference for the use of tariffs. Article 6 provides that provisional safeguard measures "should take the form of tariff increases" and Article 11 prohibits the use of voluntary export restraints.

[593] (*footnote original*) Under the Agreement on Agriculture, notwithstanding the fact that contracting parties, for over 48 years, had been relying a great deal on import restrictions and other non-tariff measures, the use of quantitative restrictions and other non-tariff measures was prohibited and Members had to proceed to a "tariffication" exercise to transform quantitative restrictions into tariff based measures.

[594] Panel Report on *Turkey – Textiles and Clothing*, paras. 9.63–9.65.

[595] (*footnote original*) Appellate Body Report on *Australia – Salmon*, paras. 257–259.

[596] Panel Report on *India – QR*, para. 5.119. The Panel on *US – Shrimp* also allocated the burden of proof to the complainant, referring to the Appellate Body Report on *US – Wool Shirts and Blouses*. Panel Report on *US – Shrimp*, para. 7.14. Further, the Panel on *Argentina – Hides and Leather* followed this practice. Panel Report on *Argentina – Hides and Leather*, paras. 11.11–11.14.

[597] Panel Report on *Canada – Periodicals*, para. 5.5.

[598] Panel Report on *India – Autos*, 7.318 – 7.322.

(b) "prohibitions or restrictions . . . on the importation of any product"

(i) Scope

400. The Panel on *US – Shrimp* found that the United States violated Article XI by imposing an import ban on shrimp and shrimp products harvested by vessels of foreign nations where such exporting country had not been certified by United States' authorities as using methods not leading to the incidental killing of sea turtles above certain levels. The Panel stated with reference to the term "prohibitions or restrictions" as follows:

> "[T]he US statutory provision in question] expressly requires the imposition of an import ban on imports from non-certified countries. We further note that in its judgement of December 1995, the CIT directed the US Department of State to prohibit, no later that 1 May 1996, the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology which may affect adversely those species of sea turtles the conservation of which is the subject of regulations of the Secretary of Commerce. Furthermore, the CIT ruled that the US Administration has to apply the import ban, *including to TED-caught shrimp*, as long as the country concerned has not been certified. In other words, the United States bans imports of shrimp or shrimp products from any country not meeting certain policy conditions. We finally note that previous panels have considered similar measures restricting imports to be 'prohibitions or restrictions' within the meaning of Article XI.[599]"[600]

401. The Panel on *EC – Asbestos* examined the WTO-consistency of a French ban on the manufacture, import and export, and domestic sales and transfer of certain asbestos and asbestos-containing products. In this context, the question arose whether the French measure fell under the scope of Article III or Article XI. The Panel's findings on this issue were not appealed and thus were not reviewed by the Appellate Body. The complainant, Canada, argued that this case was not addressed by the interpretative Note *Ad Article III*. Specifically, Canada was arguing that the interpretative Note *Ad Article III* only applies if the measure is applicable to the imported product and to the domestic product. However, in Canada's view, the explicit import ban did not apply to the domestic product because the domestic product was of course not imported. Moreover, since France neither produced nor mined asbestos fibres on its territory, the ban on manufacturing, processing, selling and domestic marketing was, in practical terms, equivalent to a ban on importing chrysotile asbestos fibres. The Panel first indicated, contrary to Canada's claim, that the Note *Ad Article III* applied to this case, stating:

> "[T]he word 'comme' in the French text of Note *Ad Article III* ['and' in the English text] implies in the first place that the measure applies to the imported product and to the like domestic product.[601] The Panel notes in this connection that the fact that France no longer produces asbestos or asbestos-containing products does not suffice to make the Decree a measure falling under Article XI:1. It is in fact because the Decree prohibits the manufacture and processing of asbestos fibres that there is no longer any French production. The cessation of French production is the consequence of the Decree and not the reverse. Consequently, the Decree is a measure which 'applies to an imported product and to the like domestic product' within the meaning of Note *Ad Article III*.
>
> Secondly, the Panel notes that the words 'any law, regulation or requirement [. . .] which applies to an imported product and ['comme' in the French text] to the like domestic product' in the Note *Ad Article III* could also mean that the same regime must apply to the imported product and the domestic product.[602] In this case, under the Decree, the domestic product may not be sold, placed on the domestic market or transferred under any title, possessed for sale, offered or exported. If we follow Canada's reasoning, products from third countries are subject to a different regime because, as they cannot be imported, they cannot be sold, placed on the domestic market, transferred under any title, possessed for sale or offered. Firstly, the regulations applicable to domestic products and foreign products lead to the same result: the halting of the spread of asbestos and asbestos-containing products on French territory. In practice, in one case (domestic products), they cannot be placed on the domestic market because they cannot be transferred under any title. In the other (imported products), the import ban also prevents their marketing."[603]

402. In this regard, the Panel rejected Canada's argument that an *identical* measure must be applied to the

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[599] (*footnote original*) *See* Panel Report on *US – Tuna (EEC)*, para. 5.17–5.18, and Panel Report on *US – Tuna (Mexico)*, para. 5.10. Speaking of the relevance for panels of previous reports, the Appellate Body has stated, with respect to adopted panel reports:

> "Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute". (Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 14)

Regarding unadopted panel reports, the Appellate Body agreed with the panel in the same case that:

> "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant". (Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 15)

[600] Panel Report on *US – Shrimp*, para 7.16.

[601] (*footnote original*) Le Nouveau Petit Robert, op. cit., p. 411.

[602] (*footnote original*) "In the same way as", "to the same extent as" are among the alternative meanings for the word "comme" in the French text (Le Nouveau Petit Robert, op. cit., p. 411). [In the English text the word is "and"].

[603] Panel Report on *EC – Asbestos*, paras. 8.91–8.92.

domestic product and the like imported product if the measure applicable to the imported product is to fall under Article III:

> "We note that the relevant part of the English text of Note *Ad Article III* reads as follows: 'Any [. . .] law, regulation or requirement [. . .] which applies to an imported product *and* to the like domestic product'.[604] The word 'and' does not have the same meaning as 'in the same way as', which can be another meaning for the word 'comme' in the French text. We therefore consider that the word 'comme' cannot be interpreted as requiring an identical measure to be applied to imported products and domestic products if Article III is to apply.
>
> We note that our interpretation is confirmed by practice under the GATT 1947. In *United States – Section 337 of the Tariff Act of 1930*[605], the Panel had to examine measures specifically applicable to imported products suspected of violating an American patent right. In this case, referring to Note *Ad Article III*, the Panel considered that the provisions of Article III:4 did apply to the special procedures prescribed for imported products suspected of violating a patent protected in the United States because these procedures were considered to be 'laws, regulations and requirements' affecting the internal sale of the imported products, within the meaning of Article III of the GATT. It should be noted that in this case the procedures examined were not the same as the equivalent procedures applicable to domestic products.[606]"[607]

403. In the context of the issue whether the French asbestos ban fell under Article III or Article XI, Canada cited the GATT Panel Report on *Canada – Provincial Liquor Boards (EEC)*. Canada quoted this report in support of its proposition that even if the French measure was an internal measure within the meaning of Article III and Note *Ad Article* III, this did not prevent the French decree from also falling under the scope of Article XI. Specifically, Canada pointed out that in the aforementioned case, the Panel had refrained from making a ruling on Article III:4; Canada argued that this confirmed the non-applicability of Article III:4 to the part of an internal measure dealing with the treatment of imported products. The Panel was unconvinced by this argument and pointed out that the case quoted by Canada concerned restrictions made effective through state-trading operations:

> "We note that in paragraph 4.24 of the Report, the Panel [*Canada – Provincial Liquor Boards (EEC)]* considered that according to the Note *Ad Articles* XI, XII, XIII, XIV and XVIII, restrictions made effective through state-trading operations were 'import restrictions' or 'export restrictions'. It considered that, in the case of enterprises enjoying a monopoly of both importation and distribution in the domestic market, the distinction normally made between restrictions affecting the importation of products and restrictions affecting imported products lost much of its significance since both types of restriction could be made effective through decision by the monopoly. In this case, the Decree did not institute a monopoly on the import or distribution of asbestos and like products, so the Note *Ad Articles* XI, XII, XIII, XIV and XVIII is not relevant to settlement of this matter.
>
> As regards Canada's reference to paragraph 4.26 of the aforementioned report[608], we consider that it does not substantiate Canada's position in this case either. In this paragraph, the Panel refrains from ruling on a violation of Article III:4. It appears to do so, however, for reasons of legal economy because it simultaneously recognizes that Article III:4 could apply to state-trading transactions. Contrary to Canada's assertion, this paragraph does not confirm the non-applicability of Article III:4 to the part of an internal measure dealing with the treatment of imported products. At the most, it could confirm the application of both provisions. Nevertheless, as explained in the preceding paragraph, the Panel found that Article XI:1 applied, referring to the Note *Ad Articles* XI, XII, XIII, XIV and XVIII. This Note only applies to state-trading transactions. In the present case, however, there is no question of a measure applied in the context of state-trading activities."[609]

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[604] (*footnote original*) Emphasis added. In the place of "and" and "comme", the Spanish version uses the conjunction "y" ("et" in French).

[605] (*footnote original*) See the Report of the Panel in *US – Section 337*.

[606] (*footnote original*) The Panel gave the grounds for its decision in para. 5.10 as follows:

> "The fact that Section 337 is used as a means for the enforcement of United States Patent Law at the border does not provide an escape from the applicability of Article III:4; the interpretative Note to Article III states that any law, regulation or requirement affecting the internal sale of products that is enforced in the case of the imported product at the time or point of importation is nevertheless subject to the provisions of Article III. Nor could the applicability of Article III:4 be denied on the ground that most of the procedures in the case before the Panel are applied to persons rather than products, since the factor determining whether persons might be susceptible to Section 337 proceedings or federal district court procedures is the source of the challenged products, that is whether they are of United States origin or imported. For these reasons, the Panel found that the procedures under Section 337 come within the concept of 'laws, regulations and requirements' affecting the internal sale of imported products, as set out in Article III of the General Agreement."

[607] Panel Report on *EC – Asbestos*, paras. 8.94–8.95.

[608] (*footnote original*) "The Panel considered that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article III:4 because it had already found that they were inconsistent with Article XI. However, the Panel saw great force in the argument that Article III:4 was also applicable to state-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in the domestic markets were combined, as was the case of the provincial liquor boards in Canada. This interpretation was confirmed *a contrario* by the wording of Article III:8(a)."

[609] Panel Report on *EC – Asbestos*, paras. 8.97–8.98.

(c) "prohibitions or restrictions . . . on the exportation or sale for export of any product"

404. In *Argentina – Hides and Leather*, the European Communities argued that Argentina's measure was inconsistent with Article XI:1 by authorizing the presence of domestic tanners' representatives in the customs inspection procedures for hides destined for export operations, and thus, imposing *de facto* restrictions on exports of hides.[610] The Panel noted:

> "There can be no doubt, in our view, that the disciplines of Article XI:1 extend to restrictions of a *de facto* nature.[611] It is also readily apparent that Resolution 2235, if indeed it makes effective a restriction, fits in the broad residual category, specifically mentioned in Article XI:1, of 'other measures'."[612]

405. Citing the Panel Report on *Japan – Film*, the Panel on *Argentina – Hides and Leather* went on to state:

> "It is well-established in GATT/WTO jurisprudence that only governmental measures fall within the ambit of Article XI:1. This said, we recall the statement of the panel in *Japan – Measures Affecting Consumer Photographic Film and Paper* to the effect that:
>
> > '[P]ast GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed governmental if there is sufficient governmental involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis.'[613]
>
> We agree with the view expressed by the panel in *Japan – Film*. However, we do not think that it follows either from that panel's statement or from the text or context of Article XI:1 that Members are under an obligation to exclude any possibility that governmental measures may enable private parties, directly or indirectly, to restrict trade, where those measures themselves are not trade-restrictive.[614]"[615]

406. The Panel on *Argentina – Hides and Leather* had to determine, *inter alia*, whether the presence of representatives of the domestic hide tanning industry in the Argentine customs inspection procedures for hides destined for export was an export restriction. The Panel discussed the relevance of the actual trade effect of the measure and found that although actual trade effects did not have to be proven in order to establish a violation of Article XI:1, trade effects carried weight, as an evidentiary matter, for establishing the existence of a *de facto* restriction

> "[A]s to whether Resolution 2235 makes effective a restriction, it should be recalled that Article XI:1, like Articles I, II and III of the GATT 1994, protects competitive opportunities of imported products, not trade flows.[616] In order to establish that Resolution 2235 infringes Article XI:1, the European Communities need not prove actual trade effects. However, it must be borne in mind that Resolution 2235 is alleged by the European Communities to make effective a *de facto* rather than a *de jure* restriction. In such circumstances, it is inevitable, as an evidentiary matter, that greater weight attaches to the actual trade impact of a measure.
>
> Even if it emerges from trade statistics that the level of exports is unusually low, this does not prove, in and of itself, that that level is attributable, in whole or in part, to the measure alleged to constitute an export restriction. Particularly in the context of an alleged *de facto* restriction and where, as here, there are possibly multiple restrictions,[617] it is necessary for a complaining party to establish a causal link between the contested measure and the low level of exports.[618] In our view, whatever else it may involve, a demonstration of causation must consist of a persuasive explanation of precisely how the measure at issue causes or contributes to the low level of exports."[619]

(d) "restrictions made effective through state-trading operations "

407. The Panel on *India – Quantitative Restrictions*, in examining the contested Indian measures, addressed the phrase "restrictions made effective through state-trading operations". In its analysis, which was subsequently not reviewed by the Appellate Body, the Panel

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[610] With respect to this measure in the light of Article X, see para. 382 of this Chapter.

[611] (*footnote original*) See the Panel Report on *Japan – Semi-Conductors*, paras. 105–109. In other contexts, see the Appellate Body Report on *EC – Bananas III*, paras. 232–234, citing *EEC – Imports of Beef*; *Spain – Unroasted Coffee*, and *Japan – SPF Dimension Lumber*.

[612] Panel Report on *Argentina – Hides and Leather*, para. 11.17.

[613] (*footnote original*) Panel Report on *Japan – Film*, para. 10.56.

[614] (*footnote original*) As we understand it, Article XI:1 does not incorporate an obligation to exercise "due diligence" in the introduction and maintenance of governmental measures beyond the need to ensure the conformity with Article XI:1 of those measures taken alone.

[615] Panel Report on *Argentina – Hides and Leather*, para. 11.18.

[616] (*footnote original*) See the Appellate Body Reports on *Japan – Alcoholic Beverages II*, at p.16; *Korea – Alcoholic Beverages*, at paras. 119–120 and 127.

[617] (*footnote original*) For example, it will be recalled that in the present case there is an export duty on raw hides which has not been challenged.

[618] (*footnote original*) The Appellate Body in *EC – Poultry* similarly required of the complaining party in that case a demonstration of a causal relationship between the imposition of an EC licensing procedure and the alleged trade distortion. See the Appellate Body Report on *EC – Poultry*, at paras. 126–127. While this interpretation related to a claim under the Agreement on Import Licensing Procedures, it is not apparent why the logic should be any different in the case of a claim under Article XI:1 of the GATT 1994.

[619] Panel Report on *Argentina – Hides and Leather*, paras. 11.20–11.21. In this line, the Panel did not find an export restriction made effective by the measure at issue. See Panel Report on *Argentina – Hides and Leather*, paras. 11.22–11.55.

emphasized that the fact that imports were effected through state-trading operations did not *per se* mean that imports were being restricted:

> "In analyzing the US claim, we note that violations of Article XI:1 can result from restrictions made effective through state trading operations. This is made very clear in the Note Ad Articles XI, XII, XIII, XIV and XVIII, which provides that 'Throughout Article XI, XII; XIII; XIV; and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations.' It should be noted however, that the mere fact that imports are effected through state trading enterprises would not in itself constitute a restriction. Rather, for a restriction to be found to exist, it should be shown that the operation of this state trading entity is such as to result in a restriction.[620]
>
> As noted above, the United States has shown in some instances that there have been zero imports of products reserved to state trading enterprises by India. We note, however, that canalization *per se* will not necessarily result in the imposition of quantitative restrictions within the meaning of Article XI:1, since an absence of importation of a given product may not always be the result of the imposition of a prohibitive quantitative restriction. For instance, the absence of importation of snow ploughs into a tropical island cannot be taken as sufficient evidence of the existence of import restrictions, even if the right to import those products is granted to an entity with exclusive or special privileges."[621]

408. The Panel on *Korea – Various Measures on Beef*, in a finding not reviewed by the Appellate Body, examined various practices of the Korean state trading agency for beef – an agency which held both an importation and a distribution monopoly – and discussed the *Ad Note* to Article XI in the following terms:

> "[I]n the special case where a state-trading enterprise possesses an import monopoly *and* a distribution monopoly, any restriction it imposes on the distribution of imported products will *lead to a restriction on importation* of the particular product over which it has a monopoly. In other words, the effective control over both importation and distribution channels by a state-trading enterprise means that the imposition of any restrictive measure, including internal measures, will have an adverse effect on the importation of the products concerned. The *Ad Note* to Article XI therefore prohibits a state-trading enterprise enjoying monopoly right over both importation and distribution from imposing any internal restriction against such imported products."[622]

409. In *EC – Asbestos*, the Panel referred to Note *Ad Articles* XI, XII, XIII, XIV and XVIII in its rejection of Canada's argument that the measure at issue was subject to Article XI:1 as well as Article III:4. See paragraph 403 above.

(e) Bonding requirements

410. In *US – Certain EC Products*, the measures at issue were increased bonding requirements imposed by the United States on imports from the European Communities. The increased bonding requirements were imposed in order to secure the future collection of additional import duties which were only later authorized by the Dispute Settlement Body under Article 22.6 of the DSU. While the majority of the Panel found that this bonding requirement constituted a duty or charge under Article II, one panelist found that this measure fell under Article XI of GATT:

> "Any bonding requirements to cover the payment of tariffs above their bound levels cannot be viewed as a mechanism in place to secure compliance with WTO compatible tariffs and constituted, therefore, import restrictions for which there was no justification. The actual trade effects of the 3 March Measure, which are reflected on the charts contained in paragraph 2.37 of this Panel Report, confirm its restrictive nature and effect. One Panelist found, therefore, that the 3 March Measure constituted a 'restriction', contrary to Article XI of GATT, rather than a duty or charge under Article II."[623]

(f) Licensing requirements

411. In *India – Quantitative Restrictions*, the Panel, in a finding not reviewed by the Appellate Body, held that Article XI:1 had a broad scope and covered discretionary or non-automatic import licensing requirements:

> "[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'. As was noted by the panel in *Japan – Trade in Semiconductors*, the wording of Article XI:1 is comprehensive: it applies 'to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.'[624] The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'.
>
> Under the GATT 1947, panels have examined whether import and export licensing systems are restrictions

[620] (*footnote original*) Panel Report on *Korea – Various Measures on Beef*, para 115: "The mere existence of producer-controlled import monopolies could not be considered as a separate import restriction inconsistent with the General Agreement. The Panel noted, however, that the activities of such enterprises had to conform to a number of rules contained in the General Agreement, including those of Article XVII and Article XI:1".

[621] Panel Report on *India – Quantitative Restrictions*, paras. 5.134–5.135.

[622] Panel Report on *Korea – Various Measures on Beef*, para. 751.

[623] Panel Report on *US – Certain EC Products*, para. 6.61.

[624] (*footnote original*) GATT Panel Report on *Japan – Semi-Conductors*, para. 104.

under Article XI:1. For example, in a case involving a so-called 'SLQ' regime, which concerned products subject in principle to quantitative restrictions, but for which no quota amount had been set either in quantity or value, permit applications being granted upon request, the panel noted 'that the SLQ regime was an import licensing procedure which would amount to a quantitative restriction unless it provided for the *automatic* issuance of licences'.[625] A similar conclusion was reached in the above-cited *Japan – Trade in Semi-conductors*, where the panel found that 'export licensing practices by Japan, leading to delays of up to three months in the issuing of licences for semi-conductors destined for contracting parties other than the United States, had been non-automatic and constituted restrictions on the exportation of such products inconsistent with Article XI'.[626] These reports are consistent with the ordinary meaning noted above, as discretionary or non-automatic licensing systems by their very nature operate as limitations on action since certain imports may not be permitted. Thus, in light of the terms of Article XI:1 and these adopted panel reports, we conclude that a discretionary or non-automatic import licensing requirement is a restriction prohibited by Article XI:1."[627]

412. In *Korea – Various Measures on Beef*, the Panel, in a finding not reviewed by the Appellate Body, rejected the United States' claim that "Korea's regulatory regime [on beef imports], and thus its licensing system, by granting exclusive authority to [certain Korean agencies] to import beef, effectively establishes a non-automatic import licensing system in violation of Article XI:1 . . .". The Panel held that discretionary licensing used in conjunction with a quantitative restriction does not necessarily provide an additional level of restriction to the quantitative restriction:

"[W]here a quota is in place, the use of a discretionary licensing system need not necessarily result in any additional restriction. Where a discretionary licensing system is implemented in conjunction with other restrictions, such as in the present dispute, the manner in which the discretionary licensing system is operated may create additional restrictions independent of those imposed by the principal restriction. Since this issue was not considered in the *India – Quantitative Restrictions* report, that case does not provide authority for the proposition that a discretionary licensing system, used in conjunction with a quantitative restriction, necessarily provides some additional level of restriction over and above the inherent restriction on access created through the imposition of a quantitative restriction."[628]

(g) Reference to GATT practice

413. For GATT practice on this subject-matter, see the GATT Analytical Index, pages 315–325.

3. Notification requirements

414. At its meeting on 31 October 1995, the Committee on Market Access adopted two Decisions relating to non-tariff measures: (1) Notification procedures of quantitative restrictions, and (2) Reverse notification on non-tariff measures.[629] At its meeting on 24 June 1997, the Committee further adopted a format for the submissions of notifications of quantitative restrictions.[630]

D. RELATIONSHIP WITH OTHER ARTICLES

1. Article I

415. In *US – Shrimp*, exercising judicial economy, the Panel did not examine a claim under Article I (and Article XIII) after having found a violation of Article XI. See paragraphs 421 and 446 below.

2. Article II

416. In *US – Certain EC Products*, the majority of the Panel found the increased bonding requirements imposed on imports in order to secure the collection of additional import duties to be a duty or charge under Article II. One panelist found the measure at issue to be a restriction within the meaning and scope of Article XI. See paragraph 410 above.

3. Article III

417. In *Korea – Various Measures on Beef*, the Panel examined the United States' claim that the prohibition of cross-trading between end-users in respect of beef was inconsistent with *GATT* Articles III and XI. After finding that this prohibition was contrary to Article III:4 of *GATT*, the Panel exercised judicial economy with respect to the claim that the same measure also violated Article XI of *GATT*.[631]

418. In *EC – Asbestos*, the Panel rejected Canada's argument that the French ban on the manufacture, importation and exportation, and domestic sales and transfer of certain asbestos products was subject to Article XI:1 as well as Article III:4. See paragraphs 401–403 above.

419. In *India – Autos*, the Panel recalled the Panel Report on *Canada – FIRA* regarding the differing scopes

[625] (*footnote original*) GATT Panel Report on *EEC – Import Restrictions*, para. 31. See also Panel Report on *EEC – Minimum Import Prices*, para. 4.9.
[626] (*footnote original*) GATT Panel Report on *Japan – Semi-Conductors*, para. 118.
[627] Panel Report on *India – Quantitative Restrictions*, paras. 5.129–5.130.
[628] Panel Report on *Korea – Various Measures on Beef*, para. 782.
[629] G/MA/M/3, para. 3. The text of the adopted decisions can be found in G/L/59 and G/L/60.
[630] G/MA/M/10, para. 3. The text of the approved format can be found in G/MA/NTM/QR/2.
[631] Panel Report on *Korea – Various Measures on Beef*, para. 705.

of Article III and XI of GATT 1994. See paragraphs 295–296 above.

4. Article VI

420. In *US – 1916 Act (Japan)*, after finding a violation of Article VI, the Panel held that in the case before it, Article VI addressed the "basic feature" of the measure at issue more directly that Article XI; however, the Panel stated explicitly that this did not mean that Article VI applied to the exclusion of Article XI:1. Nevertheless, the Panel found that it was entitled to exercise judicial economy and decided not to review the claims of Japan under Article XI.[632]

5. Article XIII

421. The Panel on *US – Shrimp*, in an exercise of judicial economy, did not examine a claim under GATT Articles I and XIII after having found a violation of Article XI. See paragraph 446 below. Also, in *India – Quantitative Restrictions*, exercising judicial economy, the Panel did not examine a claim under *GATT* Article XIII after having found a violation of Article XI. See paragraph 447 below.

6. Article XVII

422. Exercising judicial economy, the Panel on *Korea – Various Measures on Beef* did not examine claims regarding certain practices of the Korean state trading agency for beef under Articles III:4 and XVII, after it had found that this practice was inconsistent with Articles XI and II:1(a). See paragraph 481 below.

423. The interpretation and application of Note *Ad* Article XI, XII, XIII, XIV and XVIII, which clarifies that the terms "import restrictions" or "export restrictions" used in these Articles include "restrictions made effective through state-trading operations", was discussed in *India – Quantitative Restrictions* and *Korea – Various Measures on Beef*. See the excerpt(s) referenced in paragraphs 407–408 above.

7. Reference to GATT practice

424. With respect to GATT practice on this subject-matter, see the GATT Analytical Index, page 348.

E. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. SPS Agreement

425. In *Australia – Salmon*, the Panel examined the Canadian claim that the import prohibition of uncooked salmon was inconsistent with Article XI of the *GATT* as well as with several provisions of the *SPS Agreement*. After finding that the Australian measure was inconsistent with the requirements of the *SPS Agreement*, the Panel did not find it necessary to also examine the measure in the light of Article XI.[633]

2. Anti-Dumping Agreement

426. The Panel on *US – 1916 Act (Japan)*, after finding that the measure at issue was inconsistent with provisions of the *Anti-Dumping Agreement* (and Article VI of the *GATT*), did not find it necessary to address the same measure also in the light of Article XI. See also paragraph 420 above.

XIII. ARTICLE XII

A. TEXT OF ARTICLE XII

*Article XII**
Restrictions to Safeguard the Balance of Payments

1. Notwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article.

2. (a) Import restrictions instituted, maintained or intensified by a contracting party under this Article shall not exceed those necessary:

(i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves, or

(ii) in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of such contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

(b) Contracting parties applying restrictions under sub-paragraph (a) of this paragraph shall progressively relax them as such conditions improve, maintaining them only to the extent that the conditions specified in that sub-paragraph still justify their application. They shall eliminate the restrictions when conditions would no longer justify their institution or maintenance under that sub-paragraph.

3. (a) Contracting parties undertake, in carrying out their domestic policies, to pay due regard to the need for maintaining or restoring equilibrium in their balance of

[632] Panel Report on *US – 1916 Act (Japan)*, para. 6.281
[633] Panel Report on *Australia – Salmon*, para. 8.185. With respect to judicial economy in general, see Chapter on the *DSU*, Section XXXVI.F.

payments on a sound and lasting basis and to the desirability of avoiding an uneconomic employment of productive resources. They recognize that, in order to achieve these ends, it is desirable so far as possible to adopt measures which expand rather than contract international trade.

(b) Contracting parties applying restrictions under this Article may determine the incidence of the restrictions on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential.

(c) Contracting parties applying restrictions under this Article undertake:

(i) to avoid unnecessary damage to the commercial or economic interests of any other contracting party;*

(ii) not to apply restrictions so as to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and

(iii) not to apply restrictions which would prevent the importations of commercial samples or prevent compliance with patent, trade mark, copyright, or similar procedures.

(d) The contracting parties recognize that, as a result of domestic policies directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources, a contracting party may experience a high level of demand for imports involving a threat to its monetary reserves of the sort referred to in paragraph 2 (a) of this Article. Accordingly, a contracting party otherwise complying with the provisions of this Article shall not be required to withdraw or modify restrictions on the ground that a change in those policies would render unnecessary restrictions which it is applying under this Article.

4. (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Article shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(b) On a date to be determined by them,* the CONTRACTING PARTIES shall review all restrictions still applied under this Article on that date. Beginning one year after that date, contracting parties applying import restrictions under this Article shall enter into consultations of the type provided for in sub-paragraph (a) of this paragraph with the CONTRACTING PARTIES annually.

(c) (i) If, in the course of consultations with a contracting party under sub-paragraph (a) or (b) above, the CONTRACTING PARTIES find that the restrictions are not consistent with provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within the specified period of time. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(d) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Article to enter into consultations with them at the request of any contracting party which can establish a prima facie case that the restrictions are inconsistent with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES, no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(e) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to any special

external factors adversely affecting the export trade of the contracting party applying the restrictions.*

(f) Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

5. If there is a persistent and widespread application of import restrictions under this Article, indicating the existence of a general disequilibrium which is restricting international trade, the CONTRACTING PARTIES shall initiate discussions to consider whether other measures might be taken, either by those contracting parties the balance of payments of which are under pressure or by those the balance of payments of which are tending to be exceptionally favourable, or by any appropriate intergovernmental organization, to remove the underlying causes of the disequilibrium. On the invitation of the CONTRACTING PARTIES, contracting parties shall participate in such discussions.

B. TEXT OF *AD* ARTICLE XII

Ad Article XII

The CONTRACTING PARTIES shall make provision for the utmost secrecy in the conduct of any consultation under the provisions of this Article.

Paragraph 3 (c)(i)

Contracting parties applying restrictions shall endeavour to avoid causing serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.

Paragraph 4 (b)

It is agreed that the date shall be within ninety days after the entry into force of the amendments of this Article effected by the Protocol Amending the Preamble and Parts II and III of this Agreement. However, should the CONTRACTING PARTIES find that conditions were not suitable for the application of the provisions of this subparagraph at the time envisaged, they may determine a later date; Provided that such date is not more than thirty days after such time as the obligations of Article VIII, Sections 2, 3 and 4, of the Articles of Agreement of the International Monetary Fund become applicable to contracting parties, members of the Fund, the combined foreign trade of which constitutes at least fifty per centum of the aggregate foreign trade of all contracting parties.

Paragraph 4 (e)

It is agreed that paragraph 4 (e) does not add any new criteria for the imposition or maintenance of quantitative restrictions for balance of payments reasons. It is solely intended to ensure that all external factors such as changes in the terms of trade, quantitative restrictions, excessive tariffs and subsidies, which may be contributing to the balance of payments difficulties of the contracting party applying restrictions, will be fully taken into account.

C. UNDERSTANDING ON THE BALANCE-OF-PAYMENTS PROVISIONS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

[The text of the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 can be found at Section C following the text of Article XVIII below.]

D. INTERPRETATION AND APPLICATION OF ARTICLE XII

1. BOP Understanding

427. With respect to the interpretation and application of the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994, see paragraphs 508–509 and 515–516 below.

E. RELATIONSHIP WITH OTHER ARTICLES

1. Article XVII

428. The interpretation and application of the note *Ad* Article XI, XII, XIII, XIV and XVIII, which clarifies that the terms "import restrictions" or "export restrictions" used in these Articles include "restrictions made effective through state-trading operations", was discussed by the Panels on *India – Quantitative Restrictions* and on *Korea – Various Measures on Beef*. See paragraphs 407–408 above.

2. Article XVIII

429. In *India – Quantitative Restrictions*, the Panel explained the relationship between Articles XII and XVIII:B in clarifying the function of Article XVIII:B. See paragraph 488 below.

3. Reference to GATT practice

430. With respect to GATT practice on Article XII, see GATT Analytical Index, pages 356–392.

XIV. ARTICLE XIII

A. TEXT OF ARTICLE XIII

*Article XIII**

Non-discriminatory Administration of Quantitative Restrictions

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such

product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:

(*a*) Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3 (*b*) of this Article;

(*b*) In cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota;

(*c*) Contracting parties shall not, except for purposes of operating quotas allocated in accordance with subparagraph (*d*) of this paragraph, require that import licences or permits be utilized for the importation of the product concerned from a particular country or source;

(*d*) In cases in which a quota is allocated among supplying countries the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.*

3. (*a*) In cases in which import licences are issued in connection with import restrictions, the contracting party applying the restrictions shall provide, upon the request of any contracting party having an interest in the trade in the product concerned, all relevant information concerning the administration of the restrictions, the import licences granted over a recent period and the distribution of such licences among supplying countries; *Provided* that there shall be no obligation to supply information as to the names of importing or supplying enterprises.

(*b*) In the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value. Any supplies of the product in question which were *en route* at the time at which public notice was given shall not be excluded from entry; *Provided* that they may be counted so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods; and *Provided* further that if any contracting party customarily exempts from such restrictions products entered for consumption or withdrawn from warehouse for consumption during a period of thirty days after the day of such public notice, such practice shall be considered full compliance with this subparagraph.

(*c*) In the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof.

4. With regard to restrictions applied in accordance with paragraph 2 (*d*) of this Article or under paragraph 2 (*c*) of Article XI, the selection of a representative period for any product and the appraisal of any special factors* affecting the trade in the product shall be made initially by the contracting party applying the restriction; *Provided* that such contracting party shall, upon the request of any other contracting party having a substantial interest in supplying that product or upon the request of the CONTRACTING PARTIES, consult promptly with the other contracting party or the CONTRACTING PARTIES regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.

5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

B. TEXT OF *AD* ARTICLE XIII

Ad Article XIII
Paragraph 2 (d)

No mention was made of "commercial considerations" as a rule for the allocation of quotas because it was considered that its application by governmental authorities might not always be practicable. Moreover, in cases where it is practicable, a contracting party could apply these considerations in the process of seeking

agreement, consistently with the general rule laid down in the opening sentence of paragraph 2.

Paragraph 4

See note relating to "special factors" in connection with the last subparagraph of paragraph 2 of Article XI.

C. INTERPRETATION AND APPLICATION OF ARTICLE XIII

1. General

(a) Scope of application

431. In *EC – Bananas III*, the Appellate Body reviewed the Panel's finding that the EC import regime for bananas was inconsistent with Article XIII in that the European Communities allocated tariff quota shares to some Members without allocating such shares to other Members. The European Communities claimed that "there [were] two separate EC import regimes for bananas, the preferential regime for traditional ACP bananas and the *erga omnes* regime for all other imports of bananas" and argued that "the non-discrimination obligations of Article I:1, X:3(a) and XIII of GATT 1994 and Article 1.3 of the *Licensing Agreement* apply only *within* each of these separate regimes."[634] Rejecting this argument, the Appellate Body applied Article XIII to the whole import regime as follows:

> "The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to *all* imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only *within* regulatory regimes established by that Member."[635]

(b) Object and purpose

432. In *EC – Bananas III*, the Panel, in a finding not reviewed by the Appellate Body, held that the object and purpose of Article XIII:2 is to minimize the impact of quantitative restrictions on trade flows:

> "In light of the terms of Article XIII, it can be said that the object and purpose of Article XIII:2 is to minimize the impact of a quota or tariff quota regime on trade flows by attempting to approximate under such measures the trade shares that would have occurred in the absence of the regime. In interpreting the terms of Article XIII, it is important to keep their context in mind. Article XIII is basically a provision relating to the administration of restrictions authorized as exceptions to one of the most basic GATT provisions-the general ban on quotas and other non-tariff restrictions contained in Article XI."[636]

2. Article XIII:1

433. In *EC – Bananas III*, the Appellate Body found a violation of Article XIII:1 in the European Communities' import regime for bananas, stating as follows:

> "[A]llocation to Members not having a substantial interest must be subject to the basic principle of non-discrimination. When this principle of non-discrimination is applied to the allocation of tariff quota shares to Members not having a substantial interest, it is clear that a Member cannot, whether by agreement or by assignment, allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest. To do so is clearly inconsistent with the requirement in Article XIII:1 that a Member cannot restrict the importation of any product from another Member unless the importation of the like product from all third countries is 'similarly' restricted."[637]

434. With respect to GATT practice on this subject-matter, see GATT Analytical Index, pages 399–400.

3. Article XIII:2

(a) Chapeau

435. In *US – Line Pipe*, the Panel established that because the safeguard measure investigation was not based on historical trade patterns, and did not reflect an intent of approaching the shares that the members could have been expected to obtain in the absence of the measure, there was a violation of the chapeau of Article XIII:2. The Panel held:

> "[I]n our view, Korea is correct to argue that a Member would violate the general rule set forth in the chapeau of Article XIII:2 if it imposes safeguard measures without respecting traditional trade patterns (at least in the absence of any evidence indicating that the shares a Member might be expected to obtain in the future differ, as a result of changed circumstances, from its historical share). Trade flows before the imposition of a safeguard measure provide an objective, factual basis for projecting what might have occurred in the absence of that measure.
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> There is nothing in the record before the Panel to suggest that the line pipe measure was based in any way on

[634] Appellate Body Report on *EC – Bananas III*, para. 189.
[635] Appellate Body Report on *EC – Bananas III*, para. 190.
[636] Panel Report on *EC – Bananas III*, para. 7.68.
[637] Appellate Body Report on *EC – Bananas III*, para. 161.

historical trade patterns in line pipe, or that the United States otherwise 'aim[ed] at a distribution of trade . . . approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of' the line pipe measure. Instead, as noted by Korea, 'the in-quota import volume originating from Korea, the largest supplier historically to the US market, was reduced to the same level as the smallest – or even then non-existent – suppliers to the US market (9,000 short tons)'.[638] For this reason, we find that the line pipe measure is inconsistent with the general rule contained in the chapeau of Article XIII:2."[639]

436. In *EC – Bananas III*, the Appellate Body found a violation of Article XIII:2 in respect of the European Communities' import regime for bananas and, more specifically, in respect of the treatment granted to countries which had concluded with the European Communities the so-called Banana Framework Agreement (BFA). A quota share not utilized by one of the BFA countries could, at the joint request of all BFA countries, be transferred to another BFA country. No equivalent regulation existed with respect to banana exporting countries that were not part of the BFA. The Panel found that this aspect of the measure was inconsistent with the requirement to approximate, in the administration of a quantitative restriction, the relative trade flows which would exist in the absence of the measure at issue:

"Pursuant to these reallocation rules, a portion of a tariff quota share not used by the BFA country to which that share is allocated may, at the joint request of the BFA countries, be reallocated to the other BFA countries. . . . [T]he reallocation of unused portions of a tariff quota share exclusively to other BFA countries, and not to other non-BFA banana-supplying Members, does not result in an allocation of tariff quota shares which approaches 'as closely as possible the shares which the various Members might be expected to obtain in the absence of the restrictions'. Therefore, the tariff quota reallocation rules of the BFA are also inconsistent with the chapeau of Article XIII:2 of the GATT 1994."[640]

437. In *EC – Poultry*, Brazil challenged the European Communities' calculation of the tariff quota shares because imports from China – at that time not a Member of the WTO – had been included in this allocation of tariff quota shares. The Panel, in a finding expressly endorsed by the Appellate Body[641], found that nothing in Article XIII required the calculation of tariff quota shares only on the basis of imports from WTO Members:

"We note that Article XIII carefully distinguishes between Members ('contracting parties' in the original text of GATT 1947) and 'supplying countries' or 'source'. There is nothing in Article XIII that obligates Members to calculate tariff quota shares on the basis of imports from Members only.[642] If the purpose of using past trade performance is to approximate the shares in the absence of the restrictions as required under the chapeau of Article XIII:2, exclusion of a non-Member, particularly if it is an efficient supplier, would not serve that purpose.

This interpretation is also confirmed by the use in Article XIII:2(d) of the term 'of the total quantity or value of imports of the product' without limiting the total quantity to imports from Members.

The conclusion above is not affected by the fact that the TRQ in question was opened as compensatory adjustment under Article XXVIII because Article XIII is a general provision regarding the non-discriminatory administration of import restrictions applicable to any TRQs regardless of their origin."[643]

(b) Article XIII:2(a)

438. Regarding the question of whether tariff quotas were subject to the disciplines set out in Article XIII:2(a), the Panel on *US – Line Pipe*, in a finding not reviewed by the Appellate Body, held that they do constitute "quotas" within the meaning of Article XIII:2(a):

"Irrespective of whether or not tariff quotas constitute 'quotas' within the meaning of Article XIII:2(a), tariff quotas are necessarily subject to the disciplines contained in Article XIII:2(a) as a result of the express language of Article XIII:5. Thus, Article XIII:2(a) must have meaning in the context of tariff quotas. We believe that, in respect of tariff quotas, Article XIII:2(a) requires Members to fix, wherever practicable, the total amount of imports permitted at the lower tariff rate.[644]"[645]

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[638] Korea's first written submission, para. 155.
[639] Panel Report on *US – Pipe Line*, paras. 7.53–7.55.
[640] Appellate Body Report on *EC – Bananas III*, para. 163.
[641] Appellate Body Report on *EC – Poultry*, para. 106.
[642] (*footnote original*) We note in this regard that in the *Banana III* case, the panel made the following observation (which was not affected by the subsequent appeal): "The consequence of the foregoing analysis is that Members may be effectively required to use a general 'others' category for all suppliers other than Members with a substantial interest in supplying the product. The fact that in this situation tariff quota shares are allocated to some Members, notably those having a substantial interest in supplying the product, but not to others that do not have a substantial interest in supplying the product, would not necessarily be in conflict with Article XIII:1. While the requirement of Article XIII:2(d) is not expressed as an exception to the requirements of Article XIII:1, it may be regarded, to the extent that its practical application is inconsistent with it, as *lex specialis* in respect of Members with a substantial interest in supplying the product concerned". See Panel Reports on *EC – Bananas III*, para. 7.75. The quoted passage, particularly the use of the phrase "*all suppliers* other than Members with a substantial interest in supplying the product" (emphasis added), indicates that the *Banana III* panel did not take the view that allocation of quota shares to non-Members under Article XIII:2(d) was not permitted.
[643] Panel Report on *EC – Poultry*, paras. 230–232.
[644] (*footnote original*) The obligation cannot extend to fixing the total amount of permitted imports at the higher tariff rate, because that would effectively undermine the distinction between tariff quotas and quantitative restrictions.
[645] Panel Report on *US – Line Pipe*, para. 7.58.

(c) Article XIII:2(d)

(i) Allocation of import quotas to Members who have no "substantial interest"

439. The Panel on *EC – Bananas III* addressed the question whether country-specific shares can also be allocated to Members that do not have a substantial interest in supplying the product and, if so, what the specific method of allocation should be. The Panel, in an finding not addressed by the Appellate Body, answered this question in the affirmative, but emphasized that any allocation to Members not having a substantial interest in supplying the product at issue would have to comply with the principle of non-discrimination:

> "As to the first point, we note that the first sentence of Article XIII:2(d) refers to allocation of a quota 'among supplying countries'. This could be read to imply that an allocation may also be made to Members that do not have a substantial interest in supplying the product. If this interpretation is accepted, any such allocation must, however, meet the requirements of Article XIII:1 and the general rule in the chapeau to Article XIII:2(d). Therefore, if a Member wishes to allocate shares of a tariff quota to some suppliers without a substantial interest, then such shares must be allocated to all such suppliers. Otherwise, imports from Members would not be similarly restricted as required by Article XIII:1.[646] As to the second point, in such a case it would be required to use the same method as was used to allocate the country-specific shares to the Members having a substantial interest in supplying the product, because otherwise the requirements of Article XIII:1 would also not be met.
>
> . . .
>
> In so far as this in practice results in the use of an 'others' category for all Members not having a substantial interest in supplying the product, it comports well with the object and purpose of Article XIII, as expressed in the general rule to the chapeau to Article XIII:2. When a significant share of a tariff quota is assigned to 'others', the import market will evolve with the minimum amount of distortion. Members not having a substantial supplying interest will be able, if sufficiently competitive, to gain market share in the 'others' category and possibly achieve 'substantial supplying interest' status which, in turn, would provide them the opportunity to receive a country-specific allocation by invoking the provisions of Article XIII:4. New entrants will be able to compete in the market, and likewise have an opportunity to gain 'substantial supplying interest' status. For the share of the market allocated to Members with a substantial interest in supplying the product, the situation may also evolve in light of adjustments following consultations under Article XIII:4. In comparison to a situation where country-specific shares are allocated to all supplying countries, including Members with minor market shares, this result is less likely to lead to a long-term freezing of market shares. This is, in our view, consistent with the terms, object and purpose, and context of Article XIII."[647]

440. The Panel on *EC – Bananas III* (*Article 21.5 – Ecuador*) examined the consistency with Article XIII of the European Communities' regime for imports of bananas, as revised by the European Communities in response to the DSB's recommendation. In this revised regime, bananas could be imported under the MFN tariff-rate quota on the basis of past trade performance by exporting countries during the past representative period from 1994 to 1996, while bananas from traditional ACP supplier countries could be imported up to a collective amount which was originally set to reflect the overall amount of the pre-1991 best-ever export by individual traditional ACP suppliers. The Panel found the revised regime to be inconsistent with Article XIII:2(d):

> "[F]or traditional ACP supplier countries the average exports during the three-year period from 1994 to 1996 were collectively at a level of approximately 685,000 tonnes, which is only about 80 per cent of the 857,700 tonnes reserved for traditional ACP imports under the previous as well as under the revised regime. In contrast, the MFN tariff quota of 2.2 million tonnes (autonomously increased by 353,000 tonnes) has been virtually filled since its creation (over 95 per cent) and there have been some out-of-quota imports. Thus, the allocation of an 857,700 tonne tariff quota for traditional banana imports from ACP States is inconsistent with the requirements of Article XIII:2(d) because the EC regime clearly does not aim at a distribution of trade approaching as closely as possible the shares which various Members might be expected to obtain in the absence of restrictions."[648]

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[646] (*footnote original*) In this regard, we note with approval the statement by the 1980 *Chilean Apples* panel:

> "[I]n keeping with normal GATT practice, the Panel considered it appropriate to use as a 'representative period' a three-year period previous to 1979, the year in which the EC measures were in effect. Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1975, 1977, 1978 as a 'representative period'".

Panel Report on "EEC Restrictions on Imports of Dessert Apples – Complaint by Chile", adopted on 10 November 1980, BISD 27S/98, 113, para. 4.8. In the report of the "Panel on Poultry", issued on 21 November 1963, GATT Doc. L/2088, para. 10, the panel stated: "[T]he shares in the reference period of the various exporting countries in the Swiss market, which was free and competitive, afforded a fair guide as to the proportion of the increased German poultry consumption likely to be taken up by United States exports". See also Panel Report on "Japan – Restrictions on Imports of Certain Agricultural Products", adopted on 22 March 1988, BISD 35S/163, 226–227, para. 5.1.3.7.

[647] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 7.73 and 7.76.

[648] Panel Report on *EC – Bananas III*, para. 6.28.

(ii) Allocation of tariff/import quotas to non-Members

441. In *EC – Poultry*, the Appellate Body upheld the Panel's finding that the European Communities acted consistently with Article XIII in calculating a tariff-rate quota share for a Member based upon the total quantity of imports including those from non-Members.[649] See also paragraph 437 above. Brazil claimed upon appeal that the Panel had also made a finding with respect to the *allocation* of tariff-rate quota shares to a non-Member, and the *participation of non-Members in the* "*others*" *category* of a tariff-rate quota. Brazil claimed that the Panel erred because it had failed to recognize that the allocation of quota shares is always intended exclusively for Members. The Appellate Body found that the Panel statements which Brazil claimed to constitute the findings it was appealing did not amount to findings or developed legal interpretations on these two issues. As a result, the Appellate Body concluded that a consideration of these questions would be outside its mandate under Article 17.6 of the DSU. In regard to the two aforementioned issues, the Panel had stated:

> "We note in this regard that in the *Banana III* case, the panel made the following observation (which was not affected by the subsequent appeal): 'The consequence of the foregoing analysis is that Members may be effectively required to use a general "others" category for all suppliers other than Members with a substantial interest in supplying the product. The fact that in this situation tariff quota shares are allocated to some Members, notably those having a substantial interest in supplying the product, but not to others that do not have a substantial interest in supplying the product, would not necessarily be in conflict with Article XIII:1. While the requirement of Article XIII:2(d) is not expressed as an exception to the requirements of Article XIII:1, it may be regarded, to the extent that its practical application is inconsistent with it, as *lex specialis* in respect of Members with a substantial interest in supplying the product concerned'. See panel reports on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, *op. cit.*, para. 7.75. The quoted passage, particularly the use of the phrase '*all suppliers* other than Members with a substantial interest in supplying the product' (emphasis added), indicates that the *Banana III* panel did not take the view that allocation of quota shares to non-Members under Article XIII:2(d) was not permitted."[650]

442. The Panel on *EC – Bananas III*, in a finding not addressed by the Appellate Body, examined how the accession to the WTO of a supplying country impacted upon the consistency of a pre-existing quantitative restriction with Article XIII:2.

> "The general rule in the chapeau to Article XIII:2 indicates that the aim of Article XIII:2 is to give to Members the share of trade that they might be expected to obtain in the absence of a tariff quota. There is no requirement that a Member allocating shares of a tariff quota negotiate with non-Members, but when such countries accede to the WTO, they acquire rights, just as any other Member has under Article XIII whether or not they have a substantial interest in supplying the product in question.
>
> [A]lthough the EC reached an agreement with all Members who had a substantial interest in supplying the product at one point in time, under the consultation provisions of Article XIII:4, the EC would have to consider the interests of a new Member who had a substantial interest in supplying the product if that new Member requested it to do so.[651] The provisions on consultations and adjustments in Article XIII:4 mean in any event that the BFA could not be invoked to justify a permanent allocation of tariff quota shares. Moreover, while new Members cannot challenge the EC's agreements with Colombia and Costa Rica in the BFA on the grounds that the EC failed to negotiate and reach agreement with them, they otherwise have the same rights as those Complainants who were GATT contracting parties at the time the BFA was negotiated to challenge its consistency with Article XIII. Generally speaking, all Members benefit from all WTO rights."[652]

443. With respect to GATT practice concerning the allocation of quota, see GATT Analytical Index, pages 401–402.[653]

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[649] Appellate Body Report on *EC – Poultry*, para. 108.

[650] Panel Report on *EC – Poultry*, para. 230, footnote 140.

[651] (*footnote original*) While the provisions of Article XIII:4 on consultations and adjustments seem to be primarily aimed at adjustments to quota shares allocated pursuant to Article XIII:2(d), second sentence, they also apply in the case where agreements were reached pursuant to Article XIII:2(d), first sentence, with Members having a substantial interest in supplying the product concerned. In addition, in so far as a new Member has a substantial interest in supplying that product, its share of the "others" category can be viewed, for purposes of Article XIII:4, as a provision established unilaterally relating to the allocation of an adequate quota.

[652] Panel Report on *EC – Bananas III*, paras. 7.91–7.92.

[653] In this regard, in *EC – Poultry*, Brazil argued that the EC allocation of licences to imports of poultry products from East European countries was inconsistent with Article XIII, citing GATT Panel Report on *EEC – Newsprint*. The Panel rejected this argument, stating as follows:

> "There is some similarity between the *Newsprint* case and the present case regarding this specific issue. As in the *Newsprint* case, the purpose of the poultry TRQ is to allow specified quantities (15,500 tonnes) of imports into the EC duty-free which would otherwise be dutiable. However, there are three important factual differences. First, in the *Newsprint* case, EFTA suppliers were accorded duty-free access to the EEC market without restriction. In the present case, imports from Hungary and Poland under the Interim Agreements are still dutiable. Second, in the *Newsprint* case, the level of the MFN duty-free quota was reduced in order to make room for preferential access while in the present case no such reduction has occurred. Third, in the *Newsprint* case, the EFTA agreement was concluded after the opening of the MFN quota whereas in this case the Interim Agreements preceded the opening of the poultry TRQ.
>
> Thus, the present case lacks the basis that led to the conclusion by the *Newsprint* panel. We also note that before making the

D. RELATIONSHIP WITH OTHER ARTICLES

1. Article I

444. In *EC – Bananas III*, the European Communities argued that even though the Lomé waiver mentioned explicitly only *GATT* Article I:1 in respect of the allocation of country-specific tariff quotas for bananas to certain countries, a violation of Article XIII in respect of its tariff regime for bananas was also covered by the Lomé waiver, due to the inherent substantive link between Articles I and XIII. While the Panel agreed with the European Communities' argument, the Appellate Body rejected it.[654] See the Chapter on the *WTO Agreement*, Section X.B.3(i).

2. Article II

445. The Panel on *EC – Bananas III* discussed the relationship between *GATT* Articles II and XIII. See paragraphs 110–111 above.

3. Article XI

446. The Panel on *US – Shrimp* found that the United States violated Article XI by imposing an import ban on shrimps and shrimp products harvested by vessels of foreign nations, where such exporting country had not been certified by United States' authorities as using methods not leading to the incidental killing of sea turtles above a certain level. The Panel, in a finding not reviewed by the Appellate Body, then exercised judicial economy with respect to the claim concerning Article XIII.[655]

447. The Panel on *India – Quantitative Restrictions*, in a finding not reviewed by the Appellate Body, stated that "[w]ith regard to the claim of violation of Article XIII of *GATT 1994*, since the resolution of the claims under Articles XI and XVIII:B may make it unnecessary to resolve that claim, we will defer consideration of this issue."[656] The Panel ultimately did not address Article XIII.

4. Article XXVIII

448. In *EC – Poultry*, the Appellate Body addressed a complaint against the allocation of tariff quotas for certain poultry products by the European Communities, and rejected Brazil's appeal that Articles I and XIII of *GATT* were not applicable to the allocation of tariff quota resulting from the negotiation under *GATT* Article XXVIII. The Appellate Body, after having confirmed its finding in *EC – Bananas III*[657], stated that "the concessions contained in Schedule LXXX pertaining to the tariff-rate quota for frozen poultry meat must be consistent with Article I and XIII of the GATT 1994."[658] The Appellate Body opined that Article XXVIII does not dispense with the non-discrimination principle inscribed in Articles I and XIII of *GATT 1994*, and considered the negotiating history of Article XXVIII:

> "We see nothing in Article XXVIII to suggest that compensation negotiated within its framework may be exempt from compliance with the non-discrimination principle inscribed in Articles I and XIII of the GATT 1994. As the Panel observed, this interpretation is, furthermore, supported by the negotiating history of Article XXVIII. Regarding the provision which eventually became Article XXVIII:3, the Chairman of the Tariff Agreements Committee at Geneva in 1947, concluded:
>
> > 'It was agreed that there was no intention to interfere in any way with the operation of the most-favoured-nation clause. This Article is headed 'Modification of Schedules'. It refers throughout to concessions negotiated under paragraph 1 of Article II, the Schedules, and there is no reference to Article I, which is the Most-Favoured-Nation Clause. Therefore, I think the intent is clear: that in no way should this Article interfere with the operation of the Most-Favoured-Nation Clause.'[659]
>
> Although this statement refers specifically to the MFN clause in Article I of the GATT, logic requires that it applies equally to the non-discriminatory administration of quotas and tariff-rate quotas under Article XIII of the GATT 1994."[660]

5. Reference to GATT practice

449. With respect to GATT practice concerning the relationship of Article XIII with other Articles, see GATT Analytical Index, pages 410–411.

E. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Agreement on Agriculture

450. In *EC – Bananas III*, the European Communities argued that, in light of the meaning and intent of

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statement cited in paragraph 237 above, the *Newsprint* panel stated that 'the Panel could find no GATT specific provision forbidding such action'. If Brazil had intended to claim a violation of Article XIII:2 on this specific issue, at a minimum, it should have elaborated on the nature of preferences accorded to poultry products imported from East Europe and should have tied it to *inter alia* 'any special factors which may have or may be affecting the trade in the product' referred to in Article XIII:2(d). It has not done so."

Panel Report on *EC – Poultry*, paras. 238–239.

654 Appellate Body Report on *EC – Bananas III*, paras. 183–187.

655 Panel Report on *US – Shrimp*, para. 7.22. With respect to judicial economy in general, see Chapter on the *DSU*, Section XXXVI.F.

656 Panel Report on *India – Quantitative Restrictions*, para. 5.17.

657 Appellate Body Report on *EC – Poultry*, para. 98, citing Appellate Body Report on *EC – Bananas III*, para. 154, which is referenced in para. 84 of this Chapter.

658 Appellate Body Report on *EC – Poultry*, para. 99.

659 (*footnote original*) EPCT/TAC/PV/18, p. 46.

660 Appellate Body Report on *EC – Poultry*, para. 100.

Articles 4.1 and 21.1 of the *Agreement on Agriculture*, it was permitted, with respect to market access concessions, to act inconsistently with the requirements of Article XIII of the *GATT* 1994. The Panel concluded that the *Agreement on Agriculture* did not permit the European Communities to act inconsistently with Article XIII. The Appellate Body confirmed the Panel's finding:

> "[W]e do not see anything in Article 4.1 to suggest that market access concessions and commitments made as a result of the Uruguay Round negotiations on agriculture can be inconsistent with the provisions of Article XIII of the GATT 1994. There is nothing in Articles 4.1 or 4.2, or in any other article of the *Agreement on Agriculture*, that deals specifically with the allocation of tariff quotas on agricultural products. If the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994, they would have said so explicitly. The *Agreement on Agriculture* contains several specific provisions dealing with the relationship between articles of the *Agreement on Agriculture* and the GATT 1994. For example, Article 5 of the *Agreement on Agriculture* allows Members to impose special safeguards measures that would otherwise be inconsistent with Article XIX of the GATT 1994 and with the *Agreement on Safeguards*. In addition, Article 13 of the *Agreement on Agriculture* provides that, during the implementation period for that agreement, Members may not bring dispute settlement actions under either Article XVI of the GATT 1994 or Part III of the *Agreement on Subsidies and Countervailing Measures* for domestic support measures or export subsidy measures that conform fully with the provisions of the *Agreement on Agriculture*. With these examples in mind, we believe it is significant that Article 13 of the *Agreement on Agriculture* does not, by its terms, prevent dispute settlement actions relating to the consistency of market access concessions for agricultural products with Article XIII of the GATT 1994. As we have noted, the negotiators of the *Agreement on Agriculture* did not hesitate to specify such limitations elsewhere in that agreement; had they intended to do so with respect to Article XIII of the GATT 1994, they could, and presumably would, have done so. We note further that the *Agreement on Agriculture* makes no reference to the *Modalities* document[661] or to any 'common understanding' among the negotiators of the *Agreement on Agriculture* that the market access commitments for agricultural products would not be subject to Article XIII of the GATT 1994."[662]

2. Agreement on Safeguards

451. The Panel on *US – Line Pipe* held, in a statement not reviewed by the Appellate Body, that Article XIII does apply to tariff quota safeguard measures. In the Panel's view, if this were not the case, quantitative criteria regarding the availability of lower tariff rates could be introduced in a discriminatory manner inconsistently with the objectives set out in the preamble of the Safeguards Agreement:

> "[I]t is the paucity of disciplines governing the application of tariff quota safeguard measures in Article 5 of the Safeguards Agreement[663] that supports our interpretation of Article XIII. If Article XIII did not apply to tariff quota safeguard measures, such safeguard measures would escape the majority of the disciplines set forth in Article 5. This is an important consideration, given the quantitative aspect of a tariff quota. For example, if Article XIII did not apply, quantitative criteria regarding the availability of lower tariff rates could be introduced in a discriminatory manner, without any consideration to prior quantitative performance.[664] In our view, the potential for such discrimination is contrary to the object and purpose of both the Safeguards Agreement, and the WTO Agreement. In this regard, the preamble of the Safeguards Agreement refers to the 'need to clarify and reinforce the disciplines of GATT 1994' in the context of safeguards. We consider that the 'disciplines of GATT 1994' surely include those providing for non-discrimination. In any event 'the elimination of discriminatory treatment in international trade relations' is referred to explicitly in the preamble to the WTO Agreement. We further note that the preamble of the Safeguards Agreement also mentions that one of the objectives of the Safeguards Agreement is to 'establish multilateral control over safeguards and eliminate measures that escape such control'. We are of the view that non-application of Article XIII in the context of safeguards would result in tariff quota safeguard measures partially escaping the control of multilateral disciplines. This result would be contrary to the objectives set out in the preamble of the Safeguards Agreement."[665]

452. The Panel on *US – Line Pipe*, in a statement not reviewed by the Appellate Body, highlighted the importance of respecting traditional trade patterns when imposing safeguards measures:

> "In our view, Korea is correct to argue that a Member would violate the general rule set forth in the chapeau of Article XIII:2 if it imposes safeguard measures without respecting traditional trade patterns (at least in the absence of any evidence indicating that the shares a Member might be expected to obtain in the future differ, as a result of changed circumstances, from its historical share). Trade flows before the imposition of a safeguard measure provide an objective, factual basis for project-

[661] *Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme*, MTN.GNG/MA/W/24, 20 December 1993.
[662] Appellate Body Report on *EC – Bananas III*, para. 157.
[663] (*footnote original*) See section below.
[664] (*footnote original*) The same concern does not arise in respect of tariff measures – which also appear not to be covered by all Article 5 disciplines – because tariff measures affect all exporting Members equally.
[665] Panel Report on *US – Line Pipe*, para. 7.49

ing what might have occurred in the absence of that measure."[666]

XV. ARTICLE XIV

A. TEXT OF ARTICLE XIV

*Article XIV**
Exceptions to the Rule of Non-discrimination

1. A contracting party which applies restrictions under Article XII or under Section B of Article XVIII may, in the application of such restrictions, deviate from the provisions of Article XIII in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party may at that time apply under Article VIII or XIV of the Articles of Agreement of the International Monetary Fund, or under analogous provisions of a special exchange agreement entered into pursuant to paragraph 6 of Article XV.*

2. A contracting party which is applying import restrictions under Article XII or under Section B of Article XVIII may, with the consent of the CONTRACTING PARTIES, temporarily deviate from the provisions of Article XIII in respect of a small part of its external trade where the benefits to the contracting party or contracting parties concerned substantially outweigh any injury which may result to the trade of other contracting parties.*

3. The provisions of Article XIII shall not preclude a group of territories having a common quota in the International Monetary Fund from applying against imports from other countries, but not among themselves, restrictions in accordance with the provisions of Article XII or of Section B of Article XVIII on condition that such restrictions are in all other respects consistent with the provisions of Article XIII.

4. A contracting party applying import restrictions under Article XII or under Section B of Article XVIII shall not be precluded by Articles XI to XV or Section B of Article XVIII of this Agreement from applying measures to direct its exports in such a manner as to increase its earnings of currencies which it can use without deviation from the provisions of Article XIII.

5. A contracting party shall not be precluded by Articles XI to XV, inclusive, or by Section B of Article XVIII, of this Agreement from applying quantitative restrictions:

(*a*) having equivalent effect to exchange restrictions authorized under Section 3 (*b*) of Article VII of the Articles of Agreement of the International Monetary Fund, or

(*b*) under the preferential arrangements provided for in Annex A of this Agreement, pending the outcome of the negotiations referred to therein.

B. TEXT OF *AD* ARTICLE XIV

Ad Article XIV
Paragraph 1

The provisions of this paragraph shall not be so construed as to preclude full consideration by the CONTRACTING PARTIES, in the consultations provided for in paragraph 4 of Article XII and in paragraph 12 of Article XVIII, of the nature, effects and reasons for discrimination in the field of import restrictions.

Paragraph 2

One of the situations contemplated in paragraph 2 is that of a contracting party holding balances acquired as a result of current transactions which it finds itself unable to use without a measure of discrimination.

C. INTERPRETATION AND APPLICATION OF ARTICLE XIV

No jurisprudence or decision of a competent WTO body.

D. RELATIONSHIP WITH OTHER ARTICLES

1. Article XVII

453. The interpretation and application of *Ad* Articles XI, XII, XIII, XIV and XVIII, which clarifies that the terms "import restrictions" or "export restrictions" used in these Articles include "restrictions made effective through state-trading operations", was discussed by the Panels on *India – Quantitative Restrictions* and *Korea – Various Measures on Beef*. See paragraphs 407–408 above.

2. Reference to GATT practice

454. With respect to GATT practice on Article XIV, see GATT Analytical Index, pages 418–424.

XVI. ARTICLE XV

A. TEXT OF ARTICLE XV

Article XV
Exchange Arrangements

1. The CONTRACTING PARTIES shall seek co-operation with the International Monetary Fund to the end that the CONTRACTING PARTIES and the Fund may pursue a co-ordinated policy with regard to exchange questions within the jurisdiction of the Fund and questions of quantitative restrictions and other trade measures within the jurisdiction of the CONTRACTING PARTIES.

2. In all cases in which the CONTRACTING PARTIES are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign

[666] Panel Report on *US – Line Pipe*, para. 7.54.

exchange arrangements, they shall consult fully with the International Monetary Fund. In such consultations, the CONTRACTING PARTIES shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and shall accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund, or with the terms of a special exchange agreement between that contracting party and the CONTRACTING PARTIES. The CONTRACTING PARTIES in reaching their final decision in cases involving the criteria set forth in paragraph 2 (*a*) of Article XII or in paragraph 9 of Article XVIII, shall accept the determination of the Fund as to what constitutes a serious decline in the contracting party's monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases.

3. The CONTRACTING PARTIES shall seek agreement with the Fund regarding procedures for consultation under paragraph 2 of this Article.

4. Contracting parties shall not, by exchange action, frustrate* the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund.

5. If the CONTRACTING PARTIES consider, at any time, that exchange restrictions on payments and transfers in connection with imports are being applied by a contracting party in a manner inconsistent with the exceptions provided for in this Agreement for quantitative restrictions, they shall report thereon to the Fund.

6. Any contracting party which is not a member of the Fund shall, within a time to be determined by the CONTRACTING PARTIES after consultation with the Fund, become a member of the Fund, or, failing that, enter into a special exchange agreement with the CONTRACTING PARTIES. A contracting party which ceases to be a member of the Fund shall forthwith enter into a special exchange agreement with the CONTRACTING PARTIES. Any special exchange agreement entered into by a contracting party under this paragraph shall thereupon become part of its obligations under this Agreement.

7. (*a*) A special exchange agreement between a contracting party and the CONTRACTING PARTIES under paragraph 6 of this Article shall provide to the satisfaction of the CONTRACTING PARTIES that the objectives of this Agreement will not be frustrated as a result of action in exchange matters by the contracting party in question.

(*b*) The terms of any such agreement shall not impose obligations on the contracting party in exchange matters generally more restrictive than those imposed by the Articles of Agreement of the International Monetary Fund on members of the Fund.

8. A contracting party which is not a member of the Fund shall furnish such information within the general scope of section 5 of Article VIII of the Articles of Agreement of the International Monetary Fund as the CONTRACTING PARTIES may require in order to carry out their functions under this Agreement.

9. Nothing in this Agreement shall preclude:

(*a*) the use by a contracting party of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund or with that contracting party's special exchange agreement with the CONTRACTING PARTIES, or

(*b*) the use by a contracting party of restrictions or controls in imports or exports, the sole effect of which, additional to the effects permitted under Articles XI, XII, XIII and XIV, is to make effective such exchange controls or exchange restrictions.

B. TEXT OF *AD* ARTICLE XV

Ad Article XV
Paragraph 4

The word "frustrate" is intended to indicate, for example, that infringements of the letter of any Article of this Agreement by exchange action shall not be regarded as a violation of that Article if, in practice, there is no appreciable departure from the intent of the Article. Thus, a contracting party which, as part of its exchange control operated in accordance with the Articles of Agreement of the International Monetary Fund, requires payment to be received for its exports in its own currency or in the currency of one or more members of the International Monetary Fund will not thereby be deemed to contravene Article XI or Article XIII. Another example would be that of a contracting party which specifies on an import licence the country from which the goods may be imported, for the purpose not of introducing any additional element of discrimination in its import licensing system but of enforcing permissible exchange controls.

C. INTERPRETATION AND APPLICATION OF ARTICLE XV

No jurisprudence or decision of a competent WTO body.

1. Reference to GATT practice

455. With respect to GATT practice concerning Article XV, see GATT Analytical Index, pages 429–441.

XVII. ARTICLE XVI

A. TEXT OF ARTICLE XVI

*Article XVI**
Subsidies

Section A – Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

Section B – Additional Provisions on Export Subsidies*

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.*

4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.*

5. The CONTRACTING PARTIES shall review the operation of the provisions of this Article from time to time with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties.

B. TEXT OF *AD* ARTICLE XVI

Ad Article XVI

The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

Section B

1. Nothing in Section B shall preclude the use by a contracting party of multiple rates of exchange in accordance with the Articles of Agreement of the International Monetary Fund.

2. For the purposes of Section B, a "primary product" is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

Paragraph 3

1. The fact that a contracting party has not exported the product in question during the previous representative period would not in itself preclude that contracting party from establishing its right to obtain a share of the trade in the product concerned.

2. A system for the stabilization of the domestic price or of the return to domestic producers of a primary product independently of the movements of export prices, which results at times in the sale of the product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, shall be considered not to involve a subsidy on exports within the meaning of paragraph 3 if the CONTRACTING PARTIES determine that:

(a) the system has also resulted, or is so designed as to result, in the sale of the product for export at a price higher than the comparable price charged for the like product to buyers in the domestic market; and

(b) the system is so operated, or is designed so to operate, either because of the effective regulation of production or otherwise, as not to stimulate exports unduly or otherwise seriously to prejudice the interests of other contracting parties.

Notwithstanding such determination by the CONTRACTING PARTIES, operations under such a system shall be subject to the provisions of paragraph 3 where they are wholly or partly financed out of government funds in addition to the funds collected from producers in respect of the product concerned.

Paragraph 4

The intention of paragraph 4 is that the contracting parties should seek before the end of 1957 to reach agreement to abolish all remaining subsidies as from 1 January 1958; or, failing this, to reach agreement to extend the application of the standstill until the earliest date thereafter by which they can expect to reach such agreement.

C. INTERPRETATION AND APPLICATION OF ARTICLE XVI

1. Article XVI:4

456. In *US – FSC*, the Appellate Body discussed the relationship between Article XVI:4 of *GATT 1994* and the *SCM Agreement* in interpreting Article 3.1(a) of the *SCM Agreement*. See Chapter on the *SCM Agreement*, Section II.B.9(a).

2. SCM Agreement

457. With respect to WTO jurisprudence and materials produced by competent WTO bodies concerning subsidies, see Chapter on the *SCM Agreement*.

3. Reference to GATT practice

458. With respect to GATT practice on Article XVI, see GATT Analytical Index, pages 445–463.

XVIII. ARTICLE XVII

A. TEXT OF ARTICLE XVII

Article XVII
State Trading Enterprises

1* (a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges,* such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports and exports by private traders.

(b) The provisions of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations,* including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

(c) No contracting party shall prevent any enterprise (whether or not an enterprise described in subparagraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph.

2. The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods* for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.

3. The contracting parties recognize that their enterprises of the kind described in paragraph 1 (a) of this article might be operated so as to create serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis designed to limit or reduce such obstacles are of importance to the expansion of international trade.*

4. (a) Contracting parties shall notify the CONTRACTING PARTIES of the products which are imported into or exported from their territories by enterprises of the kind described in paragraph 1 (a) of this article.

(b) A contracting party establishing, maintaining or authorizing an import monopoly of a product, which is not the subject of a concession under Article II, shall, on the request of another contracting party having a substantial trade in the product concerned, inform the CONTRACTING PARTIES of the import mark-up* on the product during a recent representative period, or when it is not possible to do so, of the price charged on the resale of the product.

(c) The CONTRACTING PARTIES may, at the request of a contracting party which has reason to believe that its interest under this Agreement are being adversely affected by the operations of an enterprise of the kind described in paragraph 1 (a), request the contracting party establishing, maintaining or authorizing such enterprise to supply information about its operations related to the carrying out of the provisions of this Agreement.

(d) The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.

B. TEXT OF *AD* ARTICLE XVII

Ad Article XVII

Paragraph 1

The operations of Marketing Boards, which are established by contracting parties and are engaged in purchasing or selling, are subject to the provisions of sub-paragraphs (a) and (b).

The activities of Marketing Boards which are established by contracting parties and which do not purchase or sell but lay down regulations covering private trade are governed by the relevant Articles of this Agreement.

The charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets.

Paragraph 1 (a)

Governmental measures imposed to ensure standards of quality and efficiency in the operation of external trade, or privileges granted for the exploitation of national natural resources but which do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute "exclusive or special privileges".

Paragraph 1(b)

A country receiving a "tied loan" is free to take this loan into account as a "commercial consideration" when purchasing requirements abroad.

Paragraph 2

The term "goods" is limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services.

Paragraph 3

Negotiations which contracting parties agree to conduct under this paragraph may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of any other mutually satisfactory arrangement consistent with the provisions of this Agreement. (See paragraph 4 of Article II and the note to that paragraph.)

Paragraph 4 (b)

The term "import mark-up" in this paragraph shall represent the margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes within the purview of Article III, transportation, distribution, and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) exceeds the landed cost.

C. UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XVII OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members,

Noting that Article XVII provides for obligations on Members in respect of the activities of the state trading enterprises referred to in paragraph 1 of Article XVII, which are required to be consistent with the general principles of non-discriminatory treatment prescribed in GATT 1994 for governmental measures affecting imports or exports by private traders;

Noting further that Members are subject to their GATT 1994 obligations in respect of those governmental measures affecting state trading enterprises;

Recognizing that this Understanding is without prejudice to the substantive disciplines prescribed in Article XVII;

Hereby *agree* as follows:

1. In order to ensure the transparency of the activities of state trading enterprises, Members shall notify such enterprises to the Council for Trade in Goods, for review by the working party to be set up under paragraph 5, in accordance with the following working definition:

"Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."

This notification requirement does not apply to imports of products for immediate or ultimate consumption in governmental use or in use by an enterprise as specified above and not otherwise for resale or use in the production of goods for sale.

2. Each Member shall conduct a review of its policy with regard to the submission of notifications on state trading enterprises to the Council for Trade in Goods, taking account of the provisions of this Understanding. In carrying out such a review, each Member should have regard to the need to ensure the maximum transparency possible in its notifications so as to permit a clear appreciation of the manner of operation of the enterprises notified and the effect of their operations on international trade.

3. Notifications shall be made in accordance with the questionnaire on state trading adopted on 24 May 1960 (BISD 9S/184–185), it being understood that Members shall notify the enterprises referred to in paragraph 1 whether or not imports or exports have in fact taken place.

4. Any Member which has reason to believe that another Member has not adequately met its notification

obligation may raise the matter with the Member concerned. If the matter is not satisfactorily resolved it may make a counter-notification to the Council for Trade in Goods, for consideration by the working party set up under paragraph 5, simultaneously informing the Member concerned.

5. A working party shall be set up, on behalf of the Council for Trade in Goods[1], to review notifications and counter-notifications. In the light of this review and without prejudice to paragraph 4(c) of Article XVII, the Council for Trade in Goods may make recommendations with regard to the adequacy of notifications and the need for further information. The working party shall also review, in the light of the notifications received, the adequacy of the above-mentioned questionnaire on state trading and the coverage of state trading enterprises notified under paragraph 1. It shall also develop an illustrative list showing the kinds of relationships between governments and enterprises, and the kinds of activities, engaged in by these enterprises, which may be relevant for the purposes of Article XVII. It is understood that the Secretariat will provide a general background paper for the working party on the operations of state trading enterprises as they relate to international trade. Membership of the working party shall be open to all Members indicating their wish to serve on it. It shall meet within a year of the date of entry into force of the WTO Agreement and thereafter at least once a year. It shall report annually to the Council for Trade in Goods.

(*footnote original*) [1] The activities of this working party shall be coordinated with those of the working group provided for in Section III of the Ministerial Decision on Notification Procedures adopted on 15 April 1994.

D. INTERPRETATION AND APPLICATION OF ARTICLE XVII

1. General

(a) Relationship between paragraphs 1(a) and 1(b) of Article XVII

459. In *Canada – Wheat Exports and Grain Imports*, the Panel found that the disputed export regime was inconsistent with the principles in subparagraph (b) of Article XVII:1. Canada (the respondent) alleged that the Panel had established that a violation of subparagraph (b) was sufficient to establish a breach of Article XVII:1 and also that the Panel had failed to consider the proper relationship between subparagraphs (a) and (b) of Article XVII:1. The Appellate Body held that a failure to identify discriminatory conduct prior to determining the consistency of a state trading enterprise's (STE) conduct with subparagraph (b) of Article XVII:1 would constitute an error of law. The Appellate Body held:

"[I]n this case, we have already determined that the two subparagraphs of Article XVII:1 are closely interrelated. As we have said, a panel faced with a claim of inconsistency with Article XVII:1(a) and (b) will, in most if not all cases, need to analyze and apply *both* provisions in order to assess the consistency of the measure at issue. Subparagraph (b) sets forth two specific conditions with which an STE must comply if allegedly discriminatory conduct falling, *prima facie*, within the scope of subparagraph (a) is to be found consistent with Article XVII:1. Yet, in order to know whether the conditions in (b) are satisfied, a panel must know *what* constitutes the conduct alleged to be inconsistent with the principles of non-discriminatory treatment in the GATT 1994. A panel will need to identify at least the differential treatment at issue. The outcome of an assessment under subparagraph (b) of whether the differential treatment is consistent with commercial considerations may depend, in part, upon whether the alleged discrimination relates to pricing, quality, or conditions of sale, and whether it is discrimination between export markets or some other form of discrimination.

It follows that, logically, a panel cannot assess whether particular practices of an allegedly discriminatory nature accord with commercial considerations without first identifying the key elements of the alleged discrimination. We emphasize that we are *not* suggesting that panels are always obliged to make specific factual and legal findings with respect to each element of a claim of discrimination under subparagraph (a) before undertaking *any* analysis under subparagraph (b). Rather, because a panel's analysis and application of subparagraph (b) to the facts of the case is, like subparagraph (b) itself, dependent on the obligation set forth in subparagraph (a), panels must identify the differential treatment alleged to be discriminatory under subparagraph (a) in order to ensure that they are undertaking a proper inquiry under subparagraph (b).

For these reasons, we are of the view that a failure to identify *any* conduct alleged to constitute discrimination contrary to the general principles of the GATT 1994 for governmental measures affecting imports or exports by private traders *before* undertaking an analysis of the consistency of an STE's conduct with subparagraph (b) of Article XVII:1 would constitute an error of law. Had the Panel in this case simply *ignored* the issue of possible discrimination within the meaning of Article XVII:1(a) and passed immediately to its analysis under subparagraph (b), we would have no difficulty – based on our analysis above of the relationship between the two provisions – concluding that the Panel erred in its interpretative approach. Yet this does not appear to us to be what the Panel did. We set out in the next sub-section our understanding of how the Panel conducted its analysis in this case."[667]

[667] Appellate Body Report on *Canada – Wheat Exports and Grain Imports*, paras. 110–112. In this case, the Appellate Body found that the Panel had not ignored subparagraph (a) of Article XVII and therefore had not erred.

460. The Panel on *Korea – Various Measures on Beef* found that despite domestic demand for imported beef, the Korean state trading agency for beef imports had suspended its tenders for beef of foreign origin, and had refused to sell imported beef from its stock, during a certain period of time. In examining the consistency of this practice of the Korean state trading agency with Articles III, XI and XVII, the Panel addressed the relationship between paragraphs 1(a) and 1(b) of Article XVII. Referring to the Panel Report on *Canada – FIRA*[668], the Panel, in a finding not reviewed by the Appellate Body, held that the violation of one of these two paragraphs would suffice to show a violation of the other paragraph:

> "In other words the terms 'general principle of non-discrimination treatment prescribed in this Agreement' (Art. XVII:1(a)) should be equated with 'make any such purchases or sales solely in accordance with commercial considerations' (Art. XVII:1(b)). The list of variables that can be used to assess whether a state-trading action is based on commercial consideration (prices, availability etc. . .) are to be used to facilitate the assessment whether the state-trading enterprise has acted in respect of the general principles of non-discrimination. A conclusion that the principle of non-discrimination was violated would suffice to prove a violation of Article XVII; similarly, a conclusion that a decision to purchase or buy was not based on 'commercial considerations', would also suffice to show a violation of Article XVII."[669]

461. Further, noting that the Korean state trading agency had exclusive rights of import for its 30 per cent share of Korea's beef import quotas, the Panel on *Korea – Various Measures on Beef*, in a statement not reviewed by the Appellate Body, stated:

> "Based on the panel findings in the *Canada – Marketing Agencies (1988)* case, the Panel considers that to the extent that LPMO fully controls both the importation and distribution of its 30 per cent share of Korean beef quota, the distinction normally made in the GATT between restrictions affecting the *importation* of products (i.e. border measures) and restrictions affecting *imported* products (i.e. internal measures) loses much of its significance."[670]

(b) *Ad* Note Articles XI, XII, XIII, XIV and XVIII

462. The Note *Ad* Articles XI, XII, XIII, XIV and XVIII, which clarifies that the terms "import restrictions" or "export restrictions" used in these Articles include "restrictions made effective through state-trading operations", was discussed by the Panels on *India – Quantitative Restrictions* and *Korea – Various Measures on Beef*. See paragraphs 407–408 above.

2. Article XVII:1(a)

463. The Panel on *Korea – Various Measures on Beef*, in a finding not reviewed by the Appellate Body, described the legal status of Article XVII:1(a) in the GATT framework in the following terms:

> "Article XVII.1(a) establishes the general obligation on state trading enterprises to undertake their activities in accordance with the GATT principles of non-discrimination. The Panel considers that this general principle of non-discrimination includes at least the provisions of Articles I and III of GATT."[671]

(a) Reference to GATT practice

464. With respect to GATT practice under Article XVII:1, see the GATT Analytical Index, pages 473–479.

3. Article XVII:1(b)

465. In *Korea – Various Measures on Beef*, the Panel discussed the general character of Article XVII:1(b). See paragraph 459 above.

(a) Reference to GATT practice

466. With respect to GATT practice under Article XVII:1, see the GATT Analytical Index, pages 473–479.

4. Article XVII:4

(a) Notification requirements

467. At its meeting of 20 February 1995, the Council for Trade in Goods decided that "all new and full notifications dealt with under Article XVII of *GATT 1994* and Paragraph 1 of the Understanding on the Interpretation of Article XVII of *GATT 1994*, should be submitted not later than 30 June in every third year after 1995 and that the updating notifications due in each of the two intervening years should be submitted not later than 30 June of the respective year."[672] The Council for Trade in Goods, however, clarified that the deadlines for future notifications would be established by the Working Party itself.[673]

468. With respect to the questionnaire used for as a basis for notifications, see paragraph 471 below.

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[668] Panel Report on *Canada – FIRA*, para. 5.16.
[669] Panel Report on *Korea – Various Measures on Beef*, para. 757.
[670] Panel Report on *Korea – Various Measures on Beef*, para. 766.
[671] Panel Report on *Korea – Various Measures on Beef*, para. 753. In support of its proposition, the Panel went on to refer to the following two GATT Panel Reports: (i) Panel Report on *Canada – Provincial Liquor Board (EC)*, para. 4.26; and Panel Report on *Canada – Provincial Liquor Board (US)*, para. 5.15.
[672] G/C/M/1, paras. 5.6–5.7.
[673] G/C/M/1, para.5.5. The Working Party accordingly set forth the following deadlines: (i) 30 June 1995 for the 1995 notifications (G/STR/N/1); (ii) 30 September 1998 for the 1998 new and full notifications (G/STR/N/4); and (iii) 29 June 2001 for the 2001 new and full notifications (G/STR/N/7).

(b) Reference to GATT practice

469. With respect to GATT practice regarding notifications of state trading, see GATT Analytical Index, pages 481–482.

5. Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994

(a) Paragraph 1

470. With respect to the notification requirements set forth in paragraph 1 of the Understanding, see paragraph 467 above.

(b) Paragraph 3

471. At its meeting of 21 April 1998, the Council for Trade in Goods approved a revised questionnaire proposed by the Working Party, which is to be used as a basis for notifications on state trading.[674]

(c) Paragraph 5

(i) Working Party on State Trading Enterprises

472. Pursuant to paragraph 5 of the Understanding, the Council for Trade in Goods established a Working Party on State Trading Enterprises at its meeting of 20 February 1995, "to carry out the tasks described in paragraph 5 of the Understanding on the Interpretation of Article XVII of GATT 1994".[675]

473. With respect to the establishment of the Working Party, see also the Chapter on the *WTO Agreement*, Section V.B.6(a).

(ii) "an illustrative list"

474. At its meeting of 15 October 1999, upon a proposal of the Working Party, the Council for Trade in Goods adopted "an illustrative list showing the kinds of relationships between governments and enterprises, and the kinds of activities, engaged in by these enterprises, which may be relevant for the purposes of Article XVII".[676] The illustrative list states that "[t]his list in no way affects the rights and obligations of Members under the Understanding and under Article XVII of GATT 1994 and its Interpretive Notes."[677]

(iii) "general background paper"

475. At its meeting of 6 April 1995, the Working Party established guidelines on the contents and the sources to be used in the preparation of the general background paper to be prepared by the Secretariat on the operation of the state trading enterprises as required under Paragraph 5 of the Understanding.[678] On 26 October 1995, the Secretariat accordingly prepared and issued a background paper entitled "Operations of State Trading Enterprises as they Relate to International Trade."[679]

E. RELATIONSHIP WITH OTHER ARTICLES

1. Article I

476. The Panel on *Korea – Various Measures on Beef* touched on the relationship between Articles I and XVII. See paragraph 463 above.

2. Article II

477. In *Korea – Various Measures on Beef*, after finding that the practice of the Korean state trading agency for beef of according different treatment to grass-fed beef and grain-fed beef was inconsistent with *GATT* Articles II:1(a) and XI, the Panel exercised judicial economy with respect to claims concerning the consistency of that practice with Articles III:4 and XVII.[680]

(a) Reference to GATT practice

478. With respect to GATT practice on this issue, see the GATT Analytical Index, page 483.

3. Article III

479. The Panel on *Korea – Various Measures on Beef* discussed the relationship between Articles III and XVII. See paragraph 463 above.

(a) Reference to GATT practice

480. With respect to GATT practice on this issue, see the GATT Analytical Index, pages 483–484.

4. Article XI

481. Exercising judicial economy, the Panel on *Korea – Various Measures on Beef* did not examine claims regarding certain practices of the Korean state trading agency for beef under Articles III:4 and XVII, after it had found a violation of Articles XI and II:1(a) with respect to that practice. See also paragraph 477 above.

482. In *Korea – Various Measures on Beef*, the Panel addressed the practice of the Korean state trading agency which controlled a 30 per cent share of Korea's import quotas for certain products. See paragraph 461 above.

483. With respect to the Note *Ad* Articles XI, XII, XIII, XIV and XVIII, see paragraph 462 above.

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[674] G/C/M/33, section 3. The text of the approved questionnaire can be found in G/STR/3.
[675] G/C/M/1, subsection 5(A).
[676] G/C/M/41, section 3. The text of the adopted illustrative list can be found in G/STR/4.
[677] G/STR/4, para. 4.
[678] G/STR/M/1, paras. 25–46.
[679] G/STR/2.
[680] Panel Report on *Korea – Various Measures on Beef*, para. 7.80. With respect to judicial economy in general, see the Chapter on the *DSU*, Section XXXVI.F.

(a) Reference to GATT practice

484. With respect to GATT practice on this issue, see the GATT Analytical Index, pages 484–485.

5. Articles XII, XIII, XIV and XVIII

485. With respect to the Note *Ad* Articles XI, XII, XIII, XIV and XVIII, see paragraph 462 above.

(a) Reference to GATT practice

486. With respect to GATT practice on the Note *Ad* Articles XII and XVIII, see the GATT Analytical Index, page 485.

F. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Agreement on Agriculture

487. Footnote 1 to Article 4.2 of the *Agreement on Agriculture* sets forth that "any measures of the kind which have been required to be converted into ordinary customary duties" under that Agreement, include "quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises . . .". In *Korea – Various Measures on Beef*, the Panel found, and the Appellate Body agreed, that Korea was in violation of Article 4.2 of the *Agreement of Agriculture* and Article XI of the *GATT* in that despite the demand for imported beef, the Korean state trading agency for beef imports suspended its tenders for beef of foreign origin, and refused to sell imported beef from its stock, during a certain period of time. See Chapter on the *Agreement on Agriculture*, Section V.B.3. In this context, the Appellate Body stated:

> "Since the Panel has already reached the conclusion that the above measures are inconsistent with Article XI and the Ad Note to Articles XI, XII, XIII, XIV and XVIII relating to state-trading enterprises, the same measures are necessarily inconsistent with Article 4.2 of *the Agreement on Agriculture* and its footnote referring to non-tariff measures maintained through state-trading enterprises."[681]

XIX. ARTICLE XVIII

A. TEXT OF ARTICLE XVIII

*Article XVIII**
Governmental Assistance to Economic Development

1. The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living* and are in the early stages of development.*

2. The contracting parties recognize further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. They agree, therefore, that those contracting parties should enjoy additional facilities to enable them (*a*) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry* and (*b*) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.

3. The contracting parties recognize finally that, with those additional facilities which are provided for in Sections A and B of this Article, the provisions of this Agreement would normally be sufficient to enable contracting parties to meet the requirements of their economic development. They agree, however, that there may be circumstances where no measure consistent with those provisions is practicable to permit a contracting party in the process of economic development to grant the governmental assistance required to promote the establishment of particular industries* with a view to raising the general standard of living of its people. Special procedures are laid down in Sections C and D of this Article to deal with those cases.

4. (*a*) Consequently, a contracting party, the economy of which can only support low standards of living* and is in the early stages of development,* shall be free to deviate temporarily from the provisions of the other Articles of this Agreement, as provided in Sections A, B and C of this Article.

(*b*) A contracting party, the economy of which is in the process of development, but which does not come within the scope of subparagraph (*a*) above, may submit applications to the CONTRACTING PARTIES under Section D of this Article.

5. The contracting parties recognize that the export earnings of contracting parties, the economies of which are of the type described in paragraph 4 (*a*) and (*b*) above and which depend on exports of a small number of primary commodities, may be seriously reduced by a decline in the sale of such commodities. Accordingly, when the exports of primary commodities by such a contracting party are seriously affected by measures taken by another contracting party, it may have resort to the consultation provisions of Article XXII of this Agreement.

[681] Panel Report on *Korea – Various Measures on Beef*, para. 768.

6. The CONTRACTING PARTIES shall review annually all measures applied pursuant to the provisions of Sections C and D of this Article.

Section A

7. (*a*) If a contracting party coming within the scope of paragraph 4 (*a*) of this Article considers it desirable, in order to promote the establishment of a particular industry* with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, it shall notify the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. If agreement is reached between such contracting parties concerned, they shall be free to modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give effect to such agreement, including any compensatory adjustments involved.

(*b*) If agreement is not reached within sixty days after the notification provided for in subparagraph (*a*) above, the contracting party which proposes to modify or withdraw the concession may refer the matter to the CONTRACTING PARTIES which shall promptly examine it. If they find that the contracting party which proposes to modify or withdraw the concession has made every effort to reach an agreement and that the compensatory adjustment offered by it is adequate, that contracting party shall be free to modify or withdraw the concession if, at the same time, it gives effect to the compensatory adjustment. If the CONTRACTING PARTIES do not find that the compensation offered by a contracting party proposing to modify or withdraw the concession is adequate, but find that it has made every reasonable effort to offer adequate compensation, that contracting party shall be free to proceed with such modification or withdrawal. If such action is taken, any other contracting party referred to in subparagraph (*a*) above shall be free to modify or withdraw substantially equivalent concessions initially negotiated with the contracting party which has taken the action.*

Section B

8. The contracting parties recognize that contracting parties coming within the scope of paragraph 4 (*a*) of this Article tend, when they are in rapid process of development, to experience balance of payments difficulties arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade.

9. In order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, a contracting party coming within the scope of paragraph 4 (*a*) of this Article may, subject to the provisions of paragraphs 10 to 12, control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported; *Provided* that the import restrictions instituted, maintained or intensified shall not exceed those necessary:

(*a*) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or

(*b*) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of the contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

10. In applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development; *Provided* that the restrictions are so applied as to avoid unnecessary damage to the commercial or economic interests of any other contracting party and not to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and *Provided* further that the restrictions are not so applied as to prevent the importation of commercial samples or to prevent compliance with patent, trade mark, copyright or similar procedures.

11. In carrying out its domestic policies, the contracting party concerned shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources. It shall progressively relax any restrictions applied under this Section as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article and shall eliminate them when conditions no longer justify such maintenance; *Provided* that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section.*

12. (*a*) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Section, shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the

possible effect of the restrictions on the economies of other contracting parties.

(*b*) On a date to be determined by them* the CONTRACTING PARTIES shall review all restrictions still applied under this Section on that date. Beginning two years after that date, contracting parties applying restrictions under this Section shall enter into consultations of the type provided for in subparagraph (*a*) above with the CONTRACTING PARTIES at intervals of approximately, but not less than, two years according to a programme to be drawn up each year by the CONTRACTING PARTIES; *Provided* that no consultation under this subparagraph shall take place within two years after the conclusion of a consultation of a general nature under any other provision of this paragraph.

(*c*) (i) If, in the course of consultations with a contracting party under subparagraph (*a*) or (*b*) of this paragraph, the CONTRACTING PARTIES find that the restrictions are not consistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within a specified period. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(*d*) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Section to enter into consultations with them at the request of any contracting party which can establish a *prima facie* case that the restrictions are inconsistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(*e*) If a contracting party against which action has been taken in accordance with the last sentence of subparagraph (*c*) (ii) or (*d*) of this paragraph, finds that the release of obligations authorized by the CONTRACTING PARTIES adversely affects the operation of its programme and policy of economic development, it shall be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary[1] to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect on the sixtieth day following the day on which the notice is received by him.

(*footnote original*) [1] By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".

(*f*) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to the factors referred to in paragraph 2 of this Article. Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

Section C

13. If a contracting party coming within the scope of paragraph 4 (*a*) of this Article finds that governmental assistance is required to promote the establishment of a particular industry* with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.*

14. The contracting party concerned shall notify the CONTRACTING PARTIES of the special difficulties which it meets in the achievement of the objective outlined in paragraph 13 of this Article and shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties. It shall not introduce that measure before the expiration of the time-limit laid down in paragraph 15 or 17, as the case may be, or if the measure affects imports of a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, unless it has secured the concurrence of the CONTRACTING PARTIES in accordance with provisions of paragraph 18; *Provided* that, if the industry receiving assistance has

already started production, the contracting party may, after informing the CONTRACTING PARTIES, take such measures as may be necessary to prevent, during that period, imports of the product or products concerned from increasing substantially above a normal level.*

15. If, within thirty days of the notification of the measure, the CONTRACTING PARTIES do not request the contracting party concerned to consult with them,* that contracting party shall be free to deviate from the relevant provisions of the other Articles of this Agreement to the extent necessary to apply the proposed measure.

16. If it is requested by the CONTRACTING PARTIES to do so, *the contracting party concerned shall consult with them as to the purpose of the proposed measure, as to alternative measures which may be available under this Agreement, and as to the possible effect of the measure proposed on the commercial and economic interests of other contracting parties. If, as a result of such consultation, the CONTRACTING PARTIES agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective outlined in paragraph 13 of this Article, and concur* in the proposed measure, the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to apply that measure.

17. If, within ninety days after the date of the notification of the proposed measure under paragraph 14 of this Article, the CONTRACTING PARTIES have not concurred in such measure, the contracting party concerned may introduce the measure proposed after informing the CONTRACTING PARTIES.

18. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the contracting party concerned shall enter into consultations with any other contracting party with which the concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. The CONTRACTING PARTIES shall concur* in the measure if they agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective set forth in paragraph 13 of this Article, and if they are satisfied:

(*a*) that agreement has been reached with such other contracting parties as a result of the consultations referred to above, or

(*b*) if no such agreement has been reached within sixty days after the notification provided for in paragraph 14 has been received by the CONTRACTING PARTIES, that the contracting party having recourse to this Section has made all reasonable efforts to reach an agreement and that the interests of other contracting parties are adequately safeguarded.*

The contracting party having recourse to this Section shall thereupon be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure.

19. If a proposed measure of the type described in paragraph 13 of this Article concerns an industry the establishment of which has in the initial period been facilitated by incidental protection afforded by restrictions imposed by the contracting party concerned for balance of payments purposes under the relevant provisions of this Agreement, that contracting party may resort to the provisions and procedures of this Section; *Provided* that it shall not apply the proposed measure without the concurrence* of the CONTRACTING PARTIES.*

20. Nothing in the preceding paragraphs of this Section shall authorize any deviation from the provisions of Articles I, II and XIII of this Agreement. The provisos to paragraph 10 of this Article shall also be applicable to any restriction under this Section.

21. At any time while a measure is being applied under paragraph 17 of this Article any contracting party substantially affected by it may suspend the application to the trade of the contracting party having recourse to this Section of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove;* *Provided* that sixty days' notice of such suspension is given to the CONTRACTING PARTIES not later than six months after the measure has been introduced or changed substantially to the detriment of the contracting party affected. Any such contracting party shall afford adequate opportunity for consultation in accordance with the provisions of Article XXII of this Agreement.

Section D

22. A contracting party coming within the scope of subparagraph 4 (*b*) of this Article desiring, in the interest of the development of its economy, to introduce a measure of the type described in paragraph 13 of this Article in respect of the establishment of a particular industry* may apply to the CONTRACTING PARTIES for approval of such measure. The CONTRACTING PARTIES shall promptly consult with such contracting party and shall, in making their decision, be guided by the considerations set out in paragraph 16. If the CONTRACTING PARTIES concur* in the proposed measure the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the provisions of paragraph 18 shall apply.*

23. Any measure applied under this Section shall comply with the provisions of paragraph 20 of this Article.

B. TEXT *AD* ARTICLE XVIII

Ad Article XVIII

The CONTRACTING PARTIES and the contracting parties concerned shall preserve the utmost secrecy in respect of matters arising under this Article.

Paragraphs 1 and 4

1. When they consider whether the economy of a contracting party "can only support low standards of living", the CONTRACTING PARTIES shall take into consideration the normal position of that economy and shall not base their determination on exceptional circumstances such as those which may result from the temporary existence of exceptionally favourable conditions for the staple export product or products of such contracting party.

2. The phrase "in the early stages of development" is not meant to apply only to contracting parties which have just started their economic development, but also to contracting parties the economies of which are undergoing a process of industrialization to correct an excessive dependence on primary production.

Paragraphs 2, 3, 7, 13 and 22

The reference to the establishment of particular industries shall apply not only to the establishment of a new industry, but also to the establishment of a new branch of production in an existing industry and to the substantial transformation of an existing industry, and to the substantial expansion of an existing industry supplying a relatively small proportion of the domestic demand. It shall also cover the reconstruction of an industry destroyed or substantially damaged as a result of hostilities or natural disasters.

Paragraph 7 (b)

A modification or withdrawal, pursuant to paragraph 7 *(b)*, by a contracting party, other than the applicant contracting party, referred to in paragraph 7 *(a)*, shall be made within six months of the day on which the action is taken by the applicant contracting party, and shall become effective on the thirtieth day following the day on which such modification or withdrawal has been notified to the CONTRACTING PARTIES.

Paragraph 11

The second sentence in paragraph 11 shall not be interpreted to mean that a contracting party is required to relax or remove restrictions if such relaxation or removal would thereupon produce conditions justifying the intensification or institution, respectively, of restrictions under paragraph 9 of Article XVIII.

Paragraph 12 (b)

The date referred to in paragraph 12 *(b)* shall be the date determined by the CONTRACTING PARTIES in accordance with the provisions of paragraph 4 *(b)* of Article XII of this Agreement.

Paragraphs 13 and 14

It is recognized that, before deciding on the introduction of a measure and notifying the CONTRACTING PARTIES in accordance with paragraph 14, a contracting party may need a reasonable period of time to assess the competitive position of the industry concerned.

Paragraphs 15 and 16

It is understood that the CONTRACTING PARTIES shall invite a contracting party proposing to apply a measure under Section C to consult with them pursuant to paragraph 16 if they are requested to do so by a contracting party the trade of which would be appreciably affected by the measure in question.

Paragraphs 16, 18, 19 and 22

1. It is understood that the CONTRACTING PARTIES may concur in a proposed measure subject to specific conditions or limitations. If the measure as applied does not conform to the terms of the concurrence it will to that extent be deemed a measure in which the CONTRACTING PARTIES have not concurred. In cases in which the CONTRACTING PARTIES have concurred in a measure for a specified period, the contracting party concerned, if it finds that the maintenance of the measure for a further period of time is required to achieve the objective for which the measure was originally taken, may apply to the CONTRACTING PARTIES for an extension of that period in accordance with the provisions and procedures of Section C or D, as the case may be.

2. It is expected that the CONTRACTING PARTIES will, as a rule, refrain from concurring in a measure which is likely to cause serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.

Paragraphs 18 and 22

The phrase "that the interests of other contracting parties are adequately safeguarded" is meant to provide latitude sufficient to permit consideration in each case of the most appropriate method of safeguarding those interests. The appropriate method may, for instance, take the form of an additional concession to be applied by the contracting party having recourse to Section C or D during such time as the deviation from the other Articles of the Agreement would remain in force or of the temporary suspension by any other contracting party referred to in paragraph 18 of a concession substantially equivalent to the impairment due to the introduction of the measure in question. Such contracting party would

have the right to safeguard its interests through such a temporary suspension of a concession; *Provided* that this right will not be exercised when, in the case of a measure imposed by a contracting party coming within the scope of paragraph 4 *(a)*, the CONTRACTING PARTIES have determined that the extent of the compensatory concession proposed was adequate.

Paragraph 19

The provisions of paragraph 19 are intended to cover the cases where an industry has been in existence beyond the "reasonable period of time" referred to in the note to paragraphs 13 and 14, and should not be so construed as to deprive a contracting party coming within the scope of paragraph 4 *(a)* of Article XVIII, of its right to resort to the other provisions of Section C, including paragraph 17, with regard to a newly established industry even though it has benefited from incidental protection afforded by balance of payments import restrictions.

Paragraph 21

Any measure taken pursuant to the provisions of paragraph 21 shall be withdrawn forthwith if the action taken in accordance with paragraph 17 is withdrawn or if the CONTRACTING PARTIES concur in the measure proposed after the expiration of the ninety-day time limit specified in paragraph 17.

C. UNDERSTANDING ON THE BALANCE-OF-PAYMENTS PROVISIONS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members,

Recognizing the provisions of Articles XII and XVIII:B of GATT 1994 and of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205–209, referred to in this Understanding as the "1979 Declaration") and in order to clarify such provisions[1].

(*footnote original*) [1] Nothing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of restrictive import measures taken for balance-of-payments purposes.

Hereby *agree* as follows :

Application of Measures

1. Members confirm their commitment to announce publicly, as soon as possible, time-schedules for the removal of restrictive import measures taken for balance-of-payments purposes. It is understood that such time-schedules may be modified as appropriate to take into account changes in the balance-of-payments situation. Whenever a time-schedule is not publicly announced by a Member, that Member shall provide justification as to the reasons therefor.

2. Members confirm their commitment to give preference to those measures which have the least disruptive effect on trade. Such measures (referred to in this Understanding as "price-based measures") shall be understood to include import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods. It is understood that, notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the Schedule of that Member. Furthermore, that Member shall indicate the amount by which the price-based measure exceeds the bound duty clearly and separately under the notification procedures of this Understanding.

3. Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes unless, because of a critical balance-of-payments situation, price-based measures cannot arrest a sharp deterioration in the external payments position. In those cases in which a Member applies quantitative restrictions, it shall provide justification as to the reasons why price-based measures are not an adequate instrument to deal with the balance-of-payments situation. A Member maintaining quantitative restrictions shall indicate in successive consultations the progress made in significantly reducing the incidence and restrictive effect of such measures. It is understood that not more than one type of restrictive import measure taken for balance-of-payments purposes may be applied on the same product.

4. Members confirm that restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports and may not exceed what is necessary to address the balance-of-payments situation. In order to minimize any incidental protective effects, a Member shall administer restrictions in a transparent manner. The authorities of the importing Member shall provide adequate justification as to the criteria used to determine which products are subject to restriction. As provided in paragraph 3 of Article XII and paragraph 10 of Article XVIII, Members may, in the case of certain essential products, exclude or limit the application of surcharges applied across the board or other measures applied for balance-for-payments purposes. The term "essential products" shall be understood to mean products which meet basic consumption needs or which contribute to the Member's effort to improve its balance-of-payments situation, such as capital goods or inputs needed for production. In the administration of quantitative restrictions, a Member shall use discretionary licensing only when unavoidable and shall phase it out progressively. Appropriate justification shall be provided as to the criteria used to determine allowable import quantities or values.

Procedures for Balance-of-Payments Consultations

5. The Committee on Balance-of-Payments Restrictions (referred to in this Understanding as the "Committee") shall carry out consultations in order to review all restrictive import measures taken for balance-of-payments purposes. The membership of the Committee is open to all Members indicating their wish to serve on it. The Committee shall follow the procedures for consultations on balance-of-payments restrictions approved on 28 April 1970 (BISD 18S/48–53, referred to in this Understanding as "full consultation procedures"), subject to the provisions set out below.

6. A Member applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures shall enter into consultations with the Committee within four months of the adoption of such measures. The Member adopting such measures may request that a consultation be held under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII as appropriate. If no such request has been made, the Chairman of the Committee shall invite the Member to hod such a consultation. Factors that may be examined in the consultation would include, inter alia, the introduction of new types of restrictive measures for balance-of-payments purposes, or an increase in the level or product coverage of restrictions.

7. All restrictions applied for balance-of-payments purposes shall be subject to periodic review in the Committee under paragraph 4(b) of Article XII or under paragraph 12(b) of Article XVIII, subject to the possibility of altering the periodicity of consultations in agreement with the consulting Member or pursuant to any specific review procedure that may be recommended by the General Council.

8. Consultations may be held under the simplified procedures approved on 19 December 1972 (BISD 20S/47–49, referred to in this Understanding as "simplified consultation procedures") in the case of least-developed country Members or in the case of developing country Members which are pursuing liberalization efforts in conformity with the schedule presented to the Committee in previous consultations. Simplified consultations procedures may also be used when the Trade Policy Review of a developing country Member is scheduled for the same calendar year as the date fixed for the consultations. In such cases the decision as to whether full consultation procedures should be used will be made on the basis of the factors enumerated in paragraph 8 of the 1979 Declaration. Except in the case of least-developed country Members, no more than two successive consultations may be held under simplified consultation procedures.

Notification and Documentation

9. A Member shall notify to the General Council the introduction of or any changes in the application of restrictive import measures taken for balance-of-payments purposes, as well as any modifications in time-schedules for the removal of such measures as announced under paragraph 1. Significant changes shall be notified to the General Council prior to or not later than 30 days after their announcement. On a yearly basis, each Member shall make available to the Secretariat a consolidated notification, including all changes in laws, regulations, policy statements or public notices, for examination by Members. Notifications shall include full information, as far as possible, at the tariff-line level, on the type of measures applied, the criteria used for their administration, product coverage and trade flows affected.

10. At the request of any Member, notifications may be reviewed by the Committee. Such reviews would be limited to the clarification of specific issues raised by a notification or examination of whether a consultation under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII is required. Members which have reasons to believe that a restrictive import measure applied by another Member was taken for balance-of-payments purposes may bring the matter to the attention of the Committee. The Chairman of the Committee shall request information on the measure and make it available to all Members. Without prejudice to the right of any member of the Committee to seek appropriate clarifications in the course of consultations, questions may be submitted in advance for consideration by the consulting Member.

11. The consulting Member shall prepare a Basic Document for the consultations which, in addition to any other information considered to be relevant, should include: (a) an overview of the balance-of-payments situation and prospects, including a consideration of the internal and external factors having a bearing on the balance-of-payments situation and the domestic policy measures taken in order to restore equilibrium on a sound and lasting basis; (b) a full description of the restrictions applied for balance-of-payments purposes, their legal basis and steps taken to reduce incidental protective effects; (c) measures taken since the last consultation to liberalize import restrictions, in the light of the conclusions of the Committee; (d) a plan for the elimination and progressive relaxation of remaining restrictions. References may be made, when relevant, to the information provided in other notifications or reports made to the WTO. Under simplified consultation procedures, the consulting Member shall submit a written statement containing essential information on the elements covered by the Basic Document.

12. The Secretariat shall, with a view to facilitating the consultations in the Committee, prepare a factual background paper dealing with the different aspects of the plan for consultations. In the case of developing country Members, the Secretariat document shall include relevant background and analytical material on the

incidence of the external trading environment on the balance-of-payments situation and prospects of the consulting Member. The technical assistance services of the Secretariat shall, at the request of a developing country Member, assist in preparing the documentation for the consultations.

Conclusions of Balance-of-Payments Consultations

13. The Committee shall report on its consultations the General Council. When full consultation procedures have been used, the report should indicate the Committee's conclusions on the different elements of the plan for consultations, as well as the facts and reasons on which they are based. The Committee shall endeavour to include in its conclusions proposals for recommendations aimed at promoting the implementation of Articles XII and XVIII:B, the 1979 Declaration and this Understanding. In those cases in which a time-schedule has been presented for the removal of restrictive measures taken for balance-of-payments purposes, the General Council may recommend that, in adhering to such a time-schedule, a Member shall be deemed to be in compliance with its GATT 1994 obligations. Whenever the General Council has made specific recommendations, the rights and obligations of Members shall be assessed in the light of such recommendations. In the absence of specific proposals for recommendations by the General Council, the Committee's conclusions should record the different views expressed in the Committee. When simplified consultation procedures have been used, the report shall include a summary of the main elements discussed in the Committee and a decision on whether full consultation procedures are required."

D. INTERPRETATION AND APPLICATION OF ARTICLE XVIII

1. Article XVIII:B

(a) General

488. The Panel on *India – Quantitative Restrictions*, in a finding not addressed by the Appellate Body, explained the function of Article XVIII:B within the *GATT* framework. The Panel distinguished the conditions for taking balance-of-payments measures under Article XVIII from those applicable under Article XII of *GATT* and considered paragraphs 2, 9 and 11 of Article XVIII:

> "It is clear from these provisions that Article XVIII, which allows developing countries to maintain, under certain conditions, temporary import restrictions for balance-of-payments purposes, is premised on the assumption that it 'may be necessary' for them to adopt such measures in order to implement economic development programmes. It allows them to 'deviate temporarily from the provisions of the other Articles' of GATT 1994, as provided for in, *inter alia*, Section B. These provisions reflect an acknowledgement of the specific needs of developing countries in relation to measures taken for balance-of-payments purposes. Article XVIII:B of GATT 1994 thus embodies the special and differential treatment foreseen for developing countries with regard to such measures. In our analysis, we take due account of these provisions. In particular, the conditions for taking balance-of-payments measures under Article XVIII are clearly distinct from the conditions applicable to developed countries under Article XII of GATT 1994.[682]
>
> We also find that while Article XVIII:2 foresees the possibility that it 'may' be 'necessary' for developing countries to take restrictions for balance-of-payments purposes, such measures might not always be required. These restrictions must be adopted within specific conditions 'as provided in' Section B of Article XVIII. The specific conditions to be respected for the institution and maintenance of such measures include Article XVIII:9, which specifies the circumstances under which such measures may be instituted and maintained, and Article XVIII:11 which sets out the requirements for progressive relaxation and elimination of balance-of-payments measures."

(b) Jurisdiction of panels

489. In *India – Quantitative Restrictions*, the Appellate Body reviewed the Panel's finding that India's import restrictions for balance-of-payments reasons were inconsistent with Article XI:1 and that India was not entitled to maintain these balance-of-payments restrictions under the terms of Note *Ad* Article XVIII:11. India argued that panels have no authority to examine Members' justifications of balance-of-payments restrictions, because footnote 1 to the *Understanding on the Balance-of-Payments Provision* of the *GATT 1994* (the "*BOP Understanding*") provides that the *DSU* may be invoked in respect of matters relating to the specific use or purpose of a balance-of-payments measure or to the manner in which a balance-of-payments measure is *applied* in a particular case, but not with respect to the question of balance-of-payment *justification* of these measures. Rejecting this argument, the Appellate Body stated as follows:

> "Any doubts that may have existed in the past as to whether the dispute settlement procedures under Article XXIII were available for disputes relating to balance-of-payments restrictions have been removed by the second sentence of footnote 1 to the *BOP Understanding*, . . .

[682] (*footnote original*) In particular, the conditions to be met for the institution of balance-of-payments measures are different in Article XVIII:9 and Article XII, and an Ad Note which applies to the conditions for progressive relaxation and elimination of restrictions under Article XVIII:11 has no analogue in Article XII.

> In our opinion, this provision makes it clear that the dispute settlement procedures under Article XXIII, as elaborated and applied by the DSU, *are* available for disputes relating to *any* matters concerning balance-of-payments restrictions.
>
> . . .
>
> We note India's arguments relating to the negotiating history of the *BOP Understanding*. However, in the absence of a record of the negotiations on footnote 1 to the *BOP Understanding*, we find it difficult to give weight to these arguments. . . .
>
> Therefore, in light of footnote 1 to the *BOP Understanding*, a dispute relating to the justification of balance-of-payments restrictions is clearly within the scope of matters to which the dispute settlement provisions of Article XXIII of the GATT 1994, as elaborated and applied by the DSU, are applicable."[683]

490. With reference to the competence of the BOP Committee and the General Council under *GATT* Article XVIII and the *Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994*, the Appellate Body considered that this competence would not be rendered redundant if panels were permitted to review the justification of balance-of-payments restrictions:

> "Recourse to the dispute settlement procedures does not call into question either the availability or the utility of the procedures under Article XVIII:12 and the BOP Understanding. On the contrary, if panels refrained from reviewing the justification of balance-of-payments restrictions, they would diminish the explicit procedural rights of Members under Article XXIII and footnote 1 to the *BOP Understanding*, as well as their substantive rights under Article XVIII:11.
>
> We are cognisant of the competence of the BOP Committee and the General Council with respect to balance-of-payments restrictions under Article XVIII:12 of the GATT 1994 and the *BOP Understanding*. However, we see no conflict between that competence and the competence of panels. Moreover, we are convinced that, in considering the justification of balance-of-payments restrictions, panels should take into account the deliberations and conclusions of the BOP Committee, as did the panel in *Korea – Beef*.
>
> We agree with the Panel that the review by panels of the justification of balance-of-payments restrictions would not render redundant the competence of the BOP Committee and the General Council. The Panel correctly pointed out that the BOP Committee and panels have different functions, and that the BOP Committee procedures and the dispute settlement procedures differ in nature, scope, timing and type of outcome."[684]

491. Further, in response to India's argument that while panels did not lack jurisdiction with respect to balance-of-payments restrictions, they should nevertheless exercise judicial restraint, the Appellate Body stated:

> "India clarified its claim of legal error by stating that although panels, in principle, have competence to review any matters relating to balance-of-payments restrictions, they should exercise *judicial restraint* with respect to these matters. . . .
>
> . . .
>
> [W]e note that, if the exercise of judicial restraint were to lead *in practice*, as India seems to suggest, to panels refraining from considering disputes regarding the justification of balance-of-payments restrictions, such exercise of judicial restraint would, as discussed above, be inconsistent with Article XXIII of the GATT 1994, as elaborated and applied by the DSU, and footnote 1 to the *BOP Understanding*."[685]

(c) Right to maintain balance-of-payments measures

492. In *India – Quantitative Restrictions*, India argued before the Panel that it had the right to maintain balance-of-payment measures until the BOP Committee or the General Council advised it to modify these measures under Article XVIII:12 or established a time-period for their removal under paragraph 13 of the BOP Understanding. The Panel, in a finding not specifically addressed by the Appellate Body, disagreed:

> "We note at the outset that there is no explicit statement in Article XVIII:B or the 1994 Understanding that authorizes a Member to maintain its balance-of-payments measures in effect until the General Council or BOP Committee acts under one of the aforementioned provisions. Article XVIII:B, however, addresses the issue of the extent to which balance-of-payments measures may be maintained. Article XVIII:11, which is analyzed in more detail in Part G below, specifies that a Member:
>
> > 'shall progressively relax any restrictions applied under this Section [i.e., Article XVIII:B] as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article [XVIII] and shall eliminate them when conditions no longer justify their maintenance.'

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[683] Appellate Body Report on *India – Quantitative Restrictions*, paras. 87–88 and 94–95. Following these paragraphs, in support of this finding, the Appellate Body referred to Panel Report on *Korea – Beef (US)*, paras. 117–118. Also, the Appellate Body rejected the argument that India presented referring to Panel Reports on *EC – Citrus*; *EC – Bananas I*; and *Korea – Beef (US)*. Appellate Body Report on *India – Quantitative Restrictions*, para. 100.

[684] Appellate Body Report on *India – Quantitative Restrictions*, paras. 102–104. In this regard, see also the Panel's finding referenced in para. 492 of this Chapter.

[685] Appellate Body Report on *India – Quantitative Restrictions*, paras. 106 and 108.

> The obligation of Article XVIII:11 is not conditioned on any BOP Committee or General Council decision. If we were to interpret Article XVIII:11 to be so conditioned, we would be adding terms to Article XVIII:11 that it does not contain.
>
> Moreover, the obligation in Article XVIII:11 requires action by the individual Member. It is qualified only by a proviso and Ad Note (which we discuss in Part G and which are not relevant here) and it is not made subject to the accomplishment of other procedures. In light of the unqualified nature of the Article XVIII:11 obligation, it would be inconsistent with the principle *pacta sunt servanda* to conclude that a WTO Member has a right to maintain balance-of-payments measures, even if unjustified under Article XVIII:B, in the absence of a Committee or General Council decision in respect thereof. Thus, we find that India does not have a right to maintain its balance-of-payments measures until the General Council advises it to modify them under Article XVIII:12 or establishes a time-period for their removal under paragraph 13 of the 1994 Understanding."[686]

493. In *India – Quantitative Restrictions*, India argued that a Member invoking a balance-of-payments justification is entitled to maintain the measures until the General Council, following a recommendation from the BOP Committee, requires it to modify or remove them under Article XVIII:12(c)(i) or (ii). As referenced in paragraph 492 above, the Panel rejected this argument. However, India further argued that Article XVIII:12(c)(i) or (ii) confirms the existence of a "right to a phase-out" for measures which no longer meet the criteria set out in Article XVIII:9, by providing for a "specified period of time" to be granted to secure compliance with the relevant provisions when an inconsistency has been identified. In this context, India also claimed that paragraphs 1 and 13 of the Understanding provide an incentive for Members to present a time-schedule for removal even when there are no current balance-of-payments difficulties within the meaning of Article XVIII:9, thereby confirming the existence of a "right" to a phase-out even in the absence of current balance-of-payments difficulties within the meaning of Article XVIIII:9. The Panel rejected India's arguments:

> "The text of paragraph 13 of the Understanding itself does not specify whether the balance-of-payments difficulties which justified the imposition of the measures should still be in existence when a time schedule is presented for their elimination. However, the notion of presentation of a time-schedule, starting when the balance-of-payments difficulties still exist, is consistent with the temporary nature of balance-of-payments measures and with the requirement for their gradual elimination. Also, the time-schedules referred to in paragraphs 1 and 13 of the 1994 Understanding are the same and paragraph 1 specifies that 'such time-schedules may be modified as appropriate to take into account changes in the balance-of-payments situation.' This suggests that a time-schedule would have to be presented before the balance-of-payments difficulties disappear, otherwise, the reference to 'take into account changes in the balance-of-payments situation' would become redundant.
>
> This does not mean that the General Council has no margin of discretion in deciding whether or not to accept or not a time-schedule that would provide protection to the Member concerned. We have seen that the Ad Note suggests also that measures could, under certain circumstances, be maintained for a time when balance-of-payments difficulties which initially justified their institution are no longer in existence. In addition, paragraph 13 of the 1994 Understanding provides that 'the General Council may recommend that, in adhering to such a time-schedule, a Member *may be deemed* to be in compliance with its GATT 1994 obligations' (emphasis added). There is no clear evidence that this phrase has to be interpreted as covering only situations under which a phase-out period would exactly coincide with the gradual disappearance of balance-of-payments difficulties.
>
> In light of the above, we conclude that the procedure for submission and approval of a time-schedule incorporated in the 1994 Understanding, which is specific to the Committee consultations, does not give WTO Members a 'right' to a phase-out period which a panel would have to protect in the absence of balance-of-payments difficulties in the sense of Article XVIII:B.[687] Even assuming that such a 'right' could be recognised under paragraph 13 of the 1994 Understanding, such a recognition would in any case require a prior decision of the General Council."[688]

(d) Reference to GATT practice

494. With respect to GATT practice concerning Article XVIII:B, see the GATT Analytical Index, pages 501–508.

2. Article XVIII:9

(a) General

495. In *India – Quantitative Restrictions*, the Panel decided that in its evaluation of the situation of India's monetary reserves under Article XVIII:9, it would need to examine the facts existing on the date of its establishment. The Panel gave both legal and practical reasons for not focusing on the situation existing at a later point in time:

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[686] Panel Report on *India – Quantitative Restrictions*, paras. 5.78–5.80.

[687] (*footnote original*) As we note in our suggestions for implementation, a phase-out period typically has been negotiated (see text accompanying footnotes 366–368).

[688] Panel Report on *India – Quantitative Restrictions*, paras. 5.233–5.235.

"With respect to the date at which India's balance-of-payments and reserve situation is to be assessed, we note that practice, both prior to the WTO and since its entry into force, limits the claims which panels address to those raised in the request for establishment of the panel, which is typically the basis of the panel's terms of reference (as is the case here).[689] In our opinion, this has consequences for the determination of the facts that can be taken into account by the Panel, since the complainant obviously bases the claims contained in its request for establishment of the panel on a given set of facts existing when it presents its request to the DSB.

In the present situation, the United States primarily seeks a finding that, at the latest on the date of establishment of the Panel (18 November 1997), the measures at issue were not compatible with the WTO Agreement and were not justified under Article XVIII:11 of GATT 1994. Therefore, it would seem consistent with such a request and logical in the light of the constraints imposed by the Panel's terms of reference to limit our examination of the facts to those existing on the date the Panel was established.

This result is also dictated by practical considerations. The determination of whether balance-of-payments measures are justified is tied to a Member's reserve situation as of a certain date. In fixing that date, it is important to consider that the relevant economic and reserve data will be available only with some time-lag, which may vary by type of data. This is unlikely to be a problem if the date of assessment is the date the panel is established, since the first written submission is typically filed at least two (and often more) months after establishment of a panel. However, using the first or second panel meetings as the assessment date is more problematic since data might not be available and, if the date of the second panel meeting were chosen, it could significantly reduce the utility of the first meeting.

We note that, in the case on *Korea – Beef*, the panel relied on the conclusions of the BOP Committee reached before its establishment, but also considered 'all available information', including information related to periods after the establishment of the panel.[690] In this case, the parties and the IMF have supplied information concerning the evolution of India's balance-of-payments and reserve situation until June 1998. To the extent that such information is relevant to our determination of the consistency of India's balance-of-payments measures with GATT rules as of the date of establishment of the Panel, we take it into account.[691]"[692]

(b) Article XVIII:9(a)

496. In *India – Quantitative Restrictions*, the Panel examined whether the Indian balance-of-payments measure met with the conditions set out in subparagraph (a) of Article XVIII:9. The Panel first made a general statement about its analytical approach and then held that it would consider the "adequacy" of India's reserves for the purposes of both Article XVIII:9(a) and XVIII:9(b):

"The issue to be decided under Article XVIII:9 (a) is whether India's balance-of-payments measures exceeded those 'necessary . . . to forestall the threat of, or to stop, a serious decline in monetary reserves'. In deciding this issue, we must weigh the evidence favouring India against that favouring the United States and determine whether on the basis of all evidence before the Panel, the United States has established its claim under Article XVIII:11 that India does not meet the conditions specified in Article XVIII:9(a).

. . .

The question before us is whether India was facing a serious decline or threat thereof in its reserves (Article XVIII:9(a)) or had inadequate reserves (Article XVIII:9(b)). In analyzing India's situation in terms of Article XVIII:9(a), it is important to bear in mind that the issue is whether India was facing or threatened with a *serious* decline in its monetary reserves. Whether or not a decline of a given size is serious or not must be related to the initial state and adequacy of the reserves. A large decline need not necessarily be a serious one if the reserves are more than adequate. Accordingly, it is appropriate to consider the adequacy of India's reserves for purposes of Article XVIII:9(a), as well as for Article XVIII:9(b)."[693]

497. The Panel on *India – Quantitative Restrictions* then considered information supplied by the International Monetary Fund (IMF), which indicated the level of reserves which could be considered "adequate" for India:

"In this connection, we recall that the IMF reported that India's reserves as of 21 November 1997 were US$ 25.1 billion and that an adequate level of reserves at that date would have been US$ 16 billion. While the Reserve Bank of India did not specify a precise level of what would constitute adequacy, it concluded only three months earlier in August 1997 that India's reserves were 'well above the thumb rule of reserve adequacy' and although the Bank did not accept that thumb rule as the only measure of adequacy, it also found that '[b]y any criteria, the level of foreign exchange reserves appears comfortable'. It

[689] (*footnote original*) Appellate Body Report on *EC – Bananas III*, para. 143 and Appellate Body Report on *India – Patent (US)*, paras. 87–89.

[690] (*footnote original*) Panel Report on *Korea – Beef (US)*, paras. 122–123.

[691] (*footnote original*) We note for instance that such information might be relevant to an examination of the existence of a threat of serious decline in monetary reserves under Article XVIII:9 or to an examination of the conditions contemplated in the Note Ad Article XVIII:11.

[692] Panel Report on *India – Quantitative Restrictions*, paras. 5.160–5.163.

[693] Panel Report on *India – Quantitative Restrictions*, paras. 5.169 and 5.173.

also stated that 'the reserves would be adequate to withstand both cyclical and unanticipated shocks'.

. . .

Turning now to the question of whether India was facing a serious decline or threat thereof in its reserves, it is appropriate to consider the evolution of its reserves in the period prior to November 1997. As noted above, as of 31 March 1996, India's reserves were US$17 billion; as of 31 March 1997, India's reserves were US$22.4 billion. We note that at the time of the BOP Committee's consultations with India in January and June 1997, the IMF reported that India did not face a serious decline in its reserves or a threat thereof. As of 21 November 1997, India's reserves had risen to US$25.1 billion and the IMF continued to be of the view that India did not face a serious decline in its reserves or a threat thereof. In our view, in light of the foregoing evidence, and taking into account the provisions of Article XV:2, as of the date of establishment of the Panel, India was not facing a serious decline or a threat of a serious decline in monetary reserves as those terms are used in Article XVIII:9(a). In the event that it might be deemed relevant to add support to our findings concerning India's reserves as of November 1997, we have also examined the evolution of India's reserves after November 1997. We note that India's reserves fluctuated around the November level in subsequent months, falling to a low of US$23.9 billion in December 1997 and rising to a high of US$26.2 billion in April 1998. They were US$24.1 billion as of the end of June 1998."[694]

3. Article XVIII:11

(a) Burden of proof

498. In *India – Quantitative Restrictions*, citing its statement in *US – Wool Shirts and Blouses*[695], the Appellate Body agreed with the Panel that it is for the responding party to demonstrate that the complaining party violated its obligation not to require the responding party to change its development policy:

"The proviso precludes a Member, which is challenging the consistency of balance-of-payments restrictions, from arguing that such restrictions would be unnecessary if the developing country Member maintaining them were to change its development policy. In effect, the proviso places an obligation on Members not to require a developing country Member imposing balance-of-payments restrictions to change its development policy.

. . .

We consider that the invocation of the proviso to Article XVIII:11 does not give rise to a burden of proof issue insofar as it relates to the interpretation of what policies may constitute a 'development policy' within the meaning of the proviso. However, we do not exclude the possibility that a situation might arise in which an assertion regarding development policy does involve a burden of proof issue. Assuming that the complaining party has successfully established a *prima facie* case of inconsistency with Article XVIII:11 and the Ad Note, the responding party may, in its defence, either rebut the evidence adduced in support of the inconsistency or invoke the proviso. In the latter case, it would have to demonstrate that the complaining party violated its obligation not to require the responding party to change its development policy. This is an assertion with respect to which the responding party must bear the burden of proof. We, therefore, agree with the Panel that the burden of proof with respect to the proviso is on India."[696]

499. On the issue of the allocation of the burden of proof with respect to the *Ad* Note to the United States, India argued that the Panel had not applied the rules in accordance with the principles laid down by the Appellate Body in *EC – Hormones*.[697] Specifically, India objected to the fact that the Panel had taken into account the responses of India in its assessment regarding whether the United States had made a prima facie case. The Appellate Body did not share India's view:

"We do not interpret the . . . statement as requiring a panel to conclude that a *prima facie* case is made before it considers the views of the IMF or any other experts that it consults. Such consideration may be useful in order to determine whether a *prima facie* case has been made. Moreover, we do not find it objectionable that the Panel took into account, in assessing whether the United States had made a *prima facie* case, the responses of India to the arguments of the United States. This way of proceeding does not imply, in our view, that the Panel shifted the burden of proof to India."[698]

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[694] Panel Report on *India – Quantitative Restrictions*, paras. 5.174 and 5.177.

[695] Appellate Body Report on *US – Wool Shirts and Blouses* p.14. With respect to burden of proof in general, see Chapter on *DSU*, Section XXXVI.D.

[696] Appellate Body Report on *India – Quantitative Restrictions*, paras. 134 and 136.

[697] India cited the following finding:

> "In accordance with our ruling in *United States – Shirts and Blouses*, the Panel should have begun the analysis of each legal provision by examining whether the United States and Canada had presented evidence and legal instruments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities under each article of the *SPS Agreement* addressed by the Panel. . . . Only after such a *prima facie* determination had been made by the Panel may the onus be shifted to the European Communities to bring forward evidence and arguments to disprove the complaining party's claim."

Appellate Body Report on *EC – Hormones*, para. 109.

[698] Appellate Body Report on *India – Quantitative Restrictions*, para. 142. With respect to the burden of proof in general, see also the Chapter on *DSU*, Section XXXVI.D.

(b) Note *Ad* Article XVIII:11

(i) General

500. The Panel on *India – Quantitative Restrictions*, in a finding not reviewed by the Appellate Body, addressed the question whether Note *Ad* Article XVIII:11 permitted India to maintain balance-of-payments restrictions which did not meet the requirements of Article XVIII:9. India argued that it should not be required to remove its quantitative restrictions immediately, even if it were found that it currently did not experience balance-of-payments difficulties within the meaning of Article XVIII:9, because immediate removal would create the conditions for their reinstitution within the meaning of Note *Ad* Article XVIII:11. The Panel held that three questions had to be addressed in this context: namely (a) whether the Ad Note covered situations where the conditions of Article XVIII:9 were no longer met; (b) what conditions must be met in order to allow for the maintenance of measures under the *Ad* Note; and (c) whether these conditions were met in the present case. With respect to the first question – namely, whether the *Ad* Note covered situations where the conditions of Article XVIII:9 were no longer met – the Panel considered the wording of the *Ad* Note:

> "It seems clear to us that the use of the word 'respectively' in this provision allows the sentence to be read to refer to two situations, so that the second sentence of paragraph 11 should not be interpreted to mean (i) that a Member is required to relax restrictions if such relaxation would thereupon produce conditions justifying the intensification of restrictions under paragraph 9 of Article XVIII or (ii) that a Member is required to remove restrictions if such removal would thereupon produce conditions justifying the institution of restrictions under paragraph 9 of Article XVIII.
>
> The ordinary meaning of the words therefore suggests that the Ad Note could cover situations where the conditions of Article XVIII:9 are no longer met but are threatened. This would make it possible for a developing country having validly instituted measures for balance-of-payments purposes and whose situation has sufficiently improved so that the conditions of Article XVIII:9 are no longer fulfilled, not to eliminate the remaining measures if this would result in the reoccurrence of the conditions which had justified their institution in the first place."[699]

501. Having found that the ordinary meaning of the words of Note *Ad* Article XVIII:11 could extend to situations where the conditions of Article XVIII:9 no longer exist, but are threatened, the Panel considered also the context of the Ad Note and the notion of "gradual relaxation":

> "This appears consistent with the context of the provision, in particular with the general requirement of gradual relaxation of measures as balance-of-payments conditions improve, under Article XVIII:11. The notion of 'gradual relaxation' contained in Article XVIII:11 should itself be read in context, together with Article XVIII:9. Article XVIII:9 requires that the measures taken shall not 'exceed those necessary' to address the balance-of-payments situation justifying them. The institution and maintenance of balance-of-payments measures is only justified at the level necessary to address the concern, and cannot be more encompassing. Paragraph 11, in this context, confirms this requirement that the measures be limited to what is necessary and addresses more specifically the conditions of evolution of the measures as balance-of-payments conditions improve: at any given time, the restrictions should not exceed those necessary. This implies that as conditions improve, measures must be relaxed in proportion to the improvements. The logical conclusion of the process is that the measures will be eliminated when conditions no longer justify them.
>
> The Ad Note clarifies that the relaxation or removal should not result in a worsening of the balance-of-payments situation such as to justify strengthened or new measures. It thus seeks to avoid a situation where a developing country would be required to remove the measures, foreseeing that in doing so, it will create the conditions for their reinstitution. In light also of the need to restore equilibrium of the balance-of-payments on a sound and lasting basis, acknowledged in the first sentence of Article XVIII:11, it appears that removal should be made when the conditions actually allow for it. In this sense, we can agree with India that the developing country Member applying the measures is not required to follow a 'stop-and-go' policy. It is worth noting, however, that in circumstances where the balance-of-payments situation has gradually improved, if measures have been gradually relaxed as conditions improved under the terms of Article XVIII:11 and maintained only to the extent necessary under the terms of Article XVIII:9, it could be anticipated that only a minor portion of the measures initially instituted would remain to be removed by the time the balance-of-payments conditions have improved to the extent that the country faces neither a serious decline in monetary reserves or a threat thereof, or inadequate reserves. The elimination of these measures would thus constitute the final stage of a gradual relaxation and elimination.
>
> We therefore conclude that the Note Ad Article XVIII:11 could apply to both situations where balance-of-payments difficulties still exist and when they have ceased to exist but are threatened to return. It is therefore possible for India to invoke the existence of such risk in order to justify the maintenance of the measures. However, this possibility is available only to the extent that the conditions foreseen in the Ad Note are fulfilled. We must therefore determine what these conditions are

[699] Panel Report on *India – Quantitative Restrictions*, paras. 5.188–5.189.

before examining whether they are fulfilled in this instance."[700]

502. Having answered the first of the three questions listed in paragraph 500 above, the Panel then turned to the second question, namely which conditions had to be satisfied for a measure to be justified in the light of Note *Ad* Article XVIII:11, although the conditions under Article XVIII:9 were no longer met. The Panel gave the following overview:

"Three elements thus appear to be contemplated in this text:

(i) that conditions justifying the intensification or institution, respectively, of restrictions under paragraph 9 of Article XVIII would occur

(ii) that the relaxation or removal of the measures *would produce* occurrence of these conditions

(iii) that the relaxation or removal would *thereupon* produce these conditions."[701]

(ii) "would produce"

503. In its analysis of the conditions which a balance-of-payment measure, imposed by a developing country, had to comply with in the light of Note *Ad* Article XVIII:11, the Panel on *India – Quantitative Restrictions* first addressed the term "would . . . produce":

"We agree with the Panel that the Ad Note, and, in particular, the words 'would thereupon produce', require a *causal link of a certain directness* between the removal of the balance-of-payments restrictions and the recurrence of one of the three conditions referred to in Article XVIII:9. As pointed out by the Panel, the Ad Note demands more than a mere possibility of recurrence of one of these three conditions and allows for the maintenance of balance-of-payments restrictions on the basis only of clearly identified circumstances. In order to meet the requirements of the Ad Note, the probability of occurrence of one of the conditions would have to be clear."[702]

(iii) "thereupon"

504. With respect to the term "thereupon" in the phrase "would thereupon produce", the Appellate Body in *India – Quantitative Restrictions* rejected India's argument that the Panel had erred in interpreting the term "thereupon" contained in Note Ad Article XVIII:11 to signify "immediately":

"We also agree with the Panel that the Ad Note and, in particular, the word 'thereupon', expresses a *notion of temporal sequence* between the removal of the balance-of-payments restrictions and the recurrence of one of the conditions of Article XVIII:9. We share the Panel's view that the purpose of the word 'thereupon' is to ensure that measures are not maintained because of some distant possibility that a balance-of-payments difficulty may occur.

. . .

We recall that balance-of-payments restrictions may be maintained under the Ad Note if their removal or relaxation would thereupon produce: (i) a threat of a serious decline in monetary reserves; (ii) a serious decline in monetary reserves; *or* (iii) inadequate monetary reserves. With regard to the first of these conditions, we agree with the Panel that the word 'thereupon' means 'immediately'.

. . .

We agree with the Panel that it would be unrealistic to require that [the two other conditions, i.e.] a serious decline or inadequacy in monetary reserves should actually occur within days or weeks following the relaxation or removal of the balance-of-payments restrictions. The Panel was, therefore, correct to qualify its understanding of the word 'thereupon' with regard to these two conditions. While not explicitly stating so, the Panel in fact interpreted the word 'thereupon' for these two conditions as meaning 'soon after'. This is also one of the possible dictionary meanings of the word 'thereupon'. We are of the view that instead of using the word 'immediately', the Panel should have used the words 'soon after' to express the temporal sequence required by the word 'thereupon'."[703]

(c) Proviso to Article XVIII:11

505. In *India – Quantitative Restrictions*, the Appellate Body rejected India's argument that, contrary to the proviso to Article VIII:11, the Panel required India to change its development policy by holding that India could manage its balance-of-payments situation using macroeconomic policy instruments alone, without maintaining quantitative restrictions:

"[W]e are of the opinion that the use of macroeconomic policy instruments is not related to any particular development policy, but is resorted to by all Members regardless of the type of development policy they pursue. The IMF statement that India can manage its balance-of-payments situation using macroeconomic policy instruments alone does not, therefore, imply a change in India's development policy.

. . .

We believe structural measures are different from macroeconomic instruments with respect to their rela-

[700] Panel Report on *India – Quantitative Restrictions*, paras. 5.190–5.192.
[701] Panel Report on *India – Quantitative Restrictions*, para. 5.194.
[702] Appellate Body Report on *India – Quantitative Restrictions*, para. 114.
[703] Appellate Body Report on *India – Quantitative Restrictions*, paras. 115, 117 and 119.

tionship to development policy. If India were asked to implement agricultural reform or to scale back reservations on certain products for small-scale units as indispensable policy changes in order to overcome its balance-of-payments difficulties, such a requirement would probably have involved a change in India's development policy."[704]

4. Article XVIII:12

(a) Article XVIII:12(c)

506. The Panel on *India – Quantitative Restrictions* discussed Article XVIII:12(c)(i) and (ii) in rejecting India's argument that panels have no authority to evaluate Members' balance-of-payments justifications. See the excerpt referenced in paragraph 492 above.[705]

507. Further, the Panel rejected India's argument that Article XVIII:12(c)(ii) confirms the existence of a right to a phase-out for measures no longer justified by current balance-of-payments difficulties, stating as follows:

"We note that Article XVIII.12(c)(ii), provides a specific mechanism in order for the BOP Committee to address possible violations of the provisions of, *inter alia*, Article XVIII:B and provides for a period of time to be granted to the Member in order to implement the requirement to remove or modify the inconsistent measures. In the situation envisaged by Article XVIII:12(c)(ii), a period of time is granted when an inconsistency with the provisions of either Article XVIII:B or Article XIII has been identified. The period of time which is allocated to the Member in order to bring its measures into conformity is thus comparable, but not identical, to an implementation period of the sort provided for in Article 21.3 of the DSU. However, this specific mode of determination of the 'implementation' period applies to procedures initiated under Article XVIII:12(c), which is not the procedure under which this Panel is acting. We consider the issue of whether a phase-out would be appropriate in this case in our suggestions in respect of implementation, where we note this provision of Article XVIII:12(c)(ii)."[706]

5. Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994

(a) General

508. The Panel on *India – Quantitative Restrictions*, in a finding not addressed by the Appellate Body, explained the legal status of the BOP Understanding in relation to Articles XII and XVIII of *GATT 1994*:

"[The text of Article XVIII:B] should now be read in light of the 1994 Understanding, which clarifies the provisions of Articles XII and XVIII:B and of the 1979 Decision. The 1994 Understanding, which refers to the procedures for balance-of-payments consultations adopted in 1970 ('full consultation procedures') and 1972 ('simplified consultation procedures') as well as the 1979 Decision, contains provisions on the application of balance-of-payments measures, as well as provisions relating to the procedures for balance-of-payments consultations and their conclusion, but it does not explicitly refer to Articles XVIII:12(c) and (d)."[707]

(b) Footnote 1

509. The Appellate Body, in *India – Quantitative Restrictions*, referred to footnote 1 of the BOP Understanding in considering a panel's authority to examine the conformity with the *WTO Agreement* of Members' measures taken for balance-of-payments purposes. See the excerpts referenced in paragraphs 489–491 above.

(c) Paragraph 1

510. In *India – Quantitative Restrictions*, India argued that paragraphs 1 and 13 of the Understanding provide an incentive for Members to present a time-schedule for removal even when there are no current balance-of-payments difficulties within the meaning of Article XVIII:9, thereby confirming the existence of a "right" to a phase-out even in the absence of current balance-of-payments difficulties within the meaning of Article XVIIII:9. The Panel rejected this argument. See the excerpt referenced in paragraph 493 above.

(d) Paragraph 5

(i) Committee on Balance-of-Payments Restrictions

Establishment of Committee

511. At its meeting of 31 January 1995, the General Council established the WTO Committee on Balance-of-Payments Restrictions.[708]

Terms of reference

512. At its meeting of 31 January 1995, the General Council adopted the following terms of reference for the Committee on the Balance-of-Payments Restrictions:

"(a) to conduct consultations, pursuant to Article XII:4, Article XVIII:12 and the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994, on all restrictive import measures taken or maintained for balance-of-payments purposes and, pursuant to Article XII:5 of the General Agreement

[704] Appellate Body Report on *India – Quantitative Restrictions*, paras. 126 and 128.
[705] With respect to the relevant finding of the Appellate Body in *India – Quantitative Restrictions*, see the excerpts referenced in para. 489 of this Chapter.
[706] Panel Report on *India – Quantitative Restrictions*, para. 5.227.
[707] Panel Report on *India – Quantitative Restrictions*, para. 5.48.
[708] WT/GC/M/1, section 7.A.(1).

on Trade in Services, on all restrictions adopted or maintained for balance-of-payments purposes on trade in services on which specific commitments have been undertaken; and

(b) to carry out any additional functions assigned to it by the General Council."[709]

Rules of procedure

513. At its meeting of 13 and 15 December 1995, the General Council approved the rules of procedure adopted by the Committee on the Balance-of-Payments Restrictions.[710]

Observer status

514. At its meeting of 13 and 15 December 1995, the General Council took a decision with respect to participation in the meetings of the Committee on the Balance-of-Payments Restrictions.[711]

(e) Paragraph 9

515. At its meeting of 21 October 1996, the Committee on the Balance-of-Payments Restrictions adopted the format for the annual notification mandated under Paragraph 9 of the Understanding.[712] In order for the Committee on the Balance-of-Payments Restrictions to have a basis for the following year's schedule of consultations, it was proposed that notifications be completed and submitted to the Secretariat annually by 15 November.[713]

(f) Paragraph 13

(i) Interpretation

516. In *India – Quantitative Restrictions*, India argued that paragraphs 1 and 13 of the Understanding provide an incentive for Members to present a time-schedule for removal even when there are no current balance-of-payments difficulties within the meaning of Article XVIII:9, thereby confirming the existence of a "right" to a phase-out even in the absence of current balance-of-payments difficulties within the meaning of Article XVIIII:9. The Panel rejected this argument. See the excerpt referenced in paragraph 493 above.

(ii) Reporting procedures

517. At its meeting of 15 November 1995, the General Council adopted, *inter alia*, the following procedure for reporting for the Committee on Balance-of-Payment Restrictions to the General Council:

"The Committees on Budget, Finance and Administration and on Balance-of-Payments Restrictions will also submit, in addition to reports submitted during the course of the year on specific issues, a short factual report at the end of the year."[714]

E. RELATIONSHIP WITH OTHER ARTICLES

1. Articles XI, XIII, XIV and XVII

518. The interpretation and application of Note *Ad* Article XI, XII, XIII, XIV and XVIII, which clarifies that the terms "import restrictions" or "export restrictions" as used in these Articles include "restrictions made effective through state-trading operations", was discussed by the Panels on *India – Quantitative Restrictions* and *Korea – Various Measures on Beef*. See paragraphs 407–408 above.

2. Article XII

519. In *India – Quantitative Restrictions*, the Panel explained the relationship between Articles XII and XVIII:B in clarifying the function of Article XVIII:B. See paragraph 488 above.

3. Reference to GATT practice

520. With respect to GATT practice on this subject-matter, see the GATT Analytical Index, page 511.

XX. ARTICLE XIX

A. TEXT OF ARTICLE XIX

Article XIX
Emergency Action on Imports of Particular Products

1. (*a*) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(*b*) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in subparagraph (*a*) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be

[709] WT/GC/M/1, section 7.A.(1). The adopted terms of reference can be found in WT/L/45.
[710] WT/GC/M/1, section 4. I. (a). The approved rules of procedure can be found in WT/BOP/10.
[711] WT/GC/M/1, section 2.
[712] WT/BOP/14.
[713] WT/BOP/14.
[714] WT/L/105, section 2.

free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (*a*) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (*b*) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(*b*) Notwithstanding the provisions of subparagraph (*a*) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIX

1. General

(a) Application of Article XIX

521. In *Argentina – Footwear (EC)* and *Korea – Dairy*[715], the Appellate Body held that "any safeguard measure[716] imposed after the entry into force of the *WTO Agreement* must comply with the provisions of *both* the *Agreement on Safeguards and* Article XIX of the GATT 1994".[717] As regards the relationship between Article XIX and the *Agreement on Safeguards*, see paragraphs 566–572 below.

522. In *Korea – Dairy*, the Appellate Body concluded that safeguard measures were "intended by the drafters of the GATT to be matters out of the ordinary, and to be matters of urgency, to be, in short, 'emergency actions'"[718].

523. The Appellate Body on *Argentina – Footwear (EC)* noted that the remedy provided by Article XIX is of an emergency character and is to be "invoked only in situations when, as a result of obligations incurred under the *GATT 1994*, a Member finds itself confronted with developments it had not "foreseen" or "expected" when it incurred that obligation":

> "As part of the context of paragraph 1(a) of Article XIX, we note that the title of Article XIX is: '*Emergency Action on Imports of Particular Products*'. The words 'emergency action' also appear in Article 11.1(a) of the *Agreement on Safeguards*. We note once again, that Article XIX:1(a) requires that a product be imported '*in such increased quantities* and *under such conditions* as *to cause or threaten serious injury* to domestic producers'. (emphasis added) Clearly, this is not the language of ordinary events in routine commerce. In our view, the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions.' And, such 'emergency actions' are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation. The remedy that Article XIX:1(a) allows in this situation is temporarily to 'suspend the obligation in whole or in part or to withdraw or modify the concession'. Thus, Article XIX is clearly, and in every way, an extraordinary remedy."[719]

524. After finding support for its approach in the context of the relevant provisions, the Appellate Body in *Argentina – Footwear (EC)* held that the object and purpose of Article XIX also confirmed its interpretation:

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[715] Both Reports were adopted on the same date, 12 July 2000

[716] (*footnote original*) With the exception of special safeguard measures taken pursuant to Article 5 of the *Agreement on Agriculture* or Article 6 of the *Agreement on Textiles and Clothing*.

[717] Appellate Body Report on *Argentina – Footwear (EC)*, para. 84 and Appellate Body Report on *Korea – Dairy*, paras. 76–77. See also Chapter on *Agreement on Safeguards*, paras. 4–7.

[718] Appellate Body Report on *Korea – Dairy*, para. 86.

[719] Appellate Body Report on *Argentina – Footwear (EC)*, para. 93. See also Appellate Body Report on *Korea – Dairy*, para. 86.

"This reading of these phrases is also confirmed by the object and purpose of Article XIX of the GATT 1994. The object and purpose of Article XIX is, quite simply, to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with 'unexpected' and, thus, 'unforeseen' circumstances which lead to the product 'being imported' in 'such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products'. In perceiving and applying this object and purpose to the interpretation of this provision of the *WTO Agreement*, it is essential to keep in mind that a safeguard action is a 'fair' trade remedy. The application of a safeguard measure does not depend upon 'unfair' trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account."[720]

525. In *US – Line Pipe*, the Appellate Body emphasized that the balance struck by WTO Members in reconciling the natural tension relating to safeguard measures is found in the provisions of the *Agreement on Safeguards*. The Appellate Body further articulated on this tension:

"[P]art of the *raison d'être* of Article XIX of the GATT 1994 and the *Agreement on Safeguards* is, unquestionably, that of *giving a WTO Member the possibility*, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation *that, in the judgement of that Member, makes it necessary to protect a domestic industry temporarily*.[721] (emphasis added)

There is, therefore, a natural tension between, on the one hand, defining the appropriate and legitimate scope of the right to apply safeguard measures and, on the other hand, ensuring that safeguard measures are not applied against 'fair trade' beyond what is necessary to provide extraordinary and temporary relief. A WTO Member seeking to apply a safeguard measure will argue, correctly, that the *right* to apply such measures must be respected in order to maintain the *domestic* momentum and motivation for ongoing trade liberalization. In turn, a WTO Member whose trade is affected by a safeguard measure will argue, correctly, that the *application* of such measures must be limited in order to maintain the *multilateral* integrity of ongoing trade concessions. *The balance struck by the WTO Members in reconciling this natural tension relating to safeguard measures is found in the provisions of the Agreement on Safeguards.*" (emphasis added)[722]

(b) Standard of review

526. In *US – Steel Safeguards*, the Panel, in a finding upheld by the Appellate Body[723], recalled the standard of review for claims of violation of the unforeseen developments requirement of Article XIX of the *GATT 1994* was that provided for in Article 11 of the *DSU*. The Panel articulated the standard in the following terms:

"[T]he role of this Panel in the present dispute is not to conduct a *de novo* review of the USITC's determination. Rather, the Panel must examine whether the United States respected the provisions of Article XIX of GATT 1994 and of the Agreement on Safeguards, including Article 3.1. As further developed below, the Panel must examine whether the United States demonstrated in its published report, through a reasoned and adequate explanation, that unforeseen developments and the effects of tariff concessions resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers."[724]

527. The Appellate Body on *US – Steel Safeguards* rejected the United States argument that Article 11 of the *DSU* was not applicable to claims of violation of Article XIX of the *GATT 1994* and added:

"We explained in *US – Lamb*, in the context of a claim under Article 4.2(a) of the *Agreement on Safeguards*, that the competent authorities must provide a '*reasoned and adequate explanation* of how the facts support their determination'.[725] More recently, in *US – Line Pipe*, in the context of a claim under Article 4.2(b) of the *Agreement on Safeguards*, we said that the competent authorities must, similarly, provide a '*reasoned and adequate explanation*, that injury caused by factors other than increased imports is not attributed to increased imports'.[726] Our findings in those cases did not purport to address *solely* the standard of review that is appropriate for claims arising under Article 4.2 of the *Agreement on Safeguards*. We see no reason not to apply the same standard generally to the obligations under the *Agreement on Safeguards* as well as to the obligations in Article XIX of the GATT 1994."[727]

528. The Appellate Body on *US – Steel Safeguards* emphasized that "to the extent that the Panel looked for a 'reasoned and adequate explanation' that was 'explicit' in the sense that it was 'clear and unambiguous' and 'did not merely imply or suggest an explanation', the Panel was, in our view, correctly articulating the appropriate standard of review to be applied in assessing compliance

[720] Appellate Body Report in *Argentina – Footwear (EC)*, para. 94. See also Appellate Body Report on *Korea – Dairy*, para. 87.
[721] Appellate Body Report, *US – Line Pipe*, para 82.
[722] Appellate Body Report, *US – Line Pipe*, para. 83.
[723] Appellate Body Report, *US – Steel Safeguards*, para. 280.
[724] Panel Report on *US – Steel Safeguards*, para. 10.38.
[725] (*footnote original*) Appellate Body Report, *US – Lamb*, para. 103. (original emphasis)
[726] (*footnote original*) Appellate Body Report, *US – Line Pipe*, para. 217. (emphasis added)
[727] Appellate Body Report on *US – Steel Safeguards*, para. 276.

with Article XIX of the GATT 1994 and the *Agreement on Safeguards*."[728]

2. Article XIX:1

(a) Article XIX:1(a): *as a result of unforeseen developments*

(i) Concept of unforeseen developments

529. In *Argentina – Footwear (EC)*, the Appellate Body pronounced on the meaning of the phrase "as a result of unforeseen developments" which, although not contained in the Agreement on Safeguards, is set forth in Article XIX:1(a). The Appellate Body held that "the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been 'unexpected'":

> "To determine the meaning of the clause – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . .' – in sub-paragraph (a) of Article XIX:1, we must examine these words in their ordinary meaning, in their context and in light of the object and purpose of Article XIX.[729] We look first to the ordinary meaning of these words. As to the meaning of 'unforeseen developments', we note that the dictionary definition of 'unforeseen', particularly as it relates to the word 'developments', is synonymous with 'unexpected'.[730] 'Unforeseeable', on the other hand, is defined in the dictionaries as meaning 'unpredictable' or 'incapable of being foreseen, foretold or anticipated'.[731] Thus, it seems to us that the ordinary meaning of the phrase 'as a result of unforeseen developments' requires that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been 'unexpected'".[732]

530. The Panel on *Argentina – Preserved Peaches* emphasized that increased quantities of imports should not be equated with unforeseen developments.[733] The Panel considered that the competent authority had indicated that "the entry of the imports, or the way in which they were being imported, was unforeseen, but there is no mention that the alleged developments themselves were unforeseen." Therefore the Panel concluded that "a statement that the increase in imports, or the way in which they were being imported, was unforeseen, does not constitute a demonstration as a matter of fact of the existence of unforeseen *developments*."[734]

(ii) Requirement to demonstrate "unforeseen developments"

531. In *Argentina – Footwear (EC)* and *Korea – Dairy*, one of the issues considered by the Panel was the omission of the criterion of "unforeseen developments", contained in Article XIX:1(a) of *GATT 1994*, from the *Agreement on Safeguards*, most notably from Article 2.1. The Panel on *Argentina – Footwear (EC)* found that "the *express omission* of the criterion of unforeseen developments in the [Agreement on Safeguards], (which otherwise transposes, reflects and refines in great detail the essential conditions for the imposition of safeguard measures provided for in Article XIX of GATT), must . . . have meaning".[735] The Panel, in a finding rejected by the Appellate Body, concluded that "safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT."[736] The Panel on *Korea – Dairy* reached the same conclusion.[737] The Appellate Body held that the Panel's view was inconsistent with the principles of effective treaty interpretation[738] and with the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards*. See paragraph 569 below.

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[728] Appellate Body Report on *US – Steel Safeguards*, para. 297.

[729] (*footnote original*) As we have said in Appellate Body Report, *United States – Gasoline*, *supra*, footnote 72, p.17; Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 72, p. 11; Appellate Body Report, *India – Patents*, *supra*, footnote 25, para. 46; Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998, para. 47; Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, adopted 22 June 1998, para. 84; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 114.

[730] (*footnote original*) See Webster's *Third New International Dictionary*, (Encyclopaedia Britannica Inc., 1966) Vol. 3, p. 2496; and *Black's Law Dictionary*, 6th ed., (West Publishing Company, 1990) p. 1530.

[731] (*footnote original*) *Ibid.*

[732] Appellate Body Report on *Argentina – Footwear (EC)*, para. 91. See also Appellate Body Report on *Korea – Dairy*, para. 84.

[733] Panel Report on *Argentina – Preserved Peaches*, para. 7.18.

[734] Panel Report on *Argentina – Preserved Peaches*, para. 7.24. In addition the Panel did not agree with "the statement by the Appellate Body in *Argentina – Footwear (EC)* that 'the increased quantities of imports should have been "unforeseen" or "unexpected"'." (See original footnote 484). The Panel was of the view that "the text of Article XIX:1(a), together with the Appellate Body's own discussion of it and earlier conclusion regarding the logical connection between the circumstances in the first clause of Article XIX:1(a) – including unforeseen developments – and the conditions in the second clause – including an increase in imports – show that this is not a requirement for the imposition of a safeguard measure." See Panel Report on *Argentina – Preserved Peaches*, para. 7.24. However, it should be noted here that in *US – Steel Safeguards*, the Appellate Body reaffirmed its statement and concluded that "because the 'increased imports' must be 'as a result' of an event that was 'unforeseen' or 'unexpected', it follows that the increased imports must also be 'unforeseen' or 'unexpected'." See Appellate Body Report on *US – Steel Safeguards*, para. 350.

[735] Panel Report on *Argentina – Footwear (EC)*, para. 8.58.

[736] Panel Report on *Argentina – Footwear (EC)*, para. 8.69.

[737] Panel Report on *Korea – Dairy*, para. 7.48.

[738] With respect to treaty interpretation in general, see Chapter on the *DSU*, Section III.B.1.

532. In *US – Lamb*, the Appellate Body ruled that the existence of "unforeseen developments" is a "pertinent issue of fact and law" under Article 3.1 of the *Agreement on Safeguards*, and "it follows that the published report of the competent authorities, under that Article, must contain a 'finding' or 'reasoned conclusion' on unforeseen developments"[739]:

> "[W]e observe that Article 3.1 requires competent authorities to set forth findings and reasoned conclusions on 'all pertinent issues of fact and law' in their published report. As Article XIX:1(a) of the GATT 1994 requires that 'unforeseen developments' must be demonstrated as a matter of fact for a safeguard measure to be applied the existence of 'unforeseen developments' is, in our view, a 'pertinent issue[] of fact and law', under Article 3.1, for the application of a safeguard measure, and it follows that the published report of the competent authorities, under that Article, must contain a 'finding' or 'reasoned conclusion' on 'unforeseen developments.'"[740]

533. In *Chile – Price Band System*, the Panel referred to the Appellate Body's conclusions in *US – Lamb* that "unforeseen developments" is a circumstance whose existence must be demonstrated as a matter of fact and must feature in the published report of the investigating authorities.[741] The Panel also ruled that an *ex post facto* explanation cannot cure the importing Member's failure to meet the requirement of demonstrating "unforeseen development".[742]

534. In *Argentina – Preserved Peaches*, the Panel concluded that in order to satisfy the requirement to demonstrate "unforeseen developments", "as a minimum, some discussion should be done by the competent authorities as to why they were unforeseen at the appropriate time, and why conditions in the second clause of Article XIX:1(a) occurred 'as a result' of circumstances in the first clause."[743]

535. In *Argentina – Preserved Peaches*, the competent investigating authority had referred to unforeseen developments only in its final conclusion, the Panel held that this was insufficient:

> "A mere phrase in a conclusion, without supporting analysis of the existence of unforeseen developments, is not a substitute for a demonstration of fact. The failure of the competent authorities to demonstrate that certain alleged developments were unforeseen in the foregoing section of their report is not cured by the concluding phrase."[744]

536. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, reiterated that unforeseen developments must be demonstrated in a report before the measure is actually applied:

> "Given that the demonstration of unforeseen developments is a prerequisite for the application of a safeguard measure[745], it cannot take place after the date as of which the safeguard measure is applied. This has been confirmed by the Appellate Body, which noted, in *US – Lamb,* that although Article XIX provides no express guidance on where and when the demonstration of unforeseen developments is to be made, it is nonetheless a prerequisite, and 'it follows that this demonstration must be made *before* the safeguard measure is applied. Otherwise, the legal basis for the measure is flawed.'[746] Any demonstration made after the start of the application of a safeguard measure would have to be disregarded automatically as it cannot afford legal justification for that measure."[747]
>
> "[S]uch a reasoned and adequate explanation of how unforeseen developments resulted in increased imports causing serious injury must form part of the overall reported explanation by the competent authority that it has satisfied all the WTO prerequisites for the imposition of a safeguard measure. Since the demonstration of unforeseen developments must be included in the published report of the competent authorities it is necessary to look for the demonstration of unforeseen developments in the 'report of the competent authority', completed and published prior to the application of the safeguard measures."[748]

537. The Appellate Body on *US – Steel Safeguards* pointed out that the competent authority must provide a "reasoned and adequate explanation" of how the facts support its determination for those prerequisites, including "unforeseen developments" under Article XIX:1(a) of the *GATT 1994*:

> "We do not see how a panel could examine objectively the consistency of a determination with Article XIX of the GATT 1994 if the competent authority had not set out an explanation supporting its conclusions on 'unforeseen developments'. Indeed, to enable a panel to determine whether there was compliance with the prerequisites that must be demonstrated before the application of a safeguard measure, the competent authority must provide a 'reasoned and adequate explanation' of how the facts support its determination for those prerequisites, including 'unforeseen developments' under Article XIX:1(a) of the GATT 1994."[749]

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[739] Appellate Body Report on *US – Lamb*, para. 76.
[740] Appellate Body Report on *US – Lamb*, para. 76.
[741] Panel Report on *Chile – Price Band System*, para. 7.134.
[742] Panel Report on *Chile – Price Band System*, para. 7.139.
[743] Panel Report on *Argentina – Preserved Peaches*, para. 7.23.
[744] Panel Report on *Argentina – Preserved Peaches*, para. 7.33.
[745] (*footnote original*) Appellate Body Report in *Korea – Dairy*, paragraph 85; see also, Appellate Body Report, *Argentina – Footwear (EC)*, para. 92.
[746] (*footnote original*) Appellate Body Report, *US – Lamb*, para. 72 (emphasis in original); see also Panel Report, *US – Line Pipe*, para. 7.296.
[747] Panel Report on *US – Steel Safeguards*, para. 10.52
[748] Panel Report on *US – Steel Safeguards*, para. 10.53
[749] Appellate Body Report on *US – Steel Safeguards*, para. 279.

538. The Appellate Body on *US – Steel Safeguards*, upheld the Panel's finding that each challenged measure must have been the object of a specific unforeseen development demonstration and also that the factual demonstration of unforeseen developments must also relate to the specific product(s) covered by the specific measure(s) at issue:

> "To trigger the right to apply a safeguard measure, the development must be such as to *result* in increased imports of *the product* ('such product') that is subject to the safeguard measure. Moreover, *any* product, as Article XIX:1(a) provides, may, potentially, be subject to that safeguard measure, provided that the alleged 'unforeseen developments' *result* in increased imports of that *specific product* ('such product'). We, therefore, agree with the Panel that, with respect to the specific products subject to the respective determinations, the competent authorities are required by Article XIX:1(a) of the GATT 1994 to demonstrate that the 'unforeseen developments identified . . . have resulted in increased imports [of the specific products subject to] . . . each safeguard measure at issue.'[750]"[751]
>
> "For this reason, when an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that 'unforeseen developments' resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority. If that could be done, a Member could make a determination and apply a safeguard measure to a broad category of products even if imports of one or more of those products did not increase and did not result from the 'unforeseen developments' at issue. Accordingly, we agree with the Panel that such an approach does not meet the requirements of Article XIX:1(a), and that the demonstration of 'unforeseen developments' must be performed for *each* product subject to a safeguard measure.[752]"[753]

539. In *US – Steel Safeguards*, the Appellate Body agreed with the Panel that "with respect to the specific products subject to the respective determinations, the competent authorities are required by Article XIX:1(a) of the GATT 1994 to demonstrate that the 'unforeseen developments identified . . . have resulted in increased imports [of the specific products subject to] . . . each safeguard measure at issue.'[754]"[755] The Appellate Body further concluded:

> "[W]hen an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that 'unforeseen developments' resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority. If that could be done, a Member could make a determination and apply a safeguard measure to a broad category of products even if imports of one or more of those products did not increase and did not result from the 'unforeseen developments' at issue. Accordingly, we agree with the Panel that such an approach does not meet the requirements of Article XIX:1(a), and that the demonstration of 'unforeseen developments' must be performed for *each* product subject to a safeguard measure. (Emphasis original)"[756]

540. In *US – Steel Safeguards*, the Appellate Body was of view that it was for competent authorities not for panels to provide a "reasoned conclusion" on "unforeseen developments":

> "A 'reasoned conclusion' is not one where the conclusion does not even refer to the facts that may support that conclusion. As the United States itself acknowledges, 'Article 3.1 thus assigns the competent authorities – not the panel – the obligation to "publish a report setting forth *their* findings and reasoned conclusions reached on all pertinent issues of fact and law".' A competent authority has an obligation under Article 3.1 to provide reasoned conclusions; it is not for panels to find

[750] (*footnote original*) Panel Reports, para. 10.44. (underlining added) In the same vein, we further note that, as China argues in paragraph 49 of its appellee's submission, the USTR had, in fact, asked the USITC in its letter dated 3 January 2002, to identify "for each affirmative determination . . . any unforeseen developments that led to the relevant steel products being imported into the United States in such increased quantities as to be a substantial cause of serious injury." (Letter of the USTR to the USITC dated 3 January 2002, question 1). (underlining added)

[751] Appellate Body Report on *US – Steel Safeguards*, para. 316.

[752] (*footnote original*) We note that the United States also alleges that the Panel "mistakenly indicated that a competent authority had to 'differentiate the impact' of various unforeseen developments on the individual industries and even economies of other countries." (United States' appellant's submission, para. 85, referring to Panel Reports, paras. 10.127–10.128). Based on our review of the Panel Reports, we do not understand the Panel to have imposed such a requirement. Instead, as we see it, the Panel merely observed, in paragraph 10.127, that the Asian and Russian crises affected some countries more than others, to support its view that the USITC was required to "explain how the increased imports of the specific steel products subject to the investigation *were linked to and resulted from* the confluence of unforeseen developments." (emphasis added) Previously, in paragraph 10.123 of the Panel Reports, the Panel had stated that "even if 'large volumes of foreign steel production were displaced from foreign consumption', this [did] not, in itself, imply that *imports to the United States* increased as a result of unforeseen developments." (emphasis added)

[753] Appellate Body Report on *US – Steel Safeguards*, para. 319.

[754] (*footnote original*) Panel Reports, para. 10.44. (underlining added) In the same vein, we further note that, as China argues in paragraph 49 of its appellee's submission, the USTR had, in fact, asked the USITC in its letter dated 3 January 2002, to identify "for each affirmative determination . . . any unforeseen developments that led to the relevant steel products being imported into the United States in such increased quantities as to be a substantial cause of serious injury." (Letter of the USTR to the USITC dated 3 January 2002, question 1). (underlining added)

[755] Appellate Body Report on *US – Steel Safeguards*, paras. 316.

[756] Appellate Body Report on *US – Steel Safeguards*, paras. 319.

support for such conclusions by cobbling together disjointed references scattered throughout a competent authority's report."[757]

Unforeseen developments as describing a set of circumstances

541. The Appellate Body, in *Argentina – Footwear (EC)*, then held that the requirement of "unforeseen developments" did not establish a separate "condition" for the imposition of safeguard measures, but described a certain set of "circumstances":

"When we examine this clause – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . .' – in its immediate context in Article XIX:1(a), we see that it relates directly to the second clause in that paragraph – 'If, . . ., any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products . . .'. The latter, or second, clause in Article XIX:1(a) contains the three *conditions* for the application of safeguard measures. These *conditions*, which are reiterated in Article 2.1 of the *Agreement on Safeguards*[758], are that: (1) a product is being imported 'in such quantities and under such conditions'; (2) 'as to cause'; (3) serious injury or the threat of serious injury to domestic producers. The first clause in Article XIX:1(a) – 'as a result of unforeseen developments and of the obligations incurred by a Member under the Agreement, including tariff concessions . . .' – is a dependent clause which, in our view, is linked grammatically to the verb phrase 'is being imported' in the second clause of that paragraph. Although we do not view the first clause in Article XIX:1(a) as establishing independent *conditions* for the application of a safeguard measure, additional to the *conditions* set forth in the second clause of that paragraph, we do believe that the first clause describes certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994. In this sense, we believe that there is a logical connection between the circumstances described in the first clause – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . .' – and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure."[759]

542. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, concluded that the legal standard used to determine what constitutes an unforeseen development may be both subjective and objective:

"The legal standard that is used to determine what constitutes an unforeseen development is, as agreed by the parties, at least in part, subjective. This is supported by the Appellate Body, who stated in *Korea – Dairy* that safeguard measures "are to be invoked only in situations when . . . an importing Member finds itself confronted with developments *it had not 'foreseen' or 'expected'* when *it* incurred [its] obligation [under GATT 1994]. (emphasis added)[760]

What was 'unforeseen' when the contracting parties negotiated their first tariff concessions in all likelihood differs from what can be considered to be unforeseen today. The Panel notes that after 50 years of GATT, tariffs have, for many products, disappeared or reached very low levels. Further, what constitutes 'unforeseen developments' for an importing Member will vary depending on the context and the circumstances. Nevertheless, the subjectivity of the standard does not take away from the fact that the unexpectedness of a development[761] for an importing Member is something that must be demonstrated through a reasoned and adequate explanation.

In addition, the standard for unforeseen developments may also be said to have an objective element. The appropriate focus is on what should or could have been foreseen in light of the circumstances. The standard is not what the specific negotiators had in mind but rather what they could (reasonably) have had in mind. This was recognized early in GATT by the *US – Fur Felt Hats* decision, which characterized unforeseen developments as 'developments [. . .] which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated'.[762]"[763]

Confluence of developments to form the basis of an unforeseen development

543. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, concluded that the confluence of several events can unite to form the basis of an unforeseen development:

"The United States argues that the robustness of the US dollar was a development which combined with the other developments, namely, the currency crises in Asia and the former USSR and the continued growth in steel

[757] *Ibid.*
[758] (*footnote original*) We note that the title of Article 2 of the *Agreement on Safeguards* is: "*Conditions*".
[759] Appellate Body Report in *Argentina – Footwear (EC)*, para. 92. See also Appellate Body Report on *Korea – Dairy*, para. 85.
[760] (*footnote original*) Appellate Body Report, *Korea – Dairy*, para. 86 and Appellate Body Report, *Argentina – Footwear (EC)*, para. 93 (emphasis added).
[761] Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.
[762] (*footnote original*) *US – Fur Felt Hats*, para. 9, cited with approval in Appellate Body Report, *Argentina – Footwear (EC)*, para. 96; Appellate Body Report, *Korea – Dairy*, para. 89.
[763] Panel Report on *US – Steel Safeguards*, paras. 10.39 and 10.41–10.43.

demand in the United States' market as other markets declined, lead to increased imports.

The Panel has already accepted that the Russian and the Southeast Asian financial crises, at least conceptually, could be considered unforeseen developments that did not exist at the end of the Uruguay Round. We have also found that the USITC did not consider the strength of the United States' economy and the appreciation of the US dollar as unforeseen developments *per se;* it had referred to these factors in relation to other unforeseen developments, which *together* had resulted in increased imports causing or threatening to cause injury.

Article XIX does not preclude consideration of the confluence of a number of developments as 'unforeseen developments'. Accordingly, the Panel believes that confluence of developments can form the basis of 'unforeseen developments' for the purposes of Article XIX of GATT 1994. The Panel is of the view, therefore, that it is for each Member to demonstrate that a confluence of circumstances that it considers were unforeseen at the time it concluded its tariff negotiations resulted in increased imports causing serious injury.

To the complainants' argument that the changes in steel markets were much more pronounced in 1991 following the dissolution of the former Soviet Union than later on and could not, therefore, be unforeseen after 1994, the Panel notes that the fact that the dissolution of the USSR and its overall effects may have constituted an unforeseen development in 1991 does not mean that a subsequent financial crisis also resulting somehow from the dissolution of the USSR, cannot, with other developments, be considered part of a 'confluence of unforeseen developments' in 1997 for the purpose of Article XIX of GATT 1994."[764]

(iii) Logical connection between "unforeseen developments" and "the condition for imposition of a safeguard measure"

544. The Panel on *US – Steel Safeguards*, in a finding upheld by the Appellate Body, held that the phrase "as a result of" implies a "logical connection" between "unforeseen developments and the effects of tariffs concessions and obligations" and "the condition for imposition of a safeguard measure":

"The Appellate Body has interpreted the phrase 'as a result of' in Article XIX:1(a) of GATT 1994 as a logical connection that exists between the first two clauses of that Article. In other words, a logical connection must be demonstrated to have existed between the elements of the first clause of Article XIX:1(a) – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions' – and the conditions set forth in the second clause of that Article – 'increased imports causing serious injury' – for the imposition of a safeguard measure.[765]

. . .

The Panel agrees with New Zealand that it would be improper to reduce to a nullity the obligation to explain how 'unforeseen developments' resulted in increased imports causing or threatening to cause serious injury. In some cases, the explanation may be as simple as bringing two sets of facts together. However, in other situations, it may require much more detailed analysis in order to make clear the relationship that exists between the unforeseen developments and the increased imports that are causing or threatening to cause serious injury. The nature of the facts, including their complexity, will dictate the extent to which the relationship between the unforeseen developments and increased imports causing injury needs to be explained. The timing of the explanation, its extent and its quality are all factors that can affect whether a explanation is reasoned and adequate."[766]

545. The Appellate Body on *US – Steel Safeguards* confirmed that the "unforeseen developments" must result in increased imports of the product that is subject to a safeguard measure:

"Turning to the term 'as a result of' that is also found in Article XIX:1(a), we note that the ordinary meaning of 'result' is, as defined in the dictionary, 'an effect, issue, or outcome *from* some action, process or design'.[767] The increased imports to which this provision refers must therefore be an 'effect, or outcome' of the 'unforeseen developments'. Put differently, the 'unforeseen developments' must 'result' in increased imports of the product ('such product') that is subject to a safeguard measure."[768]

546. In *US – Steel Safeguards*, the Appellate Body clarified the relationship between unforeseen developments and increased imports and concluded that in situations of unforeseen developments, the increased imports must also be unforeseen:

"In a similar vein, we said in *Argentina – Footwear (EC)* that 'the increased quantities of imports should have been 'unforeseen' or 'unexpected'.'[769] In doing so, we were referring to the fact that the increased imports must, under Article XIX:1(a), result from 'unforeseen

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[764] Panel Report on *US – Steel Safeguards*, para. 10.97 – 10.100.
[765] (*footnote original*) Appellate Body Reports, *Argentina – Footwear (EC)*, para. 92; *Korea – Dairy*, para. 85.
[766] Panel Report on *US – Steel Safeguards*, para.10.97–10.104 and 10.110.
[767] (*footnote original*) *Shorter Oxford English Dictionary*, 5th ed. W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. II, p. 2555.
[768] Appellate Body Report on *US – Steel Safeguards*, paras 315 and 316.
[769] (*footnote original*) Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

developments' in order to justify the application of a safeguard measure. Because the 'increased imports' must be 'as a result' of an event that was 'unforeseen' or 'unexpected', it follows that the increased imports must also be 'unforeseen' or 'unexpected'. Thus, the 'extraordinary nature' of the domestic response to increased imports does not depend on the absolute or relative quantities of the product being imported. Rather, it depends on the fact that the increased imports were unforeseen or unexpected."[770]

Point in time where the developments were unforeseen

547. The Appellate Body on *Argentina – Footwear (EC)* noted a GATT Panel Report, which confirmed that the development must have been unforeseen at the time of the tariff negotiation:

"In addition, we note that our reading of the clause – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . .' – in Article XIX:1(a) is also consistent with the one GATT 1947 case that involved Article XIX, the so-called '*Hatters' Fur*' case.[771] Members of the Working Party in that case, in 1951, stated:

> . . . 'unforeseen developments' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.[772]"[773]

548. In *Korea – Dairy*, the Appellate Body held that unforeseen developments are developments not foreseen or expected when Members incurred that obligation:

"[S]uch 'emergency actions' [safeguard measures] are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation."[774]

549. In *Argentina – Preserved Peaches*, the Panel agreed with the approach advanced by both parties that the developments should have been unforeseen by the negotiators at the time they granted the relevant concession:

"There is the issue of the point in time at which Article XIX:1(a) requires that developments should have been unforeseen. Chile stated that the developments should have been unforeseen by a Member at the time it incurred the relevant obligation.[775] In response to questions posed by the Panel, both parties submitted basically that developments should have been unforeseen by the negotiators at the time at which they granted the relevant concession.[776]

. . .

We will apply this interpretation and determine whether the competent authorities assessed whether the developments which they identified were unforeseen as at the time the relevant obligation was negotiated. We emphasize that we are not now discussing the time at which the competent authorities must demonstrate the existence of unforeseen developments in order to adopt a safeguard measure."[777]

Judicial economy

550. In *Argentina – Footwear (EC)*, the European Communities appealed the Panel's finding on judicial economy as regards the absence of findings by the Panel on the European Communities claim on unforeseen developments. The Appellate Body upheld the Panel's findings that the safeguards investigation at issue was inconsistent with the requirements of Articles 2 and 4 of the *Agreement on Safeguards* and concluded that, since such an inconsistency deprived the measure of legal basis, "there was no need to go further and examine whether, in addition, the measure was also inconsistent with Article XIX:1(a) of GATT 1994".[778] As regards the obligation to apply Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of *GATT 1994* cumulatively, including the requirement to demonstrate "unforeseen developments", see paragraph 531 above.

551. In *US – Wheat Gluten*, the Appellate Body reiterated the above conclusion, stating that, given the lack of legal basis of the safeguard measure at issue, the Panel was entitled to decline to examine the claim regarding unforeseen developments.[779]

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[770] Appellate Body Report on *US – Steel Safeguards*, para. 350. Note that a previous panel report on *Argentina – Preserved Peaches*, para. 7.24 had reached the opposite conclusion.

[771] (*footnote original*) *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX*, ("*Hatters' Fur*"), GATT/CP/106, adopted 22 October 1951.

[772] (*footnote original*) *Supra*, footnote 84, para. 9. This interpretation was proposed by the representative of Czechoslovakia, and was accepted by the majority of the Working Party with the exception of the United States.

[773] Appellate Body Report in *Argentina – Footwear (EC)*, para. 96. See also Appellate Body Report on *Korea – Dairy*, para. 89.

[774] Appellate Body Report in *Korea – Dairy*, para. 86.

[775] (*footnote original*) *See* Chile's first written submission, paragraph 4.11.

[776] (*footnote original*) *See* Chile's and Argentina's respective responses to question No. 7 of the Panel.

[777] Panel Report on *Argentina – Preserved Peaches*, paras 7.25 – 7.28.

[778] Appellate Body Report on *US – Wheat Gluten*, paras. 182, referring to Appellate Body Report on *Argentina – Footwear* (EC), para. 98.

[779] Appellate Body Report on *US – Wheat Gluten*, paras. 181–184.

(iv) "as a result . . . of the effect of the obligations incurred by a Member"

552. With respect to the clause "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . ." the Appellate Body held in *Argentina – Footwear (EC):*

> "[W]e believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions. Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a Member's Schedule is subject to the obligations contained in Article II of the GATT 1994."[780]

553. [In *Argentina – Footwear (EC)*, the Appellate Body described the requirement "as a result . . . of the effect of the obligations incurred by a Member" as setting forth "certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994". See paragraph 541 above.

554. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, held that "the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the importing Member has tariff concessions for the relevant product."[781]

555. With respect to the significance of the context and object and purpose of Article XIX for the interpretation of the term "as a result . . . of the effect of the obligations incurred by a Member", see paragraph 541. With respect to a GATT Panel Report on this issue, see paragraph 547 above.

556. As regards the interpretation of the element "unforeseen developments" under Article XIX and the *Agreement on Safeguards*, see the Chapter on the *Agreement on Safeguards*, Section II.B.1(b).

(v) "being imported in such increased quantities . . ."

557. Concerning the interpretation of the phrase "in such increased quantities" under Article 2.1 of the *Agreement on Safeguards*, see the Chapter on the *Agreement on Safeguards*, Section III.B.2(c).

(vi) "under such conditions"

558. As to the interpretation of the phrase "under such conditions" under Article 2.1 of the *Agreement on Safeguards*, see Chapter on the *Agreement on Safeguards*, Section III.B.2(d).

(vii) "as to cause or threaten serious injury to domestic producers"

559. As regards the interpretation of the phrase "serious injury" under Article 2.1 of the *Agreement on Safeguards*, see Chapter on the *Agreement on Safeguards*, Section III.B.2(h).

560. With respect to the interpretation of the element of "serious injury" under Article 4.1 of the *Agreement on Safeguards*, see Chapter on the *Agreement on Safeguards*, Sections V.B.1–V.B.2.

561. Concerning the interpretation of the element "serious injury" under Article 4.2(a) of the *Agreement on Safeguards*, see Chapter on the *Agreement on Safeguards*, Section V.B.4.

562. As to the causation test to be applied in relating "increased imports" to "serious injury", see Chapter on the *Agreement on Safeguards*, Section V.B.5(a).

3. Article XIX:2

(a) "shall give notice in writing to the Contracting Parties as far as in advance as may be practicable"

563. With regard to the notification requirements and particularly to the interpretation of the phrase "shall immediately notify" under Article 12.1 of the *Agreement on Safeguards*, see the Chapter on the *Agreement on Safeguards*, Section XIII.B.1–2.

(b) "an opportunity to consult"

564. With respect to the interpretation of "opportunity for prior consultations" under Article 12.3 of the *Agreement on Safeguards*, see the Chapter on the *Agreement on Safeguards*, XIII.B.4(a)

4. Reference to GATT practice

565. Regarding GATT practice on Article XIX, see GATT Analytical Index, pages 516–529.

C. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Agreement on Safeguards

566. In *Korea – Dairy*, the Appellate Body examined the relationship between Article XIX of *GATT 1994* and the *Agreement on Safeguards* in light of, on the one hand, Article II of the WTO Agreement[782], and, on the other hand, Articles 1 and 11.1(a) of the *Agreement on*

[780] Appellate Body Report on *Argentina – Footwear (EC)*, para. 91. See also Appellate Body Report on *Korea – Dairy*, para. 84.
[781] Panel Report on *US – Steel Safeguards*, paras. 10.140.
[782] For the Appellate Body's analysis under Article II of the *WTO Agreement*, see Chapter on the *WTO Agreement*, Section III.B.1.

Safeguards.[783] The Appellate Body concluded that any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both Article XIX and the *Agreement on Safeguards*:

> "The specific relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards* within the WTO Agreement is set forth in Articles 1 and 11.1(a) of the *Agreement on Safeguards*:
>
> . . .
>
> Article 1 states that the purpose of the *Agreement on Safeguards* is to establish 'rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.' . . . The ordinary meaning of the language in Article 11.1(a) – 'unless such action conforms with the provisions of that Article applied in accordance with this Agreement' – is that any safeguard action must conform with the provisions of Article XIX of the GATT 1994 as well as with the provisions of the *Agreement on Safeguards*. Thus, any safeguard measure[784] imposed after the entry into force of the WTO Agreement must comply with the provisions of both the *Agreement on Safeguards* and Article XIX of the GATT 1994."[785]

567. In *US – Line Pipe*, the Panel, in a finding not reviewed by the Appellate Body, did not examine whether Korea's claim under Article XIX:1(a) was justified on the basis that it had already rejected Korea's claims under the *Agreement on Safeguards*:

> "In the context of its claims under Articles 5.1 (first sentence) and 7.1 concerning the extent and duration of the line pipe measure, Korea also alleged an infringement of Article XIX:1(a). This provision authorizes the imposition of safeguard measures "to the extent and for such time as may be necessary to prevent or remedy" injury caused by increased imports. Korea's Article XIX:1(a) claim is based on the same arguments advanced in support of its Article 5.1 (first sentence) and 7.1 claims. Since we have already rejected those claims, we also reject Korea's Article XIX:1(a) claim regarding the duration and extent of the line pipe measure."[786]

568. In *Argentina – Footwear (EC)*, the Appellate Body reversed a conclusion by the Panel that "safeguard investigations and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new *Safeguards Agreement* satisfy the requirements of Article XIX of GATT."[787] The Appellate Body noted that Articles 1 and 11.1(a) of the *Agreement on Safeguards* described the precise nature of the relationship between Article XIX of *GATT 1994* and the *Agreement on Safeguards* within the *WTO Agreement*[788], and then observed:

> "We see nothing in the language of either Article 1 or Article 11.1(a) of the *Agreement on Safeguards* that suggests an intention by the Uruguay Round negotiators to *subsume* the requirements of Article XIX of the GATT 1994 within the *Agreement on Safeguards* and thus to render those requirements no longer applicable. Article 1 states that the purpose of the *Agreement on Safeguards* is to establish 'rules for the application of safeguard measures which shall be understood to mean *those measures provided for* in Article XIX of GATT 1994.' . . . This suggests that Article XIX continues in full force and effect, and, in fact, establishes certain prerequisites for the imposition of safeguard measures. Furthermore, in Article 11.1(a), the ordinary meaning of the language 'unless such action *conforms with the provisions of that Article applied in accordance with this Agreement*' . . . clearly is that any safeguard action must *conform with* the provisions of Article XIX of the GATT 1994 *as well as* with the provisions of the *Agreement on Safeguards*. Neither of these provisions states that any safeguard action taken after the entry into force of the *WTO Agreement* need only conform with the provisions of the *Agreement on Safeguards*.[789]"[790]

569. The Appellate Body on *Argentina – Footwear (EC)* further rejected the conclusion of the Panel that because the clause "[i]f, as a result of unforeseen developments ... concessions"[791] in Article XIX:1(a) had been expressly omitted from Article 2.1 of the *Agreement on Safeguards*, safeguard measures that meet the requirements of the *Agreement on Safeguards* will automatically also satisfy the requirements of Article XIX. The Appellate Body considered this conclusion of the Panel as inconsistent with the principles of effective treaty interpretation[792] and with the ordinary meaning

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[783] The issue of the relationship between Article XIX of the *GATT 1994* and the *Agreement on Safeguards* arose in these disputes in connection with claims raised regarding a failure to examine whether the import trends of the products under investigation were the result of "unforeseen developments" within the meaning of Article XIX:1(a) of the *GATT 1994*. For the interpretation of the phrase "If, as a result of unforeseen developments . . . concessions" in Article XIX:1(a) of the *GATT 1994*, see Section XX.B.2 of this Chapter.

[784] (*footnote original*) With the exception of special safeguard measures taken pursuant to Article 5 of the *Agreement on Agriculture* or Article 6 of the *Agreement on Textiles and Clothing*.

[785] Appellate Body Report on *Korea – Dairy*, paras. 76–77. See also Appellate Body Report on *Argentina – Footwear (EC)*, para. 84.

[786] Panel Report on *US – Line Pipe*, para 7.115.

[787] Panel Report on *Argentina – Footwear (EC)*, para. 8.69.

[788] Appellate Body Report on *Argentina – Footwear (EC)*, para. 82.

[789] (*footnote original*) We note that the provisions of Article 11.1(a) of the *Agreement on Safeguards* are significantly different from the provisions of Article 2.4 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*, which state:

> "Sanitary or phytosanitary measures *which conform to* the relevant provisions of this Agreement *shall be presumed to be in accordance with* the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)." (emphasis added)

[790] Appellate Body Report on *Argentina – Footwear (EC)*, para. 83.

[791] The discussion on "unforeseen developments" can be found in Section XX.B.2(a)of this Chapter.

[792] With respect to treaty interpretation in general, see Chapter on the *DSU*, Section III.B.1.

of Articles 1 and 11.1(a) of the *Agreement on Safeguards*:

> "[I]t is clear from Articles 1 and 11.1(a) of the *Agreement on Safeguards* that the Uruguay Round negotiators did not intend that the *Agreement on Safeguards* would entirely replace Article XIX. Instead, the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards* confirms that the intention of the negotiators was that the provisions of Article XIX of the GATT 1994 and of the *Agreement on Safeguards* would apply *cumulatively*, except to the extent of a conflict between specific provisions . . . We do not see this as an issue involving a conflict between specific provisions of two Multilateral Agreements on Trade in Goods. Thus, we are obliged to apply the provisions of Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 *cumulatively*, in order to give meaning, by giving legal effect, to all the applicable provisions relating to safeguard measures."[793]

570. The Panel on *US – Lamb*, referring to the statements by the Appellate Body in *Argentina – Footwear (EC)* and *Korea – Dairy*, on the relationship between the *Agreement on Safeguards* and Article XIX of the *GATT 1994*, observed:

> "Thus the Appellate Body explicitly rejected the idea that those requirements of GATT Article XIX which are not reflected in the *Safeguards Agreement* could have been superseded by the requirements of the latter and stressed that all of the relevant provisions of the *Safeguards Agreement* and GATT Article XIX must be given meaning and effect."[794]

571. The Appellate Body Report in *US – Lamb* reiterated the conclusions drawn by the Appellate Body in *Argentina – Footwear (EC)* and in *Korea – Dairy* on the relationship between the *Agreement on Safeguards* and Article XIX of the *GATT 1994* and observed:

> "[A]rticles 1 and 11.1(a) of the Agreement on Safeguards express the full and continuing applicability of Article XIX of the GATT 1994, which no longer stands in isolation, but has been clarified and reinforced by the Agreement on Safeguards."[795]

572. Concerning the possibility of resorting to judicial economy as regards claims of unforeseen developments in cases where it has found that the requirements of Article 2 and 4 of the *Agreement on Safeguards* have not been met, see paragraphs 550–551 above.

XXI. ARTICLE XX

A. TEXT OF ARTICLE XX

Article XX
General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(*a*) necessary to protect public morals;

(*b*) necessary to protect human, animal or plant life or health;

(*c*) relating to the importations or exportations of gold or silver;

(*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(*e*) relating to the products of prison labour;

(*f*) imposed for the protection of national treasures of artistic, historic or archaeological value;

(*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(*h*) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*

(*i*) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and

[793] Appellate Body Report on *Argentina – Footwear (*EC), para. 89.
[794] Panel Report on *US – Lamb*, para. 7.11.
[795] Appellate Body Report on *US – Lamb*, para. 70.

shall not depart from the provisions of this Agreement relating to non-discrimination;

(*j*) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

B. TEXT OF *AD* ARTICLE XX

Ad Article XX
Subparagraph (h)

The exception provided for in this subparagraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947.

C. INTERPRETATION AND APPLICATION OF ARTICLE XX

1. General

(a) Nature and purpose of Article XX

573. In *US – Gasoline*, in discussing the preambular language (the "chapeau") of Article XX, the Appellate Body stated:

> "[T]he chapeau says that '*nothing in this Agreement* shall be construed to prevent the adoption or enforcement by any contracting party of measures . . .' The exceptions listed in Article XX thus relate to all of the obligations under the *General Agreement*: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well."[796]

574. In *US – Shrimp*, the Appellate Body examined the GATT-consistency of the import ban on shrimp and shrimp products from exporting nations not certified by United States authorities. Such certification could be obtained, *inter alia*, where the foreign country could demonstrate that shrimp or shrimp products were being caught using methods which did not lead to incidental killing of turtles beyond a certain level. The Panel had found that the measure at issue could not be justified under Article XX, because Article XX could not serve to justify "measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies". The Appellate Body disagreed with this interpretation of the scope of Article XX and stated:

> "[C]onditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply."[797]

575. In *US – Shrimp*, interpreting the chapeau of Article XX, the Appellate Body described the nature and purpose of Article XX as a balance of rights and duties:

> "[A] balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members.
>
> The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[798]

576. In *US – Gasoline*, the Appellate Body concluded its analysis by emphasizing the function of Article XX with respect to national measures taken for environmental protection:

> "It is of some importance that the Appellate Body point out what this does *not* mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests – including the protection of human health, as well as the

[796] Appellate Body Report on *US – Gasoline*, p. 24.
[797] Appellate Body Report on *US – Shrimp*, para. 121.
[798] Appellate Body Report on *US – Shrimp*, paras. 156 and 159.

conservation of exhaustible natural resources – to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*,[799] there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements."[800]

(b) Structure of Article XX

(i) Two-tier test

577. In *US – Gasoline*, the Appellate Body examined the Panel's findings that the United States regulation concerning the quality of gasoline was inconsistent with GATT Article III:4 and not justified under either paragraph (b), (d) or (g) of Article XX. The Appellate Body presented a two-tiered test under Article XX:

> "In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX."[801]

578. In *US – Shrimp*, the Appellate Body reviewed the Panel's finding concerning an import ban on shrimp and shrimp products harvested by foreign vessels. The ban applied to shrimp and shrimp products where the exporting country had not been certified by United States authorities as using methods not leading to incidental killing of sea turtles above a certain level. The Panel found a violation of Article III and held that the United States measure was not within the scope of measures permitted under the chapeau of Article XX. As a result of its finding that the United States measure could not be justified under the terms of the chapeau, the Panel did not examine the import ban in the light of Articles XX (b) and XX(g). The Appellate Body referred to its finding in *US – Gasoline*, cited in paragraph 577 above, and emphasized the need to follow the sequence of steps as set out in that Report:

> "The sequence of steps indicated above in the analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX. The Panel appears to suggest, albeit indirectly, that following the indicated sequence of steps, or the inverse thereof, does not make any difference. To the Panel, reversing the sequence set out in *United States – Gasoline* 'seems equally appropriate.'[802] We do not agree.
>
> The task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the Panel in this case) has not first identified and examined the specific exception threatened with abuse. The standards established in the chapeau are, moreover, necessarily broad in scope and reach: the prohibition of the *application* of a measure 'in a manner which would constitute a means of *arbitrary* or *unjustifiable discrimination* between countries where the same conditions prevail' or 'a *disguised restriction* on international trade.'(emphasis added) When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies."[803]

(ii) Language of paragraphs (a) to (i)

579. In *US – Gasoline*, the Appellate Body compared the terms used in paragraphs (a) to (i) of Article XX, emphasizing that different terms are used in respect of the different categories of measures described in paragraphs (a) to (i):

> "Applying the basic principle of interpretation that the words of a treaty, like the *General Agreement*, are to be given their ordinary meaning, in their context and in the light of the treaty's object and purpose, the Appellate Body observes that the Panel Report failed to take adequate account of the words actually used by Article XX in its several paragraphs. In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories:
>
> > 'necessary' – in paragraphs (a), (b) and (d); 'essential' – in paragraph (j); 'relating to' – in paragraphs (c), (e) and (g); 'for the protection of' – in paragraph (f); 'in pursuance of' – in paragraph (h); and 'involving' – in paragraph (i).
>
> It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal

[799] (*footnote original*)Adopted by Ministers at the Meeting of the Trade Negotiations Committee in Marrakesh on 14 April 1994.
[800] Appellate Body Report on *US – Gasoline*, pp. 30–31.
[801] Appellate Body Report on *US – Gasoline*, p. 22.
[802] (*footnote original*) Panel Report on *US – Shrimp*, para 7.28.
[803] Appellate Body Report on *US – Shrimp*, paras. 119–120.

and the state interest or policy sought to be promoted or realized."[804]

(c) Burden of proof

580. In *US – Gasoline*, the Appellate Body differentiated between the burden of proof under the individual paragraphs of Article XX on the one hand, and under the chapeau of Article XX on the other:

> "The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue."[805]

581. The Panel on *EC – Asbestos*, in a statement not reviewed by the Appellate Body, elaborated on the burden of proof under Article XX in the context of a defence based on Article XX(b):

> "We consider that the reasoning of the Appellate Body in *United States – Shirts and Blouses from India*[806] is applicable to Article XX, inasmuch as the invocation of that Article constitutes a 'defence' in the sense in which that word is used in the above-mentioned report. It is therefore for the European Communities to submit in respect of this defence a prima facie case showing that the measure is justified. Of course, as the Appellate Body pointed out in *United States – Gasoline*, the burden on the European Communities could vary according to what has to be proved. It will then be for Canada to rebut that prima facie case, if established.
>
> If we mention this working rule at this stage, it is because it could play a part in our assessment of the evidence submitted by the parties. Thus, the fact that a party invokes Article XX does not mean that it does not need to supply the evidence necessary to support its allegation. Similarly, it does not release the complaining party from having to supply sufficient arguments and evidence in response to the claims of the defending party. Moreover, we are of the opinion that it is not for the party invoking Article XX to prove that the arguments put forward in rebuttal by the complaining party are incorrect until the latter has backed them up with sufficient evidence.[807]"[808]

582. The Panel on *EC – Asbestos*, in a finding not addressed by the Appellate Body, further discussed the burden of proof specifically regarding the scientific aspect of the measure at issue. The Panel chose to confine itself to the provisions of the GATT 1994 and to the criteria defined by the practice relating to the application of GATT Article XX rather than to extend the principles of the *SPS Agreement* to examination under Article XX:[809]

> "[I]n relation to the scientific information submitted by the parties and the experts, the Panel feels bound to point out that it is not its function to settle a scientific debate, not being composed of experts in the field of the possible human health risks posed by asbestos. Consequently, the Panel does not intend to set itself up as an arbiter of the opinions expressed by the scientific community.
>
> Its role, taking into account the burden of proof, is to determine whether there is sufficient scientific evidence to conclude that there exists a risk for human life or health and that the measures taken by France are necessary in relation to the objectives pursued. The Panel therefore considers that it should base its conclusions with respect to the existence of a public health risk on the scientific evidence put forward by the parties and the comments of the experts consulted within the context of the present case. The opinions expressed by the experts we have consulted will help us to understand and evaluate the evidence submitted and the arguments advanced by the parties.[810] The same approach will be adopted with respect to the necessity of the measure concerned."[811]

2. Preamble of Article XX (the "chapeau")

(a) Scope

583. In *US – Gasoline*, the Appellate Body held that the chapeau has been worded so to prevent the abuse of the exceptions under Article XX:

> "The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.[812]

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[804] Appellate Body Report on *US – Gasoline*, pp. 17.

[805] Appellate Body Report on *US – Gasoline*, p. 22.

[806] (*footnote original*) Appellate Body Report on *US – Wool Shirts and Blouses*, pp. 15–16:

> "We acknowledge that several GATT 1947 and WTO panels have required such proof of a party invoking a defence such as those found in Article XX or Article XI:2(c)(i), to a claim of violation of a GATT obligation, such as those found in Articles I:1, II:1, III or XI:1. Articles XX and XI:2(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it."

[807] (*footnote original*) See Report of the Appellate Body in *EC – Hormones*, para. 104.

[808] Panel Report on *EC – Asbestos*, paras. 8.177–8.178.

[809] Panel Report on *EC – Asbestos*, para. 8.180.

[810] (*footnote original*) Report of the Appellate Body in *Japan – Agricultural Products*, para. 129. At this point, we recall that the experts were selected in consultation with the parties and that the latter did not challenge the appointment of any of them, although they reserved the right to comment on their statements. . . .

[811] Panel Report on *EC – Asbestos*, paras. 8.181–8.182. See also para. 611 of this Chapter. With respect to burden of proof in general, see the Chapter on *DSU*, Section XXXVI.D.

[812] The footnote to this sentence refers to Panel Report on *US – Spring Assemblies*, BISD 30S/107, para. 56.

> It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of [what was later to become] Article [XX].'[813] This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."[814]

584. In *US – Shrimp*, the Appellate Body elaborated on the notion of preventing abuse or misuse of the exceptions under Article XX. The Appellate Body found that "a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members"[815], as referenced in paragraph 575 above, and went on to state:

> "In our view, the language of the chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a *limited and conditional* exception from the substantive obligations contained in the other provisions of the GATT 1994, that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau.[816] This interpretation of the chapeau is confirmed by its negotiating history.[817] The language initially proposed by the United States in 1946 for the chapeau of what would later become Article XX was unqualified and unconditional.[818] Several proposals were made during the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in 1946 suggesting modifications.[819] In November 1946, the United Kingdom proposed that "in order to prevent abuse of the exceptions of Article 32 [which would subsequently become Article XX]", the chapeau of this provision should be qualified.[820] This proposal was generally accepted, subject to later review of its precise wording. Thus, the negotiating history of Article XX confirms that the paragraphs of Article XX set forth *limited and conditional* exceptions from the obligations of the substantive provisions of the GATT. Any measure, to qualify finally for exception, must also satisfy the requirements of the chapeau. This is a fundamental part of the balance of rights and obligations struck by the original framers of the GATT 1947."[821]

585. The Appellate Body then linked the balance of rights and obligations under the chapeau of Article XX to the general principle of good faith:

> "The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised

[813] The footnote to this sentence refers to EPCT/C.11/50, p. 7.

[814] Appellate Body Report on *US – Gasoline*, p. 22

[815] Appellate Body Report on *US – Shrimp*, para. 156.

[816] (*footnote original*) This view is consistent with the approach taken by the panel in *US – Section 337*, which stated:

> "Article XX is entitled 'General Exceptions' and . . . the central phrase in the introductory clause reads: 'nothing in this Agreement shall be construed to prevent the adoption or enforcement . . . of measures . . .'. Article XX(d) thus provides *a limited and conditional exception from obligations under other provisions*." (emphasis added) Adopted 7 November 1989, BISD 365/345, para. 5.9.

[817] (*footnote original*) Article 32 of the Vienna Convention permits recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." Here, we refer to the negotiating history of Article XX to confirm the interpretation of the chapeau we have reached from applying Article 31 of the Vienna Convention.

[818] (*footnote original*) The chapeau of Article 32 of the United States Draft Charter for an International Trade Organization, which formed the basis for discussions at the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in late 1946, read, in relevant part:

> "Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any member of measures: . . ."

[819] (*footnote original*) For example, the Netherlands, Belgium and Luxembourg stated that the exceptions should be qualified in some way:

> "Indirect protection is an undesirable and dangerous phenomenon. . . . Many times, the stipulations to 'protect animal or plant life or health' are misused for indirect protection. It is recommended to insert a clause which prohibits expressly to direct such measures that they constitute an indirect protection or, in general, to use these measures to attain results, which are irreconsiliable [*sic*] with the aim of chapters IV, V and VI." E/PC/T/C.II/32, 30 October 1946

[820] (*footnote original*) The United Kingdom's proposed text for the chapeau read:

> "The undertaking in Chapter IV of this Charter relating to import and export restrictions shall not be construed to prevent the adoption or enforcement by any member of measures for the following purposes, provided that they are not applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." E/PC/T/C.II/50, pp. 7 and 9; E/PC/T/C.II/54/Rev.1, 28 November 1946, p. 36.

[821] Appellate Body Report on *US – Shrimp*, para. 157.

bona fide, that is to say, reasonably."[822] An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[823]

586. In *US – Shrimp*, before elaborating on the general significance of the chapeau of Article XX, as quoted in paragraphs 584–585 above, the Appellate Body discussed the significance of the Preamble of the *WTO Agreement* for its interpretative approach to the chapeau:

"[The language of the WTO Preamble] demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.

We also note that since this preambular language was negotiated, certain other developments have occurred which help to elucidate the objectives of WTO Members with respect to the relationship between trade and the environment. The most significant, in our view, was the Decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment (the 'CTE').

. . .

[W]e must fulfill our responsibility in this specific case, which is to interpret the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX. It is proper for us to take into account, as part of the context of the chapeau, the specific language of the preamble to the *WTO Agreement*, which, we have said, gives colour, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the GATT 1994, in particular."[824]

(b) "arbitrary or unjustifiable discrimination between countries where the same conditions prevail"

(i) Constitutive elements

587. The Appellate Body on *US – Shrimp* provided an overview regarding the three constitutive elements of the concept of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail":

"In order for a measure to be applied in a manner which would constitute 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail', three elements must exist. First, the application of the measure must result in *discrimination*. As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI.[825] Second, the discrimination must be *arbitrary* or *unjustifiable* in character. We will examine this element of *arbitrariness* or *unjustifiability* in detail below. Third, this discrimination must occur *between countries where the same conditions prevail*. In *United States – Gasoline*, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting

[822] (*footnote original*) B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapter 4, in particular, p. 125 elaborates:

> . . . A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (*i.e.*, in furtherance of the interests which the right is intended to protect). It should at the same time be *fair and equitable as between the parties* and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty. . . .(emphasis added)

Also see, for example, Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed, Vol. I (Longman's, 1992), pp. 407–410, *Border and Transborder Armed Actions Case*, (1988) I.C.J. Rep. 105; *Rights of Nationals of the United States in Morocco Case*, (1952) I.C.J. Rep. 176; *Anglo-Norwegian Fisheries Case*, (1951) I.C.J. Rep. 142.

[823] Appellate Body Report on *US – Shrimp*, paras. 158–159.

[824] Appellate Body Report on *US – Shrimp*, paras. 153–155. In this context, the Appellate Body pointed out that the Decision refers to the Rio Declaration on Environment and Development, and Agenda 21.

[825] (*footnote original*) In *US – Gasoline*, p. 23, we stated: "The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."

Members, but also between exporting Members and the importing Member concerned.[826]"[827]

(ii) Type of discrimination covered by the chapeau

588. With respect to the phrase "between countries where the same conditions prevail", the question arose whether the notion of discrimination under the chapeau of Article XX referred to conditions in importing or exporting countries (i.e. discrimination between a foreign country or foreign countries on the one hand and the home country on the other) or only to conditions in various exporting countries. The Appellate Body on *US – Gasoline* indicated that it considered both types of discrimination covered by the chapeau:

"[The United States] was asked whether the words incorporated into the first two standards 'between countries where the same conditions prevail' refer to conditions in importing and exporting countries, or only to conditions in exporting countries. The reply of the United States was to the effect that it interpreted that phrase as referring to both the exporting countries and importing countries and as between exporting countries. . . . At no point in the appeal was that assumption challenged by Venezuela or Brazil. . . .

The assumption on which all the participants proceeded is buttressed by the fact that the chapeau says that '*nothing in this Agreement* shall be construed to prevent the adoption or enforcement by any contracting party of measures . . .' The exceptions listed in Article XX thus relate to all of the obligations under the *General Agreement*: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well. Effect is more easily given to the words 'nothing in this Agreement', and Article XX as a whole including its chapeau more easily integrated into the remainder of the *General Agreement*, if the chapeau is taken to mean that the standards it sets forth are applicable to all of the situations in which an allegation of a violation of a substantive obligation has been made and one of the exceptions contained in Article XX has in turn been claimed.

[W]e see no need to decide the matter of the field of application of the standards set forth in the chapeau nor to make a ruling at variance with the common understanding of the participants.[828]"[829]

589. In *US – Shrimp*, the Appellate Body confirmed its finding in *US – Gasoline* on the type of discrimination covered by the chapeau Article XX:

"In *United States – Gasoline*, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned."[830]

(iii) Standard of discrimination

590. The Appellate Body on *US – Gasoline* considered the appropriate discrimination standard relevant under the chapeau Article XX and held that this standard must be different from the standard applied under Article III:4:

"The enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4. That would also be true if the finding were one of inconsistency with some other substantive rule of the *General Agreement*. The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning. Such recourse would also confuse the question of whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified. One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.

The chapeau, it will be seen, prohibits such application

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[826] (*footnote original*) Appellate Body Report on *US – Gasoline*, pp. 23–24.

[827] Appellate Body Report on *US – Shrimp*, para. 150.

[828] (*footnote original*) We note in this connection that two previous panels had occasion to apply the chapeau. In *US – Spring Assemblies*, the panel had before it a ban on imports, and an exclusion order of the United States International Trade Commission, of certain automotive spring assemblies which the Commission had found, under Section 337 of the Tariff Act of 1930, to have infringed valid United States patents. The panel there held that the exclusion order had *not* been applied in a manner which would constitute a means of "arbitrary or unjustifiable discrimination against countries where the same conditions prevail," because that order was directed against imports of infringing assemblies "from all foreign sources, and not just from Canada." At the same time, the same order was also examined and found *not* to be "a disguised restriction on international trade." Id., paras. 54–56. See also *US – Tuna (EEC)*, para. 4.8.

It may be observed that the term "countries" in the chapeau is textually unqualified; it does not say "foreign countries", as did Article 4 of the 1927 League of Nations *International Convention for the Abolition of Import and Export Prohibitions and Restrictions*, 97 L.N.T.S. 393. Neither does the chapeau say "third countries" as did, *e.g.*, bilateral trade agreements negotiated by the United States under the 1934 *Reciprocal Trade Agreements Act*; *e.g.* the *Trade Agreement between the United States of America and Canada*, 15 November 1935, 168 L.N.T.S. 356 (1936). These earlier treaties are here noted, not as pertaining to the *travaux preparatoires* of the *General Agreement*, but simply to show how in comparable treaties, a particular intent was expressed with words not found in printer's ink in the *General Agreement*.

[829] Appellate Body Report on *US – Gasoline*, pp. 23–24.

[830] Appellate Body Report on *US – Shrimp*, para. 150.

of a measure at issue (otherwise falling within the scope of Article XX(g)) as would constitute

(a) 'arbitrary discrimination' (between countries where the same conditions prevail);

(b) 'unjustifiable discrimination' (with the same qualifier); or

(c) 'disguised restriction' on international trade.

The text of the chapeau is not without ambiguity, including one relating to the field of application of the standards its contains: the arbitrary or unjustifiable discrimination standards and the disguised restriction on international trade standard. It may be asked whether these standards do not have different fields of application."[831]

591. After noting that "[t]he enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4" as referenced in paragraph 590 above, the Appellate Body on *US – Gasoline* examined the United States conduct with respect to other Members' governments and its failure to consider the costs imposed by its measures upon foreign refiners. The Appellate Body then held that these "two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place":

"We have above located two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines. In our view, these two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place. The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable. In the light of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application, constitute 'unjustifiable discrimination' and a 'disguised restriction on international trade.' We hold, in sum, that the baseline establishment rules, although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX as a whole."[832]

592. In *US – Shrimp*, the Appellate Body listed three elements of "arbitrary or unjustifiable discrimination" within the meaning of the chapeau of Article XX. See also paragraph 587 above. In respect of the first element, it reiterated its findings from *US – Gasoline* concerning the difference in discrimination under the chapeau of Article XX and other GATT provisions:

"As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI.[833]"[834]

(iv) Examples of arbitrary and unjustifiable discrimination

593. In *US – Shrimp*, in analysing the United States measure at issue in the light of the chapeau of Article XX, the Appellate Body noted the "intended and actual coercive effect on other governments" to "adopt *essentially the same* policy" as the United States:

"Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same* policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers."[835]

594. The Appellate Body on *US – Shrimp* acknowledged that "the United States ... applie[d] a uniform standard throughout its territories regardless of the particular conditions existing in certain parts of the country"[836], but held that such a uniform standard cannot be permissible in international trade relations. The Appellate Body held that "discrimination exists", *inter alia*, "when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in those exporting countries":

"It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.

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[831] Appellate Body Report on *US – Gasoline*, p. 23.
[832] Appellate Body Report on *US – Gasoline*, pp. 28–29.
[833] (*footnote original*) In *US – Gasoline*, p. 23, we stated: "The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."
[834] Appellate Body Report on *US – Shrimp*, para. 150.
[835] Appellate Body Report on *US – Shrimp*, para. 161.
[836] Appellate Body Report on *US – Shrimp*, para. 164.

> Furthermore, when this dispute was before the Panel and before us, the United States did not permit imports of shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609. In other words, *shrimp caught using methods identical to those employed in the United States* have been excluded from the United States market solely because they have been caught in waters of *countries that have not been certified by the United States*. The resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles. This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated. We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."[837]

595. The Appellate Body on *US – Shrimp* further criticised the "single, rigid and unbending requirement" that countries applying for certification – required under the United States measure at issue in order to import shrimps into the United States – were faced with. The Appellate Body also noted a lack of flexibility in how officials were making the determination for certification:

> "Section 609, in its application, imposes a single, rigid and unbending requirement that countries applying for certification under Section 609(b)(2)(A) and (B) adopt a comprehensive regulatory program that is essentially the same as the United States program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries. Furthermore, there is little or no flexibility in how officials make the determination for certification pursuant to these provisions. In our view, this rigidity and inflexibility also constitute 'arbitrary discrimination' within the meaning of the chapeau."[838]

596. Another aspect which the Appellate Body on *US – Shrimp* considered in determining whether the United States measure at issue constituted "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" was the concept of "due process". The Appellate Body found that the procedures under which United States authorities were granting the certification which foreign countries were required to obtain in order for their nationals to import shrimps into the United States were "informal" and "casual" and not "transparent" and "predictable:

> "[W]ith respect to neither type of certification under [the measure at issue requiring certification] is there a transparent, predictable certification process that is followed by the competent United States government officials. The certification processes under Section 609 consist principally of administrative *ex parte* inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service. With respect to both types of certification, there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision, whether of acceptance or rejection, is rendered on applications for either type of certification, whether under Section 609(b)(2)(A) and (B) or under Section 609(b)(2)(C). Countries which are granted certification are included in a list of approved applications published in the Federal Register; however, they are not notified specifically. Countries whose applications are denied also do not receive notice of such denial (other than by omission from the list of approved applications) or of the reasons for the denial. No procedure for review of, or appeal from, a denial of an application is provided.
>
> The certification processes followed by the United States thus appear to be singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of Members. There appears to be no way that exporting Members can be certain whether the terms of Section 609, in particular, the 1996 Guidelines, are being applied in a fair and just manner by the appropriate governmental agencies of the United States. It appears to us that, effectively, exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, *vis-à-vis* those Members which are granted certification."[839]

597. The Panel on *EC – Tariff Preferences* analysed whether the European Communities' Drug Arrangements were justified under Article XX(b). As one of the steps in assessing this, the Panel examined whether the measure was applied in a manner consistent with the chapeau of Article XX. Specifically, the Panel looked at the inclusion of Pakistan, as of 2002, as a beneficiary of the Drug Arrangements preference scheme and the exclusion of Iran, and found that no objective criteria could be discerned in the selection process. Consequently, the Panel was not satisfied that conditions in the 12 beneficiary countries were the same or similar and that they were not the same with those prevailing in other countries:

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[837] Appellate Body Report on *US – Shrimp*, paras. 164–165.
[838] Appellate Body Report on *US – Shrimp*, para. 177.
[839] Appellate Body Report on *US – Shrimp*, paras. 180–181.

"First, the Panel notes the European Communities' argument that the assessment of the gravity of the drug issue is based on available statistics on the production and/or trafficking of drugs in each country. The Panel notes, however, from the statistics provided by the European Communities itself in support of its argument that the 12 beneficiaries are the most seriously drug-affected countries, that the seizures of opium and of heroin in Iran are substantially higher than, for example, the seizures of these drugs in Pakistan throughout the period 1994–2000.[840] Iran is not covered as a beneficiary under the Drug Arrangements. Such treatment of Iran, and possibly of other countries, in the view of the Panel, is discriminatory. Bearing in mind the well-established rule that it is for the party invoking Article XX to demonstrate the consistency of its measure with the chapeau, the Panel notes that the European Communities has not provided any justification for such discriminatory treatment *vis-à-vis* Iran. Moreover, the European Communities has not shown that such discrimination is not arbitrary and not unjustifiable as between countries where the same conditions prevail.

Second, the Panel also notes, based upon statistics provided by the European Communities, that seizures of opium in Pakistan were 14,663 kilograms in 1994, as compared to 8,867 kilograms in 2000. Seizures of heroin in Pakistan were 6,444 kilograms in 1994 and 9,492 kilograms in 2000. The overall drug problem in Pakistan in 1994 and thereafter was no less serious than in 2000. The Panel considers that the conditions in terms of the seriousness of the drug problem prevailing in Pakistan in 1994 and thereafter were very similar to those prevailing in Pakistan in the year 2000. Accordingly, the Panel fails to see how the application of the same claimed objective criteria justified the exclusion of Pakistan prior to 2002 and, at the same time, its inclusion as of that year. And, given that the Panel cannot discern any change in the criteria used for the selection of beneficiaries under the Drug Arrangements since 1990, the Panel cannot conclude that the criteria applied for the inclusion of Pakistan are objective or non-discriminatory. Moreover, the European Communities has provided no evidence on the existence of any such criteria.

. . .

Given the European Communities' unconvincing explanations as to why it included Pakistan in the Drug Arrangements in 2002 and the fact that Iran was not included as a beneficiary, the Panel is unable to identify the specific criteria and the objectivity of such criteria the European Communities has applied in its selection of beneficiaries under the Drug Arrangements.

. . .

The Panel finds no evidence to conclude that the conditions in respect of drug problems prevailing in the 12 beneficiary countries are the same or similar, while the conditions prevailing in other drug-affected developing countries not covered by any other preferential tariff schemes are *not* the same as, or sufficiently similar to, the prevailing conditions in the 12 beneficiary countries."[841]

(c) "disguised restriction on international trade"

598. In *US – Gasoline*, the Appellate Body held that the concepts of "arbitrary or unjustifiable discrimination" and "disguised restriction on international trade" were related concepts which "imparted meaning to one another":

> "'Arbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction' on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that 'disguised restriction' includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of 'disguised restriction.' We consider that 'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."[842]

599. See also the excerpt from the report of the Appellate Body in *US – Gasoline* referenced in paragraph 591 above.

(d) Reference to GATT practice

600. With respect to GATT practice on the Preamble of Article XX, see GATT Analytical Index, pages 563–565.

3. Paragraph (b)

(a) Three-tier test

(i) General

601. The Panel on *US – Gasoline*, in a finding not reviewed by the Appellate Body, presented the following three-tier test in respect of Article XX(b):

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[840] First written submission of the European Communities, para. 123. In this regard, the Panel recalls that, according to the European Communities, its inclusion of Pakistan in the Drug Arrangements is due to the seriousness of drug trafficking, based on statistics of drug seizures, not of drug production. First written submission of the European Communities, para. 136.

[841] Panel Report on *EC – Tariff Preferences*, paras. 7.228–7.229, 7.232 and 7.234.

[842] Appellate Body Report on *US – Gasoline*, p. 25.

"[A]s the party invoking an exception the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to establish the following elements:

(1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;

(2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfil the policy objective; and

(3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.

In order to justify the application of Article XX(b), all the above elements had to be satisfied."[843]

602. In *EC – Asbestos*, the Panel followed the approach used by the Panel on *US – Gasoline* and indicated that it "must first establish whether the policy in respect of the measure for which the provisions of Article XX(b) were invoked falls within the range of policies designed to protect human life or health".[844]

603. The Panel on *EC – Tariff Preferences* also followed the same approach as the Panels on *US – Gasoline* and *EC – Asbestos*:

"In *EC – Asbestos*, the panel followed the same approach as used in *US – Gasoline*: 'We must first establish whether the policy in respect of the measure for which the provisions of Article XX(b) were invoked falls within the range of policies designed to protect human life or health'.[845]

Following this jurisprudence, the Panel considers that, in order to determine whether the Drug Arrangements are justified under Article XX(b), the Panel needs to examine: (i) whether the policy reflected in the measure falls within the range of policies designed to achieve the objective of or, put differently, or whether the policy objective is for the purpose of, 'protect[ing] human . . . life or health'. In other words, whether the measure is one designed to achieve that health policy objective; (ii) whether the measure is 'necessary' to achieve said objective; and (iii) whether the measure is applied in a manner consistent with the chapeau of Article XX."[846]

(ii) Policy objective of the measure at issue

604. In determining whether the policy objective of the European Communities' Drug Arrangements was the protection of human life or health, the Panel on *EC – Tariff Preferences* analysed the design and the structure of the GSP Regulation. However, it found no references to the alleged policy objective of protection of human life and health:

"Examining the design and structure of Council Regulation 2501/2001 and the Explanatory Memorandum of the Commission, the Panel finds nothing in either of these documents relating to a policy objective of protecting the health of European Communities citizens. The only objectives set out in the Council Regulation (in the second preambular paragraph) are 'the objectives of development policy, in particular the eradication of poverty and the promotion of sustainable development in the developing countries'. The Explanatory Memorandum states that '[t]hese objectives are to favour sustainable development, so as to improve the conditions under which the beneficiary countries are combatting drug production and trafficking'.[847]

Examining the structure of the Regulation, the Panel notes that Title I provides definitions of 'beneficiary countries' and the scope of product coverage for various categories of beneficiaries. Title II then specifies the methods and levels of tariff cuts for the various preference schemes set out in the Regulation, including for the General Arrangements, Special Incentive Arrangements, Special Arrangements for Least Developed Countries and Special Arrangements to Combat Drug Production and Trafficking. Title II also provides Common Provisions on graduation. Title III deals with conditions for eligibility for special arrangements on labour rights and the environment. Title IV provides only that the European Communities should monitor and evaluate the effects of the Drug Arrangements on drug production and trafficking in the beneficiary countries. There are other titles dealing with temporary withdrawal and safeguard provisions, as well as procedural requirements. From an examination of the whole design and structure of this Regulation, the Panel finds nothing linking the preferences to the protection of human life or health in the European Communities."[848]

605. In addressing European Communities' argument that providing market access is a necessary component of the United Nations' comprehensive international strategy to fight drug problem by promoting alternative development, the Panel on *EC – Tariff Preferences* stated that while alternative development is one component of that strategy, providing market access is not itself a significant component of the comprehensive strategy. The Panel went on to state that even if it were assumed that market access was an important component of the international strategy, the European Communities had not established a link between the market access improvement and the protection of human health in the European Communities:

[843] Panel Report on *US – Gasoline*, para. 6.20.
[844] Panel Report on *EC – Asbestos*, para. 8.184.
[845] Panel Report, *EC – Asbestos*, para. 8.184.(*footnote original*)
[846] Panel Report on EC tariff preferences, paras. 7.198–7.199.
[847] (*footnote original*) Explanatory Memorandum, para. 35, Exhibit India-7.
[848] Panel Report on *EC – Tariff Preferences*, paras. 7.201–202.

> "From its examination of these international instruments, including the 1988 Convention and the 1998 Action Plan, the Panel understands that alternative development is one component of the comprehensive strategy of the UN to combat drugs. The Panel has no doubt that market access plays a supportive role in relation to alternative development, but considers that market access is not itself a significant component of this comprehensive strategy. As the Panel understands it, the alternative development set out in the Action Plan depends more on the long-term political and financial commitment of both the governments of the affected countries and the international community to supporting integrated rural development, than on improvements in market access.
>
> Even assuming that market access is an important component of the international strategy to combat the drug problem, there was no evidence presented before the Panel to suggest that providing improved market access is aimed at protecting human life or health in drug importing countries. Rather, all the relevant international conventions and resolutions suggest that alternative development, including improved market access, is aimed at helping the countries seriously affected by drug production and trafficking to move to sustainable development alternatives."[849]

(iii) "necessary"

Aspect of measure to be justified as "necessary"

606. In *US – Gasoline*, the Panel addressed the question of which specific aspect of a measure under scrutiny should be justified as "necessary" within the meaning of paragraph (b) of Article XX. The Panel held that "it was not the necessity of the policy goal that was to be examined, but whether or not it was necessary that imported gasoline be effectively prevented from benefiting from as favourable sales conditions as were afforded by an individual baseline tied to the producer of a product". The Appellate Body did not address the Panel's findings on paragraph (b). However, in addressing the Panel's findings on paragraph (g), more specifically the Panel's statements concerning the terms "relating to" and "primarily aimed at", the Appellate Body was critical that "the Panel [had] asked itself whether the 'less favourable treatment' of imported gasoline was 'primarily aimed at' the conservation of natural resources, rather than whether the 'measure', i.e. the baseline establishment rules, were 'primarily aimed at' conservation of clean air." The Appellate Body found that "the Panel . . . was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue."[850]

607. In *EC – Tariff Preferences*, the Panel, in considering the extent to which the European Communities' Drug Arrangements were necessary in achieving the European Communities' stated health objective, referred to the approach used by the Appellate Body on *Korea – Various Measures on Beef*. The Panel found that the GSP benefits decreased during the period 1 July 1999 to 31 December 2001 and that the continuing contribution of the Drug Arrangements to the EC's health objective was therefore doubtful:

> "The Panel recalls the Appellate Body ruling in *Korea – Various Measures on Beef* that 'the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to'. We consider that a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'.[851] In order to determine where the Drug Arrangements are situated along this continuum between 'contribution to' and 'indispensable', the Panel is of the view that it should determine the extent to which the Drug Arrangements contribute to the European Communities' health objective. This requires the Panel to assess the benefits of the Drug Arrangements in achieving the objective of protecting life or health in the European Communities.
>
> The Panel notes the Report of the Commission pursuant to Article 31 of Council Regulation No. 2820/98 of 21 December 1998 applying a multiannual scheme of generalized tariff preferences for the period 1 July 1999 to 31 December 2001. The assessment of the effects of the Drug Arrangements in this report reveals that the product coverage under the Drug Arrangements decreased by 31 per cent from 1999 through 2001. It also shows that the volume of imports from the beneficiary countries under the Drug Arrangements decreased during the same period. As the Panel understands it, this decrease in product coverage and in imports from the beneficiaries is due to the reduction to zero – or close to zero – of the MFN bound duty rates on certain products, including coffee products.
>
> The Panel considers that the above-referenced decreases in product coverage and depth of tariff cuts reflect a long-term trend of GSP benefits decreasing as Members reduce their import tariffs towards zero in the multilateral negotiations. Given this decreasing trend of GSP benefits, the contribution of the Drug Arrangements to the realization of the European Communities' claimed health objective is insecure for the future. To the Panel, it is difficult to deem such measure as 'necessary' in the sense of Article XX(b). Moreover, given that the benefits under the Drug Arrangements themselves are decreasing, the Panel cannot come out to the conclusion that

[849] Panel Report on *EC – Tariff Preferences*, paras. 7.206–7.207.
[850] Appellate Body Report on *US – Gasoline*, p. 16.
[851] (*footnote original*) Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

the 'necessity' of the Drug Arrangements is closer to the pole of 'indispensable' than to that of 'contributing to' in achieving the objective of protecting human life or health in the European Communities."[852]

608. The Panel on *EC – Tariff Preferences* also considered the temporary suspension mechanism in the EC's GSP Regulation as well as its application to Myanmar and found that with one or more drug- producing or trafficking countries outside of the scheme, the Drug Arrangements are not contributing sufficiently to the reduction of drug supply to the EC's market:

"Assuming a beneficiary country under the Drug Arrangements was not ensuring sufficient customs controls on export of drugs, or was infringing the objectives of an international fisheries conservation convention, the European Communities could then suspend the tariff preferences under the Drug Arrangements to this country, for reasons unrelated to protecting human life or health. Given that this beneficiary would be a seriously drug-affected country, the suspension of the tariff preferences would arrest the European Communities' support to alternative development in that beneficiary and therefore also stop efforts to reduce the supply of illicit drugs into the European Communities. The whole design of the EC Regulation does not support the European Communities' contention that it is 'necessary' to the protection of human life and health in the European Communities, because such design of the measure does not contribute sufficiently to the achievement of the health objective.

The European Communities confirms that while Myanmar is one of the world's leading producers of opium, it is not necessary to separately include this country under the Drug Arrangements since it is already accorded preferential tariff treatment as a least-developed country. The Panel notes that the European Communities has suspended tariff preferences for Myanmar. . . .

Recalling that the European Communities confirms that it is required to continue its suspension of tariff preferences for Myanmar through the expiration of the EC Regulation on 31 December 2004, the Panel notes that any of the 12 beneficiaries is also potentially subject to similar suspension under the same Regulation, regardless of the seriousness of the drug problems in that country. With one or more of the main drug-producing or trafficking countries outside the scheme, it is difficult to see how the Drug Arrangements are in fact contributing sufficiently to the reduction of drug supply into the European Communities' market to qualify as a measure necessary to achieving the European Communities' health objective."[853]

Treatment of scientific data and risk assessment

609. In *EC – Asbestos*, the Panel found that the measure at issue, a French ban on the manufacture, importation and exportation, and domestic sale and transfer of certain asbestos products including products containing chrysotile fibres, was inconsistent with *GATT* Article III:4, but justified under Article XX(b) in light of the underlying policy of prohibiting chrysotile asbestos in order to protect human life and health. The Appellate Body rejected Canada's argument under Article XX(b) that the Panel erred in law by deducing that chrysotile-cement products pose a risk to human life or health. The Appellate Body referred to Article 11 of the DSU and its reports on *US – Wheat Gluten*[854] and *Korea – Alcoholic Beverages*[855], and stated:

"The Panel enjoyed a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence. The Panel was entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements – that is the essence of the task of appreciating the evidence."[856]

610. Further, in *EC – Asbestos*, Canada argued that Article 11 of the *DSU* requires that the scientific data must be assessed in accordance with the principle of the balance of probabilities, and that in particular where the evidence is divergent or contradictory, a Panel must take a position as to the respective weight of the evidence by virtue of the principle of the preponderance of the evidence. The Appellate Body rejected this argument, pointing out:

"As we have already noted, '[w]e cannot second-guess the Panel in appreciating either the evidentiary value of . . . studies or the consequences, if any, of alleged defects in [the evidence]'.[857] And, as we have already said, in this case, the Panel's appreciation of the evidence remained well within the bounds of its discretion as the trier of facts.

In addition, in the context of the *SPS Agreement*, we have said previously, in *European Communities – Hormones,* that 'responsible and representative governments may act in good faith on the basis of what, at a given time, may be a *divergent* opinion coming from qualified and respected sources.'[858] (emphasis added) In justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent,

[852] Panel Report on *EC – Tariff Preferences*, paras. 7.211–7.213.
[853] Panel Report on *EC – Tariff Preferences*, paras. 7.216–7.218.
[854] The Appellate Body cited Appellate Body Report on *US – Wheat Gluten*, para. 151.
[855] The Appellate Body cited Appellate Body Report on *Korea – Alcoholic Beverages*, para. 161.
[856] Appellate Body Report on *EC – Asbestos*, para. 161. With respect to the standard of review in general, see Article 11 of the Chapter on the *DSU*.
[857] (*footnote original*) Appellate Body Report on *Korea – Alcoholic Beverages*, para. 161.
[858] (*footnote original*) Appellate Body Report on *EC – Hormones*, para. 194.

but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not, necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the 'preponderant' weight of the evidence."[859]

611. In *EC – Asbestos*, the Appellate Body also rejected Canada's argument that in examining whether the French ban on manufacture, sale and imports of certain asbestos products including chrysotile-cement products was justified under *GATT* Article XX(b), the Panel should have quantified the risk associated with chrysotile-cement products:

"As for Canada's second argument, relating to 'quantification' of the risk, we consider that, as with the *SPS Agreement*, there is no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health.[860] A risk may be evaluated either in quantitative or qualitative terms. In this case, contrary to what is suggested by Canada, the Panel assessed the nature and the character of the risk posed by chrysotile-cement products. The Panel found, on the basis of the scientific evidence, that 'no minimum threshold of level of exposure or duration of exposure has been identified with regard to the risk of pathologies associated with chrysotile, except for asbestosis.' The pathologies which the Panel identified as being associated with chrysotile are of a very serious nature, namely lung cancer and mesothelioma, which is also a form of cancer. Therefore, we do not agree with Canada that the Panel merely relied on the French authorities' 'hypotheses' of the risk."[861]

612. The Appellate Body also rejected Canada's argument that the Panel erroneously postulated that the level of health protection inherent in the measure was a halt to the spread of asbestos-related health risks, because it did not take into consideration the risk associated with the use of substitute products without a framework for controlled use. The Appellate Body stated:

"[W]e note that it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined, and the Panel accepted, that the chosen level of health protection by France is a 'halt' to the spread of *asbestos*-related health risks. By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is clearly designed and apt to achieve that level of health protection. Our conclusion is not altered by the fact that PCG fibres might pose a risk to health. The scientific evidence before the Panel indicated that the risk posed by the PCG fibres is, in any case, *less* than the risk posed by chrysotile asbestos fibres, although that evidence did *not* indicate that the risk posed by PCG fibres is non-existent. Accordingly, it seems to us perfectly legitimate for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place."[862]

"Reasonably available" alternatives

613. In *EC – Asbestos*, the Appellate Body confirmed that a measure is "necessary" within the meaning of *GATT* Article XX(b) "if an alternative measure which [a Member] could reasonably be expected to employ and which is not inconsistent with other GATT provisions is [not] available to it." The Appellate Body on *EC – Asbestos* then considered Canada's claim that the Panel had erroneously found that "controlled use" was not a reasonably available alternative to the measure at issue. In this connection, Canada argued that the Appellate Body itself had held in *US – Gasoline* that an alternative measure can only be ruled out if it is shown to be impossible to implement. The Appellate Body rejected Canada's argument, but began its analysis by acknowledging that "administrative difficulties" did not render a measure not "reasonably available":

"We certainly agree with Canada that an alternative measure which is impossible to implement is not 'reasonably available'. But we do not agree with Canada's reading of either the panel report or our report in *United States – Gasoline*. In *United States – Gasoline*, the panel held, in essence, that an alternative measure did not *cease* to be 'reasonably' available simply because the alternative measure involved *administrative difficulties* for a Member.[863] The panel's findings on this point were not appealed, and, thus, we did not address this issue in that case."

614. The Appellate Body then found that "several factors must be taken into account" in ascertaining whether a suggested alternative measure is "reasonably available". In this context, the Appellate Body mentioned, *inter alia*, the importance of the value pursued by the measure at issue:

"Looking at this issue now, we believe that, in determining whether a suggested alternative measure is 'reasonably available', several factors must be taken into account, besides the difficulty of implementation. In *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, the panel made the following observations on the applicable standard for evaluating whether a measure is 'necessary' under Article XX(b):

[859] Appellate Body Report on *EC – Asbestos*, paras. 177–178.
[860] (*footnote original*) Appellate Body Report on *EC – Hormones*, para. 186.
[861] Appellate Body Report on *EC – Asbestos*, para. 167.
[862] Appellate Body Report on *EC – Asbestos*, para. 168.
[863] (*footnote original*) See Panel Report on *US – Gasoline*, paras. 6.26 and 6.28.

> 'The import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could *reasonably be expected to employ to achieve its health policy objectives*.'[864] (emphasis added)

In our Report in *Korea – Beef*, we addressed the issue of 'necessity' under Article XX(d) of the GATT 1994.[865] In that appeal, we found that the panel was correct in following the standard set forth by the panel in *United States – Section 337 of the Tariff Act of 1930*:

> 'It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.'[866]

We indicated in *Korea – Beef* that one aspect of the 'weighing and balancing process . . . comprehended in the determination of whether a WTO-consistent alternative measure' is reasonably available is the extent to which the alternative measure 'contributes to the realization of the end pursued'.[867] In addition, we observed, in that case, that '[t]he more vital or important [the] common interests or values' pursued, the easier it would be to accept as 'necessary' measures designed to achieve those ends.[868] In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree."[869]

615. The Appellate Body then examined the remaining question of "whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition,"[870] i.e. "whether France could reasonably be expected to employ 'controlled use' practices to achieve its chosen level of health protection – a halt in the spread of asbestos-related health risks":[871]

> "In our view, France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to 'halt'. Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection. On the basis of the scientific evidence before it, the Panel found that, in general, the efficacy of 'controlled use' remains to be demonstrated. Moreover, even in cases where 'controlled use' practices are applied 'with greater certainty', the scientific evidence suggests that the level of exposure can, in some circumstances, still be high enough for there to be a 'significant residual risk of developing asbestos-related diseases.' The Panel found too that the efficacy of 'controlled use' is particularly doubtful for the building industry and for DIY enthusiasts, which are the most important users of cement-based products containing chrysotile asbestos.[872] Given these factual findings by the Panel, we believe that 'controlled use' would not allow France to achieve its chosen level of health protection by halting the spread of asbestos-related health risks. 'Controlled use' would, thus, not be an alternative measure that would achieve the end sought by France."[873]

(b) Reference to GATT practice

616. With respect to GATT practice under Article XX(b), see GATT Analytical Index, pages 565–573.

4. Paragraph (d)

(a) General

617. In *Korea – Various Measures on Beef*, the Appellate Body examined Korea's argument that the prohibition of retail sales of both domestic and imported beef products (the dual retail system) was designed to secure compliance with a consumer protection law, and thus, although in violation of Article III:4, nevertheless justified by Article XX(d). Referring to its Report on *US – Gasoline*, the Appellate Body set forth the following two elements for paragraph (d):

> "For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be 'necessary' to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met."[874]

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[864] (*footnote original*) Panel Report on *Thailand – Cigarettes*, para. 75.
[865] (*footnote original*) Appellate Body Report on *Korea – Various Measures on Beef*, paras. 159 ff.
[866] (*footnote original*) Panel Report on *US – Section 337*, para. 5.26; we expressly affirmed this standard in our Report in *Korea – Various Measures on Beef*, para. 166.
[867] (*footnote original*) Appellate Body Report on *Korea – Various Measures on Beef*, paras. 166 and 163.
[868] (*footnote original*) Appellate Body Report on *Korea – Various Measures on Beef*, para. 162.
[869] Appellate Body Report on *EC – Asbestos*, paras. 170–172. The cited paragraphs in Appellate Body Report on *Korea – Various Measures on Beef* are also referenced in para. 618 of this Chapter.
[870] Appellate Body Report on *EC – Asbestos*, para. 172.
[871] Appellate Body Report on *EC – Asbestos*, para. 173.
[872] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 8.213–8.214.
[873] Appellate Body Report on *EC – Asbestos*, para. 174.
[874] Appellate Body Report on *Korea – Various Measures on Beef*, para. 157.

(b) "necessary"

618. In *Argentina – Hides and Leather*, the disputed measures were certain collection and withholding mechanisms that Argentina had adopted to secure compliance with certain tax laws and to combat tax evasion. The disputing parties, Argentina and the European Communities had different views with regard to how the provision "necessary" in Article XX(d) should be interpreted. The European Communities claimed that a measure can only be "necessary" if there is no alternative, whereas Argentina argued that the Member claiming the "necessity" of a measure should be entitled a certain degree of discretion in that determination. The Panel refused to resolve this interpretative dispute[875], but taking into account *inter alia* the "general design and structure" of the measures, the Panel found that the arguments advanced by Argentina raised a presumption, not rebutted by the European Communities and accordingly held that the measures were "necessary":

> "[W]e are satisfied that Argentina has adduced argument and evidence sufficient to raise a presumption that the contested measures, in their general design and structure, are 'necessary' even on the European Communities' reading of that term. Argentina stresses the fact that tax evasion is common in its territory and that, against this background of low levels of tax compliance, tax authorities cannot expect to improve tax collection primarily through the pursuit of repressive enforcement strategies (e.g. aggressive criminal prosecution of tax offenders). In those circumstances, Argentina maintains, tax authorities must direct their efforts towards preventing tax evasion from occurring in the first place. According to Argentina, this is precisely what RG 3431 and RG 3543 are designed to accomplish.[876]
>
> The European Communities does not dispute that, in the circumstances of the present case, collection and withholding mechanisms are necessary to combat tax evasion.[877] Nor has the European Communities submitted other arguments or evidence which would rebut the presumption raised by Argentina in respect of the 'necessity' of RG 3431 and RG 3543.[878]
>
> In light of the foregoing, we conclude that, in view of their general design and structure, RG 3431 and RG 3543 are 'necessary' measures within the meaning of Article XX(d).
>
> Since it has thus been established that RG 3431 and RG 3543 satisfy all of the requirements set forth in Article XX(d), we further conclude that they enjoy provisional justification under the terms of Article XX(d)."[879]

619. In *Korea – Various Measures on Beef*, the Appellate Body attempted to situate the meaning of the term "necessary" within the context of Article XX(d) on a "continuum" stretching from "indispensable/of absolute necessity" to "making a contribution to". Furthermore, the Appellate Body emphasized the context in which the term "necessary" is found in Article XX(d) and held that in "assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation [a treaty interpreter] may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect":

> "We believe that, as used in the context of Article XX(d), the reach of the word 'necessary' is not limited to that which is 'indispensable' or 'of absolute necessity' or 'inevitable'. Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term 'necessary' refers, in our view, to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to'. We consider that a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'.[880]
>
> In appraising the 'necessity' of a measure in these terms, it is useful to bear in mind the context in which 'necessary' is found in Article XX(d). The measure at stake has

[875] Panel Report on *Argentina – Hides and Leather*, para. 11.304.

[876] (*footnote original*) In our view, the presumption raised by Argentina of the existence of a relationship of necessity between Argentina's declared objective of securing compliance with the IVA Law and IG Law and the general design of RG 3431 and RG 3543 is not affected by the inconsistency of these measures with Article III:2, first sentence.

[877] (*footnote original*) See para. 8.258 of this report.

[878] (*footnote original*) It is true that the European Communities disputes that the higher rates applied to imported products pursuant to RG 3431 and RG 3543 are "necessary" in order to secure compliance with the IVA Law and IG Law. See e.g. EC First Oral Statement, at paras. 79, 82 and 84. We consider that this contention goes to the question of whether Argentina makes improper use of the exception set out in Article XX(d) and not to the question of whether RG 3431 and RG 3543, in light of their general design and structure, fall within the terms of Article XX(d). We therefore address the justifiability of applying higher rates to imported products when we appraise RG 3431 and RG 3543 under the chapeau of Article XX. This approach is in accordance with that followed by the Appellate Body in *United States – Gasoline*. See the Appellate Body Report on *United States – Gasoline*, *supra*, at pp. 19 and 25–29.

[879] Panel Report on *Argentina – Hides and Leather*, paras. 11.306 – 11.308.

[880] (*footnote original*) We recall that we have twice interpreted Article XX(g), which requires a measure "*relating* to the conservation of exhaustible natural resources". (emphasis added). This requirement is more flexible textually than the "necessity" requirement found in Article XX(d). We note that, under the more flexible "*relating to*" standard of Article XX(g), we accepted in *United States – Gasoline* a measure because it presented a "*substantial* relationship", (emphasis added) i.e., *a close and genuine* relationship of ends and means, with the conservation of clean air. *Supra*, footnote 98, p.19. In *United States – Shrimp* we accepted a measure because it was "*reasonably related*" to the protection and conservation of sea turtles. *Supra*, footnote 98, at para. 141.

to be 'necessary to ensure compliance with laws and regulations . . ., *including* those relating to customs enforcement, the enforcement of [lawful] monopolies …, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices'. (emphasis added) Clearly, Article XX(d) is susceptible of application in respect of a wide variety of 'laws and regulations' to be enforced. It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument.

. . .

In sum, determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."[881]

620. In *Korea – Various Measures on Beef*, the Panel, in a finding upheld by the Appellate Body, did not accept Korea's argument for invoking an exception under Article XX(d) to justify a violation of Article III:4. Korea argued that it was "necessary to have domestic and imported beef sold through separate stores in order to counteract fraudulent practices prohibited by the *Unfair Competition Act*", the dual retail system.[882] Korea argued that due to the fact that imported beef was cheaper than domestic beef, "traders have a strong incentive to sell imported beef as domestic beef since by doing so they can profit from the higher sales price."[883] Korea adopted and implemented the dual retail system in 1990 and decided to abrogate the previous simultaneous sales system which had been in place since 1988 when imports of beef first resumed. Korea claimed further that, in view of the substantial costs to the government, it was not sustainable from an economic aspect to maintain continuous policing of the shops. When evaluating whether the adoption of the *Unfair Competition Act* fulfilled the "necessity" criterion in Article XX(d) the Panel stated the following:

"To demonstrate that the dual retail system is 'necessary', Korea has to convince the Panel that, contrary to what was alleged by Australia and the United States, no alternative measure consistent with the WTO Agreement is reasonably available at present in order to deal with misrepresentation in the retail beef market as to the origin of beef. The Panel considers that Korea has not discharged this burden for two inter-related reasons. First, Korea has not found it 'necessary' to establish 'dual retail systems' in order to prevent similar cases of misrepresentation of origin from occurring in other sectors of its domestic economy. Second, Korea has not shown to the satisfaction of the Panel that measures, other than a dual retail system, compatible with the WTO Agreement, are not sufficient to deal with cases of misrepresentation of origin involving imported beef."[884]

621. The Appellate Body on *Korea – Various Measures on Beef* further stated that a determination of whether a measure is necessary under Article XX(d), when that measure is not actually indispensable in achieving compliance with the law or regulation at issue, involves weighing and balancing different factors:

"In sum, determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."[885]

622. In keeping with this interpretation, the Panel on *Canada – Wheat Exports and Grain Imports* undertook the weighing and balancing of various factors in the following manner:

"In applying the 'weighing and balancing' test, the Appellate Body in *Korea – Various Measures on Beef* and, subsequently, in *EC Asbestos* considered the importance of the value or interest pursued by the laws with which the challenged measure sought to secure compliance, whether the objective pursued by the challenged measure contributed to the end that was sought to be realized and whether a reasonably available alternative measure existed. We apply the same approach here in determining whether Section 57(c) of the *Canada Grain Act* is 'necessary' for the purposes of Article XX(d) of the GATT 1994.

With respect to the importance of the interests or values that the statutory and other provisions with which, according to Canada, Section 57(c) secures compliance

[881] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 161–162 and 164. Following these paragraphs, the Appellate Body cited Panel Report on *US – Section 337*, para. 5.26.
[882] Panel Report on *Korea – Various Measures on Beef*, para. 645.
[883] Panel Report on *Korea – Various Measures on Beef*, para. 645.
[884] Panel Report on *Korea – Various Measures on Beef*, para. 659.
[885] Appellate Body Report on *Korea – Various Measures on Beef*, para. 164.

are intended to protect, Canada has indicated that those objectives are to ensure the quality of Canadian grain, maintain the integrity of the Canadian grading system, protect consumers against misrepresentation and preserve and enforce the CWB monopoly. In other words, the relevant provisions are said to essentially help maintain the integrity of Canada's grading and quality assurance system and of the CWB's exclusive right to sell Western Canadian grain for domestic sale or export and, thereby, to preserve the reputation of Canadian grain notably in export markets. It is clear that these interests, which appear to be essentially commercial in nature, are important. It seems equally clear, however, that these interests are not as important as, for instance, the protection of human life and health against a lifethreatening health risk, an interest which the Appellate Body in *EC – Asbestos* characterized as 'vital and important in the highest degree.'"[886]

(c) Aspect of measure to be justified as "necessary"

623. The Panel on *US – Gasoline* held that "maintenance of discrimination between imported and domestic gasoline contrary to Article III:4 under the baseline establishment methods did not 'secure compliance' with the baseline system. These methods were not an enforcement mechanism." While the Appellate Body did not address the Panel's findings on Article XX(d), it criticised that, in the context of Article XX(g), "the Panel asked itself whether the 'less favourable treatment' of imported gasoline was 'primarily aimed at' the conservation of natural resources, rather than whether the 'measure', i.e. the baseline establishment rules, were 'primarily aimed at' conservation of clean air." The Appellate Body found that "the Panel ... was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue."[887] See also paragraphs 606 above and 629 below.

(d) "Reasonably available" alternatives

624. In *Canada – Wheat Exports and Grain Imports*, the Panel made reference to the Appellate Body report on *EC – Asbestos* regarding "reasonably available" alternatives in the context of Article XX(b) (see paragraph 613 above) and to the Appellate Body report on *Korea – Various Measures on Beef* (see paragraph 618 above) in addressing "reasonably available" alternatives in the context of Article XX(d):

> "Therefore, the question remains as to whether there is an alternative measure to Section 57(c) that is reasonably available. The Appellate Body has indicated that relevant factors for determining whether an alternative measure is 'reasonably available' are: (i) the extent to which the alternative measure 'contributes to the realization of the end pursued'; (ii) the difficulty of implementation311; and (iii) the trade impact of the alternative measure compared to that of the measure for which justification is claimed under Article XX. The Appellate Body has also stated that, in addition to being 'reasonably available', the alternative measure must also achieve the level of compliance sought. In this regard, the Appellate Body has recognized that 'Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations'."[888]

(e) Reference to GATT practice

625. With respect to GATT practice under Article XX(d), see GATT Analytical Index, pages 573–583.

5. Paragraph (g): "relating to the conservation of exhaustible natural resources"

(a) "the conservation of exhaustible natural resources"

(i) Jurisdictional limitations

626. In *US – Shrimp*, the Appellate Body reviewed the Panel's finding concerning a United States measure which banned imports of shrimps and shrimp products harvested by vessels of foreign nations, where such exporting country had not been certified by United States authorities as using methods not leading to the incidental killing of sea turtles above certain levels. The Panel had found that the United States could not justify its measure under Article XX(g). Noting that sea turtles migrate to, or traverse waters subject to the jurisdiction of the United States, the Appellate Body indicated as follows:

> "We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)."[889]

(ii) meaning of "exhaustible natural resources"

627. In *US – Shrimp*, the Appellate Body addressed the meaning of the term "exhaustible natural resources" contained in Article XX(g). The Appellate Body emphasized the need for a dynamic rather than a static interpretation of the term "exhaustible", noting the need to interpret this term "in the light of contemporary concerns of the community of nations about the protection

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[886] Panel Report on *Canada – Wheat Exports and Grain Imports*, paras. 6.223–6.224.
[887] Appellate Body Report on *US – Gasoline*, p. 16.
[888] Panel Report on *Canada – Wheat Exports and Grain Imports*, para. 6.226.
[889] Appellate Body Report on *US – Shrimp*, para. 133.

and conservation of the environment". In its interpretative approach, the Appellate Body also took into consideration non-WTO law:

> "Textually, Article XX(g) is *not* limited to the conservation of 'mineral' or 'non-living' natural resources. The complainants' principal argument is rooted in the notion that 'living' natural resources are 'renewable' and therefore cannot be 'exhaustible' natural resources. We do not believe that 'exhaustible' natural resources and 'renewable' natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, 'renewable', are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as 'finite' as petroleum, iron ore and other non-living resources.[890]
>
> The words of Article XX(g), 'exhaustible natural resources', were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement* – which informs not only the GATT 1994, but also the other covered agreements – explicitly acknowledges 'the objective of *sustainable development* . . .':
>
> . . .
>
> From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'.[891] It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.[892] . . .
>
> . . .
>
> Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.[893] Moreover, two adopted GATT 1947 panel reports previously found fish to be an 'exhaustible natural resource' within the meaning of Article XX(g).[894] We hold that, in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether *living* or *non-living*, may fall within Article XX(g)."[895]

(iii) Reference to GATT practice

628. With respect to GATT practice on the term "exhaustible natural resources" under Article XX(g), see GATT Analytical Index, pages 585–586.

(b) "relating to"

(i) Aspect of the measure to be justified as "relating to"

629. The Panel on *US – Gasoline* held that the United States measure at issue could not be justified in the light of Article XX(g) as a measure "relating to the conservation of exhaustible natural resources". More specifically, the Panel held that it "saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the United States objective of improving air quality in the United States" and that "the less favourable baseline establishments methods at issue in this case were not primarily aimed at the conservation of natural resources".[896] The Appellate Body reversed the Panel's finding and held that the United States measure was justified under Article XX(g), although it ultimately found that the measure was inconsistent with the chapeau of

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[890] (*footnote original*) We note, for example, that the World Commission on Environment and Development stated: "The planet's species are under stress. There is growing scientific consensus that species are disappearing at rates never before witnessed on the planet . . . ." World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), p. 13.

[891] (*footnote original*) See *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep., p. 31. The International Court of Justice stated that where concepts embodied in a treaty are "by definition, evolutionary", their "interpretation cannot remain unaffected by the subsequent development of law . . . . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." See also *Aegean Sea Continental Shelf Case*, (1978) I.C.J. Rep., p. 3; Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's, 1992), p. 1282 and E. Jimenez de Arechaga, "International Law in the Past Third of a Century", (1978–I) 159 *Recueil des Cours* 1, p. 49.

[892] Following this sentence, the Appellate Body refers to 1982 United Nations Convention on the Law of the Sea, done at Montego Bay, 10 December 1982, UN Doc. A/CONF.62/122; 21 International Legal Materials 1261, Arts. 56, 61 and 62; Agenda 21, adopted by the United Nations Conference on Environment and Development, 14 June 1992, UN Doc. A/CONF. 151/26/Rev.1. See, for example, para. 17.70, ff; and Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn, 23 June 1979, 19 International Legal Materials 11, p. 15.

[893] (*footnote original*) Furthermore, the drafting history does not demonstrate an intent on the part of the framers of the GATT 1947 *to exclude* "living" natural resources from the scope of application of Article XX(g).

[894] (*footnote original*) Panel Reports on *US – Canadian Tuna*, para. 4.9; and *Canada – Herring and Salmon*, para. 4.4.

[895] Appellate Body Report on *US – Shrimp*, paras. 128–131.

[896] Panel Report on *US – Gasoline*, para. 6.40.

Article XX. See also paragraph 591 above. The Appellate Body held that the Panel was in error in searching for a link between the *discriminatory aspect* of the United States measure (rather than the *measure itself*) and the policy goal embodied in Article XX(g):

> "[The] problem with the reasoning in that paragraph is that the Panel asked itself whether the 'less favourable treatment' of imported gasoline was 'primarily aimed at' the conservation of natural resources, rather than whether the 'measure', i.e. the baseline establishment rules, were 'primarily aimed at' conservation of clean air. In our view, the Panel here was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue. The result of this analysis is to turn Article XX on its head. Obviously, there had to be a finding that the measure provided 'less favourable treatment' under Article III:4 before the Panel examined the 'General Exceptions' contained in Article XX. That, however, is a conclusion of law. The chapeau of Article XX makes it clear that it is the 'measures' which are to be examined under Article XX(g), and not the legal finding of 'less favourable treatment.'"[897]

(ii) Meaning of "relating to" and "primarily aimed at"

630. In interpreting the term "relating to" under Article XX(g), the Appellate Body noted that all the parties and participants to the appeal agreed that the term "relating to" was equivalent to "primarily aimed at":

> "All the participants and the third participants in this appeal accept the propriety and applicability of the view of the *Herring and Salmon* report and the Panel Report that a measure must be 'primarily aimed at' the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g).[898] Accordingly, we see no need to examine this point further, save, perhaps, to note that the phrase 'primarily aimed at' is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g)."[899]

631. The Panel on *US – Gasoline* found that "being consistent with the obligation to provide no less favourable treatment would not prevent the attainment of the desired level of conservation of natural resources under the Gasoline Rule. Accordingly, it could not be said that the baseline establishment methods that afforded less favourable treatment to imported gasoline were primarily aimed at the conservation of natural resources." The Appellate Body criticised the Panel analysis which had focused on whether the discriminatory aspect of the United States measure was related to the stated policy goal. See paragraph 629 above. The Appellate Body then opined that the Panel had transposed the concept of "necessary" from Article XX(b) into its analysis under Article XX(g):

> "[T]he Panel Report appears to have utilized a conclusion it had reached earlier in holding that the baseline establishment rules did not fall within the justifying terms of Articles XX(b); i.e. that the baseline establishment rules were not 'necessary' for the protection of human, animal or plant life. The Panel Report, it will be recalled, found that the baseline establishment rules had not been shown by the United States to be 'necessary' under Article XX(b) since alternative measures either consistent or less inconsistent with the *General Agreement* were reasonably available to the United States for achieving its aim of protecting human, animal or plant life.[900] In other words, the Panel Report appears to have applied the 'necessary' test not only in examining the baseline establishment rules under Article XX(b), but also in the course of applying Article XX(g)."[901]

632. In reversing the Panel's findings on Article XX(g), the Appellate Body began by recalling the principles of treaty interpretation and comparing the terms used in each paragraph of Article XX. See the quote referenced in paragraph 579 above. The Appellate Body subsequently considered the relationship between Article III:4 and Article XX:

> "Article XX(g) and its phrase, 'relating to the conservation of exhaustible natural resources,' need to be read in context and in such a manner as to give effect to the purposes and objects of the *General Agreement*. The context of Article XX(g) includes the provisions of the rest of the *General Agreement*, including in particular Articles I, III and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phrase 'relating to the conservation of exhaustible natural resources' may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, *e.g.*, Articles I, III and XI, and the policies and interests embodied in the 'General Exceptions' listed in Article XX, can be given meaning within the framework of the *General Agreement* and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose."[902]

633. The Appellate Body on *US – Gasoline* finally examined whether the United States baseline establish-

[897] Appellate Body Report on *US – Gasoline*, p. 16. See also paragraphs 606 and 623 of this Chapter.
[898] (*footnote original*) We note that the same interpretation has been applied in two recent unadopted panel reports: *US – Tuna (EEC)*; *US – Taxes on Automobiles*.
[899] Appellate Body Report on *US – Gasoline*, p. 18.
[900] (*footnote original*), Panel Report, paras. 6.25–6.28.
[901] Appellate Body Report on *US – Gasoline*, p. 16.
[902] Appellate Body Report on *US – Gasoline*, p. 18.

ment rules were appropriately regarded as "primarily aimed at" the conservation of natural resources within the meaning of Article XX(g). The Appellate Body answered this question in the affirmative:

> "The baseline establishment rules, taken as a whole (that is, the provisions relating to establishment of baselines for domestic refiners, along with the provisions relating to baselines for blenders and importers of gasoline), need to be related to the 'non-degradation' requirements set out elsewhere in the Gasoline Rule. Those provisions can scarcely be understood if scrutinized strictly by themselves, totally divorced from other sections of the Gasoline Rule which certainly constitute part of the context of these provisions. The baseline establishment rules whether individual or statutory, were designed to permit scrutiny and monitoring of the level of compliance of refiners, importers and blenders with the 'non-degradation' requirements. Without baselines of some kind, such scrutiny would not be possible and the Gasoline Rule's objective of stabilizing and preventing further deterioration of the level of air pollution prevailing in 1990, would be substantially frustrated. The relationship between the baseline establishment rules and the 'non-degradation' requirements of the Gasoline Rule is not negated by the inconsistency, found by the Panel, of the baseline establishment rules with the terms of Article III:4. We consider that, given that substantial relationship, the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g)."[903]

634. In *US – Shrimp*, in holding that the United States measure was "primarily aimed at" the conservation of natural resources, the Appellate Body opined that the measure was not a "simple, blanket prohibition" and that a reasonable "means and ends relationship" existed between the measure and the policy of natural resource conservation:

> "In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake, it appears to us that Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one.
>
> In our view, therefore, Section 609 is a measure 'relating to' the conservation of an exhaustible natural resource within the meaning of Article XX(g) of the GATT 1994."[904]

635. With respect to GATT practice on the term "relating to" under Article XX(g), see GATT Analytical Index, pages 583–585.

(c) "measures made effective in conjunction with"

636. In *US – Gasoline*, the Appellate Body described the term "measures made effective in conjunction with" as a "requirement of *even-handedness* in the imposition of restrictions":

> "Viewed in this light, the ordinary or natural meaning of 'made effective' when used in connection with a measure – a governmental act or regulation -may be seen to refer to such measure being 'operative', as 'in force', or as having 'come into effect.' Similarly, the phrase 'in conjunction with' may be read quite plainly as 'together with' or 'jointly with.' Taken together, the second clause of Article XX(g) appears to us to refer to governmental measures like the baseline establishment rules being promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources. Put in a slightly different manner, we believe that the clause 'if such measures are made effective in conjunction with restrictions on domestic product or consumption' is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources."[905]

637. The Appellate Body made clear that the "requirement of even-handedness" embodied in Article XX(g) did not amount to a requirement of "identity of treatment":

> "There is, of course, no textual basis for requiring identical treatment of domestic and imported products. Indeed, where there is identity of treatment – constituting real, not merely formal, equality of treatment – it is difficult to see how inconsistency with Article III:4 would have arisen in the first place. On the other hand, if *no* restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products *alone*, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods.
>
> In the present appeal, the baseline establishment rules affect both domestic gasoline and imported gasoline,

[903] Appellate Body Report on *US – Gasoline*, p. 19.
[904] Appellate Body Report on *US – Shrimp*, paras. 141–142.
[905] Appellate Body Report on *US – Gasoline*, p. 20.

providing for – generally speaking – individual baselines for domestic refiners and blenders and statutory baselines for importers. Thus, restrictions on the consumption or depletion of clean air by regulating the domestic production of 'dirty' gasoline are established jointly with corresponding restrictions with respect to imported gasoline. That imported gasoline has been determined to have been accorded 'less favourable treatment' than the domestic gasoline in terms of Article III:4, is not material for purposes of analysis under Article XX(g). It might also be noted that the second clause of Article XX(g) speaks disjunctively of 'domestic production *or* consumption.'"[906]

638. The Appellate Body further rejected the argument that the term "made effective" was designed to require an "empirical effects test" and that the measure at issue had to produce some measurable "positive effects":

"We do not believe . . . that the clause 'if made effective in conjunction with restrictions on domestic production or consumption' was intended to establish an empirical 'effects test' for the availability of the Article XX(g) exception. In the first place, the problem of determining causation, well-known in both domestic and international law, is always a difficult one. In the second place, in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable. The legal characterization of such a measure is not reasonably made contingent upon occurrence of subsequent events. We are not, however, suggesting that consideration of the predictable effects of a measure is never relevant. In a particular case, should it become clear that realistically, a specific measure cannot in any possible situation have any positive effect on conservation goals, it would very probably be because that measure was not designed as a conservation regulation to begin with. In other words, it would not have been 'primarily aimed at' conservation of natural resources at all."[907]

639. Citing its own finding in *US – Gasoline* that the phrase "if such measures are made effective in conjunction with restrictions on domestic product or consumption" in Article XX(g) was a "requirement of *even-handedness*" (see paragraph 636 above), the Appellate Body in *US – Shrimp* held that the United States measure at issue was justified under Article XX(g):

"We earlier noted that Section 609, enacted in 1989, addresses the mode of harvesting of imported shrimp only. However, two years earlier, in 1987, the United States issued regulations pursuant to the Endangered Species Act requiring all United States shrimp trawl vessels to use approved TEDs, or to restrict the duration of tow-times, in specified areas where there was significant incidental mortality of sea turtles in shrimp trawls. These regulations became fully effective in 1990 and were later modified. They now require United States shrimp trawlers to use approved TEDs 'in areas and at times when there is a likelihood of intercepting sea turtles', with certain limited exceptions. Penalties for violation of the Endangered Species Act, or the regulations issued thereunder, include civil and criminal sanctions. The United States government currently relies on monetary sanctions and civil penalties for enforcement. The government has the ability to seize shrimp catch from trawl vessels fishing in United States waters and has done so in cases of egregious violations. We believe that, in principle, Section 609 is an even-handed measure.

Accordingly, we hold that Section 609 is a measure made effective in conjunction with the restrictions on domestic harvesting of shrimp, as required by Article XX(g)."[908]

(d) Reference to GATT practice

640. With respect to GATT practice on the term "measures made effective in conjunction with" under Article XX(g), see GATT Analytical Index, pages 586–587.

XXII. ARTICLE XXI

A. TEXT OF ARTICLE XXI

Article XXI
Security Exceptions

Nothing in this Agreement shall be construed

(*a*) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(*b*) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(*c*) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

[906] Appellate Body Report on *US – Gasoline*, p. 21.
[907] Appellate Body Report on *US – Gasoline*, p. 21.
[908] Appellate Body Report on *US – Shrimp*, paras. 144–145.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXI

No jurisprudence or decision of a competent WTO body.

1. Reference to GATT practice

641. With respect to GATT practice on Article XXI, see GATT Analytical Index, pages 600–606.

XXIII. ARTICLE XXII

A. TEXT OF ARTICLE XXII

Article XXII
Consultation

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXII

642. The following table lists the disputes, up to 31 December 2004, in which panel and/or Appellate Body reports have been adopted where Article XXII of the *GATT 1994* was invoked:

	Case Name	Case Number	Invoked Articles
1	*US – Gasoline*	WT/DS2	XXII:1
2	*Japan – Alcoholic Beverages II*	WT/DS8, WT/DS10, WT/DS11	XXII
3	*EC – Hormones*	WT/DS26, WT/DS48	XXII
4	*Indonesia – Autos*	WT/DS54, WT/DS55, WT/DS59, WT/DS64	XXII:1 XXII
5	*Argentina – Textiles and Apparel*	WT/DS56	XXII:1
6	*US – Shrimp*	WT/DS58	XXII:1
7	*EC – Computer Equipment*	WT/DS62, WT/DS67, WT/DS68	XXII:1
8	*Korea – Alcoholic Beverages*	WT/DS75, WT/DS84	XXII
9	*Chile – Alcoholic Beverages*	WT/DS87, WT/DS110	XXII:1
10	*India – Quantitative Restrictions*	WT/DS90	XXII:1
11	*Canada – Dairy*	WT/DS103, WT/DS113	XXII:1
12	*Argentina – Footwear (EC)*	WT/DS121	XXII
13	*EC – Asbestos*	WT/DS135	XXII
14	*US – Lead and Bismuth II*	WT/DS138	XXII:1
15	*India – Autos*	WT/DS146, WT/DS175	XXII:1
16	*US – Section 301 Trade Act*	WT/DS152	XXII:1
17	*Argentina – Hides and Leather*	WT/DS155	XXII
18	*Korea – Various Measures on Beef*	WT/DS161, WT/DS169	XXII
19	*US – 1916 Act (Japan)*	WT/DS162	XXII:1
20	*US – Certain EC Products*	WT/DS165	XXII:1
21	*US – Wheat Gluten*	WT/DS166	XXII:1
22	*Canada – Patent Term*	WT/DS170	XXII
23	*US – Lamb*	WT/DS177, WT/DS178	XXII:1
24	*US – Hot-Rolled Steel*	WT/DS184	XXII
25	*US –Export Restraints*	WT/DS194	XXII
26	*US – Line Pipe*	WT/DS202	XXII:1
27	*US – Steel Plate*	WT/DS206	XXII
28	*US – Offset Act (Byrd Amendment)*	WT/DS217, WT/DS234	XXII
29	*US – Section 129(c)(1)URAA*	WT/DS221	XXII
30	*EC – Sardines*	WT/DS231	XXII
31	*US – Softwood Lumber III*	WT/DS236	XXII
32	*US – Corrosion-Resistant Steel Sunset Review*	WT/DS244	XXII
33	*US – Steel Safeguards*	WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258, WT/DS259	XXII
34	*US – Softwood Lumber IV*	WT/DS257	XXII
35	*US – Softwood Lumber V*	WT/DS264	XXII
36	*Canada – Wheat Exports and Grain Imports*	WT/DS276	XXII

643. Concerning how the requirement of consultations has been applied under other WTO agreements, see for example, Article 4 of the Chapter on the *DSU*, Article 6.11 of the Chapter on the *ATC*, Article 17 of the Chapter on the *Anti-Dumping Agreement.*

XXIV. ARTICLE XXIII

A. TEXT OF ARTICLE XXIII

Article XXIII
Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(*a*) the failure of another contracting party to carry out its obligations under this Agreement, or

(*b*) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(*c*) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (*c*) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate intergovernmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary[1] to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

(*footnote original*) [1] By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".

B. INTERPRETATION AND APPLICATION OF ARTICLE XXIII

1. General

(a) Relationship between Articles XXIII:1(a) and XXIII:1(b)

644. In *EC – Asbestos*, Canada claimed that the French ban on the sale and imports of products containing asbestos nullified or impaired benefits accruing to it under Article XXIII:1(b). In response, the European Communities raised preliminary objections, arguing on two grounds that the measure fell outside the scope of application of Article XXIII:1(b). The Panel rejected both objections. In addressing the European Communities appeal against the Panel's rejection of these preliminary objections, the Appellate Body explained the relationship between Articles XXIII:1(a) and XXIII:1(b):

> "Article XXIII:1(a) sets forth a cause of action for a claim that a Member has failed to carry out one or more of its obligations under the GATT 1994. A claim under Article XXIII:1(a), therefore, lies when a Member is alleged to have acted inconsistently with a provision of the GATT 1994. Article XXIII:1(b) sets forth a separate cause of action for a claim that, through the application of a measure, a Member has 'nullified or impaired' 'benefits' accruing to another Member, 'whether or not that measure conflicts with the provisions' of the GATT 1994. Thus, it is not necessary, under Article XXIII:1(b), to establish that the measure involved is inconsistent with, or violates, a provision of the GATT 1994. Cases under Article XXIII:1(b) are, for this reason, sometimes described as 'non-violation' cases; we note, though, that the word 'non-violation' does not appear in this provision. The purpose of this rather unusual remedy was described by the panel in *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* . . . in the following terms:
>
> > 'The idea underlying [the provisions of Article XXIII:1(b)] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.[909] (emphasis added)'"[910]

[909] Panel Report on *EEC – Oilseeds I*, para. 144.
[910] Appellate Body Report on *EC – Asbestos*, para. 185.

2. Article XXIII:1(b)

(a) Overview of the non-violation complaint

645. In *EC – Asbestos*, Canada claimed that the French ban on the sale and import of products containing asbestos nullified or impaired benefits accruing to it under Article XXIII:1(b). The Appellate Body stated that "[l]ike the panel in [*Japan – Film*], we consider that the remedy in Article XXIII:1(b) 'should be approached with caution and should remain an exceptional remedy.'"[911] The Appellate Body went on to refer to the Panel's finding in *Japan – Film* referenced in paragraph 646 below.

646. In *Japan – Film*, the United States argued, under Article XIII:1(b) of GATT 1994, that certain Japanese "measures", relating to commercial distribution of photographic film and paper, large retail stores and sales promotion techniques nullified or impaired benefits accruing to the United States based on tariff concessions made by Japan in the course of three rounds of multilateral trade negotiations. In addressing the United States' claims, the Panel made a general statement about the significance of the non-violation remedy within the WTO/GATT legal framework, holding that "the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept":

> "Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been 'on the books' for almost 50 years, we note that there have only been eight cases in which panels or working parties have substantively considered Article XXIII:1(b) claims.[912] This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Communities and the United States in the *EEC – Oilseeds* case, and the two parties in this case, have confirmed that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept.[913] The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules."[914]

(b) Purpose

647. The Panel on *Japan – Film* elaborated upon the purpose of Article XXIII:1(b) as follows:

> "[The purpose of Article XXIII:1(b) is] to protect the balance of concessions under GATT by providing a means to redress government actions not otherwise regulated by GATT rules that nonetheless nullify or impair a Member's legitimate expectations of benefits from tariff negotiations.[915]"[916]

(c) Scope

648. In *EC – Asbestos*, the Appellate Body rejected the European Communities argument that Article XXIII:1(b) only applies to measures which do not otherwise fall under other provisions of the *GATT 1994*. The Appellate Body emphasized the phrase, contained in Article XXIII:1(b), "whether or not [the measure] conflicts with the provisions of this Agreement":

> "The text of Article XXIII:1(b) stipulates that a claim under that provision arises when a 'benefit' is being 'nullified or impaired' through the 'application . . . of any measure, *whether or not it conflicts with the provisions of this Agreement*'. (emphasis added) The wording of the provision, therefore, clearly states that a claim may succeed, under Article XXIII:1(b), *even if the measure 'conflicts' with some substantive provisions of the GATT 1994*. It follows that a measure may, *at one and the same time*, be inconsistent with, or in breach of, a provision of the GATT 1994 *and*, nonetheless, give rise to a cause of action under Article XXIII:1(b). Of course, if a measure 'conflicts' with a provision of the GATT 1994, that measure must actually fall within the scope of application of that provision of the GATT 1994. We agree with the Panel that this reading of Article XXIII:1(b) is consistent with the panel reports in *Japan – Film and* EEC – *Oilseeds*, which both support the view that Article XXIII:1(b) applies to measures which simultaneously fall within the scope of application of other provisions of the GATT 1994.[917] Accordingly, we decline the European Communities' first ground of appeal under Article XXIII:1(b) of the GATT 1994."[918]

649. In *EC – Asbestos*, the Appellate Body further rejected the European Communities argument that it is possible to have "legitimate expectations" only in

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[911] Appellate Body Report on *EC – Asbestos*, para. 186.

[912] (*footnote original*) Report of the Working Party on *Australia – Ammonium Sulphate*; Panel Report on *Germany – Sardines*; [Panel Report on] *Uruguay – Recourse to Article XXIII*, ; Panel Report on *EC – Citrus* ; Panel Report on *EEC – Canned Fruit*; [Panel Report on] *Japan – Semi-Conductors*; *EEC – Oilseeds I*; [Panel Report on] *US – Sugar Waiver*.

[913] (*footnote original*) In *EEC – Oilseeds I*, the United States stated that it "concurred in the proposition that non-violation nullification or impairment should remain an exceptional concept. Although this concept had been in the text of Article XXIII of the General Agreement from the outset, a cautious approach should continue to be taken in applying the concept". *EEC – Oilseeds I*, para. 114. The EEC in that case stated that "recourse to the 'non-violation' concept under Article XXIII:1(b) should remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty". Ibid, para. 113.

[914] Panel Report on *Japan – Film*, para. 10.36.

[915] (*footnote original*) GATT Panel Report on *EEC – Oilseeds I*, para. 144.

[916] Panel Report on *Japan – Film*, para. 1050.

[917] (*footnote original*) See Panel Report, para. 8.263, which refers to the Panel Report in *Japan – Film*, *supra*, footnote 187, para. 10.50, and footnote 1214; and *EEC – Oilseeds*, *supra*, footnote 186, para. 144.

[918] Appellate Body Report on *EC – Asbestos*, para. 187.

connection with a purely "commercial measure" unlike the measure at issue, which had allegedly been taken to protect human life or health. The Appellate Body stated that "the text [of Article XXIII:1(b)] does not distinguish between, or exclude, certain types of measures" and that such distinctions would be "very difficult in practice"

> "[W]e look to the text of Article XXIII:1(b), which provides that 'the application by another Member of *any measure*' may give rise to a cause of action under that provision. The use of the word 'any' suggests that measures of all types may give rise to such a cause of action. The text does not distinguish between, or exclude, certain types of measure. Clearly, therefore, the text of Article XXIII:1(b) contradicts the European Communities' argument that certain types of measure, namely, those with health objectives, are excluded from the scope of application of Article XXIII:1(b).
>
> In any event, an attempt to draw the distinction suggested by the European Communities between so-called health and commercial measures would be very difficult in practice. By definition, measures which affect trade in goods, and which are subject to the disciplines of the GATT 1994, have a commercial impact. At the same time, the health objectives of many measures may be attainable only by means of commercial regulation. Thus, in practice, clear distinctions between health and commercial measures may be very difficult to establish. Nor do we see merit in the argument that, previously, only 'commercial' measures have been the subject of Article XXIII:1(b) claims, as that does not establish that a claim *cannot* be made under Article XXIII:1(b) regarding a 'non-commercial' measure."[919]

(d) Test under Article XXIII:1(b)

650. In *Japan – Film*, the Panel summarized the elements of a non-violation case:

> "The text of Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure."[920]

651. In *EC – Asbestos*, the Panel followed the three part test of the *Japan – Film* Panel.[921] The Appellate Body did not deal with the Panel's ultimate finding on the substance of the claim under Article XXIII:1(b).

(e) Burden of proof

652. The Panel on *Japan – Film* explained that the burden of proof under Article XXIII:1(b) falls upon the complaining party:

> "Consistent with the explicit terms of the DSU and established WTO/GATT jurisprudence, and recalling the Appellate Body ruling that 'precisely how much and precisely what kind of evidence will be required to establish . . . a presumption [that what is claimed is true] will necessarily vary from . . . provision to provision', we thus consider that the United States, with respect to its claim of non-violation nullification or impairment under Article XXIII:1(b), bears the burden of providing a detailed justification for its claim in order to establish a presumption that what is claimed is true. It will be for Japan to rebut any such presumption."[922]

653. In *EC – Asbestos*, Canada claimed that the French ban on the sale and imports of products containing asbestos nullified or impaired benefits accruing to it under Article XXIII:1(b). The Panel's finding on the burden of proof, which was not appealed, was that "with respect to its claims of non-violation, Canada bears the primary burden of presenting a detailed justification for its claims.[923]"[924] In support of its proposition, with reference to Article 26.1 of the DSU, the Panel cited the finding of the panel on *Japan – Film* referenced in paragraph 652 above.[925]

654. In *EC – Asbestos*, Canada argued, citing the Appellate Body Report on *India – Patent (US)*[926] and the Panel Report on *Japan – Film*[927], that when a complainant proves that it enjoys a tariff concession and the respondent subsequently adopts a measure that affects the value of this concession, the complainant benefits from the presumption that it could not reasonably anticipate that this concession would be nullified or otherwise impaired by this measure. The Panel, in a finding not reviewed by the Appellate Body, rejected this argument, stating that the introduction of a measure affecting the value of the concession is only one of the elements of a non-violation claim and added that "the special situation of measures justified under Article XX, insofar as they concern non-commercial interests whose importance has been recognized *a priori* by Members, requires special treatment" and that "situations that fall under Article XX justify a stricter burden of proof being applied in this context to the party invoking Article XXIII:1(b), particularly with regard to the existence of legitimate expectations":

> "We do not consider that Canada has correctly interpreted the Panel report in *Japan – Film*. First of all, the presumption to which the Panel refers is that, if it is

[919] Appellate Body Report on *EC – Asbestos*, paras. 188–189.
[920] Panel Report on *Japan – Film*, para. 10.41. See also Panel Report on *Korea – Procurement*, para. 7.85.
[921] Panel Report on *EC – Asbestos*, para. 8.283.
[922] Panel Report on *Japan – Film*, para. 10.32.
[923] Previous Panels have not defined the precise scope of the concept of detailed justification.
[924] Panel Report on *EC – Asbestos*, para. 8.278.
[925] Panel Report on *EC – Asbestos*, para. 8.277.
[926] Appellate Body Report on *India – Patents (US)*, para. 41.
[927] Panel Report on *Japan – Film*, para. 10.79.

shown that a measure has been introduced after the conclusion of the tariff negotiations in question, then the complainant should not be considered as having anticipated that measure, which is only one of the tests applied by the Panel. Moreover, if the interpretation of the burden of proof suggested by Canada were followed, the obligation to present a detailed justification for which Article 26.1(a) provides might in certain cases be evaded. Accordingly, we do not follow the interpretation proposed by Canada but the rule laid down in *Japan – Film*.

Furthermore, in the light of our reasoning in paragraph 8.272 above, we consider that the special situation of measures justified under Article XX, insofar as they concern non-commercial interests whose importance has been recognized *a priori* by Members, requires special treatment. By creating the right to invoke exceptions in certain circumstances, Members have recognized *a priori* the possibility that the benefits they derive from certain concessions may eventually be nullified or impaired at some future time for reasons recognized as being of overriding importance. This situation is different from that in which a Member takes a measure of a commercial or economic nature such as, for example, a subsidy or a decision organizing a sector of its economy, from which it expects a purely economic benefit. In this latter case, the measure remains within the field of international trade. Moreover, the nature and importance of certain measures falling under Article XX can also justify their being taken at any time, which militates in favour of a stricter treatment of actions brought against them on the basis of Article XXIII:1(b).

Consequently, the Panel concludes that because of the importance conferred on them *a priori* by the GATT 1994, as compared with the rules governing international trade, situations that fall under Article XX justify a stricter burden of proof being applied in this context to the party invoking Article XXIII:1(b), particularly with regard to the existence of legitimate expectations and whether or not the initial Decree could be reasonably anticipated."[928]

655. Further, the Panel stated that the burden of proof for a claim concerning a concession which had been made a long time previously "must be all the heavier inasmuch as the intervening period has been so long":

"[W]e consider that in view of the time that elapsed between those concessions and the adoption of the Decree (between 50 and 35 years), Canada could not assume that, over such a long period, there would not be advances in medical knowledge with the risk that one day a product would be banned on health grounds. For this reason, too, we also consider that the presumption applied in *Japan – Film* cannot be applied to the concessions granted in 1947 and 1962. Any other interpretation would extend the scope of the concept of non-violation nullification well beyond that envisaged by the Panel in *Japan – Film*. On the contrary, it is for Canada to present detailed evidence showing why it could legitimately expect the 1947 and 1962 concessions not to be affected and could not reasonably anticipate that France might adopt measures restricting the use of all asbestos products 50 and 35 years, respectively, after the negotiation of the concessions concerned. In the present case, the burden of proof must be all the heavier inasmuch as the intervening period has been so long. Indeed, it is very difficult to anticipate what a Member will do in 50 years time. It would therefore be easy for a Member to establish that he could not reasonably anticipate the adoption of a measure if the burden of proof were not made heavier."[929]

(f) "measure"

656. In the Panel on *Japan – Film*, Japan argued that a measure, in order to be classified as such, must provide a benefit or impose a legally binding obligation. The Panel stated that even non-binding actions "can potentially have adverse effects on competitive conditions of market access":

"[A] government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits within the purview of Article XXIII:1(b). Indeed, it is clear that non-binding actions, which include sufficient incentives or disincentives for private parties to act in a particular manner, can potentially have adverse effects on competitive conditions of market access. For example, a number of non-violation cases have involved subsidies, receipt of which requires only voluntary compliance with eligibility criteria."[930]

657. The Panel on *Japan – Film* noted that the *WTO Agreement* is an international agreement signed by national governments and customs territories. According to the Panel, the term "measure" in Article XXIII:1(b) and Article 26.1 of the DSU "refers only to policies or actions of governments, not those of private parties."[931]

658. The Panel on *Japan – Film* held that the non-violation remedy is limited to measures that are currently being applied and found confirmation for this finding in GATT/WTO precedent:

"The text of Article XXIII:1(b) is written in the present tense, viz. 'If any Member should consider that any benefit *accruing* to it directly or indirectly under this Agreement *is* being nullified or impaired . . . as the result of . . . (b) the application by another Member of any measure,

[928] Panel Report on *EC – Asbestos*, paras. 8.280–8.282.
[929] Panel Report on *EC – Asbestos*, para. 8.292.
[930] Panel Report on *Japan – Film*, para. 10.49.
[931] Panel Report on *Japan – Film*, para. 10.52.

whether or not it *conflicts* with the provisions of this Agreement'. It thus stands to reason that, given that the text contemplates nullification or impairment in the present tense, caused by application of a measure, 'whether or not it conflicts' (also in the present tense), the ordinary meaning of this provision limits the non-violation remedy to measures that are currently being applied.

Moreover, GATT/WTO precedent in other areas, including in respect of virtually all panel cases under Article XXIII:1(a), confirms that it is not the practice of GATT/WTO panels to rule on measures which have expired or which have been repealed or withdrawn.[932] In only a very small number of cases, involving very particular situations, have panels proceeded to adjudicate claims involving measures which no longer exist or which are no longer being applied. In those cases, the measures typically had been applied in the very recent past.[933]

[W]e do not rule out the possibility that *old* 'measures' that were never officially revoked may continue to be applied through continuing administrative guidance. Similarly, even if measures were officially revoked, the underlying policies may continue to be applied through continuing administrative guidance. However, the burden is on the United States to demonstrate clearly that such guidance does in fact exist and that it is currently nullifying or impairing benefits."[934]

(g) "benefit"

659. In *Japan – Film*, the Panel examined whether the benefits legitimately expected by a Member can be derived from successive rounds of tariff negotiations. The Panel recalled that in all GATT cases dealing with Article XXIII:1(b), except one, the claimed benefit was that of legitimate expectations of improved market-access opportunities arising out of relevant tariff concessions.[935] The Panel referred to Article 1(b)(i) of the *GATT 1994* and went on to state that "[t]he conclusion that benefits accruing from concessions granted during successive rounds of tariff negotiations may separately give rise to reasonable expectations of improved market access is consistent with past panel reports":

"GATT 1994 incorporates both 'protocols and certifications relating to tariff concessions' under paragraph 1(b)(i) and 'the Marrakesh Protocol to GATT 1994' under paragraph 1(d). The ordinary meaning of the text of paragraphs 1(b)(i) and 1(d) of GATT 1994, read together, clearly suggests that all protocols relating to tariff concessions, both those predating the Uruguay Round and the Marrakesh Protocol to GATT 1994, are incorporated into GATT 1994 and continue to have legal existence under the WTO Agreement.

Where tariff concessions have been progressively improved, the benefits – expectations of improved market access – accruing directly or indirectly under different tariff concession protocols incorporated in GATT 1994 can be read in harmony. This approach is in accordance with general principles of legal interpretation which, as the Appellate Body reiterated in *US – Gasoline*, teach that one should endeavour to give legal effect to all elements of a treaty and not reduce them to redundancy or inutility.

The conclusion that benefits accruing from concessions granted during successive rounds of tariff negotiations may separately give rise to reasonable expectations of improved market access is consistent with past panel reports.[936] The panel in *EEC – Canned Fruit* found that the United States had a reasonable expectation arising from the EEC's 1974 tariff concessions pursuant to Article XXIV:6 negotiations and 1979 Tokyo Round tariff concessions (even though the panel separately found that the United States could have anticipated certain subsidies in respect of the Tokyo Round tariff concessions).[937] And the *EEC – Oilseeds* panel found that the United States had a reasonable expectation arising from the EEC's 1962 Dillon Round tariff concessions.[938] As the United States points out, these findings would not have been possible if subsequent multilateral tariff agreements or enlargement agreements were deemed to extinguish wholesale the tariff concessions in prior tariff schedules."[939]

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[932] (*footnote original*) See Panel Report on *US – Gasoline*, para. 6.19, where the panel observed that "it had not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the panel's terms of reference were fixed, were not and would not become effective". See also Panel Report on *Argentina – Footwear, Textiles and Apparel*, pp. 84–86.

[933] (*footnote original*) See, e.g., Panel Report on *US – Wool Shirts and Blouses*, where the panel ruled on a measure that was revoked after the interim review but before issuance of the final report to the parties; Panel Report on *EEC – Measure on Animal Feed Proteins*, where the panel ruled on a discontinued measure, but one that had terminated after the terms of reference of the panel had already been agreed; Panel Report on *United States – Prohibitions on Imports of Tuna and Tuna Products from Canada*, para. 4.3., where the panel ruled on the GATT consistency of a withdrawn measure but only in light of the two parties' agreement to this procedure; Panel Report on *EEC – Restrictions on Imports of Apples from Chile*, where the panel ruled on a measure which had terminated before agreement on the panel's terms of reference but where the terms of reference specifically included the terminated measure and, given its seasonal nature, there remained the prospect of its reintroduction.

[934] Panel Report on *Japan – Film*, paras. 10.57–10.59.

[935] Panel Report on *Japan – Film*, para. 10.62. The Panel cited GATT Panel Reports on *Australia – Ammonium Sulphate*; *Germany – Sardines*; *Uruguay – Recourse to Article XXIII*,; *EC – Citrus*; *EEC – Canned Fruit*; *Japan – Semi-Conductors*; *EEC – Oilseeds I*; *US – Sugar Waiver*, The Panel then stated as follows:

> "Only in *EC – Citrus Products* did the complaining party claim that the benefit denied was not improved market access from tariff concessions granted under GATT Article II, but rather GATT Article I:1 ('most-favoured-nation') treatment with respect to unbound tariff preferences granted by the EC to certain Mediterranean countries."

[936] (*footnote original*) See Panel Reports on *EEC – Canned Fruit*; and *EEC – Oilseeds I*.

[937] (*footnote original*) Panel Report on *EEC – Canned Fruit*, para. 54.

[938] (*footnote original*) Panel Report on *EEC – Oilseeds I*, paras. 144–146.

[939] Panel Report on *Japan – Film*, paras. 10. 64–10.66.

660. After making the finding referenced in paragraph 659 above, the Panel on *Japan – Film* then quoted with approval the following excerpt from the GATT Panel Report on *EEC – Oilseeds I*:

> "In these circumstances, the partners of the Community in the successive renegotiations under Article XXIV:6 could legitimately assume, in the absence of any indications to the contrary, that the offer to continue a tariff commitment by the Community was an offer not to change the balance of concessions previously attained. The Panel noted that nothing in the material submitted to it indicated that the Community had made it clear to its negotiating partners that the withdrawal and reinstitution of the tariff concessions for oilseeds as part of the withdrawal of the whole of the Community Schedule meant that the Community was seeking a new balance of concessions with respect to these items. There is in particular no evidence that the Community, in the context of these negotiations, offered to compensate its negotiating partners for any impairment of the tariff concessions through production subsidies or that it accepted compensatory tariff withdrawals by its negotiating partners to take into account any such impairment. The balance of concessions negotiated in 1962 in respect of oilseeds was thus not altered in the successive Article XXIV:6 negotiations. The Panel therefore found that the benefits accruing to the United States under the oilseed tariff concessions resulting from the Article XXIV:6 negotiations of 1986/87 include the protection of reasonable expectations the United States had when these concessions were initially negotiated in 1962."[940]

661. The Panel on *Japan – Film* ultimately reached the following conclusion:

> "We consider, therefore, that reasonable expectations may in principle be said to continue to exist with respect to tariff concessions given by Japan on film and paper in successive rounds of Article XXVIII*bis* negotiations."[941]

662. The Panel on *EC – Asbestos* held, in a statement not reviewed by the Appellate Body:

> "[T]he Panel in *Japan – Film* recalled that, with only one exception, in all the previous cases in which Article XXIII:1(b) was invoked the benefit claimed consisted in the legitimate expectation of improved market access opportunities resulting from the relevant tariff concessions. We first need to know what benefit Canada could legitimately have expected from the Community concessions on chrysotile asbestos. We note, however, that previous panels approached the question differently, insofar as they appear to have assumed the existence of a benefit in the form of improved market access opportunities and then considered whether a party could have had a *legitimate expectation* of a given benefit."[942]

(h) Legitimate expectations

663. In *Japan – Film*, the Panel examined whether the United States could not have anticipated that the benefits related to improved market access would be offset by the subsequent application of a measure by Japan. The Panel held that if measures were anticipated, no legitimate expectations of improved market access could exist with respect to the impairment caused by these anticipated measures:

> "As suggested by the 1961 report,[943] in order for expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated at the time the tariff concession was negotiated. If the measures were anticipated, a Member could not have had a legitimate expectation of improved market access to the extent of the impairment caused by these measures.
>
> Thus, under Article XXIII:1(b), the United States may only claim impairment of benefits related to improved market access conditions flowing from relevant tariff concessions by Japan to the extent that the United States could not have reasonably anticipated that such benefits would be offset by the subsequent application of a measure by the Government of Japan."[944]

664. The Panel on *Japan – Film* then considered the standard by which to ascertain the existence of "reasonable anticipation". Where measures had been introduced after tariff negotiations had taken place, the Panel held that a presumption would exist that the United States, the complaining party, should not be held to have anticipated these measures:

> "We consider that the issue of reasonable anticipation should be approached in respect of specific 'measures' in light of the following guidelines. First, in the case of measures shown by the United States to have been introduced subsequent to the conclusion of the tariff negotiations at issue, it is our view that the United States has raised a presumption that it should not be held to have anticipated these measures and it is then for Japan to rebut that presumption. Such a rebuttal might be made, for example, by establishing that the measure at issue is so clearly contemplated in an earlier measure that the United States should be held to have anticipated it. However, there must be a clear connection shown. In our view, it is not sufficient to claim that a *specific* measure should have been anticipated because it is consistent with or a continuation of a past *general* government policy. As in the

[940] Panel Report on *EC – Oilseeds I*, para. 146, quoted in Panel Report on *Japan – Film*, para. 10.67.
[941] Panel Report on *Japan – Film*, para. 10.70.
[942] Panel Report on *EC – Asbestos*, para. 8.285.
[943] The "1961 report" referenced to is the GATT Panel Report on *Operation of the Provisions of Article XVI*, adopted on 21 November 1961, BISD 10S/201.
[944] Panel Report on *Japan – Film*, paras. 10.76–10.77.

EEC – Oilseeds case[945], we do not believe that it would be appropriate to charge the United States with having reasonably anticipated all GATT-consistent measures, such as 'measures' to improve what Japan describes as the inefficient Japanese distribution sector. Indeed, if a Member were held to anticipate all GATT-consistent measures, a non-violation claim would not be possible. Nor do we consider that as a general rule the United States should have reasonably anticipated Japanese measures that are similar to measures in other Members' markets. In each such instance, the issue of reasonable anticipation needs to be addressed on a case-by-case basis."[946]

665. After holding that "the issue of reasonable anticipation needs to be addressed on a case-by-case basis" and that it was "not sufficient to claim that a *specific* measure should have been anticipated because it is consistent with or a continuation of a past *general* government policy", the Panel on *Japan – Film* held that with respect to measures introduced prior to the conclusion of the tariff negotiations at issue, a presumption would exist that the complaining party "should be held to have anticipated those measures":

"[I]n the case of measures shown by Japan to have been introduced prior to the conclusion of the tariff negotiations at issue, it is our view that Japan has raised a presumption that the United States should be held to have anticipated those measures and it is for the United States to rebut that presumption. In this connection, it is our view that the United States is charged with knowledge of Japanese government measures as of the date of their publication. We realize that knowledge of a measure's existence is not equivalent to understanding the impact of the measure on a specific product market. For example, a vague measure could be given substance through enforcement policies that are initially unexpected or later changed significantly. However, where the United States claims that it did not know of a measure's relevance to market access conditions in respect of film or paper, we would expect the United States to clearly demonstrate why initially it could not have reasonably anticipated the effect of an existing measure on the film or paper market and when it did realize the effect. Such a showing will need to be tied to the relevant points in time (i.e., the conclusions of the Kennedy, Tokyo and Uruguay Rounds) in order to assess the extent of the United States' legitimate expectations of benefits from these three Rounds. A simple statement that a Member's measures were so opaque and informal that their impact could not be assessed is not sufficient. While it is true that in most past non-violation cases, one could easily discern a clear link between a product-specific action and the effect on the tariff concession that it allegedly impaired, one can also discern a link between general measures affecting the internal sale and distribution of products, such as rules on advertising and premiums, and tariff concessions on products in general."[947]

666. In *EC – Asbestos*, in examining a non-violation claim by Canada, the Panel decided to assess whether the measure in question could reasonably have been anticipated, as referenced in paragraph 654 above. With regard to what factors should *not* be taken into account to answer this question, the Panel considered, in a finding subsequently not reviewed by the Appellate Body:

"[P]revious panels found that a number of elements were not relevant. We consider it necessary to assess their applicability in relation to the circumstances of the present case.

(a) First of all, we note that the reports in *Japan – Film* and *EEC – Oilseeds* concluded that a specific measure could not be considered foreseeable solely because it was consistent with or a continuation of a past general government policy. However, we note that, in contrast to the two cases mentioned above, France had already developed a specific policy in response to the health problems created by asbestos before the adoption of the Decree. This factor must certainly be taken into account in our analysis.[948]

(b) The Panel in *Japan – Film,* also concluded that it would not be appropriate to charge the United States with having reasonably anticipated all GATT-consistent measures. Consequently, we do not consider that Canada reasonably anticipated all GATT-consistent measures, or even possible measures justifiable under Article XX.

(c) Finally, insofar as the Decree postdates the most recent tariff negotiations, we could apply the presumption applied by the Panel in *Japan – Film,* according to which normally Canada should not be considered to have anticipated a measure introduced after the tariff concession had been negotiated. However, we do not consider such a presumption to be consistent with the standard of proof that we found to be applicable in paragraph 8.272 above in the case of an allegation of non-violation nullification concerning measures falling under Article XX of the GATT 1994."[949]

667. After listing some of the elements which it considered should not be taken into account when deter-

[945] (*footnote original*) Panel Report on *EEC – Oilseeds I*, paras. 147 and 148.
[946] Panel Report on *Japan – Film*, para. 10.79.
[947] Panel Report on *Japan – Film*, paras. 10.76–10.77 and 10.79–10.80.
[948] (*footnote original*) In our opinion, there is a difference between, on the one hand, an import ban following upon a series of national measures gradually reinforcing, since 1977, the measures taken to protect public health against the effects of asbestos and, on the other, the relationship which the EC tried to establish in *EEC – Oilseeds* between the existence in 1962 of oilseeds subsidies in certain member States of the European Communities and the development of a subsidy programme insulating oil-seed producers from competition from imports (see para. 149 of the panel report).
[949] Panel Report on *EC – Asbestos*, para. 8.291.

mining the existence of legitimate expectations, the Panel on *EC – Asbestos* distinguished the case before it from that in *Japan – Film*:

> "Moreover, the circumstances of the present case seem to us to be different from the situation envisaged in *Japan – Film*. In that case, the measures in question concerned the organization of the Japanese domestic market. They were therefore economic measures of a kind that a third country might find surprising and, accordingly, difficult to anticipate. Here, it is a question of measures to protect public health under Article XX(b), that is to say, measures whose adoption is expressly envisaged by the GATT 1994. We therefore consider that the presumption applied in *Japan – Film* is not applicable to the present case."[950]

668. Following the finding referenced in paragraphs 666–667 above, in deciding that Canada had no legitimate expectations of maintaining or even developing its exports of certain asbestos products at the conclusion of the Uruguay Round, the Panel on *EC – Asbestos* noted that the increasing evidence showing the hazardous nature of asbestos and the growing number of international and Community decisions concerning the use of asbestos "could not do other than create a *climate* which should have led Canada to anticipate a change in the attitude of the importing countries, especially in view of the long-established trend towards ever tighter restrictions on the use of asbestos":

> "As we have found . . . the presumption applied by the Panel in *Japan – Film* cannot be applied to the present case.[951] Unlike Canada, which claims that no recent scientific development could have made the measure foreseeable, we consider that there is evidence to show that regulations restricting the use of asbestos could have been anticipated. First of all, the hazardous nature of chrysotile has long been known. . . .
>
> Moreover, in the light of the information submitted by the parties and the experts, we consider that the study of the diseases associated with the inhalation of asbestos is a field of science in which any possible conclusion would appear to be based on the observation of pathological cases day by day. . . .
>
> On the other hand, the accumulation of international and Community decisions concerning the use of asbestos, even if it did not necessarily make it certain that the use of asbestos would be banned by France, could not do other than create a *climate* which should have led Canada to anticipate a change in the attitude of the importing countries, especially in view of the long-established trend towards ever tighter restrictions on the use of asbestos. We also note that the use of chrysotile asbestos was banned by Members of the WTO well before it was banned by France. Admittedly, in *Japan – Film* the Panel considered that the adoption in other Members' markets of measures similar to the measures in question could not make the latter foreseeable. However, here again it was a question of commercial measures. We consider that in the present case the situation is different since it concerns public health and the competent international organizations have already taken a position on the question. The adoption, in an already restrictive context, of public health measures by other States, faced with a social and economic situation similar to that in France, creates an environment in which the adoption of similar measures by France, is no longer unforeseeable.
>
> Moreover, as noted above, at the end of the Uruguay Round France already had in place a number of measures regulating the use of asbestos. These included, in particular, measures relating to the exposure of workers taken after asbestos was recognized as a carcinogen by the IARC (Decree 77–949 of 17 August 1977) and the adoption of ILO Convention 162, as well as for the purpose of implementing Community directives applicable. The Panel also notes that Decree 88–466 of 28 April 1988 on products containing asbestos had prohibited the use of chrysotile asbestos in the manufacture of certain products.[952]"[953]

669. The Panel on *Korea – Procurement*, referring to the finding of the Appellate Body in *EC – Computer Equipment*, discussed the relevance of negotiation history in addressing issues of reasonable or legitimate expectation in cases relating to non-violation:

> "At the outset of our analysis of this issue, we must address some relevant issues relating to use of negotiating history which arose in the *European Communities – Computer Equipment* dispute. In that dispute, the Appellate Body specifically found that the standard of reasonable expectation or legitimate expectation existing with respect to non-violation cases had no role in reviewing negotiating history in order to aid in resolving the issues pertaining to a violation case. One of the reasons is that in a non-violation case the relevant question is what was the reasonable expectation of the complaining party. However, if it is necessary to go beyond the text in a violation case, the relevant question is to assess the objective evidence of the mutual understanding of the negotiating parties.[954] This involves not just the complaining and responding parties, but also involves possibly other parties to the negotiations. It is

[950] Panel Report on *EC – Asbestos*, para. 8.291.
[951] (*footnote original*) Even if it were applicable, we consider that the EC rebutted this presumption by their references to the systems established at international and Community level concerning the use of asbestos.
[952] (*footnote original*) See Annex II, reply of the European Communities to the Panel's question No. 4 at the Second Meeting with the Parties, paras. 254 to 261.
[953] Panel Report on *EC – Asbestos*, paras. 8.295–8.298.
[954] (*footnote original*) Appellate Body Report on *EC – Computer Equipment* at paragraphs 81–84, 93.

also important to note that there is a difference in perspectives of the reasonable expectations of one party as opposed to the mutual understanding of all the parties. The information available at the time of the negotiations may be available to some parties but not all. In other words, the evidence before the panel may be different in the two analyses and the weighting and probative value may also differ."[955]

670. With respect to the issue of legitimate expectations in the context of violation complaints, see Chapter on the *DSU*, Section XXIII.B.2.

(i) "nullified or impaired"

671. In *Japan – Film*, the Panel examined the third element required for a claim of non-violation, i.e. "nullification and impairment". The Panel equated "nullification and impairment" with "upsetting the competitive relationship" between domestic and imported products and held that the complaining party "must show a clear correlation between the measures and the adverse effect on the relevant competitive relationships":

"[I]t must be demonstrated that the competitive position of the imported products subject to and benefitting from a relevant market access (tariff) concession is being *upset by* ('nullified or impaired . . . as the result of') the application of a measure not reasonably anticipated. The equation of 'nullification or impairment' with 'upsetting the competitive relationship' established between domestic and imported products as a result of tariff concessions has been consistently used by GATT panels examining non-violation complaints. For example, the *EEC – Oilseeds* panel, in describing its findings, stated that it had 'found . . . that the subsidies concerned had impaired the tariff concession because they *upset the competitive relationship between domestic and imported oilseeds*, not because of any effect on trade flows'.[956] The same language was used in the *Australian Subsidy* and *Germany – Sardines* cases. Thus, in this case, it is up to the United States to prove that the governmental measures that it cites have upset the competitive relationship between domestic and imported photographic film and paper in Japan to the detriment of imports. In other words, the United States must show a clear correlation between the measures and the adverse effect on the relevant competitive relationships."

672. The Panel on *Japan – Film* then sub-divided the issue of "causality" into four separate issues: the degree of causation, original-neutrality of the measure at issue, the relevance of intent with respect to causality and "the extent to which measures may be considered collectively in an analysis of causation":

"As to the first issue . . . Japan should be responsible for what is caused by measures attributable to the Japanese Government as opposed, for example, to what is caused by restrictive business conduct attributable to private economic actors. At this stage of the proceeding, the issue is whether such a measure has caused nullification or impairment, i.e., whether it has made more than a *de minimis* contribution to nullification or impairment.

In respect of the second issue . . . even in the absence of *de jure* discrimination (measures which on their face discriminate as to origin), it may be possible for the United States to show *de facto* discrimination (measures which have a disparate impact on imports). However, in such circumstances, the complaining party is called upon to make a detailed showing of any claimed disproportionate impact on imports resulting from the origin-neutral measure. And, the burden of demonstrating such impact may be significantly more difficult where the relationship between the measure and the product is questionable.

We note that WTO/GATT case law on the issue of *de facto* discrimination is reasonably well-developed, both in regard to the principle of most-favoured-nation treatment under GATT Article I[957] and in regard to that of national treatment under GATT Article II[958] . . . We consider that despite the fact that these past cases dealt with GATT provisions other than Article XXIII:1(b), the reasoning contained therein appears to be equally applicable in addressing the question of *de facto* discrimination with respect to claims of non-violation nullification or impairment, subject, of course, to the caveat, that in an Article XXIII:1(b) case the issue is not whether equality of competitive conditions exists but whether the relative conditions of competition which existed between domestic and foreign products as a consequence of the relevant tariff concessions have been upset.

The third issue is the relevance of intent to causality. . . . We note . . . that Article XXIII:1(b) does not require a proof of intent of nullification or impairment of benefits by a government adopting a measure. What matters for purposes of establishing causality is the impact of a measure, i.e. whether it upsets competitive relationships. Nonetheless, intent may not be irrelevant. In our view, if a measure that appears on its face to be origin-neutral in its effect on domestic and imported products is nevertheless shown to have been intended to restrict imports, we may be more inclined to find a causal relationship in specific cases, bearing in mind that intent is not determinative where it in fact exists.

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[955] Panel Report on *Korea – Procurement*, para. 7.75.

[956] (*footnote original*) Follow-up on the GATT Panel Report on *EEC – Oilseeds*, BISD 39S/91, para. 77 (emphasis added).

[957] (*footnote original*) See, e.g., Panel Report on *European Economic Community – Imports of Beef from Canada*, paras. 4.2, 4.3.

[958] (*footnote original*) See Panel Reports on *US – Section 337*, para. 5.11; *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, paras. 5.12–5.14 and 5.30–5.31; *US – Malt Beverages*, para. 5.30; and Panel Reports on *US – Gasoline*, para. 6.10; *Japan – Alcoholic Beverages II*, para. 6.33; and *EC – Bananas III*, paras. 7.179–7.180.

> Finally, as for the US position that the Panel should examine the impact of the measures *in combination* as well as individually (a position contested by Japan), we do not reject the possibility of such an impact. It is not without logic that a measure, when analyzed in isolation, may have only very limited impact on competitive conditions in a market, but may have a more significant impact on such conditions when seen in the context of – in combination with – a larger set of measures. Notwithstanding the logic of this theoretical argument, however, we are sensitive to the fact that the technique of engaging in a combined assessment of measures so as to determine causation is subject to potential abuse and therefore must be approached with caution and circumscribed as necessary."[959]

673. In *EC – Asbestos*, Canada claimed that the French ban on the sale and imports of products containing asbestos nullified or impaired benefits accruing to it under Article XXIII:1(b). In this regard, the Panel stated:

> "[T]he Panel finds it appropriate to consider that in view of the type of measure in question the 'upsetting of the competitive relationship' can be assumed. By its very nature, an import ban constitutes a denial of any opportunity for competition, whatever the import volume that existed before the introduction of the ban. We will therefore concentrate on the question of whether the measure could reasonably have been anticipated by the Canadian Government at the time that it was negotiating the various tariff concessions covering the products concerned."[960]

(j) Non-violation complaints in relation to the Agreement on Government Procurement

674. In *Korea – Procurement*, the Panel noted the three requirements enunciated by the Panel on *Japan – Film* as necessary for a claim of non-violation under Article XXIII:1(b). The Panel observed that the key difference between a traditional non-violation case and the case involving the *Agreement on Government Procurement* before it was that the question of "reasonable expectation" in a traditional non-violation case is whether or not it was reasonable to be expected that the benefit under an existing concession would be impaired by the measures, but in the instant case, the question was "whether or not there was a reasonable expectation of an entitlement to a benefit that had accrued pursuant to the negotiation rather than pursuant to a concession." The Panel continued:

> "[T]he non-violation remedy as it has developed in GATT/WTO jurisprudence should not be viewed in isolation from general principles of customary international law. As noted above, the basic premise is that Members should not take actions, even those consistent with the letter of the treaty, which might serve to undermine the reasonable expectations of negotiating partners. This has traditionally arisen in the context of actions which might undermine the value of negotiated tariff concessions. In our view, this is a further development of the principle of *pacta sunt servanda* in the context of Article XXIII:1(b) of the GATT 1947 and disputes that arose thereunder, and subsequently in the WTO Agreements, particularly in Article 26 of the DSU. The principle of *pacta sunt servanda* is expressed in Article 26 of the *Vienna Convention*[961] in the following manner:
>
> > 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'"[962]

675. The Panel on *Korea – Procurement* then addressed the issue of "error in treaty negotiation":

> "One of the issues that arises in this dispute is whether the concept of non-violation can arise in contexts other than the traditional approach represented by *pacta sunt servanda*. Can, for instance the question of error in treaty negotiation be addressed under Article 26 of the DSU and Article XXII:2 of the GPA? We see no reason why it cannot. Parties have an obligation to negotiate in good faith just as they must implement the treaty in good faith."[963]

676. The Panel on *Korea – Procurement* explained its decision to review the claim of nullification or impairment within the framework of principles of international law which are generally applicable not only to the performance of treaties but also to treaty negotiation as follows:

> "[W]e will review the claim of nullification or impairment raised by the United States within the framework of principles of international law which are generally applicable not only to performance of treaties but also to treaty negotiation.[964] To do otherwise potentially would leave a gap in the applicability of the law generally to WTO disputes and we see no evidence in the language of the WTO Agreements that such a gap was intended. If the non-violation remedy were deemed not to provide a relief for such problems as have arisen in the present case regarding good faith and error in the negotiation of GPA commitments (and one might add, in tariff and services commitments under other WTO Agreements), then

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[959] Panel Report on *Japan – Film*, paras. 10.83–10.88.
[960] Panel Report on *EC – Asbestos*, para. 8.289.
[961] (*footnote original*) A reference to the rule of *pacta sunt servanda* also appears in the preamble to the Vienna Convention.
[962] Panel Report on *Korea – Procurement*, para. 7.93.
[963] Panel Report on *Korea – Procurement*, para. 7.100.
[964] (*footnote original*) We note that DSU Article 7.1 requires that the relevant covered agreement be cited in the request for a panel and reflected in the terms of reference of a panel. That is not a bar to a broader analysis of the type we are following here, for the GPA would be the referenced covered agreement and, in our view, we are merely fully examining the issue of non-violation raised by the United States. We are merely doing it within the broader context of customary international law rather than limiting it to the traditional analysis that accords with the extended concept of *pacta sunt servanda*. The purpose of the terms of reference is to properly identify the claims of the party and therefore the scope of a panel's review. We do not see any basis for arguing that the terms of reference are meant to *exclude* reference to the broader rules of customary international law in interpreting a claim properly before the Panel.

nothing could be done about them within the framework of the WTO dispute settlement mechanism if general rules of customary international law on good faith and error in treaty negotiations were ruled not to be applicable. As was argued above, that would not be in conformity with the normal relationship between international law and treaty law or with the WTO Agreements."[965]

(k) Relationship with other WTO Agreements

(i) Anti-Dumping Agreement

677. With respect to the relationship between Article XXIII of the *GATT 1994* and Article 17 of the *Anti-Dumping Agreement*, see the excerpts from the reports of the panels and Appellate Body referenced in the Chapter on the *Anti-Dumping Agreement*.

3. Article XXIII:1(c)

No jurisprudence or decision of a competent WTO body.

4. Article XXIII:2

678. The following table lists the disputes, up to 31 December 2004, in which panel and/or Appellate Body reports have been adopted where the provisions of the *GATT 1994* were invoked:

	Case Name	Case Number	Invoked Articles
1	*US – Gasoline*	WT/DS2	Articles I, III and XX
2	*Japan – Alcoholic Beverages II*	WT/DS8, WT/DS10, WT/DS11	Articles III, III:1 and III:2
3	*Australia – Salmon*	WT/DS18	Articles XI
4	*Brazil – Desiccated Coconut*	WT/DS22	Articles I, II, VI:3, VI:6
5	*US – Underwear*	WT/DS24	Article X:2
6	*EC – Hormones*	WT/DS26, WT/DS48	Articles III and XX
7	*EC – Bananas III*	WT/DS27	Articles I, II, III, X, XI, XIII and XVIII
8	*Canada – Periodicals*	WT/DS31	Articles III and XI
9	*US – Wool Shirts and Blouses*	WT/DS33	Article XXIII:1(a)
10	*Turkey – Textiles*	WT/DS34	Articles XI, XIII and XXIV
11	*Japan – Film*	WT/DS44	Articles III:1, III:4, X:1, X:3 and XXIII:1(b)
12	*India – Patents (US)*	WT/DS50	Article XXXIII
13	*Indonesia – Autos*	WT/DS54, WT/DS55, WT/DS59, WT/DS64	Articles I:1, III:2, III:4, III:7, X:1 and X:3(a)
14	*Argentina – Textiles and Apparel*	WT/DS56	Articles II, and VIII
15	*US – Shrimp*	WT/DS58	Articles I, XI, XIII and XX
16	*Guatemala – Cement I*	WT/DS60	Article VI
17	*EC – Computer Equipment*	WT/DS62, WT/DS67, WT/DS68	Article II
18	*EC – Poultry*	WT/DS69	Articles II, X and XIII
19	*Korea – Alcoholic Beverages*	WT/DS75, WT/DS84	Article III:2 and XX(d)
20	*Chile – Alcoholic Beverages*	WT/DS87, WT/DS110	Article III:2
21	*India – Quantitative Restrictions*	WT/DS90	Articles XI:1, XIII and XVIII:11
22	*Korea – Dairy*	WT/DS98	Article XIX
23	*US – DRAMS*	WT/DS99	Article X
24	*US – FSC*	WT/DS108	Article III:4
25	*Canada – Dairy*	WT/DS103, WT/DS113	Article II
26	*Argentina – Footwear (EC)*	WT/DS121	Articles XIX and XXIV
27	*Thailand – H-Beams*	WT/DS122	Article VI
28	*EC – Asbestos*	WT/DS135	Articles III, XI, XXIII:1(b) and XX(b)
29	*US – 1916 Act (EC)*	WT/DS136	Article VI
30	*Canada – Autos*	WT/DS139, WT/DS142	Articles I:1, III:4 and XXIV
31	*India – Autos*	WT/DS146, WT/DS175	Articles III:4 and XI:1
32	*Argentina – Hides and Leather*	WT/DS155	Articles III:2, XI:1 and X:3(a)
33	*Guatemala – Cement II*	WT/DS156	Article VI
34	*Korea – Various Measures on Beef*	WT/DS161, WT/DS169	Articles II, XI, XVII and XX
35	*US – 1916 Act (EC)*	WT/DS162	Articles III:4, VI and XI
36	*Korea – Procurement*	WT/DS163	Article XXIII
37	*US – Certain EC Products*	WT/DS165	Articles I, II, VIII and XI
38	*US – Wheat Gluten*	WT/DS166	Article XXIV
39	*US – Stainless Steel*	WT/DS179	Article X:3
40	*US – Lamb*	WT/DS177, WT/DS178	Articles I, II and XIX
41	*US – Hot-Rolled Steel*	WT/DS184	Articles VI and X
42	*US – Cotton Yarn*	WT/DS192	Article III
43	*US – Line Pipe*	WT/DS202	Articles XIII:2, XIII2:(a) and XIX
44	*US – Steel Plate*	WT/DS206	Article VI:1, VI:2

[965] Panel Report on *Korea – Procurement*, para. 7.101.

Table (*cont.*)

	Case Name	Case Number	Invoked Articles
45	*Chile – Price Band System*	WT/DS207	Articles II:1(b) and XIX:1(a)
46	*Egypt – Steel Rebar*	WT/DS211	Article X:3
47	*US – Offset Act (Byrd Amendment)*	WT/DS217, WT/DS234	Articles VI and X:3(a)
48	*EC – Tube or Pipe Fittings*	WT/DS219	Articles I and VI
49	*US – Section 129(c)(1)URAA*	WT/DS221	Articles VI:2, VI:3 and VI:6(a)
50	*EC – Sardines*	WT/DS231	Articles I, III and XI:1
51	*US – Softwood Lumber III*	WT/DS236	Article VI:3
52	*Argentina – Preserved Peaches*	WT/DS238	Article XIX:1
53	*US – Corrosion-Resistant Steel Sunset Review*	WT/DS244	Articles VI and X
54	*Japan – Apples*	WT/DS245	Article XI
55	*EC – Tariff Preferences*	WT/DS246	Article I:1
56	*US – Steel Safeguards*	WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258, WT/DS259	Articles I, II, X:3, XIII and XIX
57	*US – Softwood Lumber IV*	WT/DS257	Articles VI and X:3(a)
58	*US – Softwood Lumber V*	WT/DS264	Articles VI:1, VI:2 and X:3
59	*Canada – Wheat Exports and Grain Imports*	WT/DS276	Articles III:4 and XVII
60	*US – Softwood Lumber VI*	WT/DS277	Article VI:6(a)

679. With respect to the practice under Article XXIII:2 in general, see Chapter on the *DSU*, Article 4, Article 6.1, Article 11 and Article 22.

5. Reference to GATT practice

680. With respect to GATT practice on Article XXIII, see GATT Analytical Index, pages 612–619.

PART III

XXV. ARTICLE XXIV

A. TEXT OF ARTICLE XXIV

Article XXIV

Territorial Application – Frontier Traffic – Customs Unions and Free-trade Areas

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; *Provided* that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.

2. For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.

3. The provisions of this Agreement shall not be construed to prevent:

(*a*) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;

(*b*) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:

(*a*) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the

whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(*b*) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

(*c*) any interim agreement referred to in subparagraphs (*a*) and (*b*) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

6. If, in fulfilling the requirements of subparagraph 5 (*a*), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union.

7. (*a*) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(*b*) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of subparagraph (*a*), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

(*c*) Any substantial change in the plan or schedule referred to in paragraph 5 (*c*) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

8. For the purposes of this Agreement:

(*a*) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(*b*) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected.* This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (*a*)(i) and paragraph 8 (*b*).

10. The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.

11. Taking into account the exceptional circumstances arising out of the establishment of India and Pakistan as independent States and recognizing the fact that they have long constituted an economic unit, the contracting parties agree that the provisions of this Agreement shall not prevent the two countries from entering into special arrangements with respect to the trade between them,

pending the establishment of their mutual trade relations on a definitive basis.*

12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.

B. TEXT OF *AD* ARTICLE XXIV

Ad Article XXIV

Paragraph 9

It is understood that the provisions of Article I would require that, when a product which has been imported into the territory of a member of a customs union or free-trade area at a preferential rate of duty is re-exported to the territory of another member of such union or area, the latter member should collect a duty equal to the difference between the duty already paid and any higher duty that would be payable if the product were being imported directly into its territory.

Paragraph 11

Measures adopted by India and Pakistan in order to carry out definitive trade arrangements between them, once they have been agreed upon, might depart from particular provisions of this Agreement, but these measures would in general be consistent with the objectives of the Agreement.

C. UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XXIV OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members,

Having regard to the provisions of Article XXIV of GATT 1994;

Recognizing that customs unions and free trade areas have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade;

Recognizing the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;

Recognizing also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded;

Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;

Convinced also of the need to reinforce the effectiveness of the role of the Council for Trade in Goods in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new or enlarged agreements, and improving the transparency of all Article XXIV agreements;

Recognizing the need for a common understanding of the obligations of Members under paragraph 12 of Article XXIV;

Hereby *agree* as follows:

1. Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article.

Article XXIV:5

2. The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.

3. The "reasonable length of time" referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.

Article XXIV:6

4. Paragraph 6 of Article XXIV establishes the procedure to be followed when a Member forming a customs union proposes to increase a bound rate of duty. In this regard Members reaffirm that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted on 10 November 1980 (BISD 27S/26–28) and in the Understanding on the Interpretation of Article XXVIII of GATT 1994, must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs

union or an interim agreement leading to the formation of a customs union.

5. These negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by paragraph 6 of Article XXIV, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the Members having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable, negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII as elaborated by the Understanding on the Interpretation of Article XXVIII of GATT 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

6. GATT 1994 imposes no obligation on Members benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim agreement leading to the formation of a customs union, to provide compensatory adjustment to its constituents.

Review of Customs Unions and Free-Trade Areas

7. All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.

8. In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time-frame and on measures required to complete the formation of the customs union or free-trade area. It may if necessary provide for further review of the agreement.

9. Members parties to an interim agreement shall notify substantial changes in the plan and schedule included in that agreement to the Council for Trade in Goods and, if so requested, the Council shall examine the changes.

10. Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations. Provision shall be made for subsequent review of the implementation of the recommendations.

11. Customs unions and constituents of free-trade areas shall report periodically to the Council for Trade in Goods, as envisaged by the CONTRACTING PARTIES to GATT 1947 in their instruction to the GATT 1947 Council concerning reports on regional agreements (BISD 18S/38), on the operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur.

Dispute Settlement

12. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.

Article XXIV:12

13. Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

14. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

15. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former.

D. INTERPRETATION AND APPLICATION OF ARTICLE XXIV

1. General

(a) Committee on Regional Trade Agreements

681. Pursuant to Article IV:7 of the *WTO Agreement*, on 6 February 1996, the General Council decided to establish the Committee on Regional Trade Agree-

ments.[966] With respect to the establishment of the Committee, its rules of procedure and activities, including reports to the General Council, see the Chapter on the *WTO Agreement*, Section V.B.7(f).[967] Also, with respect to the activities of the Committee concerning the examination of agreements notified under Article XXIV of the *GATT 1994*, see Section V.B.7(f)(iv).

(b) Enabling Clause

682. In 1979, the GATT Council adopted the Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (the "Enabling Clause") to waive Article I of the GATT for certain arrangements, with respect to, *inter alia*, "[r]egional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs". For the text of the Enabling Clause, see paragraph 29 above.

(c) Reference to GATT practice

683. With respect to GATT practice on this subject, see GATT Analytical Index, pages 53–59.

2. Article XXIV:4

(a) Relationship between paragraph 4 and paragraphs 5 to 9

684. In *Turkey – Textiles*, the Appellate Body reviewed the Panel's finding that Article XXIV did not justify the imposition by Turkey of quantitative restrictions on imports of certain textile and clothing products from India upon the formation of a customs union with the European Communities. Although the key provision in this dispute was paragraph 5 of Article XXIV, the Appellate Body held that "paragraph 4 of Article XXIV constitutes an important element of the context of the chapeau of paragraph 5"[968]:

> "According to paragraph 4, the purpose of a customs union is 'to facilitate trade' between the constituent members and 'not to raise barriers to the trade' with third countries. This objective demands that a balance be struck by the constituent members of a customs union. A customs union should facilitate trade within the customs union, but it should *not* do so in a way that raises barriers to trade with third countries. We note that [the preamble of] the *Understanding on Article XXIV* explicitly reaffirms this purpose of a customs union, and states that in the formation or enlargement of a customs union, the constituent members should 'to the greatest possible extent avoid creating adverse affects on the trade of other Members'. Paragraph 4 contains purposive, and not operative, language. It does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV. Thus, the purpose set forth in paragraph 4 informs the other relevant paragraphs of Article XXIV, including the chapeau of paragraph 5."[969]

(b) "not to raise barriers to the trade of other contracting parties"

685. On the issue of whether parties to a regional trade agreement are required not to increase the barriers overall or rather not to raise any barrier, the Appellate Body identified paragraph 4 as an important element in the context of interpreting the text of the chapeau of paragraph 5, and it stated:

> "According to paragraph 4, the purpose of a customs union is 'to facilitate trade' between the constituent members and 'not to raise barriers to the trade' with third countries. This objective demands that a balance be struck by the constituent members of a customs union. A customs union should facilitate trade within the customs union, but it should *not* do so in a way that raises barriers to trade with third countries."[970]

(c) Reference to GATT practice

686. With respect to GATT practice on this subject, see GATT Analytical Index, page 796.

3. Article XXIV:5

(a) Chapeau

(i) Interpretation: the necessity test

687. The Panel on *Turkey – Textiles* had found that Turkey could not justify a violation of Article XI by invoking Article XXIV:5, because Article XXIV:5, in the view of the Panel, does not apply to *specific measures* adopted on the occasion of the formation of a new customs union. Rather, the Panel found that Article XXIV:5 focuses on the *overall effect* of a regional agreement. As a result, the Panel concluded that there is no legal basis in Article XXIV:5(a) for the justification of individual quantitative restrictions which are otherwise incompatible with WTO law. Although the Appellate Body ultimately upheld the Panel's finding that Turkey's measures could not be justified under Article XXIV, it modified the Panel's reasoning on Article XXIV:5. The Appellate Body began by emphasizing that the chapeau of Article XXIV:5 states that the provisions of GATT 1994 "shall not prevent" the formation of a customs union and that this meant "that the provisions of the

[966] WT/GC/M/10, para.11. The decision can be found in WT/L/127.
[967] WT/REG/M/2, para. 11. The text of the rules of procedures can be found in WT/REG/1. See also WT/REG/M/2, para. 12.
[968] Appellate Body Report on *Turkey – Textiles*, para. 56.
[969] Appellate Body Report on *Turkey – Textiles*, para. 57.
[970] WT/DS34/AB/R, paras. 55–56.

GATT 1994 *shall not make impossible* the formation of a customs union":

> "[I]n examining the text of the chapeau to establish its ordinary meaning, we note that the chapeau states that the provisions of the GATT 1994 '*shall not prevent*' the formation of a customs union. We read this to mean that the provisions of the GATT 1994 *shall not make impossible* the formation of a customs union. Thus, the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible 'defence' to a finding of inconsistency.[971]
>
> Second, in examining the text of the chapeau, we observe also that it states that the provisions of the GATT 1994 shall not prevent '*the formation of a customs union*'. This wording indicates that Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed."[972]

688. The Appellate Body then indicated the two conditions under which a measure, otherwise incompatible with WTO law, could be justified by virtue of Article XXIV:

> "[I]n a case involving the formation of a customs union, this 'defence' is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, *both* these conditions must be met to have the benefit of the defence under Article XXIV.
>
> We would expect a panel, when examining such a measure, to require a party to establish that both of these conditions have been fulfilled. It may not always be possible to determine whether the second of the two conditions has been fulfilled without initially determining whether the first condition has been fulfilled. In other words, it may not always be possible to determine whether not applying a measure would prevent the formation of a customs union without first determining whether there *is* a customs union."[973]

689. The Appellate Body reiterated its findings from *Turkey – Textiles*, referenced in paragraphs 687–688 above, in its Report on *Argentina – Footwear (EC)*, when it examined the Panel's finding that Argentina had violated Article 2 of the *Agreement on Safeguards* by including imports from all sources in its investigation of "increased imports" of footwear products into its territory but excluding other MERCOSUR member States from the application of the safeguard measures.[974]

(ii) Reference to GATT practice

690. With respect to GATT practice on this subject, see GATT Analytical Index, page 798.

(b) Paragraph 5(a)

(i) Link with the chapeau

691. In *Turkey – Textiles*, the Appellate Body held that "Article XXIV can . . . only be invoked as a defence . . . to the extent that the measure [at issue] is introduced upon the formation of a customs union which meets the requirement in sub-paragraph 5(a)":

> "[I]n examining the text of the chapeau of Article XXIV:5, we note that the chapeau states that the provisions of the GATT 1994 shall not prevent the formation of a customs union '*Provided that*'. The phrase '*provided that*' is an essential element of the text of the chapeau. In this respect, for purposes of a 'customs union', the relevant proviso is set out immediately following the chapeau, in Article XXIV:5(a). . . .
>
> Given this proviso, Article XXIV can, in our view, only be invoked as a defence to a finding that a measure is inconsistent with certain GATT provisions to the extent that the measure is introduced upon the formation of a customs union which meets the requirement in sub-

[971] (*footnote original*) We note that legal scholars have long considered Article XXIV to be an "exception" or a possible "defence" to claims of violation of GATT provisions. An early treatise on GATT law stated: "[Article XXIV] establishes an *exception to GATT obligations* for regional arrangements that meet a series of detailed and complex criteria." (emphasis added) J. Jackson, *World Trade and the Law of GATT* (The Bobbs-Merrill Company, 1969), p. 576. See also J. Allen, *The European Common Market and the GATT* (The University Press of Washington, D.C., 1960), p. 2; K. Dam, "Regional Economic Arrangements and the GATT: The Legacy of Misconception", *University of Chicago Law Review*, 1963, p. 616; and J. Huber, "The Practice of GATT in Examining Regional Arrangements under Article XXIV", *Journal of Common Market Studies*, 1981, p. 281. We note also the following statement in the unadopted panel report in *EEC – Member States' Import Regimes for Bananas*, DS32/R, 3 June 1993, para. 358: "The Panel noted that Article XXIV:5 to 8 permitted the contracting parties to *deviate from their obligations under other provisions of the General Agreement* for the purpose of forming a customs union . . .". (emphasis added)
The chapeau of paragraph 5 refers only to the provisions of the GATT 1994. It does not refer to the provisions of the *ATC*. However, Article 2.4 of the *ATC* provides that "[n]o new restrictions . . . shall be introduced *except under* the provisions of this Agreement or *relevant GATT 1994 provisions*." (emphasis added) In this way, Article XXIV of the GATT 1994 is incorporated in the *ATC* and may be invoked as a defence to a claim of inconsistency with Article 2.4 of the *ATC*, provided that the conditions set forth in Article XXIV for the availability of this defence are met.

[972] Appellate Body Report on *Turkey – Textiles*, paras. 45–46.

[973] Appellate Body Report on *Turkey – Textiles*, paras. 58–59.

[974] Appellate Body Report on *Argentina – Footwear (EC)*, para. 109.

paragraph 5(a) of Article XXIV relating to the 'duties and other regulations of commerce' applied by the constituent members of the customs union to trade with third countries."[975]

(ii) "General incidence" of duties

692. With respect to the requirements for a WTO-compatible customs union, the Appellate Body in *Turkey – Textiles* noted that the term "general incidence" of duties referred to the applied rates of duties:

"With respect to 'duties', Article XXIV:5(a) requires that the duties applied by the constituent members of the customs union *after* the formation of the customs union 'shall *not* on the whole be *higher* . . . than the *general incidence*' of the duties that were applied by each of the constituent members before the formation of the customs union. Paragraph 2 of the *Understanding on Article XXIV* requires that the evaluation under Article XXIV:5(a) of the *general incidence of the duties* applied before and after the formation of a customs union 'shall . . . be based upon an overall assessment of weighted average tariff rates and of customs duties collected.'[976] Before the agreement on this Understanding, there were different views among the GATT Contracting Parties as to whether one should consider, when applying the test of Article XXIV:5(a), the *bound* rates of duty or the *applied* rates of duty. This issue has been resolved by paragraph 2 of the *Understanding on Article XXIV*, which clearly states that the *applied* rate of duty must be used."[977]

(iii) "Other regulations of commerce"

693. With respect to the term "other regulations of commerce", the Appellate Body held in *Turkey – Textiles*:

"With respect to 'other regulations of commerce', Article XXIV:5(a) requires that those applied by the constituent members *after* the formation of the customs union 'shall *not* on the whole be . . . *more restrictive* than the *general incidence*' of the regulations of commerce that were applied by each of the constituent members *before* the formation of the customs union. Paragraph 2 of the *Understanding on Article XXIV* explicitly recognizes that the quantification and aggregation of regulations of commerce other than duties may be difficult, and, therefore, states that 'for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.'[978]"[979]

(iv) "Economic test"

694. On the issue of increase of barriers *vis-à-vis* third parties, the Panel in the *Turkey – Textiles* case found that:

"What paragraph 5(a) provides, in short, is that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies and that paragraph 5(a) provided for an '"economic" test' for assessing compatibility."[980]

695. The Appellate Body on *Turkey – Textiles* agreed with the Panel that the test for assessing whether a specific customs union is compatible with Article XXIV is an economic one:

"We agree with the Panel that the terms of Article XXIV:5(a), as elaborated and clarified by paragraph 2 of the *Understanding on Article XXIV*, provide:

'. . . that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies.'

and we also agree that this is:

'an "economic" test for assessing whether a specific customs union is compatible with Article XXIV.'"[981]

696. In *Canada – Autos*, Canada invoked an Article XXIV exception with respect to a certain import duty exemption, which was found inconsistent with GATT Article I. The Panel, in a finding not reviewed by the Appellate Body, rejected this defence, noting that the import duty exemption was not granted to all products imported from the United States and Mexico and that it was also granted to products from countries other than the United States and Mexico:

"We recall that in our analysis of the impact of the conditions under which the import duty exemption is accorded, we have found that these conditions entail a distinction between countries depending upon whether there are capital relationships of producers in those countries with eligible importers in Canada. Thus, the measure not only grants duty-free treatment in respect of products imported from the United States and Mexico by manufacturer-beneficiaries; it also grants duty-free treatment in respect of products imported from third countries not parties to a customs union or free-trade area with Canada. The notion that the import duty exemption involves the granting of duty-free treatment

[975] Appellate Body Report on *Turkey – Textiles*, paras. 51–52.
[976] Paragraph 2 of the *Understanding on Article XXIV* further states that "this assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin."
[977] Appellate Body Report on *Turkey – Textiles*, para. 53.
[978] (*footnote original*) In paragraph 43 of its appellant's submission, Turkey argues that this provision must be interpreted as allowing the constituent members of a customs union to introduce GATT/WTO inconsistent quantitative restrictions upon the formation of the customs union. We see no basis for such an interpretation.
[979] Appellate Body Report on *Turkey – Textiles*, para. 54.
[980] WT/DS34/R, para. 9.121.
[981] Appellate Body Report on *Turkey – Textiles*, para. 55.

of imports from the United States and Mexico does not capture this aspect of the measure. In our view, Article XXIV clearly cannot justify a measure which grants WTO-inconsistent duty-free treatment to products originating in third countries not parties to a customs union or free trade agreement.

We further note that the import duty exemption does not provide for duty-free importation of all like products originating in the United States or Mexico and that whether such products benefit from the exemption depends upon whether they are imported by certain motor vehicle manufacturers in Canada who are eligible for the exemption. While in view of the particular foreign affiliation of these manufacturers, the exemption will mainly benefit products of the United States and Mexico, products of certain producers in these countries who have no relationship with such manufacturers are unlikely to benefit from the exemption. Thus, in practice the import duty exemption does not apply to some products that would be entitled to duty-free treatment if such treatment were dependant solely on the fact that the products originated in the United States or Mexico. We thus do not believe that the import duty exemption is properly characterized as a measure which provides for duty-free treatment of imports of products of parties to a free-trade area."[982]

(c) Reference to GATT practice

697. With respect to GATT practice on this subject-matter, see GATT Analytical Index, Article XXIV, pages 798–810.

4. Article XXIV:7

(a) "Any contracting party . . . shall promptly notify the CONTRACTING PARTIES"

698. As of 31 December 2004, 310 regional trade agreements (RTAs) had been notified to the GATT/WTO[983]. Of these, 253 RTAs were notified under Article XXIV of the *GATT 1947* or *GATT 1994*; 21 under the Enabling Clause[984] (see paragraph 682 above); and 36 under Article V of the *GATS*. By that same date, 160 agreements were in force (with the following breakdown, respectively: 111/21/28).[985] [986]

(b) Examination of agreements

699. Up to the establishment of the Committee on Regional Trade Agreements in February 1996, the examination of RTAs in accordance with paragraph 7 of Article XXIV of the *GATT 1994* and of the Understanding on the Interpretation of Article XXIV of the GATT 1994 was carried out by individual working parties. As of the entry into force of the WTO, 14 working parties of the GATT 1947 were in existence;[987] from January 1995 up to February 1996, 12 additional working parties were established by either the Council for Trade in Goods or the Council for Trade in Services.[988]

700. With respect to the *GATT 1947* working parties, the decision adopted by the General Council on 31 January 1995 on the Avoidance of Procedural and Institutional Duplication states:

"2. The coordination procedures set out in paragraphs 3 and 4 below shall apply in the relations between the bodies referred to in sub-paragraphs (a) to (d) below:

. . .

(c) The Working Parties established under the GATT 1947 to examine a regional agreement or arrangement shall coordinate their activities with Working Parties of the WTO that examine the same regional agreement or arrangement.[989]

. . .

3. The bodies established under the GATT 1947 or a Tokyo Round Agreement that are referred to in paragraph 2 above shall hold their meetings jointly or consecutively, as appropriate, with the corresponding WTO bodies. In meetings held jointly the rules of procedure to be applied by the WTO body shall be followed. The reports on joint meetings shall be submitted to the competent bodies established under the GATT 1947, the Tokyo Round Agreements and the WTO Agreement.

4. The coordination of activities in accordance with paragraph 3 above shall be conducted in a manner

[982] Panel Report on *Canada – Autos*, paras. 10.55–10.56.
[983] This figure corresponds to notifications of new RTAs, as well as accessions to existing RTAs.
[984] *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Decision of the GATT 1947 CONTRACTING PARTIES of 28 November 1979.
[985] The trade-related aspects of a considerable number of RTAs previously in force were abrogated in 2004 as a consequence of the enlargement of the European Union to include ten new Member States on 1 May 2004.
[986] Updated figures on the basis of WT/REG/14, Report (2004) of the Committee on RTAs.
[987] Working Parties established to examine the following 14 regional trade agreements: Interim Agreements between the European Communities and the Czech Republic, Slovak Republic, Hungary and Poland (in one single WP); Free-Trade Agreements between the EFTA States and Israel, Romania, Bulgaria, Poland and Hungary; Free-Trade Agreements between Switzerland and Estonia, Latvia and Lithuania; MERCOSUR; the Central European Free-Trade Agreement; the North American Free-Trade Agreement; and the Free-Trade Agreements between Slovenia and the Czech Republic and the Slovak Republic.
[988] The Council for Trade in Goods established ten Working Parties to examine the following agreements: European Communities and Bulgaria, Estonia, Faroe Islands, Latvia, Lithuania, Romania and Turkey; Enlargement of the European Communities (EC-15); Hungary-Slovenia; and EFTA-Slovenia. The Council for Trade in Services established two Working Parties to examine the North American Free-Trade Agreement and the Enlargement of the European Communities. See WT/GC/W/125 and G/L/134.
[989] (*footnote original*) The Working Parties of the WTO include Working Parties originating from decisions of the CONTRACTING PARTIES to the GATT 1947 that were adopted before the entry into force of the WTO Agreement and therefore form part of the GATT 1994.

which ensures that the enjoyment of the rights and the performance of the obligations under the GATT 1947, the Tokyo Round Agreements and the WTO Agreement and the exercise of the competence of the CONTRACTING PARTIES to the GATT 1947, the Committees established under the Tokyo Round Agreements and the bodies of the WTO are unaffected."[990]

701. At its meeting on 11 July 1995, the General Council modified the terms or reference for those working parties established under the *GATT 1947* so that agreements would be examined in the light of the relevant provisions of the *GATT 1994*, and that examination reports would be submitted to the Council for Trade in Goods.[991] Similarly, the Committee on Trade and Development modified the terms of reference for the examination of MERCOSUR at its meeting on 14 September 1995, so that the examination be carried out in the light of the relevant provisions of the Enabling Clause and the *GATT 1994*. The Decision stated that the examination report would be transmitted to the Committee on Trade and Development for submission to the General Council, with a copy of the report transmitted as well to the Council for Trade in Goods.[992]

702. The first terms of reference under the WTO for the examination of a regional trade agreement – Enlargement of the European Communities (accession of Austria, Finland and Sweden) – was adopted by the Council for Trade in Goods on 20 February 1995, along with an understanding read out by the Chairman at that meeting.[993] Since then, these terms of reference and Chairman's understanding have been standard for the examination of all regional trade agreements notified under Article XXIV of the GATT 1994.

703. On 6 February 1996, the General Council established the Committee on RTAs.[994] Under its terms of reference, the Committee is mandated, *inter alia*, to carry out the examination of agreements in accordance with the procedures and terms of reference adopted by the Council for Trade in Goods, the Council for Trade in Services and the Committee on Trade and Development, as the case may be.[995] With respect to the establishment, terms of reference and rules of procedure of the Committee, see the Chapter on the *WTO Agreement*, Section V.B.7(f). With respect to procedures for the examination of regional trade agreements, see the Chapter on the *WTO Agreement*, Section V.B.7(f)(iv).

704. On 31 December 2004, the Committee on RTAs had under examination a total of 112 RTAs, of which 86 were in the area of trade in goods and 26 in trade in services.[996] By that same date, the Committee had already completed the factual examination for 40 of these RTAs; 38 RTAs were undergoing factual examination; for the remaining 34 RTAs, the factual examination had not yet started (see, respectively, Annex I-Annex III for the lists of RTAs notified under Article XXIV of the *GATT 1994*, and the Chapter on the *GATS*, for the lists of RTAs notified under Article V of the *GATS*).[997] At that same date, an additional ten agreements notified under Article XXIV of the *GATT 1994*, Article V of the *GATS* and the Enabling Clause were yet to be considered by the relevant Councils or Committee (see Annex IV below for those RTAs notified under Article XXIV of the *GATT 1994* or under *GATT 1947*, and the Chapter on the *GATS*, for those RTAs notified under Article V of the *GATS*).

705. During 2004, the Committee on RTAs was informed that 65 RTAs previously in force and notified to the GATT/WTO had been terminated as a consequence of the enlargement of the European Union to include ten new member States on 1 May 2004 (see Annex V below for those RTAs notified under Article XXIV of the *GATT 1994* or under *GATT 1947*, and the Chapter on the *GATS*, for those RTAs notified under Article V of the *GATS*)[998], and that the ten acceding countries had become, or were in the process of becoming, parties to European Communities' free trade agreements and customs unions with third parties. At its 38th session held on 11 November 2004, the Committee agreed to terminate the examination process for these agreements.[999]

"The Committee on Regional Trade Agreement has conducted a series of informal consultations regarding the examination of regional trade agreements concluded by WTO Members with non-Members."[1000]

(c) Absence of recommendation pursuant to Article XXIV:7

706. In *Turkey – Textiles*, Turkey argued before the Panel that as no Article XXIV:7 recommendation had ever been made to parties to a customs union to change or abolish any import restrictions and, in particular, that such recommendation had never been made in respect of previous Turkey/EC trade agreements, this

[990] WT/L/29, paras. 2–4.
[991] WT/GC/M/5, item 11.
[992] WT/COMTD/M/3.
[993] G/C/M/1, paras 7.1–7.12, and WT/REG3/1.
[994] WT/GC/M/10, Section 11.
[995] WT/L/127, para. 1(a).
[996] RTAs terminated at the occasion of the enlargement of the European Union on 1 May 2004 are excluded from figures contained in this paragraph.
[997] Updated figures on the basis of WT/REG/14 and WT/REG/14/Corr.1/Rev.1, Report (2004) of the Committee on RTAs to the General Council.
[998] See documents WT/REG/GEN/N/2 and WT/REG/GEN/N/3.
[999] WT/REG/M/38.
[1000] WT/REG/14, para. 9. A list of those RTAs is included in document WT/REG/14/Corr.1/Rev.1.

indicated that its measures were WTO-compatible. Recalling that a similar argument had been made before the GATT Panel in *EEC – Imports from Hong Kong*, the Panel cited approvingly the findings of the GATT Panel in this case:

> "[I]t would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties."[1001]

(d) "Any substantial change in the plan and schedule . . . shall be communicated to the CONTRACTING PARTIES"

707. See paragraph 715 below.

5. Article XXIV:8

(a) Article XXIV:8(a)(i)

708. In *Turkey – Textiles*, the Appellate Body addressed the internal trade aspect of a customs union, as set forth in Article XXIV:8(a)(i):

> "Sub-paragraph 8(a)(i) of Article XXIV establishes the standard for the *internal trade* between constituent members in order to satisfy the definition of a 'customs union'. It requires the constituent members of a customs union to eliminate 'duties and other restrictive regulations of commerce' with respect to 'substantially all the trade' between them. Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term 'substantially' in this provision. It is clear, though, that 'substantially all the trade' is not the same as *all* the trade, and also that 'substantially all the trade' is something considerably more than merely *some* of the trade. We note also that the terms of sub-paragraph 8(a)(i) provide that members of a customs union may maintain, where necessary, in their internal trade, certain restrictive regulations of commerce that are otherwise permitted under Articles XI through XV and under Article XX of the GATT 1994. Thus, we agree with the Panel that the terms of sub-paragraph 8(a)(i) offer 'some flexibility' to the constituent members of a customs union when liberalizing their internal trade in accordance with this sub-paragraph. Yet we caution that the degree of 'flexibility' that sub-paragraph 8(a)(i) allows is limited by the requirement that 'duties and other restrictive regulations of commerce' be 'eliminated with respect to substantially all' internal trade."[1002]

709. In *Turkey – Textiles*, the Appellate Body set out a two-prong test for assessing whether Article XXIV may justify a measure inconsistent with other WTO provisions: "First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of a customs union would be prevented if it were not allowed to introduce the measure at issue".[1003] With respect to the second condition, Turkey argued that "had it not introduced the quantitative restrictions on textile and clothing products from India that are at issue, the European Communities would have 'exclud[ed] these products from free trade within the Turkey/EC customs union'".[1004] The Appellate Body found that Turkey was not required to introduce the quantitative restrictions at issue:

> "As the Panel observed, there are other alternatives available to Turkey and the European Communities to prevent any possible diversion of trade, while at the same time meeting the requirements of sub-paragraph 8(a)(i). For example, Turkey could adopt rules of origin for textile and clothing products that would allow the European Communities to distinguish between those textile and clothing products originating in Turkey, which would enjoy free access to the European Communities under the terms of the customs union, *and* those textile and clothing products originating in third countries, including India. . . . A system of certificates of origin would have been a reasonable alternative until the quantitative restrictions applied by the European Communities are required to be terminated under the provisions of the *ATC*. Yet no use was made of this possibility to avoid trade diversion. Turkey preferred instead to introduce the quantitative restrictions at issue.
>
> For this reason, we conclude that Turkey was not, in fact, required to apply the quantitative restrictions at issue in this appeal in order to form a customs union with the European Communities."[1005]

710. In *Turkey – Textiles*, the Panel did not agree with the argument that a WTO right pertaining to a constituent member prior to the formation of a customs union could be "passed" or "extended" to other constituent members:

> "[E]ven if the formation of a customs union may be the occasion for the constituent member(s) to adopt, to the greatest extent possible, similar policies, the specific circumstances which serve as the legal basis for one Member's exercise of such a specific right cannot suddenly be considered to exist for the other constituent members. We also consider that the right of Members to form a customs union is to be exercised in such a way so

[1001] Panel Report on *EEC – Quantitative Restrictions against Imports of certain Products from Hong Kong*, adopted on 12 July 1983 (BISD 30S/129), para. 28, and Panel Report on *Turkey – Textiles*, adopted on 19 November 1999 (WT/DS34/R), paras. 9.172–9.174.
[1002] Appellate Body Report on *Turkey – Textiles*, para. 48.
[1003] Appellate Body Report on *Turkey – Textiles*, para. 58.
[1004] Appellate Body Report on *Turkey – Textiles*, para. 61.
[1005] Appellate Body Report on *Turkey – Textiles*, paras. 62–63.

as to ensure that the WTO rights and obligations of third country Members (and the constituent Members) are respected, consistent with the primacy of the WTO, as reiterated in the Singapore Declaration."[1006]

(b) Reference to GATT practice

711. With respect to GATT practice on this subject-matter, see GATT Analytical Index, pages 820 and 824.

(c) Article XXIV:8(a)(ii)

(i) Interpretation

712. In *Turkey – Textiles*, the Appellate Body addressed the requirement contained in Article XXIV:8(a)(ii) that constituent members of a customs union apply "substantially the same" duties and other regulations of commerce to their external trade with third countries. The Appellate Body agreed with the Panel that the term "substantially the same" has both "qualitative and quantitative components":

"Sub-paragraph 8(a)(ii) establishes the standard for the trade of constituent members *with third countries* in order to satisfy the definition of a 'customs union'. It requires the constituent members of a customs union to apply 'substantially the same' duties and other regulations of commerce to external trade with third countries. The constituent members of a customs union are thus required to apply a common external trade regime, relating to both duties and other regulations of commerce. However, sub-paragraph 8(a)(ii) does *not* require each constituent member of a customs union to apply *the same* duties and other regulations of commerce as other constituent members with respect to trade with third countries; instead, it requires that *substantially the same* duties and other regulations of commerce shall be applied. We agree with the Panel that:

> '[t]he ordinary meaning of the term "substantially" in the context of sub-paragraph 8(a) appears to provide for both qualitative and quantitative components. The expression "substantially the same duties and other regulations of commerce are applied by each of the Members of the [customs] union" would appear to encompass both quantitative and qualitative elements, the quantitative aspect more emphasized in relation to duties.'[1007]"[1008]

713. The Appellate Body on *Turkey – Textiles* further agreed with the Panel that the phrase "substantially the same" in Article XXIV:8(a)(ii) offered a "certain degree of flexibility". However, the Appellate Body objected to the standard of "comparable trade regulations having similar effects" developed by the Panel and held that this standard did not rise to the required standard of "sameness":

"We also believe that the Panel was correct in its statement that the terms of sub-paragraph 8(a)(ii), and, in particular, the phrase 'substantially the same' offer a certain degree of 'flexibility' to the constituent members of a customs union in 'the creation of a common commercial policy.'[1009] Here too we would caution that this 'flexibility' is limited. It must not be forgotten that the word 'substantially' qualifies the words 'the same'. Therefore, in our view, something closely approximating 'sameness' is required by Article XXIV:8(a)(ii).[1010] We do not agree with the Panel that:

> . . . as a general rule, a situation where constituent members have 'comparable' trade regulations having similar effects with respect to the trade with third countries, would generally meet the qualitative dimension of the requirements of sub-paragraph 8(a)(ii).[1011]

Sub-paragraph 8(a)(ii) requires the constituent members of a customs union to adopt 'substantially the same' trade regulations. In our view, 'comparable trade regulations having similar effects' do not meet this standard. A higher degree of 'sameness' is required by the terms of sub-paragraph 8(a)(ii)."[1012]

(ii) Reference to GATT practice

714. With respect to GATT practice on this subject-matter, see GATT Analytical Index, page 827.

6. Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994

(a) Notification and reporting requirements in accordance with paragraphs 9 and 11 of the Understanding

715. In November 1998, the Council for Trade in Goods approved the recommendations adopted by the Committee on RTAs with respect to the required reporting on the operation of regional trade agreements, any significant changes and/or developments in the agreement or substantial changes in the plan and schedule of interim agreements.[1013]

[1006] WT/DS34/R, paras. 9.183–184.

[1007] (*footnote original*) Panel Report on *Turkey – Textiles*, para. 9.148.

[1008] Appellate Body Report on *Turkey – Textiles*, para. 49.

[1009] (*footnote original*) Panel Report on *Turkey – Textiles*, para. 9.148.

[1010] The Appellate Body rejected the following finding of the Panel, para. 9.151 of its report:

> . . . as a general rule, a situation where constituent members have "comparable" trade regulations having similar effects with respect to the trade with third countries, would generally meet the qualitative dimension of the requirements of sub-paragraph 8(a)(ii).

[1011] (*footnote original*) Panel Report on *Turkey – Textiles*, para. 9.151.

[1012] Appellate Body Report on *Turkey – Textiles*, para. 50.

[1013] G/L/286. The text of the adopted Committee's recommendation can be found in WT/REG/6.

716. Schedules for the submission of biennial reports were presented to the Committee on RTAs in December 1998, February 2001 and December 2003[1014] (see Annex below).

(b) Paragraph 12 on dispute settlement

717. With reference to the question of a panel's jurisdiction to assess the compatibility of regional trade agreements with WTO rules, the Appellate Body, in *Turkey – Textiles*, stated:

> "More specifically, with respect to the first condition, the Panel, in this case, did not address the question of whether the regional trade arrangement between Turkey and the European Communities is, in fact, a 'customs union' which meets the requirements of paragraphs 8(a) and 5(a) of Article XXIV. The Panel maintained that 'it is arguable' that panels do not have jurisdiction to assess the overall compatibility of a customs union with the requirements of Article XXIV. We are not called upon in this appeal to address this issue, but we note in this respect our ruling in *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* on the jurisdiction of panels to review the justification of balance-of-payments restrictions under Article XVIII:B of the GATT 1994. The Panel also considered that, on the basis of the principle of judicial economy, it was not necessary to assess the compatibility of the regional trade arrangement between Turkey and the European Communities with Article XXIV in order to address the claims of India. Based on this reasoning, the Panel assumed *arguendo* that the arrangement between Turkey and the European Communities is compatible with the requirements of Article XXIV:8(a) and 5(a) and limited its examination to the question of whether Turkey was permitted to introduce the quantitative restrictions at issue. The assumption by the Panel that the agreement between Turkey and the European Communities is a 'customs union' within the meaning of Article XXIV was not appealed. Therefore, the issue of whether this arrangement meets the requirements of paragraphs 8(a) and 5(a) of Article XXIV is not before us."[1015]

718. In *Turkey – Textiles*, the Panel recalled the well-established WTO rules on burden of proof, whereby "... (b) it is for the party invoking an exception or an affirmative defense to prove that the conditions contained therein are met and ... (c) it is for the party asserting a fact to prove it", noting a third party's argument that "since Article XXIV was an exception invoked by Turkey, it was for Turkey to bear the burden of proof".[1016] In the same case, the Appellate Body stated:

> "[W]e would expect a panel, when examining such a measure [taken by a party to a customs union], to require *a party* to establish that both of these conditions [the customs union fully meets the requirements of XXIV:8(a) and 5(a) and that without such measure that customs union could not be formed] have been fulfilled." (emphasis added)[1017]

E. RELATIONSHIP WITH OTHER ARTICLES

1. Article I

719. On the major question of whether Article XXIV should be considered as a derogation from the MFN obligation under Article I of the *GATT 1994* only, or from other *GATT 1994* provisions as well, the Appellate Body on *Turkey – Textiles* stated:

> "Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this 'defence' is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, *both* these conditions must be met to have the benefit of the defence under Article XXIV."[1018]

2. Article XI

720. In *Turkey – Textiles*, the Panel found that the quantitative restrictions imposed by Turkey on imports from India of a number of textile and clothing products were inconsistent with Articles XI and XIII of *GATT 1994* (and consequently with Article 2.4 of the *Agreement on Textiles and Clothing)*. The Panel rejected Turkey's defence that Article XXIV:5(a) of *GATT 1994* authorizes Members forming a customs union to deviate from the prohibitions contained in Articles XI and XIII of the GATT 1994 (and Article 2.4 of the *Agreement on Textiles and Clothing*).[1019] The Appellate Body upheld the Panel's conclusion that "Article XXIV does not allow Turkey to adopt, upon the formation of a customs union with the European Communities, quantitative restrictions ... which were found inconsistent with Articles XI and XIII of *GATT 1994* and Article 2.4 of the ATC".[1020] However, the Appellate Body stressed that it was only finding that Turkey's quantitative restrictions at issue were not justified by Article XXIV but that it was not making a "finding on the issue of whether quantita-

[1014] WT/REG/W/33, WT/REG/W/42 and WT/REG/W/48, respectively. The lists of the reports submitted are contained in the Committee's annual reports, WT/REG/9, 11 and 14.
[1015] Appellate Body Report, adopted on 19 November 1999 (WT/DS34/AB/R), para. 60.
[1016] WT/DS34/R, paras. 9.57 and 9.58.
[1017] WT/DS34/AB/R, para. 59. (See also paragraph 32 below.)
[1018] WT/DS34/AB/R, para. 58. That reversed the Panel finding that Article XXIV did not authorize a departure from GATT/WTO obligations other than Article I of the GATT (WT/DS34/R, paras. 9.186–9.188).
[1019] Panel Report on *Turkey – Textiles*, para. 10.1.
[1020] Appellate Body Report on *Turkey – Textiles*, para. 64.

tive restrictions will *ever* be justified by Article XXIV".[1021] See paragraphs 708–709 above.

3. Article XIII

721. See paragraph 720 above.

F. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Agreement on Safeguards

(a) Footnote 1 to Article 2.1

722. In *Argentina – Footwear (EC)*, the Panel found that Argentina violated Article 2 of the *Agreement on Safeguards* by including imports from all sources in its investigation of "increased imports" of footwear products into its territory but excluding other MERCOSUR member States from the application of the safeguard measures. The Appellate Body reversed the Panel's finding, holding that footnote 1 to Article 2.1 of the *Agreement on Safeguards* applied to the facts of the case before it. The Appellate Body opined that "the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'"; in the case before it, the Appellate Body found, MERCOSUR had not applied the safeguards measures at issue (the measures had been imposed by the Argentine authorities).[1022]

723. In *US – Wheat Gluten*, the Panel found that the United States had acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* by *including* imports from all sources in its *investigation*, but *excluding* imports from Canada from the *application* of the safeguard measure. On appeal, the United States argued, *inter alia*, that the Panel erred in failing to assess the legal relevance of footnote 1 to the *Agreement on Safeguards*, and Article XXIV of the GATT 1994 to this issue. The Appellate Body held:

> "In this case, the Panel determined that this dispute does not raise the issue of whether, as a general principle, a member of a free-trade area can exclude imports from other members of that free-trade area from the application of a safeguard measure. The Panel also found that it could rule on the claim of the European Communities without having recourse to Article XXIV or footnote 1 to the *Agreement on Safeguards*. We see no error in this approach, and make no findings on these arguments."[1023]

(b) Article 2.2

724. The Appellate Body on *US – Line Pipe* avoided ruling on whether Article 2.2 of the *Agreement on Safeguards* "permits a Member to exclude imports originating in member states of a free-trade area from the scope of a safeguard measure". Nevertheless, the Appellate Body asserted that the latter question becomes relevant in two circumstances:

> "The question of whether Article XXIV of the GATT 1994 serves as an exception to Article 2.2 of the *Agreement on Safeguards* becomes relevant in only two possible circumstances. One is when, in the investigation by the competent authorities of a WTO Member, the imports that are exempted from the safeguard measure *are not considered* in the determination of serious injury. The other is when, in such an investigation, the imports that are exempted from the safeguard measure *are considered* in the determination of serious injury, *and* the competent authorities have *also* established explicitly, through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2."[1024]

2. Agreement on Textiles and Clothing

725. In *Turkey – Textiles*, the Panel found that the quantitative restrictions imposed by Turkey on imports from India of a number of textile and clothing products were inconsistent with Articles XI and XIII of the *GATT 1994* and consequently with Article 2.4 of the *Agreement on Textiles and Clothing*. The Panel rejected Turkey's defence that Article XXIV:5(a) of the *GATT 1994* authorizes Members forming a customs union to deviate from the prohibitions contained in Article 2.4 of the *Agreement on Textiles and Clothing* (and Articles XI and XIII of the *GATT 1994*).[1025] The Appellate Body upheld the Panel's conclusion that "Article XXIV does not allow Turkey to adopt, upon the formation of a customs union with the European Communities, quantitative restrictions ... which were found inconsistent with Articles XI and XIII of the *GATT 1994* and Article 2.4 of the ATC".[1026] However, the Appellate Body stressed that it was only finding that Turkey's quantitative restrictions at issue were not justified by Article XXIV but that it was not making a "finding on the issue of whether quantitative restrictions will *ever* be justified by Article XXIV".[1027] In this regard, the Appellate Body recalled that Article 2.4 of the *Agreement on Textiles and Clothing* refers to the "*relevant GATT 1994 provisions*" as an exception to the prohibition of new restrictions to trade and that, therefore, "Article XXIV of *GATT 1994* is incorporated in the *ATC* and may be invoked as a defence to a claim of inconsistency of Article 2.4 of the *ATC*, provided that the conditions set forth in Article XXIV for the availability of this defence are met."[1028]

[1021] Appellate Body Report on *Turkey – Textiles*, para. 65.
[1022] Appellate Body Report on *Argentina – Footwear (EC)*, paras. 106–108.
[1023] Appellate Body Report on *US – Wheat Gluten*, para. 99.
[1024] Appellate Body Report on *US – Line Pipe*, para. 198.
[1025] Panel Report on *Turkey – Textiles*, para. 10.1.
[1026] Appellate Body Report on *Turkey – Textiles*, para. 64.
[1027] Appellate Body Report on *Turkey – Textiles*, para. 65.
[1028] Appellate Body Report on *Turkey – Textiles*, footnote 13 to para. 45.

G. ANNEX I

1. List of RTAs notified under Article XXIV of the GATT 1994 for which factual examination has been completed

Agreement	Date of Notification	Terms of Reference for the Examination	WTO Document series
Free Trade Agreement between Chile and Costa Rica	14-May-02	WT/REG136/2	WT/REG136
Agreement between New Zealand and Singapore on a Closer Economic Partnership	19-Sep-01	WT/REG127/2	WT/REG127
Free Trade Agreement between the EFTA States and Mexico	22-Aug-01	WT/REG126/2	WT/REG126
Free Trade Agreement between Chile and Mexico	8-Mar-01	WT/REG125/2	WT/REG125
Free Trade Agreement between Israel and Mexico	8-Mar-01	WT/REG124/2	WT/REG124
Free Trade Area between the EFTA States and the Former Yugoslav Republic of Macedonia	31-Jan-01	WT/REG117/2 and Corr.1	WT/REG117
Free Trade Agreement between Turkey and the Former Yugoslav Republic of Macedonia	22-Jan-01	WT/REG115/2 and Corr.1	WT/REG115
Euro-Mediterranean Agreement between the European Communities and Israel	7-Nov-00	WT/REG110/2 and Corr.1	WT/REG110
Free Trade Agreement between EFTA and Morocco	18-Feb-00	WT/REG91/2	WT/REG91
Free Trade Agreement between Bulgaria and the Former Yugoslav Republic of Macedonia	18-Feb-00	WT/REG90/2	WT/REG90
Free Trade Agreement between the Kyrgyz Republic and Moldova	15-Jun-99	WT/REG76/2	WT/REG76
Free Trade Agreement between Turkey and Bulgaria	4-May-99	WT/REG72/2	WT/REG72
Central European Free Trade Agreement – Accession of Bulgaria	24-Mar-99	WT/REG11/11	WT/REG11
Euro-Mediterranean Agreement between the European Communities and Tunisia	23-Mar-99	WT/REG69/3	WT/REG69
Free Trade Agreement between Turkey and Israel	18-May-98	WT/REG60/2	WT/REG60
Free Trade Agreement between Turkey and Romania	18-May-98	WT/REG59/2	WT/REG59
Customs Union between the European Community and the Principality of Andorra	9-Mar-98	WT/REG53/2	WT/REG53
Central European Free Trade Agreement – Accession of Romania	8-Jan-98	WT/REG11/8	WT/REG11
Free Trade Agreement between Romania and the Republic of Moldova	24-Sep-97	WT/REG44/3	WT/REG44
Free Trade Agreement between Canada and Chile	26-Aug-97	WT/REG38/3	WT/REG38
Free Trade Agreement between the Government of Canada and the Government of the State of Israel	23-Jan-97	WT/REG31/3	WT/REG31
Agreement between the Government of Denmark and the Home Government of the Faroe Islands, on the one part, and the Government of Norway, on the other part	13-Mar-96	WT/REG25/2	WT/REG25
Agreement between the Government of Denmark and the Home Government of the Faroe Islands, on the one part, and the Government of Switzerland, on the other part	8-Mar-96	WT/REG24/2	WT/REG24
Agreement between the Government of Denmark and the Home Government of the Faroe Islands, on the one part, and the Government of Iceland, on the other part	23-Jan-96	WT/REG23/2	WT/REG23
Enlargement of the European Union – Accession of Austria, Finland and Sweden	20-Jan-95	WT/REG3/1 L/7614/Add.1	WT/REG3
Interim Agreement between Bulgaria and the European Communities	23-Dec-94	WT/REG1/2	WT/REG1
Interim Agreement between Romania and the European Communities	23-Dec-94	WT/REG2/2 and Corr. 1	WT/REG2
Central European Free Trade Agreement (CEFTA)	30-Jun-94	WT/REG11/1	WT/REG11
EFTA – Bulgaria Free Trade Agreement	7-Jul-93	WT/REG12/1	WT/REG12
EFTA – Romania Free Trade Agreement	24-May-93	WT/REG16/1	WT/REG16
North American Free Trade Agreement	1-Feb-93	WT/REG4/2	WT/REG4
EFTA – Israel Free Trade Agreement	1-Dec-92	WT/REG14/1	WT/REG14

H. ANNEX II

1. List of RTAs notified under Article XXIV of the GATT 1994 under factual examination

Agreement	Date of Notification	Terms of Reference for the Examination	WTO Document series
Singapore-Australia Free Trade Agreement	1-Oct-03	WT/REG158/2	WT/REG158
Free Trade Agreement between Turkey and Croatia	8-Sep-03	WT/REG156/2	WT/REG156
Free Trade Agreement between the EFTA States and Singapore	24-Jan-03	WT/REG148/2	WT/REG148
Free Trade Agreement between Canada and Costa Rica	17-Jan-03	WT/REG147/2	WT/REG147
European Communities – Croatia Interim Agreement	20-Dec-02	WT/REG142/2	WT/REG142
European Communities – Jordan Euro-Mediterranean Agreement	20-Dec-02	WT/REG141/2	WT/REG141
Agreement between Japan and Singapore for a New-Age Economic Partnership	14-Nov-02	WT/REG140/2	WT/REG140
Free Trade Agreement between the United States and Jordan	5-Mar-02	WT/REG134/2	WT/REG134
Free Trade Agreement between the EFTA States and Jordan	22-Jan-02	WT/REG133/2	WT/REG133
Free Trade Agreement between the EFTA States and Croatia	22-Jan-02	WT/REG132/2	WT/REG132
Interim Agreement between the European Community and the Former Yugoslav Republic of Macedonia	21-Nov-01	WT/REG129/2	WT/REG129
Free Trade Agreement between Georgia and Armenia	21-Feb-01	WT/REG119/2 and Corr.1	WT/REG119
Free Trade Agreement between Georgia and Azerbaijan	21-Feb-01	WT/REG120/2 and Corr.1	WT/REG120
Free Trade Agreement between Georgia and Kazakhstan	21-Feb-01	WT/REG123/2 and Corr.1	WT/REG123
Free Trade Agreement between Georgia and the Russian Federation	21-Feb-01	WT/REG118/2 and Corr.1	WT/REG118
Free Trade Agreement between Georgia and Turkmenistan	21-Feb-01	WT/REG122/2 and Corr.1	WT/REG122
Free Trade Agreement between Georgia and Ukraine	21-Feb-01	WT/REG121/2 and Corr.1	WT/REG121
Free Trade Agreement between the Kyrgyz Republic and Armenia	4-Jan-01	WT/REG114/2 and Corr.1	WT/REG114
Euro-Mediterranean Agreement between the European Communities and Morocco	8-Nov-00	WT/REG112/2	WT/REG112
Free Trade Agreement between the European Communities and Mexico	1-Aug-00	WT/REG109/2	WT/REG109
Free Trade Agreement between Azerbaijan, Armenia, Belarus, Georgia, Moldova, Kazakhstan, Russian Federation, Ukraine, Uzbekistan Tajikistan and Kyrgyz Rep.	1-Oct-99	WT/REG82/2	WT/REG82
Free Trade Agreement between the Kyrgyz Republic and Kazakhstan	29-Sep-99	WT/REG81/2	WT/REG81
Free Trade Agreement between the Kyrgyz Republic and the Russian Federation	15-Jun-99	WT/REG73/2	WT/REG73
Free Trade Agreement between the Kyrgyz Republic and Ukraine	15-Jun-99	WT/REG74/2	WT/REG74
Free Trade Agreement between the Kyrgyz Republic and Uzbekistan	15-Jun-99	WT/REG75/2	WT/REG75
Agreement on Customs Union and Single Economic Area between the Kyrgyz Republic, the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan and the Republic of Tajikistan	21-Apr-99	WT/REG71/3/Rev.1	WT/REG71
Agreement between the European Community on the one part and the Government of Denmark and the Home Government of the Faroe Islands on the other part	19-Feb-97	WT/REG21/2	WT/REG21
Customs Union between Turkey and the European Community	22-Dec-95	WT/REG22/4	WT/REG22

I. ANNEX III

1. List of RTAs notified under Article XXIV of the GATT 1994 for which factual examination has not yet commenced

Agreement	Date of Notification	Terms of Reference for the Examination	WTO Document series
Free Trade Agreement between Albania and Serbia Montenegro	19-Oct-04	WT/REG178/2	WT/REG178
Euro-Mediterranean Association Agreement between the European Community and Egypt	4-Oct-04	WT/REG177/2	WT/REG177
Southern African Development Community Free Trade Area	9-Aug-04	WT/REG176/3	WT/REG176
Free Trade Agreement between Armenia and Turkmenistan	27-Jul-04	WT/REG175/2	WT/REG175
Free Trade Agreement between Armenia and Russian Federation	27-Jul-04	WT/REG174/2	WT/REG174
Free Trade Agreement between Armenia and Moldova	27-Jul-04	WT/REG173/2	WT/REG173
Free Trade Agreement between Armenia and Kazakhstan	27-Jul-04	WT/REG172/2	WT/REG172
Free Trade Agreement between Armenia and Ukraine	27-Jul-04	WT/REG171/2	WT/REG171
Enlargement of the European Union	30-Apr-04	WT/REG170/1	WT/REG170
Free Trade Agreement between the Republic of Korea and Chile	19-Apr-04	WT/REG169/2	WT/REG169
Free Trade Agreement between Albania and the United Nations Interim Administration Mission in Kosovo (UNMIK)	8-Apr-04	WT/REG168/2	WT/REG168
Free Trade Agreement between Albania and Bulgaria	31-Mar-04	WT/REG167/2	WT/REG167
Free Trade Agreement between Croatia and Albania	31-Mar-04	WT/REG166/2	WT/REG166
Central European Free Trade Agreement – Accession of the Republic of Croatia	3-Mar-04	WT/REG11/13	WT/REG11
EC – Chile Interim Agreement	18-Feb-04	WT/REG164/3	WT/REG164
Free-Trade Agreement between Chile and El Salvador	16-Feb-04	WT/REG165/3	WT/REG165
Closer Economic Partnership Arrangement between China and Macao, China	12-Jan-04	WT/REG163/2	WT/REG163
Closer Economic Partnership Arrangement between China and Hong Kong, China	12-Jan-04	WT/REG162/2	WT/REG162
Free Trade Agreement between the United States and Singapore	19-Dec-03	WT/REG161/2	WT/REG161
Free Trade Agreement between the United States and Chile	19-Dec-03	WT/REG160/2	WT/REG160
Free Trade Agreement between Croatia and Bosnia and Herzegovina	6-Oct-03	WT/REG159/2	WT/REG159
Free Trade Agreement between Turkey and Bosnia and Herzegovina	8-Sep-03	WT/REG157/2	WT/REG157
EC – Lebanon Interim Agreement	4-Jun-03	WT/REG153/2	WT/REG153
Free Trade Agreement between Bulgaria and Israel	14-Apr-03	WT/REG150/2	WT/REG150
Trade, Development and Cooperation Agreement between the European Community and South Africa	21-Nov-00	WT/REG113/2	WT/REG113
Interim Agreement between the EFTA states and the Palestine Liberation Organization for the benefit of the Palestinian Authority	21-Sep-99	WT/REG79/2	WT/REG79
Euro-Mediterranean Interim Association Agreement on Trade and Co-operation between the European Community and the Palestine Liberation Organization for the benefit of the Palestinian Authority of the West Bank and Gaza Strip	30-Jun-97	WT/REG43/2	WT/REG43

J. ANNEX IV

1. List of RTAs notified under Article XXIV of the GATT 1994 which have not yet been considered by the Council for Trade in Goods

Agreement	Date of Notification	WTO Document series
Free Trade Agreement between the United States and Australia	23-Dec-04	WT/REG184
Free Trade Agreement between Albania and Moldova	20-Dec-04	WT/REG183
Free Trade Agreement between Albania and FYROM	14-Dec-04	WT/REG182
Free Trade Agreement between Albania and Bosnia and Herzegovina	14-Dec-04	WT/REG181
Free Trade Agreement between Albania and Romania	14-Dec-04	WT/REG180
Free Trade Agreement between the EFTA States and Chile	10-Dec-04	WT/REG179

K. ANNEX V

1. RTAs notified under Article XXIV of the GATT 1994 which have been terminated following the Enlargement of the European Union on 1 May 2004

Agreement	Terms of Reference for the Examination	Notification of Termination	WTO Document series
Free Trade Agreement between the Czech Republic and the Republic of Estonia	WT/REG62/3	WT/REG/GEN/N/3	WT/REG62
Free Trade Agreement between the Czech Republic and the Republic of Latvia	WT/REG45/2	WT/REG/GEN/N/3	WT/REG45
Free Trade Agreement between the Czech Republic and the Republic of Lithuania	WT/REG46/1	WT/REG/GEN/N/3	WT/REG46
Free Trade Agreement between the Czech Republic and Israel	WT/REG56/3	WT/REG/GEN/N/3	WT/REG56
Free Trade Agreement between Turkey and the Czech Republic	WT/REG67/3	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG67
Free Trade Agreement between Turkey and Estonia	WT/REG70/3	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG70
Free Trade Agreement between Estonia and the Faroe Islands	WT/REG64/2	WT/REG/GEN/N/3	WT/REG64
Interim Agreement between the European Communities and Czech Republic	WT/REG18/1	WT/REG/GEN/N/3	WT/REG18
Free Trade Agreement between Estonia and the European Communities	WT/REG8/2	WT/REG/GEN/N/3	WT/REG8/2
Interim Agreement between the European Communities and Hungary	WT/REG18/1	WT/REG/GEN/N/3	WT/REG18
Free Trade Agreement between Latvia and the European Communities	WT/REG7/2	WT/REG/GEN/N/3	WT/REG7
Free Trade Agreement between Lithuania and the European Communities	WT/REG9/2	WT/REG/GEN/N/3	WT/REG9
Interim Agreement between the European Communities and Poland	WT/REG18/1	WT/REG/GEN/N/3	WT/REG18
Interim Agreement between the European Communities and Slovak Republic	WT/REG18/1	WT/REG/GEN/N/3	WT/REG18
Interim Agreement between the European Communities and the Republic of Slovenia	WT/REG32/3	WT/REG/GEN/N/3	WT/REG32
Free Trade Agreement between the EFTA States and Estonia	WT/REG28/3	WT/REG/GEN/N/3	WT/REG28
EFTA – Hungary Free Trade Agreement	WT/REG13/1	WT/REG/GEN/N/3	WT/REG13
Free Trade Agreement between the EFTA States and Latvia	WT/REG29/3	WT/REG/GEN/N/3	WT/REG29
Free Trade Agreement between the EFTA States and Lithuania	WT/REG30/3	WT/REG/GEN/N/3	WT/REG30
EFTA – Poland Free Trade Agreement	WT/REG15/1	WT/REG/GEN/N/3	WT/REG15
EFTA – Slovenia Free Trade Agreement	WT/REG20/3	WT/REG/GEN/N/3	WT/REG20
Free Trade Agreement between Bulgaria and Estonia	WT/REG149/2	WT/REG/GEN/N/3	WT/REG149
Agreements between Estonia, Latvia and Lithuania	WT/REG77/2	WT/REG/GEN/N/3	WT/REG77
Free Trade Agreement between Estonia and Ukraine	WT/REG108/2	WT/REG/GEN/N/3	WT/REG108

Table (*cont.*)

Agreement	Terms of Reference for the Examination	Notification of Termination	WTO Document series
Free Trade Agreement between Hungary and Estonia	WT/REG128/2	WT/REG/GEN/N/3	WT/REG128
Free Trade Agreement between Hungary and Latvia	WT/REG84/2	WT/REG/GEN/N/3	WT/REG84
Free Trade Agreement between Hungary and Lithuania	WT/REG83/2	WT/REG/GEN/N/3	WT/REG83
Free Trade Agreement between Hungary and Israel	WT/REG54/2	WT/REG/GEN/N/3	WT/REG54
Free Trade Agreement between Turkey and Hungary	WT/REG58/2	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG58
Free Trade Agreement between Bulgaria and Latvia	WT/REG151/2	WT/REG/GEN/N/3	WT/REG151
Free Trade Agreement between Turkey and Latvia	WT/REG116/2 and Corr.1	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG116
Free Trade Agreement between Bulgaria and Lithuania	WT/REG152/2	WT/REG/GEN/N/3	WT/REG152
Free Trade Agreement between Turkey and Lithuania	WT/REG61/2	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG61
Agreement between Poland and the Government of Denmark and the Home Government of the Faroe Islands	WT/REG78/2	WT/REG/GEN/N/3	WT/REG78
Free Trade Agreement between Poland and Latvia	WT/REG80/2	WT/REG/GEN/N/3	WT/REG80
Free Trade Agreement between Poland and the Republic of Lithuania	WT/REG49/2	WT/REG/GEN/N/3	WT/REG49
Free Trade Agreement between Israel and Poland	WT/REG65/2	WT/REG/GEN/N/3	WT/REG65
Free Trade Agreement between Turkey and Poland	WT/REG107/2	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG107
Free Trade Agreement between the Slovak Republic and the Republic of Estonia	WT/REG63/3	WT/REG/GEN/N/3	WT/REG63
Free Trade Agreement between the Slovak Republic and the Republic of Latvia	WT/REG47/2	WT/REG/GEN/N/3	WT/REG47
Free Trade Agreement between the Slovak Republic and the Republic of Lithuania	WT/REG48/2	WT/REG/GEN/N/3	WT/REG48
Free Trade Agreement between Israel and the Slovak Republic	WT/REG57/3	WT/REG/GEN/N/3	WT/REG57
Free Trade Agreement between Turkey and the Slovak Republic	WT/REG68/3	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG68
Free Trade Agreement between Slovenia and Bosnia and Herzegovina	WT/REG131/2	WT/REG/GEN/N/3	WT/REG131
Free Trade Agreement between Croatia and Slovenia	WT/REG55/3	WT/REG/GEN/N/3	WT/REG55
Free Trade Agreement between Slovenia and Estonia	WT/REG37/2	WT/REG/GEN/N/3	WT/REG37
Free Trade Agreement between Israel and Slovenia	WT/REG66/2	WT/REG/GEN/N/3	WT/REG66
Free Trade Agreement between Turkey and Slovenia	WT/REG135/2	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG135
Free Trade Agreement between the Former Yugoslav Republic of Macedonia and Slovenia	WT/REG36/3	WT/REG/GEN/N/3	WT/REG36
Free Trade Agreement between Latvia and Slovenia	WT/REG34/2	WT/REG/GEN/N/3	WT/REG34
Free Trade Agreement between Lithuania and Slovenia	WT/REG35/2	WT/REG/GEN/N/3	WT/REG35
Central European Free Trade Agreement – Accession of the Republic of Slovenia	WT/REG11/7	WT/REG11/N/7 WT/REG/GEN/N/3	WT/REG11

2. RTAs notified under the GATT 1947 which have been terminated following the Enlargement of the European Union on 1 May 2004

- Association Agreement between the European Community and Cyprus
- Association Agreement between the European Community and Malta
- EFTA – Czech Republic Free Trade Area
- EFTA – Slovak Republic Free Trade Area
- Czech and Slovak Customs Union

L. ANNEX VI

1. Reports on the operation of agreements – 2004 Schedule

Agreement	Document Reference	CRTA Reference
Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)	not submitted	…
Australia-Papua New Guinea Agreement (PATCRA)	not submitted	…
Caribbean Community and Common Market (CARICOM)	not submitted	…
Czech and Slovak Customs Union	not submitted	…
European Free Trade Association	WT/REG85/R/B/3	WT/REG/M/37
EFTA – Turkey Free Trade Area	WT/REG86/R/B/3	WT/REG/M/37
EFTA – Czech Republic Free Trade Area	not submitted	…
EFTA – Slovak Republic Free Trade Area	not submitted	…
General Treaty on Central American Economic Integration	WT/REG93/R/B/2*	WT/REG/M/37
Agreement between the European Communities and Switzerland	WT/REG94/R/B/3	WT/REG/M/37
Agreement between the European Communities and Iceland	WT/REG95/R/B/3	WT/REG/M/37
Association of Certain Overseas Countries and Territories Europe with the European Community	WT/REG106/R/B/3	WT/REG/M/37
Agreement between the European Communities and Norway	WT/REG137/R/B/2	WT/REG/M/37
Co-operation Agreement between the European Community and Algeria	not submitted	…
Association Agreement between the European Community and Cyprus	not submitted	…
Co-operation Agreement between the European Community and Egypt	not submitted	…
Association Agreement between the European Community and Malta	not submitted	…
Co-operation Agreement between the European Community and Syria	not submitted	…
Free Trade Area Agreement between Israel and the United States	not submitted	…

* Also covers the 2001 schedule of reports.

2. Reports on the operation of agreements – 2001 Schedule

Agreement	Document Reference	CRTA Reference
Australia-Papua New Guinea Agreement (PATCRA)	not submitted	…
Caribbean Community and Common Market (CARICOM)	not submitted	…
European Free Trade Association	WT/REG85/R/B/2	WT/REG/M/30
EFTA – Turkey Free Trade Area	WT/REG86/R/B/2	WT/REG/M/30
EFTA – Czech Republic Free Trade Area	WT/REG87/R/B/2	WT/REG/M/30
EFTA – Slovak Republic Free Trade Area	WT/REG88/R/B/2	WT/REG/M/30
Czech Republic – Slovak Republic Customs Union	WT/REG89/R/B/2	WT/REG/M/33
Agreement between the European Communities and Switzerland	WT/REG94/R/B/2	WT/REG/M/33
Agreement between the European Communities and Iceland	WT/REG95/R/B/2	WT/REG/M/33
Co-operation Agreement between the European Community and Egypt	WT/REG98/R/B/2	WT/REG/M/33
Co-operation Agreement between the European Community and Jordan	WT/REG100/R/B/2	WT/REG/M/33
Co-operation Agreement between the European Community and Lebanon	WT/REG101/R/B/1	WT/REG/M/33
Co-operation Agreement between the European Community and Syria	WT/REG104/R/B/2	WT/REG/M/33
Co-operation Agreement between the European Community and Algeria	WT/REG105/R/B/1	WT/REG/M/33
Association of Certain Overseas Countries and Territories Europe with the European Community	WT/REG106/R/B/2	WT/REG/M/33
Association Agreement between the European Community and Cyprus	not submitted	…
Association Agreement between the European Community and Malta	not submitted	…
Australia and New Zealand Closer Economic Relations Trade Agreement	WT/REG111/R/B/2	WT/REG/M/33
Agreement between the European Communities and Norway	WT/REG137/R/B/1	WT/REG/M/33
Free Trade Area Agreement between Israel and the United States	not submitted	…

XXVI. ARTICLE XXV

A. TEXT OF ARTICLE XXV

Article XXV
Joint Action by the Contracting Parties

1. Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement. Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES.

2. The Secretary-General of the United Nations is requested to convene the first meeting of the CONTRACTING PARTIES, which shall take place not later than March 1, 1948.

3. Each contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES.

4. Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.

5. In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote

(i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and

(ii) prescribe such criteria as may be necessary for the application of this paragraph[1].

(*footnote original*) [1] The authentic text erroneously reads "subparagraph".

B. INTERPRETATION AND APPLICATION OF ARTICLE XXV

726. With respect to decision-making by the WTO, see Chapter on the *WTO Agreement*, Sections V.B.1(d) and X.B.1 and X.B.3.

1. Reference to GATT practice

727. With respect to GATT practice on this subject-matter, see GATT Analytical Index, Article XXV, pages 874–888.

XXVII. ARTICLE XXVI

A. TEXT OF ARTICLE XXVI

Article XXVI
Acceptance, Entry into Force and Registration

1. The date of this Agreement shall be 30 October 1947.

2. This Agreement shall be open for acceptance by any contracting party which, on 1 March 1955, was a contracting party or was negotiating with a view to accession to this Agreement.

3. This Agreement, done in a single English original and a single French original, both texts authentic, shall be deposited with the Secretary-General of the United Nations, who shall furnish certified copies thereof to all interested governments.

4. Each government accepting this Agreement shall deposit an instrument of acceptance with the Executive Secretary[5] to the Contracting Parties, who will inform all interested governments of the date of deposit of each instrument of acceptance and of the day on which this Agreement enters into force under paragraph 6 of this Article.

(*footnote original*) [5] By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".

5. (*a*) Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility, except such separate customs territories as it shall notify to the Executive Secretary[5] to the CONTRACTING PARTIES at the time of its own acceptance.

(*b*) Any government, which has so notified the Executive Secretary[5] under the exceptions in subparagraph (*a*) of this paragraph, may at any time give notice to the Executive Secretary[5] that its acceptance shall be effective in respect of any separate customs territory or territories so excepted and such notice shall take effect on the thirtieth day following the day on which it is received by the Executive Secretary.[5]

(*c*) If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.

6. This Agreement shall enter into force, as among the governments which have accepted it, on the thirtieth day following the day on which instruments of acceptance have been deposited with Executive Secretary[6] to the Contracting Parties on behalf of governments

named in Annex H, the territories of which account for 85 per centum of the total external trade of the territories of such governments, computed in accordance with the applicable column of percentages set forth therein. The instrument of acceptance of each other government shall take effect on the thirtieth day following the day on which such instrument has been deposited.

(*footnote original*) [6] By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".

7. The United Nations is authorized to effect registration of this Agreement as soon as it enters into force.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXVI

728. With respect to acceptance, entry into force and deposit under the *WTO Agreement*, see Chapter on the *WTO Agreement*, Section XV.B.

1. Reference to GATT practice

729. With respect to GATT practice on this subject-matter, see GATT Analytical Index, Article XXVI, pages 909–923.

XXVIII. ARTICLE XXVII

A. TEXT OF ARTICLE XXVII

Article XXVII
Withholding or Withdrawal of Concessions

Any contracting party shall at any time be free to withhold or to withdraw in whole or in part any concession, provided for in the appropriate Schedule annexed to this Agreement, in respect of which such contracting party determines that it was initially negotiated with a government which has not become, or has ceased to be, a contracting party. A contracting party taking such action shall notify the CONTRACTING PARTIES and, upon request, consult with contracting parties which have a substantial interest in the product concerned.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXVII

No jurisprudence or decision of a competent WTO body.

1. Reference to GATT practice

730. With respect to GATT practice on this subject-matter, see GATT Analytical Index, Article XXVII, pages 927–930.

XXIX. ARTICLE XXVIII

A. TEXT OF ARTICLE XXVIII

*Article XXVIII**
Modification of Schedules

1. On the first day of each three-year period, the first period beginning on 1 January 1958 (or on the first day of any other period* that may be specified by the CONTRACTING PARTIES by two-thirds of the votes cast) a contracting party (hereafter in this Article referred to as the "applicant contracting party") may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest* (which two preceding categories of contracting parties, together with the applicant contracting party, are in this Article hereinafter referred to as the "contracting parties primarily concerned"), and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest* in such concession, modify or withdraw a concession* included in the appropriate schedule annexed to this Agreement.

2. In such negotiations and agreement, which may include provision for compensatory adjustment with respect to other products, the contracting parties concerned shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations.

3. (*a*) If agreement between the contracting parties primarily concerned cannot be reached before 1 January 1958 or before the expiration of a period envisaged in paragraph 1 of this Article, the contracting party which proposes to modify or withdraw the concession shall, nevertheless, be free to do so and if such action is taken any contracting party with which such concession was initially negotiated, any contracting party determined under paragraph 1 to have a principal supplying interest and any contracting party determined under paragraph 1 to have a substantial interest shall then be free not later than six months after such action is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

(*b*) If agreement between the contracting parties primarily concerned is reached but any other contracting party determined under paragraph 1 of this Article to have a substantial interest is not satisfied, such other contracting party shall be free, not later than six months after action under such agreement is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the

CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

4. The CONTRACTING PARTIES may, at any time, in special circumstances, authorize* a contracting party to enter into negotiations for modification or withdrawal of a concession included in the appropriate Schedule annexed to this Agreement subject to the following procedures and conditions:

(*a*) Such negotiations* and any related consultations shall be conducted in accordance with the provisions of paragraph 1 and 2 of this Article.

(*b*) If agreement between the contracting parties primarily concerned is reached in the negotiations, the provisions of paragraph 3 (*b*) of this Article shall apply.

(*c*) If agreement between the contracting parties primarily concerned is not reached within a period of sixty days* after negotiations have been authorized, or within such longer period as the CONTRACTING PARTIES may have prescribed, the applicant contracting party may refer the matter to the CONTRACTING PARTIES.

(*d*) Upon such reference, the CONTRACTING PARTIES shall promptly examine the matter and submit their views to the contracting parties primarily concerned with the aim of achieving a settlement. If a settlement is reached, the provisions of paragraph 3 (*b*) shall apply as if agreement between the contracting parties primarily concerned had been reached. If no settlement is reached between the contracting parties primarily concerned, the applicant contracting party shall be free to modify or withdraw the concession, unless the CONTRACTING PARTIES determine that the applicant contracting party has unreasonably failed to offer adequate compensation.* If such action is taken, any contracting party with which the concession was initially negotiated, any contracting party determined under paragraph 4 (*a*) to have a principal supplying interest and any contracting party determined under paragraph 4 (*a*) to have a substantial interest, shall be free, not later than six months after such action is taken, to modify or withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with applicant contracting party.

5. Before 1 January 1958 and before the end of any period envisaged in paragraph 1 a contracting party may elect by notifying the CONTRACTING PARTIES to reserve the right, for the duration of the next period, to modify the appropriate Schedule in accordance with the procedures of paragraph 1 to 3. If a contracting party so elects, other contracting parties shall have the right, during the same period, to modify or withdraw, in accordance with the same procedures, concessions initially negotiated with that contracting party.

B. TEXT OF *AD* ARTICLE XXVIII

Ad Article XXVIII

The CONTRACTING PARTIES and each contracting party concerned should arrange to conduct the negotiations and consultations with the greatest possible secrecy in order to avoid premature disclosure of details of prospective tariff changes. The CONTRACTING PARTIES shall be informed immediately of all changes in national tariffs resulting from recourse to this Article.

Paragraph 1

1. If the CONTRACTING PARTIES specify a period other than a three-year period, a contracting party may act pursuant to paragraph 1 or paragraph 3 of Article XXVIII on the first day following the expiration of such other period and, unless the CONTRACTING PARTIES have again specified another period, subsequent periods will be three-year periods following the expiration of such specified period.

2. The provision that on 1 January 1958, and on other days determined pursuant to paragraph 1, a contracting party "may . . . modify or withdraw a concession" means that on such day, and on the first day after the end of each period, the legal obligation of such contracting party under Article II is altered; it does not mean that the changes in its customs tariff should necessarily be made effective on that day. If a tariff change resulting from negotiations undertaken pursuant to this Article is delayed, the entry into force of any compensatory concessions may be similarly delayed.

3. Not earlier than six months, nor later than three months, prior to 1 January 1958, or to the termination date of any subsequent period, a contracting party wishing to modify or withdraw any concession embodied in the appropriate Schedule, should notify the CONTRACTING PARTIES to this effect. The CONTRACTING PARTIES shall then determine the contracting party or contracting parties with which the negotiations or consultations referred to in paragraph 1 shall take place. Any contracting party so determined shall participate in such negotiations or consultations with the applicant contracting party with the aim of reaching agreement before the end of the period. Any extension of the assured life of the Schedules shall relate to the Schedules as modified after such negotiations, in accordance with paragraphs 1, 2, and 3 of Article XXVIII. If the CONTRACTING PARTIES are arranging for multilateral tariff

negotiations to take place within the period of six months before 1 January 1958, or before any other day determined pursuant to paragraph 1, they shall include in the arrangements for such negotiations suitable procedures for carrying out the negotiations referred to in this paragraph.

4. The object of providing for the participation in the negotiation of any contracting party with a principle supplying interest, in addition to any contracting party with which the concession was originally negotiated, is to ensure that a contracting party with a larger share in the trade affected by the concession than a contracting party with which the concession was originally negotiated shall have an effective opportunity to protect the contractual right which it enjoys under this Agreement. On the other hand, it is not intended that the scope of the negotiations should be such as to make negotiations and agreement under Article XXVIII unduly difficult nor to create complications in the application of this Article in the future to concessions which result from negotiations thereunder. Accordingly, the CONTRACTING PARTIES should only determine that a contracting party has a principal supplying interest if that contracting party has had, over a reasonable period of time prior to the negotiations, a larger share in the market of the applicant contracting party than a contracting party with which the concession was initially negotiated or would, in the judgement of the CONTRACTING PARTIES, have had such a share in the absence of discriminatory quantitative restrictions maintained by the applicant contracting party. It would therefore not be appropriate for the CONTRACTING PARTIES to determine that more than one contracting party, or in those exceptional cases where there is near equality more than two contracting parties, had a principal supplying interest.

5. Notwithstanding the definition of a principal supplying interest in note 4 to paragraph 1, the CONTRACTING PARTIES may exceptionally determine that a contracting party has a principal supplying interest if the concession in question affects trade which constitutes a major part of the total exports of such contracting party.

6. It is not intended that provision for participation in the negotiations of any contracting party with a principal supplying interest, and for consultation with any contracting party having a substantial interest in the concession which the applicant contracting party is seeking to modify or withdraw, should have the effect that it should have to pay compensation or suffer retaliation greater than the withdrawal or modification sought, judged in the light of the conditions of trade at the time of the proposed withdrawal or modification, making allowance for any discriminatory quantitative restrictions maintained by the applicant contracting party.

7. The expression "substantial interest" is not capable of a precise definition and accordingly may present difficulties for the CONTRACTING PARTIES. It is, however, intended to be construed to cover only those contracting parties which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably be expected to have, a significant share in the market of the contracting party seeking to modify or withdraw the concession.

Paragraph 4

1. Any request for authorization to enter into negotiations shall be accompanied by all relevant statistical and other data. A decision on such request shall be made within thirty days of its submission.

2. It is recognized that to permit certain contracting parties, depending in large measure on a relatively small number of primary commodities and relying on the tariff as an important aid for furthering diversification of their economies or as an important source of revenue, normally to negotiate for the modification or withdrawal of concessions only under paragraph 1 of Article XXVIII, might cause them at such time to make modifications or withdrawals which in the long run would prove unnecessary. To avoid such a situation the CONTRACTING PARTIES shall authorize any such contracting party, under paragraph 4, to enter into negotiations unless they consider this would result in, or contribute substantially towards, such an increase in tariff levels as to threaten the stability of the Schedules to this Agreement or lead to undue disturbance of international trade.

3. It is expected that negotiations authorized under paragraph 4 for modification or withdrawal of a single item, or a very small group of items, could normally be brought to a conclusion in sixty days. It is recognized, however, that such a period will be inadequate for cases involving negotiations for the modification or withdrawal of a larger number of items and in such cases, therefore, it would be appropriate for the CONTRACTING PARTIES to prescribe a longer period.

4. The determination referred to in paragraph 4 *(d)* shall be made by the CONTRACTING PARTIES within thirty days of the submission of the matter to them unless the applicant contracting party agrees to a longer period.

5. In determining under paragraph 4 *(d)* whether an applicant contracting party has unreasonably failed to offer adequate compensation, it is understood that the CONTRACTING PARTIES will take due account of the special position of a contracting party which has bound a high proportion of its tariffs at very low rates of duty and to this extent has less scope than other contracting parties to make compensatory adjustment.

C. UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XXVIII OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members hereby *agree* as follows:

1. For the purposes of modification or withdrawal of a concession, the Member which has the highest ratio of exports affected by the concession (i.e. exports of the product to the market of the Member modifying or withdrawing the concession) to its total exports shall be deemed to have a principal supplying interest if it does not already have an initial negotiating right or a principal supplying interest as provided for in paragraph 1 of Article XXVIII. It is however agreed that this paragraph will be reviewed by the Council for Trade in Goods five years from the date of entry into force of the WTO Agreement with a view to deciding whether this criterion has worked satisfactorily in securing a redistribution of negotiating rights in favour of small and medium-sized exporting Members. If this is not the case, consideration will be given to possible improvements, including, in the light of the availability of adequate data, the adoption of a criterion based on the ratio of exports affected by the concession to exports to all markets of the product in question.

2. Where a Member considers that it has a principal supplying interest in terms of paragraph 1, it should communicate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession, and at the same time inform the Secretariat. Paragraph 4 of the "Procedures for Negotiations under Article XXVIII" adopted on 10 November 1980 (BISD 27S/26–28) shall apply in these cases.

3. In the determination of which Members have a principal supplying interest (whether as provided for in paragraph 1 above or in paragraph 1 of Article XXVIII) or substantial interest, only trade in the affected product which has taken place on an MFN basis shall be taken into consideration. However, trade in the affected product which has taken place under non-contractual preferences shall also be taken into account if the trade in question has ceased to benefit from such preferential treatment, thus becoming MFN trade, at the time of the negotiation for the modification or withdrawal of the concession, or will do so by the conclusion of that negotiation.

4. When a tariff concession is modified or withdrawn on a new product (i.e. a product for which three years' trade statistics are not available) the Member possessing initial negotiating rights on the tariff line where the product is or was formerly classified shall be deemed to have an initial negotiating right in the concession in question. The determination of principal supplying and substantial interests and the calculation of compensation shall take into account, *inter alia,* production capacity and investment in the affected product in the exporting Member and estimates of export growth, as well as forecasts of demand for the product in the importing Member. For the purposes of this paragraph, "new product" is understood to include a tariff item created by means of a breakout from an existing tariff line.

5. Where a Member considers that it has a principal supplying or a substantial interest in terms of paragraph 4, it should communicate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession, and at the same time inform the Secretariat. Paragraph 4 of the above-mentioned "Procedures for Negotiations under Article XXVIII" shall apply in these cases.

6. When an unlimited tariff concession is replaced by a tariff rate quota, the amount of compensation provided should exceed the amount of the trade actually affected by the modification of the concession. The basis for the calculation of compensation should be the amount by which future trade prospects exceed the level of the quota. It is understood that the calculation of future trade prospects should be based on the greater of:

(a) the average annual trade in the most recent representative three-year period, increased by the average annual growth rate of imports in that same period, or by 10 per cent, whichever is the greater; or

(b) trade in the most recent year increased by 10 per cent.

In no case shall a Member's liability for compensation exceed that which would be entailed by complete withdrawal of the concession.

7. Any Member having a principal supplying interest, whether as provided for in paragraph 1 above or in paragraph 1 of Article XXVIII, in a concession which is modified or withdrawn shall be accorded an initial negotiating right in the compensatory concessions, unless another form of compensation is agreed by the Members concerned.

D. INTERPRETATION AND APPLICATION OF ARTICLE XXVIII

1. Legal relevance of Article XXVIII negotiations in interpretation of GATT Articles

731. In *EC – Poultry*, Brazil claimed that the MFN principle in Articles I and XIII did not apply to tariff-rate quotas resulting from compensation negotiations under Article XXVIII of the *GATT*. The Panel rejected this argument and held:

"[I]f a preferential treatment of a particular trading partner not elsewhere justified is permitted under the pretext

of 'compensatory adjustment' under Article XXVIII:2, it would create a serious loophole in the multilateral trading system. Such a result would fundamentally alter the overall balance of concessions Article XXVIII is designed to achieve."[1029]

732. The Panel concluded that a tariff-rate quota which resulted from negotiations under Article XXVIII of the *GATT 1947*, and which was incorporated into a Member's Uruguay Round Schedule, must be administered in a non-discriminatory manner consistent with Article XIII of the *GATT 1994*.[1030] The Appellate Body agreed:

"We see nothing in Article XXVIII to suggest that compensation negotiated within its framework may be exempt from compliance with the non-discrimination principle inscribed in Articles I and XIII of the GATT 1994. As the Panel observed, this interpretation is, furthermore, supported by the negotiating history of Article XXVIII. Regarding the provision which eventually became Article XXVIII:3, the Chairman of the Tariff Agreements Committee at Geneva in 1947, concluded:

'It was agreed that there was no intention to interfere in any way with the operation of the most-favoured-nation clause. This Article is headed "Modification of Schedules". It refers throughout to concessions negotiated under paragraph 1 of Article II, the Schedules, and there is no reference to Article I, which is the Most-Favoured-Nation Clause. Therefore, I think the intent is clear: that in no way should this Article interfere with the operation of the Most-Favoured-Nation Clause.'[1031]

Although this statement refers specifically to the MFN clause in Article I of the GATT, logic requires that it applies equally to the non-discriminatory administration of quotas and tariff-rate quotas under Article XIII of the GATT 1994."[1032]

2. Review of the Understanding on the Interpretation of Article XXVIII of the GATT 1994

733. On 24 January 2000, the Council for Trade in Goods requested the Committee on Market Access to conduct the review envisaged in paragraph 1 of the Understanding on the Interpretation of Article XXVIII of the *GATT 1994*.[1033] On 12 October 2000, the Committee on Market Access agreed to report to the Council for Trade in Goods that the review had been carried out as mandated by that body and that, at that stage, there was no basis to change the criterion contained in paragraph 1 of the aforementioned Understanding, with a reservation that in the future any Member would be free to raise this matter when necessary.[1034]

3. Reference to GATT practice

734. With respect to GATT practice under Article XXVIII, see GATT Analytical Index, pages 933–984.

XXX. ARTICLE XXVIII *BIS*

A. TEXT OF ARTICLE XXVIII *BIS*

Article XXVIII bis
Tariff Negotiations

1. The contracting parties recognize that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of individual contracting parties, are of great importance to the expansion of international trade. The CONTRACTING PARTIES may therefore sponsor such negotiations from time to time.

2. (*a*) Negotiations under this Article may be carried out on a selective product-by-product basis or by the application of such multilateral procedures as may be accepted by the contracting parties concerned. Such negotiations may be directed towards the reduction of duties, the binding of duties at then existing levels or undertakings that individual duties or the average duties on specified categories of products shall not exceed specified levels. The binding against increase of low duties or of duty-free treatment shall, in principle, be recognized as a concession equivalent in value to the reduction of high duties.

(*b*) The contracting parties recognize that in general the success of multilateral negotiations would depend on the participation of all contracting parties which conduct a substantial proportion of their external trade with one another.

3. Negotiations shall be conducted on a basis which affords adequate opportunity to take into account:

(*a*) the needs of individual contracting parties and individual industries;

(*b*) the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special

[1029] Panel Report on *EC – Poultry*, para. 215.
[1030] Appellate Body Report on *EC – Poultry*, para. 102.
[1031] (*footnote original*) EPCT/TAC/PV/18, p. 46; see Panel Report, para. 217.
[1032] Appellate Body Report on *EC – Poultry*, para. 100.
[1033] G/C/M/42, para. 4.
[1034] G/MA/M/26, Section 6.

needs of these countries to maintain tariffs for revenue purposes; and

(c) all other relevant circumstances, including the fiscal,* developmental, strategic and other needs of the contracting parties concerned.

B. TEXT OF *AD* ARTICLE XXVIII *BIS*

Ad Article XXVIII bis
Paragraph 3

It is understood that the reference to fiscal needs would include the revenues aspect of duties and particularly duties imposed primarily for revenue purpose, or duties imposed on products which can be substituted for products subject to revenue duties to prevent the avoidance of such duties.

C. INTERPRETATION AND APPLICATION OF ARTICLE XXVIII *BIS*

No jurisprudence or decision of a competent WTO body.

XXXI. ARTICLE XXIX

A. TEXT OF ARTICLE XXIX

Article XXIX
The Relation of this Agreement to the Havana Charter

1. The contracting parties undertake to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter pending their acceptance of it in accordance with their constitutional procedures.*

2. Part II of this Agreement shall be suspended on the day on which the Havana Charter enters into force.

3. If by September 30, 1949, the Havana Charter has not entered into force, the contracting parties shall meet before December 31, 1949, to agree whether this Agreement shall be amended, supplemented or maintained.

4. If at any time the Havana Charter should cease to be in force, the CONTRACTING PARTIES shall meet as soon as practicable thereafter to agree whether this Agreement shall be supplemented, amended or maintained. Pending such agreement, Part II of this Agreement shall again enter into force; *Provided* that the provisions of Part II other than Article XXIII shall be replaced, *mutatis mutandis,* in the form in which they then appeared in the Havana Charter; and *Provided* further that no contracting party shall be bound by any provisions which did not bind it at the time when the Havana Charter ceased to be in force.

5. If any contracting party has not accepted the Havana Charter by the date upon which it enters into force, the CONTRACTING PARTIES shall confer to agree whether, and if so in what way, this Agreement in so far as it affects relations between such contracting party and other contracting parties, shall be supplemented or amended. Pending such agreement the provisions of Part II of this Agreement shall, notwithstanding the provisions of paragraph 2 of this Article, continue to apply as between such contracting party and other contracting parties.

6. Contracting parties which are Members of the International Trade Organization shall not invoke the provisions of this Agreement so as to prevent the operation of any provision of the Havana Charter. The application of the principle underlying this paragraph to any contracting party which is not a Member of the International Trade Organization shall be the subject of an agreement pursuant to paragraph 5 of this Article.

B. TEXT OF *AD* ARTICLE XXIX

Ad Article XXIX
Paragraph 1

Chapters VII and VIII of the Havana Charter have been excluded from paragraph 1 because they generally deal with the organization, functions and procedures of the International Trade Organization.

C. INTERPRETATION AND APPLICATION OF ARTICLE XXIX

No jurisprudence or decision of a competent WTO body.

XXXII. ARTICLE XXX

A. TEXT OF ARTICLE XXX

Article XXX
Amendments

1. Except where provision for modification is made elsewhere in this Agreement, amendments to the provisions of Part I of this Agreement or the provisions of Article XXIX or of this Article shall become effective upon acceptance by all the contracting parties, and other amendments to this Agreement shall become effective, in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it.

2. Any contracting party accepting an amendment to this Agreement shall deposit an instrument of acceptance with the Secretary-General of the United Nations within such period as the CONTRACTING PARTIES may specify. The CONTRACTING PARTIES may decide that any amendment made effective under this Article is of such a nature that any contracting party which has not accepted it within a period specified by the CONTRACTING PARTIES shall be free to withdraw from this Agreement, or to remain a contracting party with the consent of the CONTRACTING PARTIES.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXX

735. With respect to amendments to the *WTO Agreement*, see Chapter on the *WTO Agreement*, Section XI.B.

1. Reference to GATT practice

736. With respect to GATT practice under Article XXX, see GATT Analytical Index, pages 1002–1008.

XXXIII. ARTICLE XXXI

A. TEXT OF ARTICLE XXXI

Article XXXI
Withdrawal

Without prejudice to the provisions of paragraph 12 of Article XVIII, of Article XXIII or of paragraph 2 of Article XXX, any contracting party may withdraw from this Agreement, or may separately withdraw on behalf of any of the separate customs territories for which it has international responsibility and which at the time possesses full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement. The withdrawal shall take effect upon the expiration of six months from the day on which written notice of withdrawal is received by the Secretary-General of the United Nations.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXXI

737. With respect to withdrawal from the WTO, see Chapter on the *WTO Agreement*, Section XVI.B.

1. Reference to GATT practice

738. With respect to GATT practice under Article XXXI, see GATT Analytical Index, pages 1011–1012.

XXXIV. ARTICLE XXXII

A. TEXT OF ARTICLE XXXII

Article XXXII
Contracting Parties

1. The contracting parties to this Agreement shall be understood to mean those governments which are applying the provisions of this Agreement under Articles XXVI or XXXIII or pursuant to the Protocol of Provisional Application.

2. At any time after the entry into force of this Agreement pursuant to paragraph 6 of Article XXVI, those contracting parties which have accepted this Agreement pursuant to paragraph 4 of Article XXVI may decide that any contracting party which has not so accepted it shall cease to be a contracting party.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXXII

No jurisprudence or decision of a competent WTO body.

1. Reference to GATT practice

739. With respect to GATT practice under Article XXXII, see GATT Analytical Index, pages 1013–1014.

XXXV. ARTICLE XXXIII

A. TEXT OF ARTICLE XXXIII

Article XXXIII
Accession

A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXXIII

740. With respect to accession to the WTO, see Chapter on the *WTO Agreement*, Section XIII.B.

1. Reference to GATT practice

741. With respect to GATT practice under Article XXXIII, see GATT Analytical Index, pages 1017–1028.

XXXVI. ARTICLE XXXIV

A. TEXT OF ARTICLE XXXIV

Article XXXIV
Annexes

The annexes to this Agreement are hereby made an integral part of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXXIV

742. See Chapter on the *WTO Agreement*, Section III.B.

1. Reference to GATT practice

743. With respect to GATT practice under Article XXXIV, see GATT Analytical Index, page 1029.

XXXVII. ARTICLE XXXV

A. TEXT OF ARTICLE XXXV

Article XXXV
Non-application of the Agreement between Particular Contracting Parties

1. This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if:

(*a*) the two contracting parties have not entered into tariff negotiations with each other, and

(*b*) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.

2. The CONTRACTING PARTIES may review the operation of this Article in particular cases at the request of any contracting party and make appropriate recommendations.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXXV

744. With respect to the non-application of the Multilateral Trade Agreements between particular Members, see Chapter on the *WTO Agreement*, Section XIV.B.

1. Reference to GATT practice

745. With respect to GATT practice under Article XXXV, see GATT Analytical Index, pages 1031–1038.

PART IV*
TRADE AND DEVELOPMENT

XXXVIII. ARTICLE XXXVI

A. TEXT OF ARTICLE XXXVI

Article XXXVI
Principles and Objectives

1.* The contracting parties,

(*a*) recalling that the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less-developed contracting parties;

(*b*) considering that export earnings of the less-developed contracting parties can play a vital part in their economic development and that the extent of this contribution depends on the prices paid by the less-developed contracting parties for essential imports, the volume of their exports, and the prices received for these exports;

(*c*) noting, that there is a wide gap between standards of living in less-developed countries and in other countries;

(*d*) recognizing that individual and joint action is essential to further the development of the economies of less-developed contracting parties and to bring about a rapid advance in the standards of living in these countries;

(*e*) recognizing that international trade as a means of achieving economic and social advancement should be governed by such rules and procedures – and measures in conformity with such rules and procedures – as are consistent with the objectives set forth in this Article;

(*f*) noting that the CONTRACTING PARTIES may enable less-developed contracting parties to use special measures to promote their trade and development;

agree as follows.

2. There is need for a rapid and sustained expansion of the export earnings of the less-developed contracting parties.

3. There is need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.

4. Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products,* there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, and wherever appropriate to devise measures designed to stabilize and improve conditions of world markets in these products, including in particular measures designed to attain stable, equitable and remunerative prices, thus permitting an expansion of world trade and demand and a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development.

5. The rapid expansion of the economies of the less-developed contracting parties will be facilitated by a diversification* of the structure of their economies and the avoidance of an excessive dependence on the export of primary products. There is, therefore, need for increased access in the largest possible measure to markets under favourable conditions for processed and manufactured products currently or potentially of particular export interest to less-developed contracting parties.

6. Because of the chronic deficiency in the export proceeds and other foreign exchange earnings of less-

developed contracting parties, there are important interrelationships between trade and financial assistance to development. There is, therefore, need for close and continuing collaboration between the CONTRACTING PARTIES and the international lending agencies so that they can contribute most effectively to alleviating the burdens these less-developed contracting parties assume in the interest of their economic development.

7. There is need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less-developed countries.

8. The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.*

9. The adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly.

B. TEXT OF *AD* ARTICLE XXXVI

Ad Article XXXVI
Paragraph 1

This Article is based upon the objectives set forth in Article I as it will be amended by Section A of paragraph 1 of the Protocol Amending Part I and Articles XXIX and XXX when that Protocol enters into force.[1]

(*footnote original*) [1] This Protocol was abandoned on 1 January 1968.

Paragraph 4

The term "primary products" includes agricultural products, *vide* paragraph 2 of the note *ad* Article XVI, Section B.

Paragraph 5

A diversification programme would generally include the intensification of activities for the processing of primary products and the development of manufacturing industries, taking into account the situation of the particular contracting party and the world outlook for production and consumption of different commodities.

Paragraph 8

It is understood that the phrase "do not expect reciprocity" means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments.

This paragraph would apply in the event of action under Section A of Article XVIII, Article XXVIII, Article XXVIII *bis* (Article XXIX after the amendment set forth in Section A of paragraph 1 of the Protocol Amending Part I and Articles XXIX and XXX shall have become effective[2]), Article XXXIII, or any other procedure under this Agreement.

(*footnote original*) [2] This Protocol was abandoned on 1 January 1968.

C. INTERPRETATION AND APPLICATION OF ARTICLE XXXVI

746. With respect to the issue of trade and development under the *WTO Agreement*, see the Chapter on the *WTO Agreement*, paragraphs V.B.7. Also, with respect to special and preferential treatment for developing country Members, see V.B.7(a)(iv).

1. Reference to GATT practice

747. With respect to GATT practice under Article XXXVI, see GATT Analytical Index, pages 1055–1058.

XXXIX. ARTICLE XXXVII

A. TEXT OF ARTICLE XXXVII

Article XXXVII
Commitments

1. The developed contracting parties shall to the fullest extent possible – that is, except when compelling reasons, which may include legal reasons, make it impossible – give effect to the following provisions:

(*a*) accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties, including customs duties and other restrictions which differentiate unreasonably between such products in their primary and in their processed forms;*

(*b*) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties; and

(*c*) (i) refrain from imposing new fiscal measures, and

(ii) in any adjustments of fiscal policy accord high priority to the reduction and elimination of fiscal measures, which would hamper, or which hamper, significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced in the territories of less-

developed contracting parties, and which are applied specifically to those products.

2. (*a*) Whenever it is considered that effect is not being given to any of the provisions of subparagraph (*a*), (*b*) or (*c*) of paragraph 1, the matter shall be reported to the CONTRACTING PARTIES either by the contracting party not so giving effect to the relevant provisions or by any other interested contracting party.

(b) (i) The CONTRACTING PARTIES shall, if requested so to do by any interested contracting party, and without prejudice to any bilateral consultations that may be undertaken, consult with the contracting party concerned and all interested contracting parties with respect to the matter with a view to reaching solutions satisfactory to all contracting parties concerned in order to further the objectives set forth in Article XXXVI. In the course of these consultations, the reasons given in cases where effect was not being given to the provisions of subparagraph (*a*), (*b*) or (*c*) of paragraph 1 shall be examined.

(ii) As the implementation of the provisions of subparagraph (a), (b) or (c) of paragraph 1 by individual contracting parties may in some cases be more readily achieved where action is taken jointly with other developed contracting parties, such consultation might, where appropriate, be directed towards this end.

(iii) The consultations by the CONTRACTING PARTIES might also, in appropriate cases, be directed towards agreement on joint action designed to further the objectives of this Agreement as envisaged in paragraph 1 of Article XXV.

3. The developed contracting parties shall:

(*a*) make every effort, in cases where a government directly or indirectly determines the resale price of products wholly or mainly produced in the territories of less-developed contracting parties, to maintain trade margins at equitable levels;

(*b*) give active consideration to the adoption of other measures* designed to provide greater scope for the development of imports from less-developed contracting parties and collaborate in appropriate international action to this end;

(*c*) have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties.

4. Less-developed contracting parties agree to take appropriate action in implementation of the provisions of Part IV for the benefit of the trade of other less-developed contracting parties, in so far as such action is consistent with their individual present and future development, financial and trade needs taking into account past trade developments as well as the trade interests of less-developed contracting parties as a whole.

5. In the implementation of the commitments set forth in paragraph 1 to 4 each contracting party shall afford to any other interested contracting party or contracting parties full and prompt opportunity for consultations under the normal procedures of this Agreement with respect to any matter or difficulty which may arise.

B. TEXT OF *AD* ARTICLE XXXVII

Ad Article XXXVII
Paragraph 1 (a)

This paragraph would apply in the event of negotiations for reduction or elimination of tariffs or other restrictive regulations of commerce under Articles XXVIII, XXVIII *bis* (XXIX after the amendment set forth in Section A of paragraph 1 of the Protocol Amending Part I and Articles XXIX and XXX shall have become effective[13]), and Article XXXIII, as well as in connection with other action to effect such reduction or elimination which contracting parties may be able to undertake.

(*footnote original*) [13] This Protocol was abandoned on 1 January 1968.

Paragraph 3 (b)

The other measures referred to in this paragraph might include steps to promote domestic structural changes, to encourage the consumption of particular products, or to introduce measures of trade promotion.

C. INTERPRETATION AND APPLICATION OF ARTICLE XXXVII

748. With respect to the issue of trade and development under the *WTO Agreement*, see the Chapter on the *WTO Agreement*, Section V.B.7. Also, with respect to special and preferential treatment for developing country Members, see Section V.B.7(a)(iv).

1. Reference to GATT practice

749. With respect to GATT practice under Article XXXVII, see GATT Analytical Index, pages 1061–1068.

XL. ARTICLE XXXVIII

A. TEXT OF ARTICLE XXXVIII

Article XXXVIII
Joint Action

1. The contracting parties shall collaborate jointly, with the framework of this Agreement and elsewhere, as

appropriate, to further the objectives set forth in Article XXXVI.

2. In particular, the CONTRACTING PARTIES shall:

(*a*) where appropriate, take action, including action through international arrangements, to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties and to devise measures designed to stabilize and improve conditions of world markets in these products including measures designed to attain stable, equitable and remunerative prices for exports of such products;

(*b*) seek appropriate collaboration in matters of trade and development policy with the United Nations and its organs and agencies, including any institutions that may be created on the basis of recommendations by the United Nations Conference on Trade and Development;

(*c*) collaborate in analysing the development plans and policies of individual less-developed contracting parties and in examining trade and aid relationships with a view to devising concrete measures to promote the development of export potential and to facilitate access to export markets for the products of the industries thus developed and, in this connection, seek appropriate collaboration with governments and international organizations, and in particular with organizations having competence in relation to financial assistance for economic development, in systematic studies of trade and aid relationships in individual less-developed contracting parties aimed at obtaining a clear analysis of export potential, market prospects and any further action that may be required;

(*d*) keep under continuous review the development of world trade with special reference to the rate of growth of the trade of less-developed contracting parties and make such recommendations to contracting parties as may, in the circumstances, be deemed appropriate;

(*e*) collaborate in seeking feasible methods to expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and regulations, through technical and commercial standards affecting production, transportation and marketing, and through export promotion by the establishment of facilities for the increased flow of trade information and the development of market research; and

(*f*) establish such institutional arrangements as may be necessary to further the objectives set forth in Article XXXVI and to give effect to the provision of this Part.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXXVIII

750. With respect to the issue of trade and development under the *WTO Agreement*, see the Chapter on the *WTO Agreement*, Section V.B.7. Also, with respect to special and preferential treatment for developing country Members, see V.B.7.(a)(iv).

1. Reference to GATT practice

751. With respect to GATT practice under Article XXXVIII, see GATT Analytical Index, page 1071.

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Having decided to establish a basis for initiating a process of reform of trade in agriculture in line with the objectives of the negotiations as set out in the Punta del Este Declaration;

Recalling that their long-term objective as agreed at the Mid-Term Review of the Uruguay Round "is to establish a fair and market-oriented agricultural trading system and that a reform process should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines";

Recalling further that "the above-mentioned long-term objective is to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets";

Committed to achieving specific binding commitments in each of the following areas: market access; domestic support; export competition; and to reaching an agreement on sanitary and phytosanitary issues;

Having agreed that in implementing their commitments on market access, developed country Members would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members, including the fullest liberalization of trade in tropical agricultural products as agreed at the Mid-Term Review, and for products of particular importance to the diversification of production from the growing of illicit narcotic crops;

Noting that commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and the need to protect the environment; having regard to the agreement that special and differential treatment for developing countries is an integral element of the negotiations, and taking into account the possible negative effects of the implementation of the reform programme on least-developed and net food-importing developing countries;

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

1. "objectives of the negotiations as set out in the Punta del Este Declaration"

1. The objectives of the Uruguay Round negotiations in the agriculture sector are set out in the Ministerial Declaration on the Uruguay Round.[1]

2. Long-term objective of the reform process and the Mid-Term Review

2. At the Mid-Term Review of the Uruguay Round, Ministers agreed on the long-term objective of the Uruguay Round negotiations in the agriculture sector.[2]

PART I

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1
Definition of Terms

In this Agreement, unless the context otherwise requires:

(a) "Aggregate Measurement of Support" and "AMS" mean the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, which is:

(i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule; and

(ii) with respect to support provided during any year of the implementation period and thereafter, calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material

[1] BISD 33S/19, Part I, Section D.
[2] MTN.TNC/11, pp. 6–7.

incorporated by reference in Part IV of the Member's Schedule;

(b) "basic agricultural product" in relation to domestic support commitments is defined as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material;

(c) "budgetary outlays" or "outlays" includes revenue foregone;

(d) "Equivalent Measurement of Support" means the annual level of support, expressed in monetary terms, provided to producers of a basic agricultural product through the application of one or more measures, the calculation of which in accordance with the AMS methodology is impracticable, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, and which is:

(i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule; and

(ii) with respect to support provided during any year of the implementation period and thereafter, calculated in accordance with the provisions of Annex 4 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule;

(e) "export subsidies" refers to subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement;

(f) "implementation period" means the six-year period commencing in the year 1995, except that, for the purposes of Article 13, it means the nine-year period commencing in 1995;

(g) "market access concessions" includes all market access commitments undertaken pursuant to this Agreement;

(h) "Total Aggregate Measurement of Support" and "Total AMS" mean the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products, and which is:

(i) with respect to support provided during the base period (i.e. the "Base Total AMS") and the maximum support permitted to be provided during any year of the implementation period or thereafter (i.e. the "Annual and Final Bound Commitment Levels"), as specified in Part IV of a Member's Schedule; and

(ii) with respect to the level of support actually provided during any year of the implementation period and thereafter (i.e. the "Current Total AMS"), calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule;

(i) "year" in paragraph (f) above and in relation to the specific commitments of a Member refers to the calendar, financial or marketing year specified in the Schedule relating to that Member.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. Article 1(a)(ii)

3. The Panel on *Korea – Various Measures on Beef*, in a finding later reversed by the Appellate Body[3], agreed with the complainants that Korea had provided domestic support to its beef industry in excess of its commitment levels for 1997 and 1998. In its notifications, Korea had determined that its Current AMS for beef was below the *de minimis* threshold as set out in Article 6.4; as a result, Korea argued, this domestic support item did not have to be included in the calculation of its Current Total AMS. The Panel found that Korea's calculations in this respect were in error. Korea argued that its calculation was correct, because it was based on the "constituent data and methodology" used in its Schedule, in accordance with Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture*. The Appellate Body, with respect to the calculation of the Current AMS, first recalled the wording of Article 1(a)(ii) of the *Agreement on Agriculture* which contains the definition of the term "Current AMS" stating:

> "To determine whether Korea's Current AMS for beef exceeds 10 per cent of total value of beef production, we refer again to Article 1(a)(ii) of the *Agreement on Agriculture*, which defines Current AMS. Under this provision, Current AMS is to be
>
> 'calculated *in accordance with* the provisions of Annex 3 of this Agreement and *taking into account* the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule; . . . (emphasis added)'

Article 1(a)(ii) contains two express requirements for calculating Current AMS. First, Current AMS is to be

[3] See Appellate Body Report on *Korea – Various Measures on Beef*, paras. 126, 127 and 129.

'calculated *in accordance with* the provisions of Annex 3 of this Agreement'. The ordinary meaning of 'accordance' is 'agreement, conformity, harmony'.[4] Thus, Current AMS must be calculated in 'conformity' with the provisions of Annex 3. Second, Article 1(a)(ii) provides that the calculation of Current AMS is to be made while 'taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule.' 'Take into account' is defined as 'take into consideration, notice'.[5] Thus, when Current AMS is calculated, the 'constituent data and methodology' in a Member's Schedule must be 'taken into account', that is, it must be 'considered'.[6]"[7]

4. The Appellate Body subsequently held that Article 1(a)(ii) accorded "higher priority" to the provisions of Annex 3 than to "constituent data and methodology" contained in a Member's Schedule, but noted that in the case before it, it was not necessary to decide a conflict between the two, because there was no specific Korean "constituent data and methodology". As a result, the Current AMS was to be calculated in accordance with the provisions of Annex 3:

"Looking at the wording of Article 1(a)(ii) itself, it seems to us that this provision attributes higher priority to 'the provisions of Annex 3' than to the 'constituent data and methodology'. From the viewpoint of ordinary meaning, the term 'in accordance with' reflects a more rigorous standard than the term 'taking into account'.

We note, however, that the Panel did not base its reasoning on this apparent hierarchy as between 'the provisions of Annex 3' and the 'constituent data and methodology'.[8] Instead, the Panel considered that where no support was included in the base period calculation for a given product, there is no 'constituent data or methodology' to refer to, so that the only means available for calculating domestic support is that provided in Annex 3. As beef had not been included in Supporting Table 6 of Korea's Schedule LX, Part IV, Section I, the Panel concluded that Annex 3 alone is applicable for the purposes of calculating current non-exempt support in respect of Korean beef.

In the circumstances of the present case, it is not necessary to decide how a conflict between 'the provisions of Annex 3' and the 'constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule' would have to be resolved in principle. As the Panel has found, in this case, there simply are no constituent data and methodology for beef.[9] Assuming *arguendo* that one would be justified – in spite of the wording of Article 1(a)(ii) – to give priority to constituent data and methodology used in the tables of supporting material over the guidance of Annex 3, for products entering into the calculation of the Base Total AMS, such a step would seem to us to be unwarranted in calculating Current AMS for a product which did *not* enter into the Base Total AMS calculation. We do not believe that the *Agreement on Agriculture* would sustain such an extrapolation. We, therefore, agree with the Panel that, in this case, Current AMS for beef has to be calculated in accordance with the provisions of Annex 3, and with these provisions alone."[10]

5. Further, in *Korea – Various Measures on Beef*, the Panel held that Korea had calculated its Current AMS for beef on the basis of a fixed external reference price for the period 1989–1991, rather than the period 1986–88, as set forth in paragraph 9 of Annex 3. Korea argued that its use of the period 1989–1991 was justified, because this period was referred to in the constituent data and methodology (used with respect to products other than beef) contained in a table of supporting material incorporated in its Schedule. The Appellate Body agreed with the Panel and recalled its findings referenced in paragraph 4 above:

"The Panel found that in both 1997 and 1998 Korea miscalculated its fixed external reference price, contrary to Article 6 and paragraph 9 of Annex 3, by using a fixed external reference price based on data for 1989–1991. Korea justifies this choice by invoking the 'constituent data and methodology' used in its Supporting Table 6 for all products other than rice, i.e., for barley, soybean, maize (corn) and rape seeds. In Supporting Table 6, all these products use the period 1989–1991 for the fixed external reference price.

We have already explained above that we share the Panel's view with respect to Korea's argument on 'constituent data and methodology' used in the table of supporting material. We agree with the Panel that, in this case, Current AMS for beef has to be calculated in accordance with Annex 3. According to Annex 3, '[t]he fixed external reference price shall be based on the years 1986

[4] (*footnote original*) *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. I, p. 15.
[5] (*footnote original*) *Ibid.*
[6] (*footnote original*) We note that this difference is not reflected in the wording of the definition of Current Total AMS in Article 1(h). Article 1(h)(ii) provides that Current Total AMS is to be calculated "in accordance with the provisions of this Agreement, including Article 6, *and* with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule". (emphasis added)
[7] Appellate Body Report on *Korea – Various Measures on Beef*, para. 111.
[8] (*footnote original*) On the contrary, the Panel opines that the "constituent data and methodology" has an important role to play in ensuring that the calculation of support to any given product is calculated in subsequent years consistently with support calculated in the base period. Panel Report, para. 811.
[9] (*footnote original*) . . . In other words, there is no *data* (product) in respect of which the *methodology* of Schedule LX of Korea (that is, the use of figures for the years 1989–1991) could be applied, in so far as beef is concerned.
[10] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 112–114.

to 1988'. We, therefore, also agree with the Panel that in calculating the product specific AMS for beef for the years 1997 and 1998, Korea should have used an external reference price based on data for 1986–1988, instead of data for 1989–1991."[11]

2. Article 1(e)

(a) Definition of the term "subsidy"

6. In *Canada – Dairy*, the Appellate Body recalled its finding in *Canada – Aircraft* where it had stated that a subsidy "arises where the grantor makes a 'financial contribution' which confers a 'benefit' on the recipient, as compared with what would have been otherwise available to the recipient in the marketplace".[12]

7. In *US – FSC*, the Appellate Body, noting "that the *Agreement on Agriculture* does not contain a definition of the terms 'subsidy' or 'subsidies'"[13], reiterated the approach it followed in *Canada – Dairy* as follows:

> "Therefore, in this case, we will consider, first, whether the FSC measure involves a transfer of economic resources by the grantor, which in this dispute is the government of the United States, and, second, whether any transfer of economic resources involves a benefit to the recipient."[14]

8. As regards the definition of a subsidy under the *SCM Agreement*, see Section I.B.2(a) of the Chapter on the *SCM Agreement*.

(b) "contingent upon export performance"

9. In *US – FSC*, the Appellate Body interpreted the requirement of export contingency also with reference to the *SCM Agreement*, stating that:

> "We see no reason, and none has been pointed out to us, to read the requirement of 'contingent upon export performance' in the *Agreement on Agriculture* differently from the same requirement imposed by the *SCM Agreement*. The two Agreements use precisely the same words to define 'export subsidies'. Although there are differences between the export subsidy disciplines established under the two Agreements, those differences do not, in our view, affect the common substantive requirement relating to export contingency. Therefore, we think it appropriate to apply the interpretation of export contingency that we have adopted under the *SCM Agreement* to the interpretation of export contingency under the *Agreement on Agriculture*."[15]

10. As regards the concept of export contingency under the *SCM Agreement*, see Section III.B.1 of the Chapter on the *SCM Agreement*.

3. Article 1(h)

11. In *Korea – Various Measures on Beef*, the Panel and the Appellate Body addressed Korea's argument that its method for calculation of domestic support was justifiable because it was based upon "the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule", although it was not consistent with the methodology set out in Annex 3 to the *Agreement on Agriculture*. See paragraphs 3–5 above.

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2
Product Coverage

This Agreement applies to the products listed in Annex 1 to this Agreement, hereinafter referred to as agricultural products.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

No jurisprudence or decision of a competent WTO body.

PART II

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3
Incorporation of Concessions and Commitments

1. The domestic support and export subsidy commitments in Part IV of each Member's Schedule constitute commitments limiting subsidization and are hereby made an integral part of GATT 1994.

2. Subject to the provisions of Article 6, a Member shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule.

3. Subject to the provisions of paragraphs 2(b) and 4 of Article 9, a Member shall not provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule.

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[11] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 117–118.
[12] Appellate Body Report on *Canada – Dairy*, para. 87.
[13] Appellate Body Report on *US – FSC*, para. 136.
[14] Appellate Body Report on *US – FSC*, para. 137.
[15] Appellate Body Report on *US – FSC*, para. 141. This was confirmed in the Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras 192–195.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. Article 3.2

12. In *Korea – Various Measures on Beef*, examining whether Korea's domestic support to its cattle industry was consistent with Articles 3, 6 and 7 of the *Agreement on Agriculture*, the Panel indicated, in a statement subsequently not reviewed by the Appellate Body:

> "It is, therefore, clear that Article 3 provides that support in favour of domestic producers (and here explicit reference is made to '*subject to* Article 6') cannot exceed the level of support provided for in a Member's schedule. So, when assessing the WTO compatibility of domestic support, two parameters are indicated: first the provisions of Article 6 which refer to the object of those same 'commitments' on domestic support; and second, Section I of Part IV of a Member's schedule."[16]

2. Article 3.3

13. With respect to Members' export subsidy commitments and related waivers, see also paragraphs 54–80 below.

14. In *US – FSC*, the Appellate Body explained the obligations set forth in Article 3.3 by distinguishing two distinct types of "commitments":

> "Under Article 3, Members have undertaken two different types of 'export subsidy commitments'. Under the first clause of Article 3.3, Members have made a commitment that they will not 'provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitments levels specified therein'. This is the commitment for *scheduled* agricultural products.
>
> . . .
>
> Under the second clause of Article 3.3, Members have committed *not* to provide *any* export subsidies, *listed in Article 9.1*, with respect to *unscheduled* agricultural products. This clause clearly also involves 'export subsidy commitments' within the meaning of Article 10.1. Our interpretation of this term is confirmed by the title of Article 9, which is '*Export Subsidy Commitments*'. Consistently with our reading of that term, Article 9.1 relates *both* to (1) the commitments made for *scheduled* agricultural products, under the first clause of Article 3.3, and to (2) the general prohibition, in the second clause of Article 3.3, against providing export subsidies listed in Article 9.1 to *unscheduled* agricultural products."[17]

15. The Appellate Body on *US – FSC* further stated that with regard to unscheduled products, Members are prohibited from providing any export subsidies, while in respect of scheduled agricultural products the "nature of the commitment made under the first clause of Article 3.3 is different":

> "With respect to *unscheduled* agricultural products, Members are *prohibited* under Article 3.3 from providing *any* export subsidies as listed in Article 9.1. Article 10.1 prevents the application of export subsidies which '*results in*, or which *threatens to lead to*, *circumvention*' of that prohibition. Members would certainly have 'found a way round', a way to 'evade', this prohibition if they could transfer, through tax exemptions, the very same economic resources that they are prohibited from providing in other forms under Articles 3.3 and 9.1. Thus, with respect to the *prohibition* against providing subsidies listed in Article 9.1 on *unscheduled* agricultural products, we believe that the FSC measure involves the application of export subsidies, *not* listed in Article 9.1, in a manner that, at the very least, '*threatens* to lead to circumvention' of that 'export subsidy commitment' in Article 3.3.
>
> With respect to *scheduled* agricultural products, the nature of the commitment made under the first clause of Article 3.3 is different. Members are not subject to a general prohibition against providing export subsidies as listed in Article 9.1; rather, there is a *limited authorization* for Members to provide such subsidies up to the level of the reduction commitments specified in their Schedule.
>
> . . .
>
> As regards *scheduled* products, when the specific reduction commitment levels have been reached, the *limited authorization* to provide export subsidies as listed in Article 9.1 is transformed, effectively, into a *prohibition* against the provision of those subsidies.
>
> . . .
>
> In our view, Members would have found 'a way round', a way to 'evade', their commitments under Articles 3.3 and 9.1, if they could transfer, through tax exemptions, the very same economic resources that they were, *at that time*, prohibited from providing through other methods under the first clause of Article 3.3 and under 9.1."[18]

PART III

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4
Market Access

1. Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments as specified therein.

[16] Panel Report on *Korea – Various Measures on Beef*, para. 803.
[17] Appellate Body Report on *US – FSC*, paras. 145–146.
[18] Appellate Body Report on *US – FSC*, paras. 150–152.

2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties[1], except as otherwise provided for in Article 5 and Annex 5.

(*footnote original*) [1] These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

1. General

(a) Purpose of Article 4

16. In *Chile – Price Band System*, the Appellate Body explained the background of the negotiations which produced the text of Article 4, "which is the main provision of Part III of the *Agreement on Agriculture*", and indicated that Article 4 "is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products":

> "[W]e turn now to Article 4, which is the main provision of Part III of the *Agreement on Agriculture*. As its title indicates, Article 4 deals with 'Market Access'.[19] During the course of the Uruguay Round, negotiators identified certain border measures which have in common that they restrict the volume or distort the price of imports of agricultural products. The negotiators decided that these border measures should be converted into ordinary customs duties, with a view to ensuring enhanced market access for such imports. Thus, they envisioned that ordinary customs duties would, in principle, become the only form of border protection. As ordinary customs duties are more transparent and more easily quantifiable than non-tariff barriers, they are also more easily compared between trading partners, and thus the maximum amount of such duties can be more easily reduced in future multilateral trade negotiations. The Uruguay Round negotiators agreed that market access would be improved – both in the short term and in the long term – through bindings and reductions of tariffs and minimum access requirements, which were to be recorded in Members' Schedules.
>
> Thus, Article 4 of the *Agreement on Agriculture* is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products . . ."[20]

(b) Notification requirements

17. With respect to the notification requirements concerning tariff quotas and other quotas, see paragraph 116 below.[21]

2. Article 4.1

18. In *EC – Bananas III*, the Appellate Body upheld the Panel's finding that Article 4.1 cannot be interpreted so as to allow an inconsistency with GATT Article XIII of the European Communities import scheme for bananas. See paragraph 126 below.

3. Article 4.2

(a) "any measures which have been required to be converted into ordinary customs duties"

(i) Interpretation

Ordinary meaning in its context and in light of its object and purpose

19. In *Chile – Price Band System*, the Appellate Body interpreted the ordinary meaning of the phrase "measures which have been required to be converted into ordinary customs duties", in its context and in light of its object and purpose.[22] The Appellate Body first focussed on the present perfect tense in that phrase ("have been required") and considered that "Article 4.2 was drafted in the present perfect tense to ensure that measures that were required to be converted as a result of the Uruguay Round – but that had not been converted – could not be maintained, by virtue of that Article, from the date of the entry into force of the *WTO Agreement* on 1 January 1995". The Appellate Body therefore concluded that this phrase could not be interpreted as limiting the obligation "only to those measures which were *actually* converted, or were *requested* to be converted, into ordinary customs duties by the end of the Uruguay Round":

> "Article 4.2 of the *Agreement on Agriculture* should be interpreted in a way that gives meaning to the use of the present perfect tense in that provision – particularly in the light of the fact that most of the other obligations in the *Agreement on Agriculture* and in the other covered agreements are expressed in the present, and not in the present perfect, tense. In general, requirements expressed in the present perfect tense impose obligations that came into being in the past, but may continue

[19] (*footnote original*) Part III contains only one other provision, namely, Article 5, which provides for a special safeguard mechanism that may be used to derogate from the requirements of Article 4 when certain conditions are met. We will discuss Article 5 later in this section.

[20] Appellate Body Report on *Chile – Price Band System*, paras. 200–201.

[21] G/AG/2, pp. 2–4.

[22] See Section III.B.1 of the Chapter on the *DSU*.

to apply at present.[23] As used in Article 4.2, this temporal connotation relates to the date *by which* Members had to convert measures covered by Article 4.2 into ordinary customs duties, as well as to the date *from which* Members had to refrain from maintaining, reverting to, or resorting to, measures prohibited by Article 4.2. The conversion into ordinary customs duties of measures within the meaning of Article 4.2 began *during* the Uruguay Round multilateral trade negotiations, because ordinary customs duties that were to 'compensate' for and replace converted border measures were to be recorded in Members' draft WTO Schedules by the *conclusion* of those negotiations. These draft Schedules, in turn, had to be verified before the signing of the *WTO Agreement* on 15 April 1994. Thereafter, there was no longer an option to replace measures covered by Article 4.2 with ordinary customs duties in excess of the levels of previously bound tariff rates. Moreover, as of the date of entry into force of the *WTO Agreement* on 1 January 1995, Members are required not to 'maintain, revert to, or resort to' measures covered by Article 4.2 of the *Agreement on Agriculture*.

If Article 4.2 were to read 'any measures of the kind which *are* required to be converted', this would imply that if a Member – for whatever reason – had failed, by the end of the Uruguay Round negotiations, to convert a measure within the meaning of Article 4.2, it could, *even today*, replace that measure with ordinary customs duties in excess of bound tariff rates.[24] But, as Chile and Argentina have agreed, this is clearly not so. (footnote omitted) It seems to us that Article 4.2 was drafted in the present perfect tense to ensure that measures that were required to be converted as a result of the Uruguay Round – but were not converted – could not be maintained, by virtue of that Article, from the date of the entry into force of the *WTO Agreement* on 1 January 1995.

Thus, contrary to what Chile argues, giving meaning and effect to the use of the present perfect tense in the phrase 'have been required' does not suggest that the scope of the phrase 'any measures of the kind which have been required to be converted into ordinary customs duties' must be limited only to those measures which were *actually* converted, or were *requested* to be converted, into ordinary customs duties by the end of the Uruguay Round. Indeed, in our view, such an interpretation would fail to give meaning and effect to the word '*any*' and the phrase '*of the kind*', which are descriptive of the word 'measures' in that provision. A plain reading of these words suggests that the drafters intended to cover a broad category of measures. We do not see how proper meaning and effect could be accorded to the word 'any' and the phrase 'of the kind' in Article 4.2 if that provision were read to include only those specific measures that were singled out to be converted into ordinary customs duties by negotiating partners in the course of the Uruguay Round."[25]

Footnote 1

20. The Appellate Body on *Chile – Price Band System*, referred to the wording of footnote 1 to the *Agreement on Agriculture* as confirmation of its interpretation of the phrase "measures which have been required to be converted into ordinary customs duties" (see paragraph 19 above):

> "The wording of footnote 1 to the *Agreement on Agriculture* confirms our interpretation. The footnote imparts meaning to Article 4.2 by enumerating examples of 'measures of the kind which have been required to be converted', and which Members must not maintain, revert to, or resort to, from the date of the entry into force of the *WTO Agreement*. Specifically, and as both participants agree (footnote omitted), the use of the word 'include' in the footnote indicates that the list of measures is illustrative, not exhaustive. And, clearly, the existence of footnote 1 suggests that there will be 'measures of the kind which have been required to be converted' that were *not* specifically identified during the Uruguay Round negotiations. Thus, in our view, the illustrative nature of this list lends support to our interpretation that the measures covered by Article 4.2 are not limited only to those that were *actually* converted, or were requested to be converted, into ordinary customs duties during the Uruguay Round.
>
> Footnote 1 also refers to a residual category of 'similar border measures other than ordinary customs duties', which indicates that the drafters of the Agreement did not seek to identify all 'measures which have been required to be converted' during the Uruguay Round negotiations. The existence of this residual category confirms our interpretation that Article 4.2 covers more than merely the measures that had been specifically identified or challenged by other negotiating partners in the course of the Uruguay Round."[26]

Article 5 as context for Article 4.2 interpretation

21. The Appellate Body on *Chile – Price Band System* further indicated that the context of Article 4.2 confirms its interpretation (see paragraph 19 above). In this regard, the Appellate Body referred to Article 5.1 as an illustration that "where the drafters of the *Agreement on Agriculture* wanted to limit the application of a rule to measures that have *actually* been converted, they used specific language expressing that limitation":

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[23] (*footnote original*) G. Leech and J. Svartvik, *A Communicative Grammar of English*, (Longman, 1979), paras 112–119. R. Quirk and S. Greenbaum, *A University Grammar of English*, (Longman, 1979), paras. 328–330.

[24] (*footnote original*) Bound tariffs could, however, be renegotiated pursuant to Article XXVIII of the GATT 1994.

[25] Appellate Body Report on *Chile – Price Band System*, paras. 206–208.

[26] Appellate Body Report on *Chile – Price Band System*, paras. 209–210.

"[T]he context of Article 4.2 confirms our interpretation. Article 5.1 of the *Agreement on Agriculture*, the only provision in addition to Article 4 that is included in Part III of that Agreement, specifies that a Member may, under certain conditions, impose a special safeguard on imports of an agricultural product 'in respect of which measures referred to in [Article 4.2] *have been converted* into an ordinary customs duty'. (emphasis added) In our view, the phrase 'have been required to be converted' in Article 4.2 has a broader connotation than the phrase 'have been converted' in Article 5.1.[27] Therefore, it is perfectly apt that Article 5.1 speaks of such special safeguards only with respect to those agricultural products for which measures covered by Article 4.2 'have been converted' – that is, have in fact already been converted – into ordinary customs duties. Article 5.1 illustrates that, where the drafters of the *Agreement on Agriculture* wanted to limit the application of a rule to measures that have *actually* been converted, they used specific language expressing that limitation."[28]

22. The Appellate Body on *Chile – Price Band System* further considered that Article 5 lends contextual support to its interpretation of Article 4.2 (see paragraph 19 above) since "the existence of a market access exemption in the form of a special safeguard provision under Article 5 implies that Article 4.2 should *not* be interpreted in a way that permits Members to maintain measures that a Member would not be permitted to maintain *but for* Article 5":

"Article 5, also found in Part III of the *Agreement on Agriculture* on 'Market Access', lends contextual support to our interpretation of Article 4.2. In our view, the existence of a market access exemption in the form of a special safeguard provision under Article 5 implies that Article 4.2 should *not* be interpreted in a way that permits Members to maintain measures that a Member would not be permitted to maintain *but for* Article 5, and, much less, measures that are even more trade-distorting than special safeguards. In particular, if Article 4.2 were interpreted in a way that allowed Members to maintain measures that operate in a way similar to a special safeguard within the meaning of Article 5 – but without respecting the conditions set out in that provision for invoking such measures – it would be difficult to see how proper meaning and effect could be given to those conditions set forth in Article 5.[29]"[30]

Subsequent practice

23. In *Chile – Price Band System*, Chile had argued that, in interpreting this Article 4.2 phrase, it was "highly relevant" that no country that had a price band system in place before the conclusion of the Uruguay Round had actually converted it into ordinary customs duties. The Appellate Body looked into the possibility that this practice could be considered "subsequent practice"[31] pursuant to Article 31(3)(b) of the *Vienna Convention* and therefore a practice relevant to the interpretation of Article 4.2. The Appellate Body referred to its definition of "subsequent practice" in its Report in *Japan – Alcoholic Beverages*[32] and noted that neither the Panel record nor the submissions of the parties suggested that there was a discernible pattern of acts or pronouncements implying an agreement among WTO Members on the interpretation of Article 4.2. The Appellate Body thus concluded that this practice of some Members alleged by Chile did not amount to a "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*.[33]

(ii) "converted"

24. In *Chile – Price Band System*, the Appellate Body looked at the meaning of "converted" in the phrase "any measures which have been required to be converted into ordinary customs duties" and concluded, on the basis of the dictionary meanings of "convert" and "converted" that those measures "had to be transformed into something they were not – namely, ordinary customs duties". In this case, Chile had argued that its price band system was not a measure of the kind which had been required to be converted, but rather a system for determining the level of the resulting ordinary customs duties. The Appellate Body considered that the "mere fact that ... measures result in the payment of duties does not exonerate a Member from the requirement not to maintain, resort to, or revert to those measures":

"Article 4.2 speaks of 'measures of the kind which have been required to be *converted* into ordinary customs duties'. The word 'convert' means 'undergo transformation'.[34] The word 'converted' connotes 'changed in their nature', 'turned into something different'.[35] Thus, 'measures which have been required to be converted into ordinary customs duties' had to be transformed into something they were not – namely, ordinary customs duties. The following example illustrates this point.

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[27] (*footnote original*) In this context, we note that a special safeguard can be imposed only on those agricultural products for which a Member has reserved its right to do so in its Schedule.

[28] Appellate Body Report on *Chile – Price Band System*, para. 211.

[29] (*footnote original*)We note that Chile has not reserved, in it Schedule, the right to apply special safeguards. In response to questioning at the oral hearing, no participant suggested that the interpretation of Article 4.2 should be different depending on whether or not a Member reserved such a right.

[30] Appellate Body Report on *Chile – Price Band System*, para. 217.

[31] See Section III.B.1(iii)(c) of the Chapter on the *DSU*.

[32] "... a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation." Appellate Body Report on *Japan – Alcoholic Beverages*, para. 107.

[33] Appellate Body Report on *Chile – Price Band System*, paras. 213–214.

[34] (*footnote original*) *The New Shorter Oxford Dictionary*, L. Brown (ed.) (Clarendon Press), 1993, Vol. I, p. 502.

[35] (*footnote original*) *Ibid.*

> The application of a 'variable import levy', or a 'minimum import price', as the terms are used in footnote 1, can result in the levying of a specific duty equal to the difference between a reference price and a target price, or minimum price. These resulting levies or specific duties take the same *form* as ordinary customs duties. However, the mere fact that a duty imposed on an import at the border is in the same *form* as an ordinary customs duty, does not mean that it is *not* a 'variable import levy' or a 'minimum import price'. Clearly, as measures listed in footnote 1, 'variable import levies' and 'minimum import prices' had to be *converted into* ordinary customs duties by the end of the Uruguay Round. The mere fact that such measures result in the payment of duties does not exonerate a Member from the requirement not to maintain, resort to, or revert to those measures."[36]

(iii) "ordinary customs duties"

25. In *Chile – Price Band System*, the Appellate Body reversed the Panel's definition of "ordinary customs duty". The Panel had found that "[a]ll 'ordinary' customs duties may . . . be said to take the form of *ad valorem* or specific duties (or combinations thereof)".[37] The Panel further found that the term "ordinary customs duty" has a "normative connotation".[38] The Appellate Body disagreed:

> "We do not agree with the Panel's reasoning that, necessarily, '[a]s a *normative* matter, . . . those scheduled duties always relate to either the value of the imported goods, in the case of *ad valorem* duties, or the volume of the imported goods, in the case of specific duties.'[39] (emphasis in original, underlining added) Indeed, the Panel came to this conclusion by interpreting the French and Spanish versions of the term 'ordinary customs duty' to mean something *different* from the ordinary meaning of the English version of that term. It is difficult to see how, in doing so, the Panel took into account the rule of interpretation codified in Article 33(4) of the *Vienna Convention* whereby 'when a comparison of the authentic texts discloses a difference of meaning . . ., the meaning which best *reconciles* the texts . . . shall be adopted.' (emphasis added).
>
> We also find it difficult to understand how the Panel could find 'normative' support for its reasoning by examining the Schedules of WTO Members. We have observed in a previous case that '[t]he ordinary meaning of the term "concessions" suggests that a Member may yield rights and grant benefits, but it cannot diminish its obligations'.[40] A Member's Schedule imposes obligations on the Member who has made the concessions. The Schedule of one Member, and even the scheduling practice of a number of Members, is not relevant in interpreting the meaning of a treaty provision, unless that practice amounts to 'subsequent practice in the application of the treaty' within the meaning of Article 31(3)(b) of the *Vienna Convention*.[41] In this case the Panel Report contains no support for the conclusion that the scheduling activity of WTO Members amounts to 'subsequent practice'.
>
> [N]ot each and every duty that is calculated on the basis of the *value* and/or *volume* of imports is necessarily an 'ordinary customs duty'. For example, in the case at hand, the *ad valorem* duty is calculated on the *value* of the imports. The calculation of the *specific* duty resulting from Chile's price band system is, on the other hand, based, not only on the difference between the lower threshold of the price band and the applicable reference price, but also on the *volume* per unit of the imports."[42]

26. The Appellate Body on *Chile – Price Band System* also disagreed and thus reversed the Panel's finding that the term "ordinary customs duty", as used in Article 4.2 of the *Agreement on Agriculture*, is to be understood as "referring to a customs duty which is not applied to factors of an exogenous nature":[43]

> "Surely Members will ordinarily take into account the interests of domestic consumers and domestic producers in setting their *applied* tariff rates at a certain level. In doing so, they will doubtless take into account factors such as world market prices and domestic price developments. These are *exogenous* factors, as the Panel used that term. According to the Panel, duties that are calculated on the basis of such *exogenous* factors are *not* ordinary customs duties. This would imply that such duties be *prohibited* under Article II:1(b) of the GATT unless recorded in the "other duties or charges" column

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[36] Appellate Body Report on *Chile – Price Band System*, para. 216.

[37] The Panel found that "[a]s an *empirical* matter, we observe that Members, in regular practice, invariably express commitments in the ordinary customs duty column of their Schedules as *ad valorem* or specific duties, or combinations thereof. All 'ordinary' customs duties may therefore be said to take the form of ad valorem or specific duties (or combinations thereof)." Panel Report on *Chile – Price Band System*, para. 7.52.

[38] The Panel had found that "[a]s a *normative* matter, we observe that those scheduled duties always relate to either the value of the imported goods, in the case of *ad valorem* duties, or the volume of imported goods, in the case of specific duties." Panel Report on *Chile – Price Band System*, para. 7.52.

[39] (*footnote original*) *Ibid.*, para. 7.52.

[40] (*footnote original*) Appellate Body Report, *EC – Bananas III, supra*, footnote 58, para. 154. Panel Report in *United States Restrictions on Imports of Sugar*, adopted 22 June 1989, BISD 36S/331, para. 5.2.

[41] (*footnote original*) Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851, paras. 84, 90 and 93. See also our paras. 213–214 of this Report.

[42] Appellate Body Report on *Chile – Price Band System*, paras. 271, 272 and 274.

[43] The Panel had found that "for the purpose of Article II:1(b), first sentence, of GATT 1994 and Article 4.2 of the Agreement on Agriculture, an 'ordinary' customs duty, that is, a customs duty *senso strictu*, is to be understood as referring to a customs duty which is not applied on the basis of factors of an exogenous nature". Panel Report on *Chile – Price Band System*, para. 7.52.

of a Member's Schedule. We see no legal basis for such a conclusion.[44]"[45]

27. The Appellate Body on *Chile – Price Band System* further noted that "in examining Article 4.2 of the *Agreement on Agriculture*, the *second* sentence of Article II:1(b) of the *GATT 1994*, does *not* specify what form 'other duties or charges' must take to qualify as such within the meaning of that sentence":

> "We further note, in examining Article 4.2 of the *Agreement on Agriculture*, that the *second* sentence of Article II:1(b) of the GATT 1994, does *not* specify what form 'other duties or charges' must take to qualify as such within the meaning of that sentence. The Panel's own approach of reviewing Members' Schedules reveals that many, if not most, 'other duties or charges' are expressed in *ad valorem* and/or specific terms, which does not, of course, make them 'ordinary customs duties' under the first sentence of Article II:1(b)."[46]

28. The Appellate Body on *Chile – Price Band System*, pointed to Article II:2 of the *GATT 1994* and Annex 5 to the *Agreement on Agriculture* as contextual support for interpreting the term "ordinary customs duties":

> "As context for this phrase in Article 4.2 of the Agreement on Agriculture, we observe that Article II:2 of the GATT 1994 sets out examples of measures that do not qualify as either 'ordinary customs duties' or 'other duties or charges'. These measures include charges equivalent to internal taxes, anti-dumping and countervailing duties, and fees or other charges commensurate with the cost of services rendered. They too may be based on the value and/or volume of imports, and yet Article II:2 distinguishes them from 'ordinary customs duties' by providing that '[n]othing in [Article II] shall prevent any Member from imposing' them 'at any time on the importation of any product'.
>
> Contextual support for interpreting the term 'ordinary customs duties' also appears in Annex 5 to the *Agreement on Agriculture*. Annex 5, read together with the Attachment to Annex 5 ('*Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraphs 6 and 10 of this Annex*'), contemplates the calculation of 'tariff equivalents' in a way that would result in ordinary customs duties 'expressed as *ad valorem* or specific rates'. We do not find an obligation in either of those provisions that would require Members to refrain from basing their duties on what the Panel calls 'exogenous factors'. Rather, all that is required is that 'ordinary customs duties' be expressed in the *form* of '*ad valorem* or specific rates'."[47]

Measure resulting in ordinary customs duties

29. In *Chile – Price Band System*, Argentina had argued before the Panel that Chile's price band system was a measure "of the kind which has been required to be converted into ordinary customs duties" and which, by the terms of Article 4.2 of the *Agreement on Agriculture*, Members are required not to maintain. Chile had refuted such an allegation and claimed that the duties resulting from its price band system were "ordinary customs duties" and that its price band system was merely a system for determining the level of those duties and, therefore, consistent with Article 4.2. The Appellate Body agreed with the Panel as regards the inconsistency of Chile's price band system with Article 4.2 (although not as regards the Panel's reasoning) and found that "the fact that the *duties* that result from the application of Chile's price band system take the same form as 'ordinary customs duties' does not imply that the underlying measure is consistent with Article 4.2 of the *Agreement on Agriculture*."[48]

(iv) Timing of the obligation

30. The Appellate Body on *Chile – Price Band System* concluded that "the obligation in Article 4.2 not to 'maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties' applies from the date of the entry into force of the *WTO Agreement* – regardless of whether or not a Member converted any such measures into ordinary customs duties before the conclusion of the Uruguay Round".[49]

(b) Relation with Article XI of GATT and its *Ad Note*

31. The Panel on *Korea – Various Measures on Beef*, in a statement not reviewed by the Appellate Body, held with respect to a certain practice of the Korean state trading agency for beef imports:

> "[W]hen dealing with measures relating to agricultural products which should have been converted into tariffs or tariff-quotas, a violation of Article XI of GATT and its *Ad Note* relating to state-trading operations would necessarily constitute a violation of Article 4.2 of the *Agreement on Agriculture* and its footnote which refers to non-tariff measures maintained through state-trading enterprises."[50]

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[44] (*footnote original*) We stated in *Argentina – Textiles and Apparel*, *supra*, footnote 55, para. 46, that "a tariff binding in a Member's Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to apply a rate of duty that is less than that provided for in its Schedule." Thus, the fact that the "cap" (recorded in the "ordinary customs duty" column of a schedule) is a specific or an *ad valorem* duty does not mean that a Member will not apply a tariff at a lower rate, or that the rate it applies will not be based on what the Panel calls "*exogenous*" factors. Indeed, as we noted above, it is difficult to conceive that a Member would ever make changes to its applied tariff rate except based on *exogenous* factors such as the interests of domestic consumers or producers.

[45] Appellate Body Report on *Chile – Price Band System*, para. 273.

[46] Appellate Body Report on *Chile – Price Band System*, para. 275.

[47] Appellate Body Report on *Chile – Price Band System*, paras. 276–277.

[48] Appellate Body Report on *Chile – Price Band System*, para. 279.

[49] Appellate Body Report on *Chile – Price Band System*, para. 212.

[50] Panel Report on *Korea – Various Measures on Beef*, para. 762.

(c) Special treatment

32. With respect to the special treatment in connection with paragraph 2 of Article 4, see Article 5, Section VI below, and Annex 5, Section XXVII below.

4. Footnote 1

(a) "variable import levies"

33. In *Chile – Price Band System*, the Appellate Body, which overturned the Panel's interpretation of this term[51], noted that the "WTO Members have not chosen to define [this] 'term of art' in the *Agreement on Agriculture* or anywhere else in the *WTO Agreement*".[52], The Appellate Body concluded that a variable import duty requires the presence of both a formula causing automatic and continuous variability of duties and additional features that undermine the object and purpose of Article 4 because they include a lack of transparency and a lack of predictability in the level of duties that will result from such measures:

> "In examining the ordinary meaning of the term '*variable import levies*' as it appears in footnote 1, we note that a 'levy' is a duty, tax, charge, or other exaction usually imposed or raised by legal execution or process.[53] An 'import' levy is, of course, a duty assessed upon importation. A levy is 'variable' when it is 'liable to vary'.[54] This feature alone, however, is not conclusive as to what constitutes a 'variable import levy' within the meaning of footnote 1. An 'ordinary customs duty' could also fit this description. A Member may, fully in accordance with Article II of the GATT 1994, exact a duty upon importation and periodically change the rate at which it applies that duty (provided the changed rates remain *below* the tariff rates bound in the Member's Schedule).[55] This change in the *applied* rate of duty could be made, for example, through an act of a Member's legislature or executive at any time. Moreover, it is clear that the term 'variable import levies' as used in footnote 1 must have a meaning different from 'ordinary customs duties', because 'variable import levies' must be *converted into* 'ordinary customs duties'. Thus, the mere fact that an import duty can be varied cannot, alone, bring that duty within the category of 'variable import levies' for purposes of footnote 1.
>
> To determine *what kind* of variability makes an import levy a 'variable import levy', we turn to the immediate context of the other words in footnote 1. The term 'variable import levies' appears after the introductory phrase '[t]hese *measures* include'. Article 4.2 – to which the footnote is attached – also speaks of '*measures*'. This suggests that at least one feature of 'variable import levies' is the fact that the *measure* itself – as a mechanism – must impose the *variability* of the duties. Variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously. Ordinary customs duties, by contrast, are subject to discrete changes in applied tariff rates that occur independently, and unrelated to such an underlying scheme or formula. The level at which ordinary customs duties are applied can be *varied* by a legislature, but such duties will not be automatically and continuously *variable*. To vary the applied rate of duty in the case of ordinary customs duties will always require *separate* legislative or administrative action, whereas the ordinary meaning of the term 'variable' implies that *no* such action is required.
>
> However, in our view, the presence of a formula causing automatic and continuous variability of duties is a *necessary,* but by no means a *sufficient,* condition for a particular measure to be a 'variable import levy' within the meaning of footnote 1. *(footnote omitted)* 'Variable import levies' have additional features that undermine the object and purpose of Article 4, which is to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties. These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures. This lack of transparency and this lack of predictability are liable to restrict the volume of imports. . . . an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be. (i) This lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market."[56]

34. As regards the question whether a measure ceases to be similar to a "variable import levy" because it is subject to a tariff cap, see paragraphs 38–39 below.

(b) "minimum import prices"

35. In *Chile – Price Band System*, unlike with the definition of "variable import levies" (see paragraph 33 above), the Appellate Body did not overturn the Panel's interpretation of the term "minimum import price" and

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[51] The Panel had concluded that it could not develop an interpretation of the term "variable import levies" solely on the basis of the methods of interpretation codified in Article 31 of the *Vienna Convention*. and decided, therefore, to have recourse to "supplementary means of interpretation" within the meaning of Article 32 of that Convention. This led to the Panel's identification of what it described as "fundamental characteristics" of "variable import levies". Panel Report on *Chile – Price Band System*, paras. 7.35–7.36. The Appellate Body, nevertheless, upheld the Panel's finding, in para. 7.47 of the Panel Report, that Chile's price band system is a "border measure similar to 'variable import levies' and 'minimum import prices' within the meaning of footnote 1 and Article 4.2 of the *Agreement on Agriculture*". Appellate Body Report on *Chile – Price Band System*, para. 262.

[52] Appellate Body Report on *Chile – Price Band System*, para. 229.

[53] (*footnote original*) *The New Shorter Oxford English Dictionary*, *supra*, footnote 190, p. 1574.

[54] (*footnote original*) *Ibid.*, p. 3547.

[55] (*footnote original*) Appellate Body Report, *Argentina – Textiles and Apparel*, *supra*, footnote 55, para. 46.

[56] Appellate Body Report on *Chile – Price Band System*, paras. 232–234.

simply noted that the parties did not disagree with it.[57] The Appellate Body, after indicating that the "term 'minimum import price' refers generally to the lowest price at which imports of a certain product may enter a Member's domestic market" and that "no definition has been provided by the drafters of the *Agreement on Agriculture*", quoted the Panel's description of "minimum import prices" as follows:

> "The term 'minimum import price' refers generally to the lowest price at which imports of a certain product may enter a Member's domestic market. Here, too, no definition has been provided by the drafters of the *Agreement on Agriculture*. However, the Panel described 'minimum import prices' as follows:
>
> > '[these] schemes generally operate in relation to the actual transaction value of the imports. If the price of an individual consignment is below a specified minimum import price, an additional charge is imposed corresponding to the difference.[58]'
>
> The Panel also said that minimum import prices 'are generally not dissimilar from variable import levies in many respects, including in terms of their protective and stabilization effects, but that their mode of operation is generally less complicated.'[59] The main difference between minimum import prices and variable import levies is, according to the Panel, that 'variable import levies are generally based on the difference between the *governmentally determined threshold* and the lowest world market offer price for the product concerned, while minimum import price schemes generally operate in relation to the *actual transaction value* of the imports.'[60] (emphasis added)
>
> . . . the participants said they do not object to the Panel's definition of a 'minimum import price'. . ."[61]

(c) "similar border measures"

(i) Concept of similarity

36. In *Chile – Price Band System*, the Appellate Body agreed with the Panel's definition of the term "similar" as "having a resemblance or likeness", "of the same nature or kind", and "having characteristics in common". The Appellate Body, however, disagreed with the Panel's emphasis on the degree to which measures share characteristics of a "fundamental" nature.[62] The Appellate Body found that the appropriate approach to determine similarity was to ask "whether two or more things have likeness or resemblance sufficient to be similar to each other". The Appellate Body further considered that, for a measure to be "similar" to a border measure, it must have "sufficient 'resemblance or likeness to', or be 'of the same nature or kind' as, *at least one* of the specific categories of measures listed in footnote 1":

> "We agree with the first part of the Panel's definition of the term 'similar' as 'having a resemblance or likeness', 'of the same nature or kind', and 'having characteristics in common'.[63] However, in our view, the Panel went unnecessarily far in focusing on the degree to which two measures share characteristics of a 'fundamental' nature. We see no basis for determining similarity by relying on characteristics of a 'fundamental' nature. The Panel seems to substitute for the task of defining the term 'similar' that of defining the term 'fundamental'. This merely complicates matters, because it raises the question of how to distinguish 'fundamental' characteristics from those of a *less than* 'fundamental' nature. The better and appropriate approach is to determine similarity by asking the question whether two or more things have likeness or resemblance sufficient to be similar to each other. In our view, the task of determining whether something is similar to something else must be approached on an empirical basis.
>
> . . . To be 'similar', Chile's price band system – in its specific factual configuration – must have, to recall the dictionary definitions we mentioned, sufficient 'resemblance or likeness to', or be 'of the same nature or kind' as, *at least one* of the specific categories of measures listed in footnote 1."[64]

37. The Appellate Body on *Chile – Price Band System* stressed that "any examination of similarity presupposes a *comparative* analysis" and therefore, to determine whether a measure is "similar" within the meaning of footnote 1, it is necessary to "identify *with which categories* that [measure] must be compared".[65]

(ii) Relevance of tariff caps in the similarity analysis

38. In *Chile – Price Band System*, Chile had argued that the Panel had failed to take proper account of the fact that the total amount of duties that may be levied as a result of Chile's price band system was "capped" at

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[57] Appellate Body Report on *Chile – Price Band System*, para. 238.
[58] (*original footnote*) Panel Report, para. 7.36(e).
[59] (*footnote original*) *Ibid.*
[60] (*footnote original*) *Ibid.*
[61] Appellate Body Report on *Chile – Price Band System*, paras. 236–238.
[62] The Panel's reasoning was the following: "First, as regards the term 'similar', dictionaries define this term as 'having a resemblance or likeness', 'of the same nature or kind', and 'having characteristics in common'. Two measures are in our view 'similar' if they share some, but not all, of their fundamental characteristics. If two measures share all of their fundamental characteristics, they are identical rather than similar. A border measure should therefore have *some* fundamental characteristics in common with one or more of the measures explicitly listed in footnote 1. It is then a matter of weighing the evidence to determine whether the characteristics are sufficiently close to be considered 'similar'." Panel Report on *Chile – Price Band System*, para. 7.26.
[63] (*footnote original*) *The New Shorter Oxford English Dictionary*, *supra*, [], p. 2865.
[64] Appellate Body Report on *Chile – Price Band System*, paras. 226–227.
[65] Appellate Body Report on *Chile – Price Band System*, para. 228. In this case, Chile's price band system was compared to and found to be sufficiently similar to a "variable import levy" and "minimum import price" to make it a "similar border measure". Para. 252.

the level of the tariff rate of 31.5 per cent *ad valorem* bound in Chile's Schedule. The Appellate Body thus considered whether Chile's price band system ceases to be similar to a "variable import levy" because it is subject to a cap. The Appellate Body concluded:

> "[W]e find nothing in Article 4.2 to suggest that a measure prohibited by that provision would be rendered consistent with it if applied with a cap. Before the conclusion of the Uruguay Round, a measure could be recognized as a 'variable import levy' even if the products to which the measure applied were subject to tariff bindings.[66] And, there is nothing in the text of Article 4.2 to indicate that a measure, which was recognized as a 'variable import levy' before the Uruguay Round, is exempt from the requirements of Article 4.2 simply because tariffs on some, or all, of the products to which that measure *now* applies were bound as a result of the Uruguay Round."[67]

39. The Appellate Body on *Chile – Price Band System*, found support for this view in the context of Article 4.2. which includes the *Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraph 6 and 10 of this Annex ("Guidelines")*, which are an Attachment to *Annex 5 on Special Treatment with respect to Paragraph 2 of Article 4.* and Articles II and XI of the GATT 1994.

> "The context of Article 4.2 lends support to this interpretation. That context includes the Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraph 6 and 10 of this Annex ('Guidelines'), which are an Attachment to Annex 5 on Special Treatment with respect to Paragraph 2 of Article 4. Both the Attachment and the Annex form part of the Agreement on Agriculture. Paragraph 6 of the Guidelines[68] envisages that tariff equivalents resulting from conversion of measures within the meaning of Article 4.2 may exceed previous bound rates. This implies that, even if the product to which that measure applied was in fact subject to a tariff binding before the Uruguay Round, conversion of that measure may nevertheless have been required. Therefore, a measure cannot be excluded per se from the scope of Article 4.2 simply because the products to which that measure applies are subject to a tariff binding.
>
> Relevant context can also be found in Articles II and XI of the GATT 1994. If Members were free to apply a measure with a 'cap' – which, in the absence of that 'cap', would be a prohibited 'variable import levy' – Article 4.2 would, in our view, add little to the longstanding requirements of Articles II:1(b) and XI:1 of the GATT 1947. In fact, Chile concedes that the scope of measures prohibited by Article 4.2 extends beyond the tariffs in excess of bound rates that are prohibited by Article II and the 'restrictions other than taxes, duties and charges' that are prohibited by Article XI:1. (*footnote omitted*) In any event, it is difficult to see why Uruguay Round negotiators would 'compensate' Members for converting prohibited measures by permitting them to raise tariffs on certain products, while permitting those Members to retain those measures and, at the same time, impose those higher tariffs on those same products. It is not clear why, if this were so, a Member would ever have converted a measure. All that a Member would have had to do to comply with Article 4.2 would have been to adopt a tariff binding – even at a higher level – on the products covered by the original measure. Had this been the intention of the Uruguay Round negotiators, there would have been no need to list price-based measures in footnote 1 among the categories of measures prohibited by Article 4.2. The drafters of the *Agreement on Agriculture* simply could have adopted a requirement that all tariffs on agricultural products be bound."[69]

(iii) Common features of border measures

40. In *Chile – Price Band System*, the Appellate Body noted that trade distortive objectives and effects are common to all border measures:

> "[W]e note that *all* of the border measures listed in footnote 1 have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the ways that ordinary customs duties do. Moreover, *all* of these measures have in common also that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market."[70]

(d) Relation with Article 4.2

41. The Appellate Body on *Chile – Price Band System*, referred to the wording of footnote 1 to the *Agreement on Agriculture* as confirmation of its interpretation[71] of the phrase "measures which have been required to be converted into ordinary customs duties" of Article 4.2. See paragraph 20 above.

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[66] (*footnote original*) In this respect, we note that, as illustrated by documents from GATT 1947, Contracting Parties to GATT 1947 regarded import levies which were applied to products subject to a tariff binding as variable import levies in spite of the existence of that binding:

> The General Agreement contains no provision on the use of "variable import levies". It is obvious that *if any such duty or levy is imposed on a 'bound' item*, the rate must not be raised in excess of what is permitted by Article II . . . . (emphasis added)

See Note by the Executive Secretary on "Questions relating to Bilateral Agreements, discrimination and Variable Taxes", dated 21 November 1961, GATT document L/1636, paras. 7–8.

[67] Appellate Body Report on *Chile – Price Band System*, para. 254.

[68] (*footnote original*) Paragraph 6 provides:

> Where a tariff equivalent resulting from these guidelines is negative or lower than the *current bound rate*, the initial tariff equivalent may be established at the *current bound rate* or on the basis of national offers for that product. (emphasis added)

[69] Appellate Body Report on *Chile – Price Band System*, paras. 255–256.

[70] Appellate Body Report on *Chile – Price Band System*, para. 227.

[71] For this interpretation, see para. 19. of this Chapter.

C. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. GATT 1994

42. The Appellate Body on *Chile – Price Band System*, in examining the concept of ordinary customs duties under Article 4.2 of the *Agreement on Agriculture*, referred to Article II:1(b) of the *GATT 1994*. See paragraphs 24–28 above. The Appellate Body also indicated that if it were to find that Chile's price band system was inconsistent with Article 4.2 of the *Agreement of Agriculture*, it would not need to make a separate finding on whether Chile's price band system also results in a violation of Article II:1(b) of the *GATT 1994* to resolve this dispute.[72]

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5
Special Safeguard Provisions

1. Notwithstanding the provisions of paragraph 1(b) of Article II of GATT 1994, any Member may take recourse to the provisions of paragraphs 4 and 5 below in connection with the importation of an agricultural product, in respect of which measures referred to in paragraph 2 of Article 4 of this Agreement have been converted into an ordinary customs duty and which is designated in its Schedule with the symbol "SSG" as being the subject of a concession in respect of which the provisions of this Article may be invoked, if:

(a) the volume of imports of that product entering the customs territory of the Member granting the concession during any year exceeds a trigger level which relates to the existing market access opportunity as set out in paragraph 4; or, but not concurrently:

(b) the price at which imports of that product may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 to 1988 reference price[2] for the product concerned.

(*footnote original*) [2] The reference price used to invoke the provisions of this subparagraph shall, in general, be the average c.i.f. unit value of the product concerned, or otherwise shall be an appropriate price in terms of the quality of the product and its stage of processing. It shall, following its initial use, be publicly specified and available to the extent necessary to allow other Members to assess the additional duty that may be levied.

2. Imports under current and minimum access commitments established as part of a concession referred to in paragraph 1 above shall be counted for the purpose of determining the volume of imports required for invoking the provisions of subparagraph 1(a) and paragraph 4, but imports under such commitments shall not be affected by any additional duty imposed under either subparagraph 1(a) and paragraph 4 or subparagraph 1(b) and paragraph 5 below.

3. Any supplies of the product in question which were *en route* on the basis of a contract settled before the additional duty is imposed under subparagraph 1(a) and paragraph 4 shall be exempted from any such additional duty, provided that they may be counted in the volume of imports of the product in question during the following year for the purposes of triggering the provisions of subparagraph 1(a) in that year.

4. Any additional duty imposed under subparagraph 1(a) shall only be maintained until the end of the year in which it has been imposed, and may only be levied at a level which shall not exceed one third of the level of the ordinary customs duty in effect in the year in which the action is taken. The trigger level shall be set according to the following schedule based on market access opportunities defined as imports as a percentage of the corresponding domestic consumption[3] during the three preceding years for which data are available:

(*footnote original*) [3] Where domestic consumption is not taken into account, the base trigger level under subparagraph 4(a) shall apply.

(a) where such market access opportunities for a product are less than or equal to 10 percent, the base trigger level shall equal 125 percent;

(b) where such market access opportunities for a product are greater than 10 percent but less than or equal to 30 percent, the base trigger level shall equal 110 percent;

(c) where such market access opportunities for a product are greater than 30 percent, the base trigger level shall equal 105 percent.

In all cases the additional duty may be imposed in any year where the absolute volume of imports of the product concerned entering the customs territory of the Member granting the concession exceeds the sum of (*x*) the base trigger level set out above multiplied by the average quantity of imports during the three preceding years for which data are available and (*y*) the absolute volume change in domestic consumption of the product concerned in the most recent year for which data are available compared to the preceding year, provided that the trigger level shall not be less than 105 percent of the average quantity of imports in (*x*) above.

5. The additional duty imposed under subparagraph 1(b) shall be set according to the following schedule:

[72] Appellate Body Report on Chile – Price Band Systems, para. 190.

(a) if the difference between the c.i.f. import price of the shipment expressed in terms of the domestic currency (hereinafter referred to as the "import price") and the trigger price as defined under that subparagraph is less than or equal to 10 percent of the trigger price, no additional duty shall be imposed;

(b) if the difference between the import price and the trigger price (hereinafter referred to as the "difference") is greater than 10 percent but less than or equal to 40 percent of the trigger price, the additional duty shall equal 30 percent of the amount by which the difference exceeds 10 percent;

(c) if the difference is greater than 40 percent but less than or equal to 60 percent of the trigger price, the additional duty shall equal 50 percent of the amount by which the difference exceeds 40 percent, plus the additional duty allowed under (b);

(d) if the difference is greater than 60 percent but less than or equal to 75 percent, the additional duty shall equal 70 percent of the amount by which the difference exceeds 60 percent of the trigger price, plus the additional duties allowed under (b) and (c);

(e) if the difference is greater than 75 percent of the trigger price, the additional duty shall equal 90 percent of the amount by which the difference exceeds 75 percent, plus the additional duties allowed under (b), (c) and (d).

6. For perishable and seasonal products, the conditions set out above shall be applied in such a manner as to take account of the specific characteristics of such products. In particular, shorter time periods under subparagraph 1(a) and paragraph 4 may be used in reference to the corresponding periods in the base period and different reference prices for different periods may be used under subparagraph 1(b).

7. The operation of the special safeguard shall be carried out in a transparent manner. Any Member taking action under subparagraph 1(a) above shall give notice in writing, including relevant data, to the Committee on Agriculture as far in advance as may be practicable and in any event within 10 days of the implementation of such action. In cases where changes in consumption volumes must be allocated to individual tariff lines subject to action under paragraph 4, relevant data shall include the information and methods used to allocate these changes. A Member taking action under paragraph 4 shall afford any interested Members the opportunity to consult with it in respect of the conditions of application of such action. Any Member taking action under subparagraph 1(b) above shall give notice in writing, including relevant data, to the Committee on Agriculture within 10 days of the implementation of the first such action or, for perishable and seasonal products, the first action in any period. Members undertake, as far as practicable, not to take recourse to the provisions of subparagraph 1(b) where the volume of imports of the products concerned are declining. In either case a Member taking such action shall afford any interested Members the opportunity to consult with it in respect of the conditions of application of such action.

8. Where measures are taken in conformity with paragraphs 1 through 7 above, Members undertake not to have recourse, in respect of such measures, to the provisions of paragraphs 1(a) and 3 of Article XIX of GATT 1994 or paragraph 2 of Article 8 of the Agreement on Safeguards.

9. The provisions of this Article shall remain in force for the duration of the reform process as determined under Article 20.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. Article 5.1(b)

43. In *EC – Poultry*, Brazil argued that the European Communities had failed to comply with Article 5 of the *Agreement on Agriculture* in the implementation of the special safeguard measures for imports of poultry meat outside tariff quotas. The European Communities contested the finding of the Panel that the phrase in Article 5.1(b) "on the basis of the c.i.f. import price" referred to the c.i.f. price *plus* import duties. Reversing the Panel's findings on Article 5.1(b), the Appellate Body first explored the circumstances in which this specific question could become relevant and then went on to distinguish between an entry into the customs territory on the one hand, and an entry into the domestic market on the other:

> "This dispute has no practical significance if both the c.i.f. import price and the c.i.f. import price plus customs duties fall above or below the trigger price. If both prices are above the trigger price, then additional duties cannot be imposed. And, if both prices fall below the trigger price, then additional duties may be imposed regardless of which definition of the relevant import price is adopted. However, the practical significance of this dispute becomes apparent whenever the trigger price falls between the other two prices, that is, when the trigger price is greater than the c.i.f. import price but smaller than the c.i.f. import price plus customs duties. . . . [I]f the relevant price is defined as the c.i.f. import price plus customs duties, additional duties may not be imposed since the relevant price is well above the trigger price. If, on the other hand, it is defined as the c.i.f. import price only (that is, without customs duties), additional duties may be imposed because the relevant price is below the trigger price. Thus, to adopt one definition, rather than

another, will determine whether or not an importing Member may impose additional safeguard duties.

. . .

The relevant import price in Article 5.1(b) is described as 'the price at which imports of that product *may enter the customs territory* of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned'. It is noteworthy that the drafters of the *Agreement on Agriculture* chose to use as the relevant import price the entry price into the *customs territory*, rather than the entry price into the *domestic market*. This suggests that they had in mind the point of time *just before* the entry of the product concerned into the customs territory, and certainly before entry into the domestic market, of the importing Member. The ordinary meaning of these terms in Article 5.1(b) supports the view that the 'price at which that product may enter the customs territory' of the importing Member should be construed to mean just that – the price at which the product may enter the *customs territory*, not the price at which the product may enter the *domestic market* of the importing Member. And that price is a price that does not include customs duties and internal charges. It is upon entry of a product into the customs territory, but before the product enters the domestic market, that the obligation to pay customs duties and internal charges accrues."[73]

44. The Appellate Body on *EC – Poultry* then noted that the *Agreement on Agriculture* does not define the term "c.i.f. import price", but considered the customary usage of this term in international trade:

"Article 5.1(b) also states that the relevant import price is to be 'as determined *on the basis of* the c.i.f. import price of the shipment concerned'. (emphasis added) The Panel interprets this phrase to mean 'that the market entry price is something that has to be constructed using the c.i.f. price as one of the parameters.'[74] We disagree. In the light of our construction of the preceding phrase 'the price at which imports of the product may enter the customs territory of the Member granting the concession', we conclude that the phrase 'as determined *on the basis of* the c.i.f. import price of the shipment concerned' in Article 5.1(b) refers simply to the c.i.f. price without customs duties and taxes. There is no definition of the term 'c.i.f. import price' in the *Agreement on Agriculture* or in any of the other covered agreements. However, in customary usage in international trade, the c.i.f. import price does not include any taxes, customs duties, or other charges that may be imposed on a product by a Member upon entry into its customs territory.[75] We think it significant also that ordinary customs duties are not mentioned as a component of the relevant import price in the text of Article 5.1(b). Article 5.1(b) does not state that the relevant import price is 'the c.i.f. price plus ordinary customs duties'. Accordingly, to read the inclusion of customs duties into the definition of the c.i.f. import price in Article 5.1(b) would require us to read words into the text of that provision that simply are not there."[76]

45. The Appellate Body on *EC – Poultry* found support for its finding referenced in paragraph 44 above in the context of Article 5.1(b):

"This reading of the text of Article 5.1(b) is supported by our reading of the context of that provision in accordance with Article 31 of the *Vienna Convention*, which specifies that the ordinary meaning of the terms of a treaty should be interpreted in their context.

We look first to the rest of Article 5.1. In considering when additional special safeguard duties under Article 5.1(b) may be imposed, the relevant import price must be compared with a trigger price. According to Article 5.1(b), this trigger price is 'equal to the average 1986 to 1988 reference price for the product concerned'. Footnote 2 to Article 5.1(b) states:

> The reference price used to invoke the provisions of this subparagraph shall, in general, be the average c.i.f. unit value of the product concerned, or otherwise shall be an appropriate price in terms of the quality of the product and its stage of processing. It shall, following its initial use, be publicly specified and available to the extent necessary to allow other Members to assess the additional duty that may be levied.

Thus, the reference price with which the relevant price is compared under Article 5.1 does *not* include ordinary customs duties. It is simply the average c.i.f. import price of the product concerned during the reference period, 1986–1988. Given this definition of the reference price, it could not have been the intention of the drafters to compare a c.i.f. price exclusive of customs duties for the reference period with a c.i.f. price inclusive of such duties today.

Paragraph 5 of Article 5 is also part of the context of Article 5.1(b). This provision establishes a link between the amount of the additional duty to be imposed and the difference between the c.i.f. import price of the shipment and the trigger price. According to the schedule contained in paragraph 5, when the difference between the c.i.f. import price of the shipment and the trigger price is not greater than 10 per cent, no additional duty shall be imposed. When the difference is greater than 10 per

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[73] Appellate Body Report on *EC – Poultry*, paras. 143 and 145.

[74] (*footnote original*) Panel Report, para. 278.

[75] (*footnote original*) We note that the *Incoterms 1990* of the International Chamber of Commerce explains what the acronym "c.i.f." means "cost, insurance and freight", but does not give a definition of "c.i.f. import price". However, according to customary usage in international trade, c.i.f. import price, or simply c.i.f. price, is equal to the price of the product in the exporting country plus additional costs, insurance and freight to the importing country. This definition may also be inferred from paragraph 2 of the *Attachment to Annex 5 of the Agreement on Agriculture*.

[76] Panel Report on *EC – Poultry*, para. 146.

cent, additional duties may be imposed. The amount of the additional safeguard duties increases as the difference in the two prices increases. We see no reference in paragraph 5 to 'c.i.f. import price *plus* ordinary customs duties'. The price used to determine when the special safeguard may be triggered and the price used to calculate the amount of the additional duties must be one and the same."[77]

46. The Appellate Body on *EC – Poultry*, after making the findings referenced in paragraphs 43–45 above, considered what it termed two "anomalies" which would arise under the interpretation given to Article 5.1(b) by the Panel:

"Certain anomalies would arise from the interpretation adopted by the majority of the Panel. One of these anomalies was cited in the opinion of the dissenting member of the Panel.[78] If tariffication of non-tariff barriers on a certain product took the form of specific duties that were greater than the trigger price, then an importing Member may never be able to invoke Article 5.1(b). The truth of this observation is evident from the fact that the c.i.f. import price plus customs duties may never fall below the trigger price. This consequence is not limited to the case of specific duties that exceed the trigger price. It could also occur in cases where tariffication takes the form of *ad valorem* duties. We know that tariffication has resulted in tariffs which are, in a large number of cases, very high. The probability is strong, therefore, that the *ad valorem* duties could exceed the percentage decrease in the c.i.f. import price by a substantial margin. In such cases, the decrease in the c.i.f. price would have to be very deep before the relevant import price would fall below the trigger price. Thus, the provisions of Article 5.1(b) would not be operational in many cases. It is doubtful that this was intended by the drafters of the 'Special Safeguard Provisions'.

Another anomaly that would arise from defining the relevant import price as the c.i.f. import price *plus* ordinary customs duties would be that the right of Members to invoke the provisions of Article 5.1(b) would depend on the level of tariffs resulting from tariffication. Faced with a certain decline in the c.i.f. price – say, 20 per cent – some Members would find themselves in a situation where they could not invoke the price safeguard; others would have the right to do so. The first category would comprise those Members with a relatively high level of tariffied duties; the second would be those with a relatively moderate level. Thus, the rights of Members would ultimately depend on the level of their tariffied duties. It is doubtful, too, that this was intended by the drafters of the 'Special Safeguard Provisions'."[79]

47. As a result of the reasoning referenced in paragraphs 43–46 above, the Appellate Body in *EC – Poultry* concluded:

"[W]e interpret the 'price at which the product concerned may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price' in Article 5.1(b) as the c.i.f. import price not including ordinary customs duties."[80]

2. Article 5.5

48. Regarding Article 5.5, in *EC – Poultry*, the Appellate Body examined whether it was permissible for the importing Member to offer the importer a choice between the use of the c.i.f price of the shipment as provided in that provision, and another method of calculation which departs from this principle. Under the relevant regulation, the European Communities calculated a periodic representative price, based, *inter alia*, in part on prices in third-country markets and prices at various stages of marketing within the European Communities. The Commission, in its determination of the trigger price for the purposes of the special safeguard provision, would use this "representative price", unless the importer specifically requested the use of the c.i.f. price, conditional upon the presentation of certain documents and the lodging of a security by the importer. The Appellate Body held as follows:

"[N]either the text nor the context of Article 5.5 of the *Agreement on Agriculture* permits us to conclude that the additional duties imposed under the special safeguard mechanism in Article 5 of the *Agreement on Agriculture* may be established by any method other than a comparison of the *c.i.f. price of the shipment* with the trigger price."[81]

3. Article 5.7

(a) Notification requirements

49. With respect to notification requirements concerning the special safeguard provisions, see paragraphs 116–118 below.

PART IV

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6
Domestic Support Commitments

1. The domestic support reduction commitments of each Member contained in Part IV of its Schedule shall apply to all of its domestic support measures in favour of

[77] Appellate Body Report on *EC – Poultry*, paras. 147–150.
[78] (*footnote original*) Panel Report, para. 291.
[79] Appellate Body Report on *EC – Poultry*, paras. 151–152.
[80] Appellate Body Report on *EC – Poultry*, para. 153.
[81] Appellate Body Report on *EC – Poultry*, para. 168.

agricultural producers with the exception of domestic measures which are not subject to reduction in terms of the criteria set out in this Article and in Annex 2 to this Agreement. The commitments are expressed in terms of Total Aggregate Measurement of Support and "Annual and Final Bound Commitment Levels".

2. In accordance with the Mid-Term Review Agreement that government measures of assistance, whether direct or indirect, to encourage agricultural and rural development are an integral part of the development programmes of developing countries, investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures, as shall domestic support to producers in developing country Members to encourage diversification from growing illicit narcotic crops. Domestic support meeting the criteria of this paragraph shall not be required to be included in a Member's calculation of its Current Total AMS.

3. A Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule.

4. (a) A Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce:

(i) product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 percent of that Member's total value of production of a basic agricultural product during the relevant year; and

(ii) non-product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 percent of the value of that Member's total agricultural production.

(b) For developing country Members, the *de minimis* percentage under this paragraph shall be 10 percent.

5. (a) Direct payments under production-limiting programmes shall not be subject to the commitment to reduce domestic support if:

(i) such payments are based on fixed area and yields; or

(ii) such payments are made on 85 percent or less of the base level of production; or

(iii) livestock payments are made on a fixed number of head.

(b) The exemption from the reduction commitment for direct payments meeting the above criteria shall be reflected by the exclusion of the value of those direct payments in a Member's calculation of its Current Total AMS.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

1. Notification requirements

50. With respect to the notification requirements concerning domestic support, see paragraphs 116–118 below.

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7
General Disciplines on Domestic Support

1. Each Member shall ensure that any domestic support measures in favour of agricultural producers which are not subject to reduction commitments because they qualify under the criteria set out in Annex 2 to this Agreement are maintained in conformity therewith.

2. (a) Any domestic support measure in favour of agricultural producers, including any modification to such measure, and any measure that is subsequently introduced that cannot be shown to satisfy the criteria in Annex 2 to this Agreement or to be exempt from reduction by reason of any other provision of this Agreement shall be included in the Member's calculation of its Current Total AMS.

(b) Where no Total AMS commitment exists in Part IV of a Member's Schedule, the Member shall not provide support to agricultural producers in excess of the relevant *de minimis* level set out in paragraph 4 of Article 6.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

51. No jurisprudence or decision of a competent WTO body.

1. Relationship with Annex 2

52. In order to consult the criteria established in Annex 2, see Section XXIV below.

PART V

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8
Export Competition Commitments

Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

1. General

53. With respect to Members' export subsidy commitments, see paragraphs 14–15 above and paragraphs 54–80 below.

2. Waivers from export subsidy commitments

54. On 22 October 1997, the General Council decided to grant a waiver from the export subsidy commitments to Hungary, in accordance with Article IX of the *WTO Agreement*.[82] See Chapter on the *WTO Agreement*, Section X.B.3 for a list of the waivers currently in force.

X. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9
Export Subsidy Commitments

1. The following export subsidies are subject to reduction commitments under this Agreement:

(a) the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance;

(b) the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market;

(c) payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived;

(d) the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight;

(e) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments;

(f) subsidies on agricultural products contingent on their incorporation in exported products.

2. (a) Except as provided in subparagraph (b), the export subsidy commitment levels for each year of the implementation period, as specified in a Member's Schedule, represent with respect to the export subsidies listed in paragraph 1 of this Article:

(i) in the case of budgetary outlay reduction commitments, the maximum level of expenditure for such subsidies that may be allocated or incurred in that year in respect of the agricultural product, or group of products, concerned; and

(ii) in the case of export quantity reduction commitments, the maximum quantity of an agricultural product, or group of products, in respect of which such export subsidies may be granted in that year.

(b) In any of the second through fifth years of the implementation period, a Member may provide export subsidies listed in paragraph 1 above in a given year in excess of the corresponding annual commitment levels in respect of the products or groups of products specified in Part IV of the Member's Schedule, provided that:

(i) the cumulative amounts of budgetary outlays for such subsidies, from the beginning of the implementation period through the year in question, does not exceed the cumulative amounts that would have resulted from full compliance with the relevant annual outlay commitment levels specified in the Member's Schedule by more than 3 percent of the base period level of such budgetary outlays;

(ii) the cumulative quantities exported with the benefit of such export subsidies, from

[82] WT/L/238.

the beginning of the implementation period through the year in question, does not exceed the cumulative quantities that would have resulted from full compliance with the relevant annual quantity commitment levels specified in the Member's Schedule by more than 1.75 percent of the base period quantities;

(iii) the total cumulative amounts of budgetary outlays for such export subsidies and the quantities benefiting from such export subsidies over the entire implementation period are no greater than the totals that would have resulted from full compliance with the relevant annual commitment levels specified in the Member's Schedule; and

(iv) the Member's budgetary outlays for export subsidies and the quantities benefiting from such subsidies, at the conclusion of the implementation period, are no greater than 64 percent and 79 percent of the 1986–1990 base period levels, respectively. For developing country Members these percentages shall be 76 and 86 percent, respectively.

3. Commitments relating to limitations on the extension of the scope of export subsidization are as specified in Schedules.

4. During the implementation period, developing country Members shall not be required to undertake commitments in respect of the export subsidies listed in subparagraphs (d) and (e) of paragraph 1 above, provided that these are not applied in a manner that would circumvent reduction commitments.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

1. General

(a) Notification requirements

55. With respect to notification requirements concerning export subsidies, see paragraphs 116–118 below.

2. Article 9.1(a)

(a) "direct subsidies, including payments-in-kind"

56. The Panel on *Canada – Dairy* held that "'payments-in-kind' are a form of direct subsidy" and that "a determination in the instant matter that '*payments-in-kind*' exist *would also be* a determination of the existence of a *direct subsidy*." (Emphasis added)[83] The Appellate Body disagreed and held, *inter alia*, that "[w]here the recipient gives full consideration in return for a 'payment-in-kind' there can be no 'subsidy', for the recipient is paying market-rates for what it receives":

> "In our view, the term 'payments-in-kind' describes one of the *forms* in which 'direct subsidies' may be granted. Thus, Article 9.1(a) applies to 'direct subsidies', *including* 'direct subsidies' granted in the form of 'payments-in-kind'. We believe that, in its ordinary meaning, the word 'payments', in the term 'payments-in-kind', denotes a transfer of economic resources, in a form other than money, from the grantor of the payment to the recipient. However, the fact that a 'payment-in-kind' has been made provides no indication as to the economic *value* of the transfer effected, either from the perspective of the grantor of the payment or from that of the recipient. A 'payment-in-kind' may be made in exchange for full or partial consideration or it may be made gratuitously. Correspondingly, a 'subsidy' involves a transfer of economic resources from the grantor to the recipient for less than full consideration. As we said in our Report in *Canada – Aircraft*, a 'subsidy', within the meaning of Article 1.1 of the *SCM Agreement*, arises where the grantor makes a 'financial contribution' which confers a 'benefit' on the recipient, as compared with what would have been otherwise available to the recipient in the marketplace. Where the recipient gives full consideration in return for a 'payment-in-kind' there can be no 'subsidy', for the recipient is paying market-rates for what it receives. It follows, in our view, that the mere fact that a 'payment-in-kind' has been made does not, *by itself*, imply that a 'subsidy', 'direct' or otherwise, has been granted.
>
> [T]he Panel erred in finding that 'a determination in the instant matter that "payments-in-kind" exist would also be a determination of the existence of a direct subsidy.' The Panel should have considered whether the particular 'payment-in-kind' that it found existed was a 'direct subsidy'. Instead, because the Panel assumed that a 'payment-in-kind' is necessarily a 'direct subsidy', it did not address specifically either the meaning of the term 'direct subsidies' or the question whether the provision of milk to processors for export under Special Classes 5(d) and 5(e) constitutes 'direct subsidies'."[84]

(b) "governments or their agencies"

57. In *Canada – Dairy*, the Appellate Body addressed the phrase "governments or their agencies" and held that the fact that such an agency enjoys a "degree of discretion" does not remove its quality of being a government agency:

> "According to *Black's Law Dictionary*, 'government' means, *inter alia*, '[t]he *regulation*, *restraint*, *supervision*, or *control* which is exercised upon the individual

[83] Panel Report on *Canada – Dairy*, para. 7.43.
[84] Appellate Body Report on *Canada – Dairy*, paras. 87–88.

members of an organized jural society *by those invested with authority*'. (emphasis added) This is similar to meanings given in other dictionaries. The essence of 'government' is, therefore, that it enjoys the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct, through the exercise of lawful authority. This meaning is derived, in part, from the *functions* performed by a government and, in part, from the government having the *powers* and *authority* to perform those functions. A 'government agency' is, in our view, an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens. As with any agency relationship, a 'government agency' may enjoy a degree of discretion in the exercise of its functions."[85]

3. Article 9.1(c)

(a) "payments"

(i) A payment includes a payment-in-kind

58. In *Canada – Dairy*, the Appellate Body interpreted the term "payments" to include a transfer of resources other than money, including a "payment in kind":

> "We have found that the word 'payments', in the term 'payments-in-kind' in Article 9.1(a), denotes a transfer of economic resources.[86] We believe that the same holds true for the word 'payments' in Article 9.1(c). The question which we now address is whether, under Article 9.1(c), the economic resources that are transferred by way of a 'payment' must be in the form of money, or whether the resources transferred may take other forms. As the Panel observed, the dictionary meaning of the word 'payment' is not limited to payments made in monetary form. In support of this, the Panel cited the *Oxford English Dictionary*, which defines 'payment' as 'the remuneration of a person with money *or its equivalent*'.[87] (emphasis added) Similarly, the *Shorter Oxford English Dictionary* describes a 'payment' as a 'sum of money (*or other thing*) paid'.[88] (emphasis added) Thus, according to these meanings, a 'payment' could be made in a form, other than money, that confers value, such as by way of goods or services. A 'payment' which does not take the form of money is commonly referred to as a 'payment in kind'.
>
> We agree with the Panel that the ordinary meaning of the word 'payments' in Article 9.1(c) is consistent with the dictionary meaning of the word. Under Article 9.1(c), 'payments' are 'financed by virtue of governmental action' and they may or may not involve 'a charge on the public account'. Neither the word 'financed' nor the term 'a charge' suggests that the word 'payments' should be interpreted to apply solely to money payments. A payment made in the form of goods or services is also 'financed' in the same way as a money payment, and, likewise, 'a charge on the public account' may arise as a result of a payment, or a legally binding commitment to make payment by way of goods or services, or as a result of revenue foregone."[89]

59. The Appellate Body on *Canada – Dairy* considered that the context of Article 9.1(c) also supported a reading of the word "payments" that covered "payments-in-kind".

> "The context of Article 9.1(c) also supports a reading of the word 'payments' that embraces 'payments-in-kind'. That context includes the other sub-paragraphs of Article 9.1. As the Panel explained, *none* of the export subsidies listed in Article 9.1 is restricted to grants made solely in money form and several expressly involve subsidies granted in a form other than money.[90] Under Article 9.1(a), 'payments-in-kind' are specifically included as a form of 'direct subsidies'. Similarly, under Articles 9.1(b), the export subsidy identified may involve the disposal of agricultural goods *at less than domestic price*. Under Article 9.1(e), the provision of transport services for export shipments at *prices lower than the price charged for domestic shipments* is also an export subsidy. Thus, each of these three sub-paragraphs of Article 9.1 specifically contemplates that the export subsidy may be granted in a form other than a money payment.
>
> The context, in our view, also includes Article 1(c) of the *Agreement on Agriculture*. In terms of that provision, 'revenue foregone' is to be taken into account in determining whether 'budgetary outlay' commitments, made with respect to export subsidies as listed in Article 9.1, have been exceeded. In our view, the foregoing of revenue usually does not involve a monetary payment. Thus, if a restrictive reading of the words 'payments' were adopted, such that 'payments' under Article 9.1(c) had to be monetary, no account could be taken, under Article 9.1(c), of 'revenue foregone'. This would, we believe, prevent a proper assessment of the commitments made by WTO Members under Article 9.2, as envisaged by Article 1(c) of the *Agreement on Agriculture*. We, therefore, prefer a reading of Article 9.1(c) that allows full account to be taken of 'revenue foregone'. The contrary view would, in our opinion, elevate form over substance and permit Members to circumvent the subsidy disciplines set forth in Article 9 of the *Agreement on Agriculture*."[91]

60. The Appellate Body on *Canada – Dairy* acknowledged that Article 9.1(c) did not refer explicitly to

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[85] Appellate Body Report on *Canada – Dairy*, para. 97.
[86] (*footnote original*) *Supra*, para. 87.
[87] (*footnote original*) Panel Report, para. 7.92.
[88] (*footnote original*) *The Shorter Oxford English Dictionary*, C.T. Onions (ed.) (Guild Publishing, 1983), Vol. II, p. 1532.
[89] Appellate Body Report on *Canada – Dairy*, paras. 107–108.
[90] (*footnote original*) See Panel Report, para. 7.95.
[91] Appellate Body Report on *Canada – Dairy*, paras. 109–110.

"payments-in-kind", unlike other provisions of the *Agreement on Agriculture*, but held that the purpose of its express inclusion was "to counter any suggestion that the ordinary meaning of the terms '*direct* subsidies' and '*direct* payments' does *not* include 'payments-in-kind'":

> "It is true, as Canada argues, that Article 9.1(c) does not expressly include 'payments-in-kind' within its scope, whereas Article 9.1(a) and paragraph 5 of Annex 2 to the *Agreement on Agriculture* do. However, we do not regard the express inclusion of 'payments-in-kind' in these two provisions as necessarily implying the exclusion of 'payments-in-kind' under Article 9.1(c). In Article 9.1(a) and in paragraph 5 of Annex 2, the term 'payments-in-kind' is used in conjunction with the words '*direct* subsidies' and '*direct* payments', respectively. We believe that reference is made to 'payments-in-kind' in these two provisions to counter any suggestion that the ordinary meaning of the terms '*direct* subsidies' and '*direct* payments' does *not* include 'payments-in-kind'. By contrast, since the ordinary meaning of the word 'payments' in Article 9.1(c) includes 'payments-in-kind', there was no need for 'payments-in-kind' to be expressly provided for. Moreover, if 'payments-in-kind' are *included* in the qualified concept of 'direct payments' under Annex 2, paragraph 5, it would be incongruous to *exclude* them from the broader concept of 'payments' in Article 9.1(c)."[92]

61. The Appellate Body on *Canada – Dairy* consequently agreed with the Panel that the ordinary meaning of the word "payments" in Article 9.1(c) encompassed "payments" in forms other than money, including revenue foregone:

> "In our view, the provision of milk at discounted prices to processors for export under Special Classes 5(d) and 5(e) constitutes 'payments', in a form other than money, within the meaning of Article 9.1(c). If goods or services are supplied to an enterprise, or a group of enterprises, at reduced rates (that is, at below market-rates), 'payments' are, in effect, made to the recipient of the portion of the price that is not charged. Instead of receiving a monetary payment equal to the revenue foregone, the recipient is paid in the form of goods or services. But, as far as the recipient is concerned, the economic value of the transfer is precisely the same.
>
> We, therefore, uphold the Panel's finding, in paragraph 7.101 of the Panel Report, that the provision of discounted milk to processors or exporters under Special Classes 5(d) and 5(e) involves 'payments' within the meaning of Article 9.1(c) of the *Agreement on Agriculture*."[93] [94]

(ii) Benchmark to be applied when assessing payments

62. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* explained the importance of a benchmark when assessing if the measure at issue involves "payments" under Article 9.1(c):

> "Thus, the determination of whether 'payments' are involved requires a comparison between the price actually charged by the provider of the goods or services – the prices of CEM in this case – and some objective standard or benchmark which reflects the proper value of the goods or services to their provider – the milk producer in this case. We do not accept Canada's argument that as the producer negotiates freely the price with the processor, and CEM prices are, therefore, market-determined, it is not necessary to compare these prices with an objective standard.
>
> Article 9.1(c) of the *Agreement on Agriculture* does not expressly identify any standard for determining when a measure involves 'payments' in the form of payments-in-kind. The absence of an express standard in Article 9.1(c) may be contrasted with several other provisions involving export subsidies which do provide an express standard. Thus, for instance, even within Article 9.1 itself, sub-paragraphs (b) and (e) expressly provide that the domestic market constitutes the appropriate basis for comparison.[95]
>
> We believe that it is significant that Article 9.1(c) of the *Agreement on Agriculture* does not expressly identify a standard or benchmark for determining whether a measure involves 'payments'. It is clear that the notion of 'payments' encompasses a diverse range of practices involving a transfer of resources, either monetary or in-kind. Moreover, the 'payments' may take place in many different factual and regulatory settings. Accordingly, we believe that it is necessary to scrutinize carefully the facts and circumstances of a disputed measure, including the regulatory framework surrounding that measure, to determine the appropriate basis for comparison in assessing whether the measure involves 'payments' under Article 9.1(c)."[96]

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[92] Appellate Body Report on *Canada – Dairy*, para. 111.

[93] Appellate Body Report on *Canada – Dairy*, paras. 113–114.

[94] The Panel on *Canada – Dairy (Article 21.5 – New Zealand and US II)* recalled that, as found by the Panel (Panel Report on *Canada – Dairy*, para.7.101) and confirmed by the Appellate Body (Appellate Body Report on *Canada – Dairy*, para.112) in the original *Canada – Dairy* case, a payment under Article 9.1(c) includes a "payment-in-kind." This finding had been reaffirmed by the Panel (Panel Report on *Canada - Dairy (Article 21.5 – New Zealand and US)*, para. 6.12*)* and Appellate Body (Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras.71 and 76*)* in the first *Canada – Dairy* compliance case. The point had not been re-argued by the parties before The Panel on the second *Canada – Dairy* compliance case*:* Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 5.26.

[95] (*footnote original*) *See also*, items (c), (d), (f), (g), (h), (j) and (k) of the Illustrative List of the *SCM Agreement*, each of which expressly identifies one or more benchmarks to be used as a basis for comparison in determining whether a measure involves export subsidies. *See further*, paragraphs 8 and 13 of Annex 3, and paragraph 2 of Annex 4, of the *Agreement on Agriculture*, which expressly identify one or more benchmarks for calculating the amount of domestic support.

[96] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 74–76.

63. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* rejected the Panel's suggestion that the domestic market provided the "right benchmark" for the dispute.

> "The domestic price in this case is an administered price fixed by the Canadian government as part of the regulatory framework established by it for managing the supply of milk destined for consumption in the domestic market. As with administered prices in general, this price expresses a government policy choice based, not only on economic considerations, but also on other social objectives. The Canadian regulatory framework for managing domestic milk supply, including the establishment of the administered price, is not in dispute in this case. There can be little doubt, however, that the administered price is a price that is favourable to the domestic producers. Consequently, sale of CEM by the producer at less than the administered domestic price does not, necessarily, imply that the producer has foregone a portion of the proper value of the milk to it. In the situation where the producer, rather than the government, chooses to produce and sell CEM in the marketplace at a price it freely negotiates, we do not believe it is appropriate to use, as a basis for comparison, a domestic price that is fixed by the government."[97]

64. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* also rejected an alternative "benchmark" which relied on world market prices.

> "The alternative 'benchmark' which the Panel relied upon to determine whether CEM prices involve 'payments' was the terms and conditions on which alternative supplies are available to processors on world markets, through IREP.[98] In reviewing this benchmark, we recall that, in these proceedings, the standard used to determine whether there are 'payments' under Article 9.1(c) must be based on the proper value of the milk to the producer, in order to determine whether the producer foregoes a portion of this value. If a producer wishes to sell milk for export processing, it is obvious that the price of the milk to the processor must be competitive with world market prices. If it is not, the processor will not buy the milk, as it will not be able to produce a final product that is competitive in export markets. Accordingly, the range of world market prices determines the price which the producer can charge for milk destined for export markets.[99] World market prices do, therefore, provide one possible measure of the value of the milk to the producer.
>
> However, world market prices do not provide a valid basis for determining whether there are 'payments', under Article 9.1(c) of the *Agreement on Agriculture*, for, it remains possible that the reason CEM can be sold at prices competitive with world market prices is precisely because sales of CEM involve subsidies that make it competitive. Thus, a comparison between CEM prices and world market prices gives no indication on the crucial question, namely, whether Canadian export production has been given an advantage. Furthermore, if the basis for comparison were world market prices, it would be possible for WTO Members to subsidize domestic inputs for export processing, while taking care to maintain the price of these inputs to the processors at a level which equalled or marginally exceeded world market prices. There would then be no 'payments' under Article 9.1(c) of the *Agreement on Agriculture* and WTO Members could easily defeat the export subsidy commitments that they have undertaken in Article 3 of the *Agreement on Agriculture*.[100]
>
> We do not, therefore, accept that world market prices are an appropriate basis for determining whether sales of CEM by producers involve 'payments' under Article 9.1(c) of the *Agreement on Agriculture*."[101]

65. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* indicated that a number of possible measures for assessing the value of milk existed:

> "We turn now to determine the appropriate standard for assessing whether sales of CEM by producers involve 'payments' under Article 9.1(c) of the *Agreement on Agriculture*. We reiterate that the standard must be objective and based on the value of the milk to the producer.
>
> Although the proceeds from sales at domestic or world market prices represent two possible measures of the value of milk to the producer, we do not see these as the

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[97] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para.81

[98] (*footnote original*) Panel Report, paras. 6.22 ff. *See*, *supra*, para. 67. We note that, in examining the terms and conditions on which IREP is available, the Panel focused exclusively on the requirements to obtain a discretionary permit and to pay an administrative fee. In assessing whether alternative sources of supply are available on more favourable terms, we consider that panels should take account of all the factors which affect the relative "attractiveness" in the marketplace of the different goods or services. The primary consideration must be price, while the importance of administrative formalities will depend on their nature and characteristics. For instance, if an import permit were granted to importers as a matter of course, in the context of straightforward import procedures, and if import fees were only administrative charges to cover expenses, these formalities would be unlikely, on their own, to mean that imports were available on less favourable terms and conditions.

[99] (*footnote original*) New Zealand acknowledged, before the Panel, that the price of CEM "will be essentially world market prices". (New Zealand's first submission to the Panel, para. 4.05) Canada also argued that the processor offers producers a price for CEM that is based on world market conditions. (Canada's first submission to the Panel, para. 37; Canada's second submission to the Panel, para. 13; Canada's oral statement before the Panel, paras. 21, 30, 49 and 51; Canada's appellant's submission, para. 39 and footnote 32 thereto.)

[100] (*footnote original*) We note that none of the participants in these proceedings argued that world market prices are the appropriate benchmark for determining whether supplies of CEM involve "payments" within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. *See also*, *supra*, footnote 43.

[101] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)* paras. 83–85.

only possible measures of this value. For any economic operator, the production of goods or services involves an investment of economic resources. In the case of a milk producer, production requires an investment in fixed assets, such as land, cattle and milking facilities, and an outlay to meet variable costs, such as labour, animal feed and health-care, power and administration. These fixed and variable costs are the total amount which the producer must spend in order to produce the milk and the total amount it must recoup, in the long-term, to avoid making losses. To the extent that the producer charges prices that do not recoup the total cost of production, over time, it sustains a loss which must be financed from some other source, possibly 'by virtue of governmental action."[102]

66. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US II*) considered that the average total cost of production benchmark should be an industry-wide average:

"We believe that the standard for determining the existence of 'payments', under Article 9.1(c), should reflect the fact that the obligation at issue is an international obligation imposed on Canada. The question is not whether one or more individual milk producers, efficient or not, are selling CEM at a price above or below their individual costs of production. The issue is whether Canada, on a national basis, has respected its WTO obligations and, in particular, its commitment levels. It, therefore, seems to us that the benchmark should be a single, industry-wide cost of production figure, rather than an indefinite number of cost of production figures for each individual producer. The industry-wide figure enables cost of production data for producers, as a whole, to be aggregated into a single, national standard that can be used to assess Canada's compliance with its international obligations.

By contrast, if the benchmark were to operate at the level of each individual producer, there would be a proliferation of standards, requiring individual-level inquiry and application of Article 9.1(c), as if the obligations under the *Agreement on Agriculture* involved rights and obligations of individual producers, rather than WTO Members."[103]

67. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US II*) agreed with the Panel that certain imputed costs and selling costs should be included in the cost of production benchmark:

"We, therefore, find that the COP standard for determining whether 'payments' exist, under Article 9.1(c) of the *Agreement on Agriculture*, includes all monetary and non-monetary economic costs of production, such as the costs of family labour and management, and of owner's equity.

. . .

Accordingly, we find that any transport, marketing, and administrative costs are to be included in the COP standard applied under Article 9.1(c), as are any costs of acquiring and retaining quota."[104]

(b) "financed by virtue of governmental action"

(i) Meaning of governmental action

68. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* considered the meaning of the term "governmental action" under Article 9.1(c):

"We recall that, in the original proceedings, the role of the government in managing the supply of milk for export was manifest. We stated that:

> '[G]overnmental action' is not simply involved; it is, in fact, *indispensable* to enable the supply of milk to processors for export, and hence the transfer of resources, to take place. In the regulatory framework, 'government agencies' stand so completely between the producers of the milk and the processors or the exporters that we have no doubt that the transfer of resources takes place 'by virtue of governmental action'.[105] (emphasis added)

Although the phrase 'financed by virtue of governmental action' must be understood as a whole, it is useful to consider separately the meaning of the different parts of this phrase. Taking the words 'governmental action' first, we observe that the text of Article 9.1(c) does not place any qualifications on the types of 'governmental action' which may be relevant under Article 9.1(c). In the original proceedings, we stated that '[t]he essence of "government" is . . . that it enjoys the effective power to "regulate", "control" or "supervise" individuals, or otherwise "restrain" their conduct, through the exercise of lawful authority.'[106] In our opinion the word 'action' embraces the full-range of these activities, including governmental action regulating the supply and price of milk in the domestic market."[107]

(ii) Meaning of "financed"

69. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* considered the meaning of this term under Article 9.1(c):

"[I]t will not be sufficient simply to demonstrate that a payment occurs as a consequence of governmental action because the word 'financed', in Article 9.1(c), must also be given meaning.

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[102] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 86–87.
[103] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*,paras. 95–96.
[104] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 110 and 116.
[105] (*footnote original*) Appellate Body Report, *Canada – Dairy*, *supra*, footnote 2, para. 120.
[106] (*footnote original*) *Ibid.*, para. 97.
[107] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US*), paras. 111 and 112.

> The word 'financed' might be given a rather specific meaning such that it would be confined to the financing of 'payments' in monetary form or to the funding of 'payments' from government resources. However, we have already recalled that 'payments', under Article 9.1(c), include payments-in-kind, so the word 'financed' needs to cover both the financing of monetary payments and payments-in-kind.[108] In addition, Article 9.1(c) explicitly excludes a reading of the word 'financed' whereby payments must be funded from government resources, as the provision states that payments can be financed by virtue of governmental action 'whether or not a charge on the public account is involved'. Thus, under Article 9.1(c), it is not necessary that the economic resources constituting the 'payment' actually be paid by the government or even that they be paid from government resources. Accordingly, although the words 'by virtue of' render governmental action essential, Article 9.1(c) contemplates that payments may be financed by virtue of governmental action even though significant aspects of the financing might not involve government."[109]

(iii) Link between governmental action and the financing of payments

70. When examining the link required between governmental action and the financing of payments under Article 9.1(c), the Panel on *Canada – Dairy (Article 21.5 – New Zealand and US)* considered that governmental action should be "indispensable" to the financing of payments, and "establish[es] the conditions which ensure that the payment . . . takes place."[110] Further, the Panel indicated that for the "by virtue of" test of Article 9.1(c) to be met "it must be established that a payment would not be financed . . . but for governmental action."[111] This "but for" standard would be met if the following two requirements were established:

> "[T]hat governmental action, *de jure* or *de facto*: (i) prevents Canadian milk producers from selling more milk on the regulated domestic market, at a higher price, than to the extent of the quota allocated to them; and (ii) obliges Canadian milk processors to export all milk contracted as lower priced commercial export milk, and, accordingly, penalizes the diversion by processors of milk contracted as commercial export milk to the domestic market. As explained below,[112] only if both those requirements were to be met, governmental action could be said to be indispensable for the transfer of resources to take place: the lower priced commercial export milk would not have been available to Canadian processors for export *but for* these governmental actions, taken together."[113]

71. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* confirmed that mere governmental action would not be sufficient for a finding that an export subsidy existed under Article 9.1(c) and expanded on the meaning of the words "by virtue of":

> "The words 'by virtue of' indicate that there must be a demonstrable link between the *governmental action* at issue and the *financing* of the payments, whereby the payments are, in some way, financed as a result of, or as a consequence of, the governmental action."[114] (emphasis added)

72. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* indicated that establishing such a link would be more difficult in cases involving payments-in-kind.

> "[T]he link between governmental action and the financing of payments will be more difficult to establish, as an evidentiary matter, when the payment is in the form of a payment-in-kind rather than in monetary form, and all the more so when the payment-in-kind is made, not by the government, but by an independent economic operator."[115]

73. Further, the Appellate Body in *Canada – Dairy (Article 21.5 – New Zealand and US)* indicated that it disagreed with the Panel's findings that governmental action had "oblige[d]" or "drive[n]" producers to sell commercial export milk ("CEM").[116] However, the Appellate Body did not make any further findings on the meaning of "financed by governmental action" at that stage of the proceedings.

74. In *Canada – Dairy (Article 21.5 – New Zealand and US II)* the Appellate Body considered the meaning of "financed by government action" in light of the ordinary meaning of the word "financing" but, on the other hand, the fact that Article 9.1(c) expressly states that "payments" need not involve "a charge on the public account". It summed up as follows:

> "Accordingly, even if government does not fund the payments itself, it must play a sufficiently important part in the process by which a private party funds 'payments', such that the requisite nexus exists between 'governmental action' and 'financing'."[117]

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[108] (*footnote original*) *Supra*, para. 71.
[109] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 114.
[110] Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 6.38, 6.40 and 6.44.
[111] Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 6.39.
[112] (*footnote original*) See paragraphs 6.43–6.48 below [of the Report].
[113] Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 6.42. The Panel found that these requirements were satisfied – a finding which led Canada to appeal.
[114] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US*), para. 113.
[115] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US*), para. 113.
[116] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 116–117.
[117] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 133.

75. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US II)* considered the facts of the dispute and agreed with the Panel that a significant percentage of producers were likely to finance sales of commercial export milk ("CEM") at below the costs of production as a result of participation in the domestic market and, further, that payments made through the supply of CEM at below the costs of production were financed by virtue of "governmental action" within the meaning of Article 9.1(c) of the *Agreement on Agriculture*:

> "It falls now to consider the role of the Canadian government in financing payments made on the sale of CEM. We have agreed with the Panel that a significant percentage of producers are likely to finance sales of CEM at below the costs of production as a result of participation in the domestic market. Canadian 'governmental action' controls virtually every aspect of domestic milk supply and management. [footnote omitted] In particular, government agencies fix the price of domestic milk that renders it highly remunerative to producers. Government action also controls the supply of domestic milk through quota, thereby protecting the administered price. The imposition by government of financial penalties on processors that divert CEM into the domestic market is another element of governmental control over the supply of milk. Further, the degree of government control over the domestic market is emphasized by the fact that government pools, allocates, and distributes revenues to producers from all domestic sales. Finally, governmental action also protects the domestic market from import competition through tariffs. [footnote omitted]
>
> In our view, the effect of these different governmental actions is to secure a highly remunerative price for sales of domestic milk by producers. In turn, it is due to this price that a significant proportion of producers covers their fixed costs in the domestic market and, as a result, has the resources profitably to sell export milk at prices that are below the costs of production."[118]

76. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US II)* dismissed an objection that this reasoning brings "cross-subsidization" under Article 9.1(c) of the *Agreement on Agriculture*:

> "We have explained that the text of Article 9.1(c) applies to any 'governmental action' which 'finances' export 'payments'. The text does not exclude from the scope of the provision any particular governmental action, such as regulation of domestic markets, to the extent that this action may become an instrument for granting export subsidies. Nor does the text exclude any particular form of financing, such as 'cross-subsidization'. Moreover, the text focuses on the consequences of governmental action ('by virtue of which') and not the intent of government. Thus, the provision applies to governmental action that finances export payments, even if this result is not intended. As stated in our Report in the first Article 21.5 proceedings, this reading of Article 9.1(c) serves to preserve the legal 'distinction between the domestic support and export subsidies disciplines of the *Agreement on Agriculture*'.[119] Subsidies may be granted in both the domestic and export markets, provided that the disciplines imposed by the Agreement on the levels of subsidization are respected. If governmental action in support of the domestic market could be applied to subsidize export sales, without respecting the commitments Members made to limit the level of export subsidies, the value of these commitments would be undermined. Article 9.1(c) addresses this possibility by bringing, in some circumstances, governmental action in the domestic market within the scope of the 'export subsidies' disciplines of Article 3.3."[120]

77. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US II)* considered that the "payments" at issue were not financed "by virtue of" another form of governmental action in the dispute, which was an exemption for processors from paying the higher domestic price for milk when they purchased commercial export milk:

> "We do not believe that this action influences the 'financing' of payments by the producer. Certainly, this action explains why the *processor* of CEM is not *required* to pay the higher domestic price for CEM. However, the mere fact that the processor is not obliged to buy CEM at the domestic price does not demonstrate a link between this exemption and the financing of payments by the *producer* on the sale of CEM. The exemption is, in short, not linked to the mechanism by which the producer funds the payments."[121]

4. Article 9.1(d)

(a) "costs of marketing"

78. In *US – FSC*, the measure at issue created a reduction of income tax liability for certain United States' corporations, provided, *inter alia*, that these corporations incurred a certain portion of their marketing expenses abroad. The Panel found that the United States' measure constituted a subsidy to "reduce the costs of marketing exports", within the meaning of paragraph 1(d).[122] The Appellate Body disagreed and held, *inter alia*, that "income tax liability under the FSC measure arises only when goods are actually sold for

[118] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 144–145.
[119] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 90.
[120] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 148.
[121] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 149.
[122] Panel Report on *US – FSC*, para. 7.155.

export, that is, *when they have been the subject of successful marketing*. Such liability arises *because* goods have, in fact, been sold, and not as *part of the process* of marketing them".[123] (Emphasis original) The Appellate Body ultimately concluded that "if income tax liability arising from export sales can be viewed as among the 'costs of marketing exports', then so too can virtually any other cost incurred by a business engaged in exporting":

> "We turn, first, to the word 'marketing' in Article 9.1(d), which is at the heart of the phrase 'to reduce the costs of *marketing* exports' in Article 9.1(d). Taken alone, that word can have, as the Panel indicated, a range of meanings. The Panel noted the *Webster's Dictionary* meaning, according to which 'marketing' is the 'aggregate of functions involved in transferring title and in moving goods from producer to consumer including among others buying, selling, storing, transporting, standardizing, financing, risk bearing and supplying market information'. . . . *The New Shorter Oxford Dictionary* provides a similar meaning: 'The action, business, or process of promoting and selling a product . . .'. However, we must look beyond dictionary meanings, because, as we have said before, 'dictionary meanings leave many interpretive questions open.'
>
> The text of Article 9.1(d) lists 'handling, upgrading and other processing costs, and the costs of international transport and freight' as examples of 'costs of marketing'. The text also states that 'export promotion and advisory services' are covered by Article 9.1(d), provided that they are not 'widely available'. These are not examples of just *any* 'cost of doing business' that 'effectively reduce[s] the cost of marketing' products. Rather, they are specific types of costs that are incurred *as part of* and *during* the process of selling a product. They differ from general business costs, such as administrative overhead and debt financing costs, which are not specific to the process of putting a product on the market, and which are, therefore, related to the marketing of exports only in the broadest sense.
>
> . . .
>
> Income tax liability under the FSC measure arises only when goods are actually sold for export, that is, *when they have been the subject of successful marketing*. Such liability arises *because* goods have, in fact, been sold, and not as *part of the process* of marketing them. Furthermore, at the time goods are sold, the costs associated with putting them on the market – costs such as handling, promotion and distribution costs – have already been incurred and the amount of these costs is not altered by the income tax, the amount of which is calculated by reference to the sale price of the goods. In our view, if income tax liability arising from export sales can be viewed as among the 'costs of marketing exports', then so too can virtually any other cost incurred by a business engaged in exporting."[124]

XI. ARTICLE 10

A. TEXT OF ARTICLE 10

Article 10
Prevention of Circumvention of Export Subsidy Commitments

1. Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.

2. Members undertake to work toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes and, after agreement on such disciplines, to provide export credits, export credit guarantees or insurance programmes only in conformity therewith.

3. Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question.

4. Members donors of international food aid shall ensure:

(a) that the provision of international food aid is not tied directly or indirectly to commercial exports of agricultural products to recipient countries;

(b) that international food aid transactions, including bilateral food aid which is monetized, shall be carried out in accordance with the FAO "Principles of Surplus Disposal and Consultative Obligations", including, where appropriate, the system of Usual Marketing Requirements (UMRs); and

(c) that such aid shall be provided to the extent possible in fully grant form or on terms no less concessional than those provided for in Article IV of the Food Aid Convention 1986.

B. INTERPRETATION AND APPLICATION OF ARTICLE 10

1. Article 10.1

(a) Export subsidy commitments

79. In *US – FSC*, the Appellate Body interpreted the term "export subsidy commitments" to have "a wider reach [than reduction commitments] that covers commitments and obligations relating to *both* scheduled and unscheduled agricultural products":

[123] Appellate Body Report on *US – FSC*, para. 131.
[124] Appellate Body Report on *US – FSC*, paras. 129–131.

"The word 'commitments' generally connotes 'engagements' or 'obligations'. Thus, the term 'export subsidy *commitments*' refers to commitments or obligations relating to export subsidies assumed by Members under provisions of the *Agreement on Agriculture*, in particular, under Articles 3, 8 and 9 of that Agreement.

. . .

We also find support for this interpretation of the term 'export subsidy commitments' in Article 10 itself, which draws a distinction, in sub-paragraphs 1 and 3, between 'export subsidy commitments' and '*reduction commitment levels*'. In our view, the terms 'export subsidy commitments' and 'reduction commitments' have different meanings. '*Reduction* commitments' is a narrower term than 'export subsidy commitments' and refers only to commitments made, under the first clause of Article 3.3, with respect to *scheduled* agricultural products. It is only with respect to *scheduled* products that Members have undertaken, under Article 9.2(b)(iv) of the *Agreement on Agriculture*, to *reduce* the level of export subsidies, as listed in Article 9.1, during the implementation period of the *Agreement on Agriculture*. The term 'export subsidy commitments' has a wider reach that covers commitments and obligations relating to *both* scheduled and unscheduled agricultural products."[125]

(b) "applied in a manner which results in, or which threatens to lead to circumvention"

80. In *US – FSC*, the Appellate Body made a number of observations relevant to the interpretation of the phrase "applied in a manner which results in, or which threatens to lead to, circumvention":

"We turn next to whether the subsidies under the FSC measure are 'applied in a manner which *results in*, or which *threatens to lead to*, *circumvention* of export subsidy commitments'. (emphasis added) The verb 'circumvent' means, *inter alia*, 'find a way round, evade . . .'. Article 10.1 is designed to prevent Members from circumventing or 'evading' their 'export subsidy commitments'. This may arise in many different ways. We note, moreover, that, under Article 10.1, it is not necessary to demonstrate *actual* 'circumvention' of 'export subsidy commitments'. It suffices that 'export subsidies' are 'applied in a manner which . . . *threatens to lead to circumvention* of export subsidy commitments'.

. . .

Article 10.1 prevents the application of export subsidies which '*results in*, or which *threatens to lead to*, *circumvention*' of that prohibition. Members would certainly have 'found a way round', a way to 'evade', this prohibition if they could transfer, through tax exemptions, the very same economic resources that they are prohibited from providing in other forms under Articles 3.3 and 9.1.

. . .

Given that the nature of the 'export subsidy commitment' differs as between scheduled and unscheduled products, we believe that what constitutes 'circumvention' of those commitments, under Article 10.1, may also differ.

As regards *scheduled* products, when the specific reduction commitment levels have been reached, the *limited authorization* to provide export subsidies as listed in Article 9.1 is transformed, effectively, into a *prohibition* against the provision of those subsidies. However, as we have seen, the FSC measure allows for the provision of an unlimited amount of FSC subsidies, and scheduled agricultural products may, therefore, benefit from those subsidies when the reduction commitment levels specified in the United States' Schedule for those agricultural products have been reached. In our view, Members would have found 'a way round', a way to 'evade', their commitments under Articles 3.3 and 9.1, if they could transfer, through tax exemptions, the very same economic resources that they were, *at that time*, prohibited from providing through other methods under the first clause of Article 3.3 and under 9.1."[126]

81. The Panel on *US – FSC (Article 21.5 – EC)* indicated that the Act concerned contained subsidies contingent on export performance under Article 1(e) of the *Agreement on Agriculture*. The United States was found to have acted inconsistently with Article 10.1 for "applying the export subsidies, with respect to both scheduled and unscheduled agricultural products, in a manner that, at the very least, threaten[ed] to circumvent its export subsidy commitments under Article 3.3 of the *Agreement on Agriculture*":

"Turning to the issue of whether the export subsidies are 'applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments' within the meaning of Article 10.1 of the *Agreement on Agriculture*, we derive guidance from the approach of the Appellate Body in the original dispute and consider the structure and other characteristics of the measure.[127] We recall that the term 'export subsidy commitments', defining the obligations that are to be protected under Article 10.1 of the *Agreement on Agriculture*, '. . . covers commitments and obligations relating to *both* scheduled and unscheduled agricultural products'.[128]

We note that the Act creates a legal entitlement for recipients to receive export subsidies, not listed in Article 9.1[129], with respect to both scheduled and unscheduled

[125] Appellate Body Report on *US – FSC*, paras. 144 and 147.
[126] Appellate Body Report on *US – FSC*, paras. 148–152. This was confirmed by the Panel Report on *US – FSC (Article 21.5 – EC)*, paras. 8.117–8.122.
[127] (*footnote original*) Original Appellate Body Report, *supra*, note 1, para. 149.
[128] (*footnote original*) Original Appellate Body Report, *supra*, note 1, paras. 144–147.
[129] (*footnote original*) See *supra*, note 219.

agricultural products. Upon fulfilment by the taxpayer of the conditions stipulated in the Act, the United States government must provide the tax exclusion. As there is no limitation on the amount of extraterritorial income, and thus on the amount of qualifying foreign trade income, that may be claimed in respect of eligible transactions, the amount of export subsidies is unqualified.[130]

Thus, with respect to *unscheduled* agricultural products, we believe that the Act involves the application of export subsidies, *not* listed in Article 9.1, in a manner that, at the very least, 'threatens to lead to circumvention' of that 'export subsidy commitment' in Article 3.3.

With respect to *scheduled* agricultural products, we observe that the measure allows for the provision of an unlimited amount of subsidies, and scheduled agricultural products may, therefore, benefit from those subsidies even after the reduction commitment levels specified in the United States' Schedule for those agricultural products have been reached. Thus, we find that the Act is applied in a manner that, at the very least, threatens to lead to circumvention of the export subsidy commitments made by the United States, under the first clause of Article 3.3, with respect to scheduled agricultural products.[131]

We note that, in these proceedings, the United States does not contest that, if the measure gives rise to subsidies contingent upon export performance under the *Agreement on Agriculture*, then these subsidies would violate its obligations under Articles 10.1 and 8 of the *Agreement on Agriculture*.

We therefore conclude that the United States has acted inconsistently with its obligations under Article 10.1 of the *Agreement on Agriculture* by applying the export subsidies, with respect to both scheduled and unscheduled agricultural products, in a manner that, at the very least, threatens to circumvent its export subsidy commitments under Article 3.3 of the *Agreement on Agriculture*. Furthermore, by acting inconsistently with Article 10.1, the United States has acted inconsistently with its obligation under Article 8 of the *Agreement on Agriculture* 'not to provide export subsidies otherwise than in conformity with this Agreement . . .'."[132]

2. Article 10.2

82. At its meeting of 18 October 2000, the General Council agreed to instruct the Committee on Agriculture to include an item on the implementation of Article 10.2 of the *Agreement on Agriculture* in the agenda of the regular meetings of the Committee on Agriculture.[133]

83. At its meeting of 18 October 2000, the General Council also stated that:

"[I]n pursuing their work on export credits in accordance with Article 10.2, Members will of course take into account the provisions of paragraph 4 of the Marrakesh Decision on net food-importing countries, in which Ministers had agreed that any agreement on export credits should ensure appropriate provision for differential treatment in favour of least-developed and net food-importing developing countries.[134]"

84. At the Doha WTO Ministerial, Members approved the following recommendations, which had been submitted to the Committee on Agriculture for their consideration:

"a) That the focus of the work in the regular Committee meetings would be on the implementation of Article 10.2 and the disciplines foreseen therein, whereas the Special Session negotiations would focus on the proposals tabled or to be tabled on export credit practices;

b) that, without prejudice to further work to be undertaken in the regular meetings of the Committee as provided for in subparagraph (l) above, in the event that a Sector Understanding on agricultural export credits is concluded at the OEC, the Committee would, as envisaged in the report of the Committee on Agriculture to the Singapore WTO Ministerial (G/L/131, paragraph 11), consider how any such understanding could be multilateralized within the framework of the Agreement on Agriculture and how the provisions of paragraph 4 of the Marrakesh NFIDC Decision have been taken into account; and

c) that the Committee on Agriculture should submit a report to the General Council on this subject following its regular September 2002 meeting.[135]"

85. Pursuant to the above implementation agenda, the Committee in its regular meetings under the provisions of Article 18.6 while considering the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes, took into account the provisions of paragraph 4 of the NFIDC Decision.[136]

86. With respect to the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (the "NFIDC Decision"), see Section XXIX below.

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[130] (*footnote original*) See also original Appellate Body Report, *supra*, note 1, para. 149.
[131] (*footnote original*) Original Appellate Body Report, *supra*, note 1, para. 152.
[132] Panel Report on *US – FSC (Article 21.5 – EC)*, paras. 8.117–8.122.
[133] WT/GC/M/59, para. 20.
[134] WT/GC/M/59, para. 21.
[135] WT/MIN(01)/17, para. 2.3. The text of the recommendations is contained in document G/AG/11, paras. 1–4.
[136] G/L/719, para.4 (i).

3. Article 10.3

(a) Export credits, export credit guarantees and insurance programmes

87. With respect to the different treatment of developing Members in respect of agricultural export credits, export credit guarantees or insurance programmes, see paragraph 103 below.

(b) Burden of proof

88. In *Canada – Dairy (Article 21.5 – New Zealand and US II)*, the Appellate Body explained that Article 10.3 of the *Agreement on Agriculture* provides a special rule for proof of export subsidies that applies in certain disputes under Articles 3, 8, 9 and 10 of the *Agreement on Agriculture*. Article 10.3 partially reverses the usual rules on burden of proof as follows:

> "Under the usual rules on burden of proof, the complaining Member would bear the burden of proving both parts of the claim. However, Article 10.3 of the *Agreement on Agriculture* partially alters the usual rules. The provision cleaves the complaining Member's claim in two, allocating to different parties the burden of proof with respect to the two parts of the claim we have described.
>
> Consistent with the usual rules on burden of proof, it is for the complaining Member to prove the first part of the claim, namely that the responding Member has exported an agricultural product in quantities that exceed the responding Member's quantity commitment level.
>
> If the complaining Member succeeds in proving the quantitative part of the claim, and the responding Member contests the export subsidization aspect of the claim, then, under Article 10.3, the responding Member '*must establish* that no export subsidy . . . has been granted' in respect of the excess quantity exported." (emphasis added)

89. With respect to the export subsidization part of the claim, the complaining Member, therefore, is relieved of its burden, under the usual rules, to establish a *prima facie* case of export subsidization of the excess quantity, provided that this Member has established the quantitative part of the claim.[137]

4. Article 10.4

90. With respect to international food aid, see Article 16 and paragraphs 3(i) and (ii) of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (the "NFIDC Decision"). Section XVII below and paragraph 131 below.

91. The Chairman of the General Council referred a proposal by the African Group to the Committee on Agriculture for its consideration.[138] On 14 July 2003 he submitted a report to the General Council on the status of the proposal and the progress made with regards to it.[139] In the proposal it was suggested that developed country Members undertake in their schedule of commitments to make contributions towards a revolving fund for normal levels of food imports, providing food aid in fully grant form, and maintaining food aid levels consistently with recommendations and rules under the Food Aid Convention.

XII. ARTICLE 11

A. TEXT OF ARTICLE 11

Article 11
Incorporated Products

In no case may the per-unit subsidy paid on an incorporated agricultural primary product exceed the per-unit export subsidy that would be payable on exports of the primary product as such.

B. INTERPRETATION AND APPLICATION OF ARTICLE 11

No jurisprudence or decision of a competent WTO body.

PART VI

XIII. ARTICLE 12

A. TEXT OF ARTICLE 12

Article 12
Disciplines on Export Prohibitions and Restrictions

1. Where any Member institutes any new export prohibition or restriction on foodstuffs in accordance with paragraph 2(a) of Article XI of GATT 1994, the Member shall observe the following provisions:

(a) the Member instituting the export prohibition or restriction shall give due consideration to the effects of such prohibition or restriction on importing Members' food security;

(b) before any Member institutes an export prohibition or restriction, it shall give notice in writing, as far in advance as practicable, to the Committee on Agriculture comprising such information as the nature and the duration of such measure, and shall consult, upon request, with any other Member having a substantial interest as an importer with respect to any matter related to the measure in question. The

[137] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 71–73 and 75.
[138] TN/CTD/W/3/Rev.2.
[139] G/AG/17 and G/AG/17/Corr.1.

Member instituting such export prohibition or restriction shall provide, upon request, such a Member with necessary information.

2. The provisions of this Article shall not apply to any developing country Member, unless the measure is taken by a developing country Member which is a net-food exporter of the specific foodstuff concerned.

B. INTERPRETATION AND APPLICATION OF ARTICLE 12

1. Notification requirements

92. With respect to notification requirements concerning export prohibitions and restrictions, see paragraphs 116–118 below.

PART VII

XIV. ARTICLE 13

A. TEXT OF ARTICLE 13

Article 13
Due restraint

During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (referred to in this Article as the "Subsidies Agreement"):

(a) domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be:

(i) non-actionable subsidies for purposes of countervailing duties[4];

(*footnote original*) [4] "Countervailing duties" where referred to in this Article are those covered by Article VI of GATT 1994 and Part V of the Agreement on Subsidies and Countervailing Measures.

(ii) exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement; and

(iii) exempt from actions based on non-violation nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994;

(b) domestic support measures that conform fully to the provisions of Article 6 of this Agreement including direct payments that conform to the requirements of paragraph 5 thereof, as reflected in each Member's Schedule, as well as domestic support within de minimis levels and in conformity with paragraph 2 of Article 6, shall be:

(i) exempt from the imposition of countervailing duties unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations;

(ii) exempt from actions based on paragraph 1 of Article XVI of GATT 1994 or Articles 5 and 6 of the Subsidies Agreement, provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year; and

(iii) exempt from actions based on non-violation nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994, provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year;

(c) export subsidies that conform fully to the provisions of Part V of this Agreement, as reflected in each Member's Schedule, shall be:

(i) subject to countervailing duties only upon a determination of injury or threat thereof based on volume, effect on prices, or consequent impact in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations; and

(ii) exempt from actions based on Article XVI of GATT 1994 or Articles 3, 5 and 6 of the Subsidies Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 13

No jurisprudence or decision of a competent WTO body.

XV. ARTICLE 14

A. TEXT OF ARTICLE 14

Article 14
Sanitary and Phytosanitary Measures

Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures.

B. INTERPRETATION AND APPLICATION OF ARTICLE 14

No jurisprudence or decision of a competent WTO body.

XVI. ARTICLE 15

A. TEXT OF ARTICLE 15

Article 15

Special and Differential Treatment

1. In keeping with the recognition that differential and more favourable treatment for developing country Members is an integral part of the negotiation, special and differential treatment in respect of commitments shall be provided as set out in the relevant provisions of this Agreement and embodied in the Schedules of concessions and commitments.

2. Developing country Members shall have the flexibility to implement reduction commitments over a period of up to 10 years. Least-developed country Members shall not be required to undertake reduction commitments.

B. INTERPRETATION AND APPLICATION OF ARTICLE 15

93. At the Doha Ministerial Conference, a recommendation was adopted that "[u]rges Members to exercise restraint in challenging measures notified under the green box by developing countries to promote rural development and adequately address food security concerns".[140]

94. With respect to the notification obligation for developing countries, see paragraph 118 below.

95. As regards the green box, see Annex 2, in Section XXIV below.

XVII. ARTICLE 16

A. TEXT OF ARTICLE 16

Article 16

Least-Developed and Net Food-Importing Developing Countries

1. Developed country Members shall take such action as is provided for within the framework of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries.[141]

2. The Committee on Agriculture shall monitor, as appropriate, the follow-up to this Decision.

B. INTERPRETATION AND APPLICATION OF ARTICLE 16

1. Article 16.1

(a) The Singapore Ministerial Conference

96. In the light of the Committee's discussions on the follow-up to the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (NFIDC Decision), the Committee on Agriculture submitted the following recommendations for consideration by the Singapore Ministerial Conference, which were approved by Ministers:

"(i) that, in anticipation of the expiry of the current Food Aid Convention in June 1998 and in preparation for the renegotiation of the Food Aid Convention, action be initiated in 1997 within the framework of the Food Aid Convention, under arrangements for participation by all interested countries and by relevant international organizations as appropriate, to develop recommendations with a view towards establishing a level of food aid commitments, covering as wide a range of donors and donable foodstuffs as possible, which is sufficient to meet the legitimate needs of developing countries during the reform programme. These recommendations should include guidelines to ensure that an increasing proportion of food aid is provided to least-developed and net food-importing developing countries in fully grant form and/or on appropriate concessional terms in line with Article IV of the current Food Aid Convention, as well as means to improve the effectiveness and positive impact of food aid;[142]

(ii) that developed country WTO Members continue to give full consideration in the context of their aid programmes to requests for the provision of technical and financial assistance to least-developed and net food-importing developing countries to improve their agricultural productivity and infrastructure;

(iii) that the provisions of paragraph 4 of the Marrakesh Ministerial Decision, whereby Ministers agreed to ensure that any agreement relating to agricultural export credits makes appropriate provision for differential treatment in favour of least-developed and net food-importing developing countries, be taken fully into account in the agreement to be negotiated on agricultural export credits;

(iv) that WTO Members, in their individual capacity as members of relevant international financial institutions, take appropriate steps to encourage the institutions concerned, through their respective governing bodies, to further consider the scope for establishing new facilities or enhancing existing facilities for developing countries experiencing Uruguay Round-related difficulties in

[140] WT/MIN(01)/17, para. 2.1.

[141] The Decision adopted by the Ministerial Conference at Marrakesh is referenced in Section XXIX of this Chapter.

[142] The Food Aid Convention 1999 was adopted under the auspices of the United Nations on 24 March 1999. It provisionally entered into force on 1 July 1999 for an initial duration of three years. At that stage it was agreed to extend the Convention by one year and it was subsequently further extended to 30 June 2005 (Footnote not in the original document.)

financing normal levels of commercial imports of basic foodstuffs."[143]

(b) The Doha Ministerial Conference

97. The Committee's recommendations in the area of food aid in the context of the Marrakesh NFIDC Decision that were approved by the Doha Ministerial Conference provide as follows:

"(a) that early action be taken within the framework of the Food Aid Convention 1999 (which unless extended, with or without a decision regarding its renegotiation, would expire on 30 June 2002) and of the UN World Food Programme by donors of food aid to review their food aid contributions with a view to better identifying and meeting the food aid needs of least-developed and WTO net food-importing developing countries;

(b) WTO Members which are donors of food aid shall, within the framework of their food aid policies, statutes, programmes and commitments, take appropriate measures aimed at ensuring: (i) that to the maximum extent possible their levels of food aid to developing countries are maintained during periods in which trends in world market prices of basic foodstuffs have been increasing; and (ii) that all food aid to least developed countries is provided in fully grant form and, to the maximum extent possible, to WTO net food-importing developing countries as well."[144]

98. The Committee's recommendations in the area of technical and financial assistance in the context of aid programmes to improve agricultural productivity and infrastructure approved by the Doha Ministerial Conference provide:

"(a) that developed country WTO Members should continue to give full and favourable consideration in the context of their aid programmes to requests for the provision of technical and financial assistance by least-developed and net food-importing developing countries to improve their agricultural productivity and infrastructure;

(b) that, in support of the priority accorded by least-developed and net food-importing developing countries to the development of their agricultural productivity and infrastructure, the WTO General Council call upon relevant international development organisations, including the World Bank, the FAO, IFAD, the UNDP and the Regional Development Banks to enhance their provision of, and access to, technical and financial assistance to least-developed and net food-importing developing countries, on terms and conditions conducive to the better use of such facilities and resources, in order to improve agricultural productivity and infrastructure in these countries under existing facilities and programmes, as well as under such facilities and programmes as may be introduced."[145]

99. The Committee's recommendations in the area of financing difficulties of imports of basic foodstuffs in the context of the Marrakesh NFIDC Decision that were approved by the Doha Ministerial Conference state:

"(a) that the provisions of paragraph 4 of the Marrakesh Ministerial Decision, which provide for differential treatment in favour of least-developed and WTO net food-importing developing countries, shall be taken fully into account in any agreement to be negotiated on disciplines on agricultural export credits pursuant to Article 10.2 of the Agreement on Agriculture;

(b) that an inter-agency panel of financial and commodity experts be established, with the requested participation of the World Bank, the IMF, the FAO, the International Grains Council and the UNCTAD, to explore ways and means for improving access by least-developed and WTO net food-importing developing countries to multilateral programs and facilities to assist with short term difficulties in financing normal levels of commercial imports of basic foodstuffs, as well as the concept and feasibility of the proposal for the establishment of a revolving fund in G/AG/W/49 and Add.1and Corr.1. The detailed terms of reference, drawing on the Marrakesh NFIDC Decision, should be submitted by the Vice-Chairman of the WTO Committee on Agriculture, following consultations with Members, to the General Council for approval by not later than 31 December 2001. The inter-agency panel shall submit its recommendations to the General Council by not later than 30 June 2002."

100. In light of the above recommendation in the area of financing difficulties of imports of basic foodstuffs in the context of the Marrakesh NFIDC Decision an Inter-Agency Panel on Short-Term Difficulties in Financing Normal Levels of Commercial Imports of Basic Foodstuffs was established and detailed terms of reference of the Panel were approved by the General Council.[146]

(c) List of least-developed and net food-importing developing countries

101. At its meeting of 21 November 1995, the Committee on Agriculture adopted a decision relating to the establishment of a list of WTO net food-importing developing countries, setting out the criteria for the inclusion.[147]

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[143] G/L/125, adopted by the Singapore Ministerial Conference, WT/MIN(96)/DEC, para. 13.

[144] G/AG/11, Section B-I.

[145] G/AG/11, Section B-II.

[146] G/AG/12.

[147] G/AG/3. The decision settled on two criteria for the selection of the Members which became beneficiaries of the measures provided for in the decision:

"a) Least developed countries as recognised by the Economic and Social Council of the United Nations."

Under the first criterion, 48 least-developed countries defined as such by the United Nations are automatically contained in the list. Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo (formerly

102. The decision to establish this list was taken on the understanding that:

> "[B]eing listed would not as such confer automatic benefits since, under the mechanisms covered by the Marrakesh Ministerial Decision, donors and the institutions concerned would have a role to play."[148]

(d) Differential treatment within the framework of an agreement on agricultural export credits

103. In 1997, the Singapore Ministerial Conference decided as follows:

> "[T]he provisions of paragraph 4 of the Marrakesh Ministerial Decision, whereby Ministers agreed to ensure that any agreement relating to agricultural export credits makes appropriate provision for differential treatment in favour of least-developed and net food-importing developing countries, be taken fully into account in the agreement to be negotiated on agricultural export credits."[149]

2. Article 16.2

(a) Notification requirements

104. For notification requirements and formats concerning the follow-up to the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, see paragraphs 116–118 below.

(b) Opportunities for consultation

105. Paragraph 18 of the Organization of Work and Working Procedures of the Committee on Agriculture[150] states:

> "There shall be an opportunity at any regular meeting of the Committee to raise any matter relating to the Decision on Measures concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries."[151]

(c) Effectiveness

106. At its meeting on 15 December 2000, the General Council decided that:

> "The Committee on Agriculture shall examine possible means of improving the effectiveness of the implementation of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries and report to the General Council at the second regular meeting of the Council in 2001.[152]"

107. Pursuant to this mandate, the Committee on Agriculture submitted seven recommendations that were adopted by the Doha Ministerial Conference.[153] The recommendations concerned: (i) food aid; (ii) technical and financial assistance in the context of aid programmes to improve agricultural productivity and infrastructure; (iii) financing normal levels of commercial imports of basic foodstuff; and (iv) review of follow-up. See Section XXIX below.

108. In its report submitted to the General Council on 4 July 2003, the Committee on Agriculture stated that it would continue to explore options and solutions within the framework of the Marrakesh NFIDC Decision to address short-term difficulties of LDCs and WTO NFIDCs in financing commercial imports of basic foodstuffs.[154] Pursuant to this the Committee further considered a pending proposal by the WTO Africa Group regarding the NFIDC Decision that was referred to the Committee by the Chairman of the General Council in the context of the review of all special and differential treatment provisions by the Committee on Trade and Development in Special Session.[155]

109. In the report of 4 July 2003 the Committee on Agriculture, while examining the possible means of improving the effectiveness of the implementation of paragraph 5 of the Marrakesh NFIDC Decision, forwarded the following recommendations for approval by the General Council:

> "(a) that in the context of the current review of the Poverty Reduction and Growth Facility and the Compensatory Financing Facility of the IMF, WTO Members, in their capacity as members of the IMF, consider the concerns by LDCs and WTO NFIDCs concerning short-term difficulties in financing commercial imports of basic foodstuffs; and

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Zaire), Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea Bissau, Haiti, Kiribati, Lao People's Democratic Republic, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Sierra Leone, Solomon Islands, Somalia, Sudan, Togo, Tuvalu, Uganda, United Republic of Tanzania, Vanuatu, Yemen and Zambia.

> "b) Any developing country Member of the WTO which was a net importer of basic foodstuffs in any three years of the most recent five-year period for which data are available and which notifies the Committee of its decision to be listed as a Net Food-Importing Developing Country for the purpose of the decision"

The list currently includes the following countries: Barbados, Botswana, Côte d'Ivoire, Cuba, Dominica, Dominican Republic, Egypt, Gabon, Honduras, Jamaica, Jordan, Kenya, Mauritius, Morocco, Namibia, Pakistan, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sri Lanka, Trinidad and Tobago, Tunisia and Venezuela. G/AG/5/Rev. 7.

148 G/AG/R/4, para. 17.

149 G/L/125. No such agreement has been reached as of 30 June 2001.

150 With respect to the adoption of the document, see para. 114 of this Chapter.

151 G/AG/1, para. 18.

152 WT/L/384, para. 1.2.

153 WT/MIN(01)/17, para. 2.2; G/AG/11.

154 G/AG/16, para.4.

155 TN/CTD/W/3/Rev.2, para.52.

(b) that the General Council invite the World Bank and other relevant international organizations to report on the feasibility and effectiveness of commodity price risk management instruments for use by LDCs and WTO NFIDCs as part of strategies to address short-term difficulties in financing commercial imports of basic foodstuffs, in particular during phases of rising world market prices; and

(c) that, building on the work already undertaken, including the WTO roundtable of 19 May 2003, the Committee will continue to explore, as a matter of priority and on the basis of proposals submitted by Members, options and solutions within the framework of the Marrakesh NFIDC Decision to address short-term difficulties of LDCs and WTO NFIDCs in financing commercial imports of basic foodstuffs."[156]

110. The annual monitoring exercise on the follow-up to the NFIDC Decision as a whole was undertaken at the November meeting of the Committee, on the basis, *inter alia*, of Table NF:1 notifications by donor Members as well as contributions by the observer organizations.[157]

XVIII. ARTICLE 17

A. TEXT OF ARTICLE 17

Article 17
Committee on Agriculture:

A Committee on Agriculture is hereby established.

B. INTERPRETATION AND APPLICATION OF ARTICLE 17

1. Committee on Agriculture

(a) Terms of reference

111. At its meeting on 31 January 1995 the General Council adopted the following terms of reference for the Committee on Agriculture:

"The Committee shall oversee the implementation of the Agreement on Agriculture. The Committee shall afford members the opportunity of consulting on any matter relating to the implementation of the provisions of the Agreement."[158]

(b) Rules of procedure

112. At its meeting of 22 May 1996, the Council for Trade in Goods adopted the rules of procedure for the Committee on Agriculture.[159]

(c) Activities

113. With respect to the initiation of the further negotiations on agriculture in February 2000, see paragraph 125 below.

XIX. ARTICLE 18

A. TEXT OF ARTICLE 18

Article 18
Review of the Implementation of Commitments

1. Progress in the implementation of commitments negotiated under the Uruguay Round reform programme shall be reviewed by the Committee on Agriculture.

2. The review process shall be undertaken on the basis of notifications submitted by Members in relation to such matters and at such intervals as shall be determined, as well as on the basis of such documentation as the Secretariat may be requested to prepare in order to facilitate the review process.

3. In addition to the notifications to be submitted under paragraph 2, any new domestic support measure, or modification of an existing measure, for which exemption from reduction is claimed shall be notified promptly. This notification shall contain details of the new or modified measure and its conformity with the agreed criteria as set out either in Article 6 or in Annex 2.

4. In the review process Members shall give due consideration to the influence of excessive rates of inflation on the ability of any Member to abide by its domestic support commitments.

5. Members agree to consult annually in the Committee on Agriculture with respect to their participation in the normal growth of world trade in agricultural products within the framework of the commitments on export subsidies under this Agreement.

6. The review process shall provide an opportunity for Members to raise any matter relevant to the implementation of commitments under the reform programme as set out in this Agreement.

7. Any Member may bring to the attention of the Committee on Agriculture any measure which it considers ought to have been notified by another Member.

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[156] G/AG/16, para.19
[157] G/L/719, para.7.
[158] These terms of reference are those agreed by the Sub-Committee on Institutional, Procedural and Legal Matters of the Preparatory Committee for the World Trade Organization at its meeting on 7 October 1994 (PC/IPL/1), WT/L/43 (17 February 1995).
[159] G/C/M/10, section 1(i). The text of the adopted rules of procedure can be found in G/L/142.

B. INTERPRETATION AND APPLICATION OF ARTICLE 18

1. Article 18.2

(a) Review procedure

(i) General

114. At its first meeting on 27–28 March 1995, the Committee on Agriculture adopted the Organization of Work and Working Procedures.[160] The Committee decided, *inter alia*, that it:

> "Shall meet at regular intervals to review progress in the implementation of the Uruguay Round reform programme under Article 18:1 and 2 of the Agreement (the 'review process') and generally to carry out such other tasks as are provided for in the Agreement or which may be required to be dealt with."[161]

(ii) Transitional Review Mechanism under Paragraph 18 of the Protocol of Accession of the People's Republic of China

115. In accordance with the mandate of paragraph 2 of the Organization of Work and Working Procedures adopted by the Committee on Agriculture, the Committee was also to periodically review China's progress with regard to its commitments under the Agreement of Agriculture, as stated in the Transitional Review Mechanism of the Protocol of the Accession of the People's Republic of China.[162] At its regular meeting held on 23 September 2004[163] the Committee on Agriculture held its third annual Transitional Review under the Protocol of the Accession of the People's Republic of China, and submitted a report to the Council of Trade in Goods on China's transitional review.[164]

(b) Notification requirements

(i) General

116. At its meeting on 8 June 1995, the Committee on Agriculture adopted a document setting out the requirements and formats for notifications under Article 18:2 and other relevant provisions of the *Agreement on Agriculture.*[165] The document covers five areas: market access[166], domestic support[167], export subsidies[168], export prohibitions and restrictions[169], and the follow-up to the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries.[170] In 1995, the Committee also adopted a list of "significant exporters". Those Members with significant exporters status are required to notify annually their total exports in respect of the products identified on the list.[171]

117. In its report of 19 November 2004 to the General Council on the regular meetings of the Committee on Agriculture, the, status of Member notifications issued for 1999–2003 as well as the outstanding notifications for the implementing years 1995–1998 were laid out.[172]

(ii) Developing countries

118. In the context of the General Council's consideration of implementation-related issues and concerns, the General Council decided, *inter alia*:[173]:

> "Members shall ensure that their tariff rate quotas regimes (TRQs) are administered in a transparent, equitable and non-discriminatory manner. In the context, they shall ensure that the notifications they provide to the Committee on Agriculture contain all the relevant information including details on guidelines and procedures on the allotment of TRQs. Members administering TRQs shall submit addenda to their notifications to the Committee on Agriculture (Table MA:1) by the time of the second regular meeting of the Committee in 2001. The understanding was that this decision should not place undue new burdens on developing countries (WT/GC/M/62, paragraph 14, refers)."[174]

2. Article 18.5

(a) Annual consultations

119. According to the Committee's Organization of Work and Working Procedures[175], these consultations are to be undertaken at the November meetings of the Committee.[176] In practice, these annual consultations have been based on annually updated statistical background notes provided by the Secretariat.[177]

120. Data is made available on not only those members who have made export subsidy reduction commitments[178] with respect to a particular product, but also Members that have been identified in the list of

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160 G/AG/R/1, para. 4. The text of the adopted document can be found in G/AG/1.
161 G/AG/1, para. 2.
162 WT/L/432, para.18.
163 Summary Report by the Secretariat of the September 2003 meeting: G/AG/R/36.
164 G/AG/19.
165 G/AG/R/2, para. 2. The text of the adopted document can be found in G/AG/2.
166 G/AG/2, pp. 2–11.
167 G/AG/2, pp. 12–23.
168 G/AG/2, pp. 24–30.
169 G/AG/2, pp. 31–32.
170 G/AG/2, pp. 33–34.
171 G/AG/2/Add.1.
172 G/L/719.
173 Document G/AG/11.
174 WT/MIN(01)/17, para. 2.4.
175 With respect to the adoption of the document, see para. 114 of this Chapter.
176 G/AG/1, para. 17.
177 G/AG/W/32 and Revisions. A revised note was issued by the Secretariat in November 2003. (G/AG/W/32/Rev.6 and Rev.7)
178 G/AG/2/Add.1.

"significant exporters" for the purpose of the Committee's notification requirements on export subsidy commitments. Those Members and Observers have also been included who have emerged as major exporters for a particular product during the period covered.

3. Article 18.6

121. In respect of the review process envisaged under Article 18.6, the Organization of Work and Working Procedures of the Committee[179] states, *inter alia*:

> "A Member raising a matter relevant to the implementation commitments under Article 18:6, may request the Member to which the matter in question relates, through the Chairperson of the Committee, to provide in writing specific information, or an explanation of the relevant facts or circumstances, regarding the matter that has been raised. The role of the Chairperson shall be to ensure that there are reasonable grounds for the request and that as far as possible duplication and unduly burdensome requests are avoided. The information or explanation thus requested should normally be provided to the Committee by the Member to which the request is addressed within 30 days."[180]

4. Article 18.7

(a) Counter notifications

122. The Organization of Work and Working Procedures[181] states, *inter alia*, that "counter notifications, shall be considered by the Committee at the earliest opportunity."[182]

XX. ARTICLE 19

A. TEXT OF ARTICLE 19

Article 19
Consultation and Dispute Settlement

The provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, shall apply to consultations and the settlement of disputes under this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 19

123. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the *Agreement on Agriculture* were invoked:

	Case Name	Case Number	Invoked Articles
1	*EC – Poultry*	WT/DS69	Articles 4 and 5(1)(b)
2	*India – Quantitative Restrictions*	WT/DS90	Article 4.2
3	*Canada – Dairy*	WT/DS103, WT/DS113	Articles 1(e), 9.1(a), 9.1(c), 3.3, 8 and 10
4	*Canada – Dairy (Article 21.5 – New Zealand and US)*	WT/DS103, WT/DS113	Articles 3.3, 8, 9.1(c) and 10.1
5	*Canada – Dairy (Article 21.5 – New Zealand and US II)*	WT/DS103, WT/DS113	Articles 3.3, 8, 9.1(c), 10.1 and 10.3
6	*US – FSC*	WT/DS108	Articles 3, 3.8, 9.1 and 10.1
7	*US – FSC (Article 21.5 – EC)*	WT/DS108	Articles 3.3, 8 and 10.1
8	*Korea – Various Measures on Beef*	WT/DS161, WT/DS169	Articles 3, 4.2, 6, 7 and Annex 3
9	*Chile – Price Band System*	WT/DS207	Article 4.2 and Footnote 1

PART XII

XXI. ARTICLE 20

A. TEXT OF ARTICLE 20

Article 20
Continuation of the Reform Process

Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period, taking into account:

(a) the experience to that date from implementing the reduction commitments;

(b) the effects of the reduction commitments on world trade in agriculture;

(c) non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the preamble to this Agreement; and

(d) what further commitments are necessary to achieve the above mentioned long-term objectives.

[179] With respect to the adoption of the document, see para. 114 of this Chapter.
[180] G/AG/1, para. 12.
[181] See para. 114 of this Chapter.
[182] G/AG/1, para. 11.

B. INTERPRETATION AND APPLICATION OF ARTICLE 20

1. Decision of the Singapore Ministerial Conference

124. The Singapore Ministerial Conference decided as follows:

> "Bearing in mind that an important aspect of WTO activities is a continuous overseeing of the implementation of various agreements, a periodic examination and updating of the WTO Work Programme is a key to enable the WTO to fulfil its objectives. In this context, we endorse the reports of the various WTO bodies. A major share of the Work Programme stems from the WTO Agreement and decisions adopted at Marrakesh. As part of these Agreements and decisions we agreed to a number of provisions calling for future negotiations on Agriculture, ... We agree to a process of analysis and exchange of information, where provided for in the conclusions and recommendations of the relevant WTO bodies, on the Built-in Agenda issues, to allow Members to better understand the issues involved and identify their interests before undertaking the agreed negotiations and reviews. We agree that: the time frames established in the Agreements will be respected in each case."[183]

2. Decision to launch negotiations on agriculture

125. At its meeting of 7 and 8 February 2000, the General Council decided to launch a new negotiation round on agriculture, stating as follows:

> "[U]nder Article 20 of the Agreement on Agriculture, Members had agreed that negotiations for continuing the reform process would be initiated one year before the end of the implementation period, i.e. 1 January 2000. [. . .] However, a number of procedural matters remained to be settled before the work could start in practice. In this regard, and in the light of wide and intensive consultations with and among Members on the structure of the negotiations, [the Chairman] proposed that the negotiations be conducted in the Committee on Agriculture meeting in Special Sessions. Progress in the negotiations would be reported directly to the General Council on a regular basis."[184]

PART XIII

XXII. ARTICLE 21

A. TEXT OF ARTICLE 21

Article 21
Final Provisions

1. The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.

2. The Annexes to this Agreement are hereby made an integral part of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 21

126. In *EC – Bananas III*, the Panel rejected the European Communities argument that Articles 4.1 and 21.1 of the *Agreement on Agriculture* provided a justification for an inconsistency of the European Communities import scheme for bananas with Article XIII of *GATT 1994*.[185] The Appellate Body agreed with the Panel, stating:

> "The preamble of the *Agreement on Agriculture* states that it establishes 'a basis for initiating a process of reform of trade in agriculture' and that this reform process 'should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines'. The relationship between the provisions of the GATT 1994 and of the *Agreement on Agriculture* is set out in Article 21.1 of the *Agreement on Agriculture*:
>
> . . .
>
> Therefore, the provisions of the GATT 1994, including Article XIII, apply to market access commitments concerning agricultural products, except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter.
>
> . . .
>
> In our view, Article 4.1 does more than merely indicate where market access concessions and commitments for agricultural products are to be found. Article 4.1 acknowledges that significant, new market access concessions, in the form of new bindings and reductions of tariffs as well as other market access commitments (i.e. those made as a result of the tariffication process), were made as a result of the Uruguay Round negotiations on agriculture and included in Members' GATT 1994 Schedules. These concessions are fundamental to the agricultural reform process that is a fundamental objective of the *Agreement on Agriculture*."[186]

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[183] WT/MIN(96)/DEC, para. 19.
[184] WT/GC/M/53, para. 12.
[185] Panel Report on *EC – Bananas III*, para. 7.127.
[186] Appellate Body Report on *EC – Bananas III*, paras. 155–156.

XXIII. ANNEX 1

A. TEXT OF ANNEX 1

Annex 1
Product Coverage

1. This Agreement shall cover the following products:

(i) HS Chapters 1 to 24 less fish and fish products, plus*

(ii)	HS Code	2905.43	(mannitol)
	HS Code	2905.44	(sorbitol)
	HS Heading	33.01	(essential oils)
	HS Headings	35.01 to 35.05	(albuminoidal substances, modified starches, glues)
	HS Code	3809.10	(finishing agents)
	HS Code	3823.60	(sorbitol n.e.p.)
	HS Headings	41.01 to 41.03	(hides and skins)
	HS Heading	43.01	(raw furskins)
	HS Headings	50.01 to 50.03	(raw silk and silk waste)
	HS Headings	51.01 to 51.03	(wool and animal hair)
	HS Headings	52.01 to 52.03	(raw cotton, waste and cotton carded or combed)
	HS Heading	53.01	(raw flax)
	HS Heading	53.02	(raw hemp)

2. The foregoing shall not limit the product coverage of the Agreement on the Application of Sanitary and Phytosanitary Measures.

*The product descriptions in round brackets are not necessarily exhaustive.

B. INTERPRETATION AND APPLICATION OF ANNEX 1

No jurisprudence or decision of a competent WTO body.

XXIV. ANNEX 2

A. TEXT OF ANNEX 2

Annex 2
Domestic Support: The Basis for Exemption from the Reduction Commitments

1. Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:

(a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and,

(b) the support in question shall not have the effect of providing price support to producers;

plus policy-specific criteria and conditions as set out below.

Government Service Programmes

2. General services

Policies in this category involve expenditures (or revenue foregone) in relation to programmes which provide services or benefits to agriculture or the rural community. They shall not involve direct payments to producers or processors. Such programmes, which include but are not restricted to the following list, shall meet the general criteria in paragraph 1 above and policy-specific conditions where set out below:

(a) research, including general research, research in connection with environmental programmes, and research programmes relating to particular products;

(b) pest and disease control, including general and product-specific pest and disease control measures, such as early-warning systems, quarantine and eradication;

(c) training services, including both general and specialist training facilities;

(d) extension and advisory services, including the provision of means to facilitate the transfer of information and the results of research to producers and consumers;

(e) inspection services, including general inspection services and the inspection of particular products for health, safety, grading or standardization purposes;

(f) marketing and promotion services, including market information, advice and promotion relating to particular products but excluding expenditure for unspecified purposes that could be used by sellers to reduce their selling price or confer a direct economic benefit to purchasers; and

(g) infrastructural services, including: electricity reticulation, roads and other means of transport, market and port facilities, water supply facilities, dams and drainage schemes, and infrastructural works associated with environmental programmes. In all cases the expenditure shall be directed to the provision or construction of capital works only, and shall

exclude the subsidized provision of on-farm facilities other than for the reticulation of generally available public utilities. It shall not include subsidies to inputs or operating costs, or preferential user charges.

3. Public stockholding for food security purposes[5]

(*footnote original*) [5] For the purposes of paragraph 3 of this Annex, governmental stockholding programmes for food security purposes in developing countries whose operation is transparent and conducted in accordance with officially published objective criteria or guidelines shall be considered to be in conformity with the provisions of this paragraph, including programmes under which stocks of foodstuffs for food security purposes are acquired and released at administered prices, provided that the difference between the acquisition price and the external reference price is accounted for in the AMS.

Expenditures (or revenue foregone) in relation to the accumulation and holding of stocks of products which form an integral part of a food security programme identified in national legislation. This may include government aid to private storage of products as part of such a programme.

The volume and accumulation of such stocks shall correspond to predetermined targets related solely to food security. The process of stock accumulation and disposal shall be financially transparent. Food purchases by the government shall be made at current market prices and sales from food security stocks shall be made at no less than the current domestic market price for the product and quality in question.

4. Domestic food aid[6]

(*footnote original*) [5 & 6] For the purposes of paragraphs 3 and 4 of this Annex, the provision of foodstuffs at subsidized prices with the objective of meeting food requirements of urban and rural poor in developing countries on a regular basis at reasonable prices shall be considered to be in conformity with the provisions of this paragraph.

Expenditures (or revenue foregone) in relation to the provision of domestic food aid to sections of the population in need.

Eligibility to receive the food aid shall be subject to clearly-defined criteria related to nutritional objectives. Such aid shall be in the form of direct provision of food to those concerned or the provision of means to allow eligible recipients to buy food either at market or at subsidized prices. Food purchases by the government shall be made at current market prices and the financing and administration of the aid shall be transparent.

5. Direct payments to producers

Support provided through direct payments (or revenue foregone, including payments in kind) to producers for which exemption from reduction commitments is claimed shall meet the basic criteria set out in paragraph 1 above, plus specific criteria applying to individual types of direct payment as set out in paragraphs 6 through 13 below. Where exemption from reduction is claimed for any existing or new type of direct payment other than those specified in paragraphs 6 through 13, it shall conform to criteria (b) through (e) in paragraph 6, in addition to the general criteria set out in paragraph 1.

6. Decoupled income support

(a) Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period.

(b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period.

(c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.

(d) The amount of such payments in any given year shall not be related to, or based on, the factors of production employed in any year after the base period.

(e) No production shall be required in order to receive such payments.

7. Government financial participation in income insurance and income safety-net programmes

(a) Eligibility for such payments shall be determined by an income loss, taking into account only income derived from agriculture, which exceeds 30 per cent of average gross income or the equivalent in net income terms (excluding any payments from the same or similar schemes) in the preceding three-year period or a three-year average based on the preceding five-year period, excluding the highest and the lowest entry. Any producer meeting this condition shall be eligible to receive the payments.

(b) The amount of such payments shall compensate for less than 70 per cent of the producer's income loss in the year the producer becomes eligible to receive this assistance.

(c) The amount of any such payments shall relate solely to income; it shall not relate to the type or volume of production (including livestock units) undertaken by the producer; or to the prices, domestic or international, applying to such production; or to the factors of production employed.

(d) Where a producer receives in the same year payments under this paragraph and under paragraph 8 (relief from natural disasters), the total of such payments shall be less than 100 per cent of the producer's total loss.

8. Payments (made either directly or by way of government financial participation in crop insurance schemes) for relief from natural disasters

(a) Eligibility for such payments shall arise only following a formal recognition by government authorities that a natural or like disaster (including disease outbreaks, pest infestations, nuclear accidents, and war on the territory of the Member concerned) has occurred or is occurring; and shall be determined by a production loss which exceeds 30 per cent of the average of production in the preceding three-year period or a three-year average based on the preceding five-year period, excluding the highest and the lowest entry.

(b) Payments made following a disaster shall be applied only in respect of losses of income, livestock (including payments in connection with the veterinary treatment of animals), land or other production factors due to the natural disaster in question.

(c) Payments shall compensate for not more than the total cost of replacing such losses and shall not require or specify the type or quantity of future production.

(d) Payments made during a disaster shall not exceed the level required to prevent or alleviate further loss as defined in criterion (b) above.

(e) Where a producer receives in the same year payments under this paragraph and under paragraph 7 (income insurance and income safety-net programmes), the total of such payments shall be less than 100 per cent of the producer's total loss.

9. Structural adjustment assistance provided through producer retirement programmes

(a) Eligibility for such payments shall be determined by reference to clearly defined criteria in programmes designed to facilitate the retirement of persons engaged in marketable agricultural production, or their movement to non-agricultural activities.

(b) Payments shall be conditional upon the total and permanent retirement of the recipients from marketable agricultural production.

10. Structural adjustment assistance provided through resource retirement programmes

(a) Eligibility for such payments shall be determined by reference to clearly defined criteria in programmes designed to remove land or other resources, including livestock, from marketable agricultural production.

(b) Payments shall be conditional upon the retirement of land from marketable agricultural production for a minimum of three years, and in the case of livestock on its slaughter or definitive permanent disposal.

(c) Payments shall not require or specify any alternative use for such land or other resources which involves the production of marketable agricultural products.

(d) Payments shall not be related to either the type or quantity of production or to the prices, domestic or international, applying to production undertaken using the land or other resources remaining in production.

11. Structural adjustment assistance provided through investment aids

(a) Eligibility for such payments shall be determined by reference to clearly-defined criteria in government programmes designed to assist the financial or physical restructuring of a producer's operations in response to objectively demonstrated structural disadvantages. Eligibility for such programmes may also be based on a clearly-defined government programme for the reprivatization of agricultural land.

(b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period other than as provided for under criterion (e) below.

(c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.

(d) The payments shall be given only for the period of time necessary for the realization of the investment in respect of which they are provided.

(e) The payments shall not mandate or in any way designate the agricultural products to be produced by the recipients except to require them not to produce a particular product.

(f) The payments shall be limited to the amount required to compensate for the structural disadvantage.

12. Payments under environmental programmes

(a) Eligibility for such payments shall be determined as part of a clearly-defined government

environmental or conservation programme and be dependent on the fulfilment of specific conditions under the government programme, including conditions related to production methods or inputs.

(b) The amount of payment shall be limited to the extra costs or loss of income involved in complying with the government programme.

13. Payments under regional assistance programmes

(a) Eligibility for such payments shall be limited to producers in disadvantaged regions. Each such region must be a clearly designated contiguous geographical area with a definable economic and administrative identity, considered as disadvantaged on the basis of neutral and objective criteria clearly spelt out in law or regulation and indicating that the region's difficulties arise out of more than temporary circumstances.

(b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period other than to reduce that production.

(c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.

(d) Payments shall be available only to producers in eligible regions, but generally available to all producers within such regions.

(e) Where related to production factors, payments shall be made at a degressive rate above a threshold level of the factor concerned.

(f) The payments shall be limited to the extra costs or loss of income involved in undertaking agricultural production in the prescribed area.

B. INTERPRETATION AND APPLICATION OF ANNEX 2

No jurisprudence or decision of a competent WTO body.

XXV. ANNEX 3

A. TEXT OF ANNEX 3

Annex 3

Domestic Support: Calculation of Aggregate Measurement of Support

1. Subject to the provisions of Article 6, an Aggregate Measurement of Support (AMS) shall be calculated on a product-specific basis for each basic agricultural product receiving market price support, non-exempt direct payments, or any other subsidy not exempted from the reduction commitment ("other non-exempt policies"). Support which is non-product specific shall be totalled into one non-product-specific AMS in total monetary terms.

2. Subsidies under paragraph 1 shall include both budgetary outlays and revenue foregone by governments or their agents.

3. Support at both the national and sub-national level shall be included.

4. Specific agricultural levies or fees paid by producers shall be deducted from the AMS.

5. The AMS calculated as outlined below for the base period shall constitute the base level for the implementation of the reduction commitment on domestic support.

6. For each basic agricultural product, a specific AMS shall be established, expressed in total monetary value terms.

7. The AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned. Measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products.

8. Market price support: market price support shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price. Budgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS.

9. The fixed external reference price shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period. The fixed reference price may be adjusted for quality differences as necessary.

10. Non-exempt direct payments: non-exempt direct payments which are dependent on a price gap shall be calculated either using the gap between the fixed reference price and the applied administered price multiplied by the quantity of production eligible to receive the administered price, or using budgetary outlays.

11. The fixed reference price shall be based on the years 1986 to 1988 and shall generally be the actual price used for determining payment rates.

12. Non-exempt direct payments which are based on factors other than price shall be measured using budgetary outlays.

13. Other non-exempt measures, including input subsidies and other measures such as marketing-cost

reduction measures: the value of such measures shall be measured using government budgetary outlays or, where the use of budgetary outlays does not reflect the full extent of the subsidy concerned, the basis for calculating the subsidy shall be the gap between the price of the subsidized good or service and a representative market price for a similar good or service multiplied by the quantity of the good or service.

B. INTERPRETATION AND APPLICATION OF ANNEX 3

127. In *Korea – Various Measures on Beef*, the Panel and the Appellate Body addressed Korea's argument that its method for calculation of domestic support was justifiable because it was based upon "the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule", although it was not consistent with the methodology set out in Annex 3 to the *Agreement on Agriculture*. See paragraphs 3–5 above.

128. Further, in *Korea – Various Measures on Beef*, the Appellate Body agreed with the Panel that in determining its market price support for beef, Korea had used the quantity of cattle actually purchased, in contravention of paragraph 8 of Annex 3. The Appellate Body stated:

> "We share the Panel's view that the words 'production *eligible* to receive the applied administered price' in paragraph 8 of Annex 3 have a different meaning in ordinary usage from 'production *actually purchased*'. The ordinary meaning of 'eligible' is 'fit or *entitled* to be chosen'.[187] Thus, 'production eligible' refers to production that is 'fit or entitled' to be purchased rather than production that was actually purchased. In establishing its program for future market price support, a government is able to define and to limit 'eligible' production. Production actually purchased may often be less than eligible production."[188]

XXVI. ANNEX 4

A. TEXT OF ANNEX 4

Annex 4
Domestic Support: Calculation of Equivalent Measurement of Support

1. Subject to the provisions of Article 6, equivalent measurements of support shall be calculated in respect of all basic agricultural products where market price support as defined in Annex 3 exists but for which calculation of this component of the AMS is not practicable. For such products the base level for implementation of the domestic support reduction commitments shall consist of a market price support component expressed in terms of equivalent measurements of support under paragraph 2 below, as well as any non-exempt direct payments and other non-exempt support, which shall be evaluated as provided for under paragraph 3 below. Support at both national and sub-national level shall be included.

2. The equivalent measurements of support provided for in paragraph 1 shall be calculated on a product-specific basis for all basic agricultural products as close as practicable to the point of first sale receiving market price support and for which the calculation of the market price support component of the AMS is not practicable. For those basic agricultural products, equivalent measurements of market price support shall be made using the applied administered price and the quantity of production eligible to receive that price or, where this is not practicable, on budgetary outlays used to maintain the producer price.

3. Where basic agricultural products falling under paragraph 1 are the subject of non-exempt direct payments or any other product-specific subsidy not exempted from the reduction commitment, the basis for equivalent measurements of support concerning these measures shall be calculations as for the corresponding AMS components (specified in paragraphs 10 through 13 of Annex 3).

4. Equivalent measurements of support shall be calculated on the amount of subsidy as close as practicable to the point of first sale of the basic agricultural product concerned. Measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products. Specific agricultural levies or fees paid by producers shall reduce the equivalent measurements of support by a corresponding amount.

B. INTERPRETATION AND APPLICATION OF ANNEX 4

No jurisprudence or decision of a competent WTO body.

XXVII. ANNEX 5

A. TEXT OF ANNEX 5

Annex 5
Special Treatment with Respect to Paragraph 2 of Article 4

Section A

1. The provisions of paragraph 2 of Article 4 shall not apply with effect from the entry into force of the WTO Agreement to any primary agricultural product and its worked and/or prepared products ("designated products") in respect of which the following conditions are

[187] (*footnote original*) *The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 438.
[188] Appellate Body Report on *Korea – Various Measures on Beef*, para. 120.

complied with (hereinafter referred to as "special treatment"):

(a) imports of the designated products comprised less than 3 per cent of corresponding domestic consumption in the base period 1986–1988 ("the base period");

(b) no export subsidies have been provided since the beginning of the base period for the designated products;

(c) effective production-restricting measures are applied to the primary agricultural product;

(d) such products are designated with the symbol "ST-Annex 5" in Section I-B of Part I of a Member's Schedule annexed to the Marrakesh Protocol, as being subject to special treatment reflecting factors of non-trade concerns, such as food security and environmental protection; and

(e) minimum access opportunities in respect of the designated products correspond, as specified in Section I-B of Part I of the Schedule of the Member concerned, to 4 per cent of base period domestic consumption of the designated products from the beginning of the first year of the implementation period and, thereafter, are increased by 0.8 per cent of corresponding domestic consumption in the base period per year for the remainder of the implementation period.

2. At the beginning of any year of the implementation period a Member may cease to apply special treatment in respect of the designated products by complying with the provisions of paragraph 6. In such a case, the Member concerned shall maintain the minimum access opportunities already in effect at such time and increase the minimum access opportunities by 0.4 per cent of corresponding domestic consumption in the base period per year for the remainder of the implementation period. Thereafter, the level of minimum access opportunities resulting from this formula in the final year of the implementation period shall be maintained in the Schedule of the Member concerned.

3. Any negotiation on the question of whether there can be a continuation of the special treatment as set out in paragraph 1 after the end of the implementation period shall be completed within the time-frame of the implementation period itself as a part of the negotiations set out in Article 20 of this Agreement, taking into account the factors of non-trade concerns.

4. If it is agreed as a result of the negotiation referred to in paragraph 3 that a Member may continue to apply the special treatment, such Member shall confer additional and acceptable concessions as determined in that negotiation.

5. Where the special treatment is not to be continued at the end of the implementation period, the Member concerned shall implement the provisions of paragraph 6. In such a case, after the end of the implementation period the minimum access opportunities for the designated products shall be maintained at the level of 8 per cent of corresponding domestic consumption in the base period in the Schedule of the Member concerned.

6. Border measures other than ordinary customs duties maintained in respect of the designated products shall become subject to the provisions of paragraph 2 of Article 4 with effect from the beginning of the year in which the special treatment ceases to apply. Such products shall be subject to ordinary customs duties, which shall be bound in the Schedule of the Member concerned and applied, from the beginning of the year in which special treatment ceases and thereafter, at such rates as would have been applicable had a reduction of at least 15 per cent been implemented over the implementation period in equal annual instalments. These duties shall be established on the basis of tariff equivalents to be calculated in accordance with the guidelines prescribed in the attachment hereto.

Section B

7. The provisions of paragraph 2 of Article 4 shall also not apply with effect from the entry into force of the WTO Agreement to a primary agricultural product that is the predominant staple in the traditional diet of a developing country Member and in respect of which the following conditions, in addition to those specified in paragraph 1(a) through 1(d), as they apply to the products concerned, are complied with:

(a) minimum access opportunities in respect of the products concerned, as specified in Section I-B of Part I of the Schedule of the developing country Member concerned, correspond to 1 per cent of base period domestic consumption of the products concerned from the beginning of the first year of the implementation period and are increased in equal annual instalments to 2 per cent of corresponding domestic consumption in the base period at the beginning of the fifth year of the implementation period. From the beginning of the sixth year of the implementation period, minimum access opportunities in respect of the products concerned correspond to 2 per cent of corresponding domestic consumption in the base period and are increased in equal annual instalments to 4 per cent of corresponding domestic consumption in the base period until the beginning of the 10th year. Thereafter, the level of minimum access opportunities resulting from this formula in the 10th year shall be maintained in the Schedule of the developing country Member concerned;

(b) appropriate market access opportunities have been provided for in other products under this Agreement.

8. Any negotiation on the question of whether there can be a continuation of the special treatment as set out in paragraph 7 after the end of the 10th year following the beginning of the implementation period shall be initiated and completed within the time-frame of the 10th year itself following the beginning of the implementation period.

9. If it is agreed as a result of the negotiation referred to in paragraph 8 that a Member may continue to apply the special treatment, such Member shall confer additional and acceptable concessions as determined in that negotiation.

10. In the event that special treatment under paragraph 7 is not to be continued beyond the 10th year following the beginning of the implementation period, the products concerned shall be subject to ordinary customs duties, established on the basis of a tariff equivalent to be calculated in accordance with the guidelines prescribed in the attachment hereto, which shall be bound in the Schedule of the Member concerned. In other respects, the provisions of paragraph 6 shall apply as modified by the relevant special and differential treatment accorded to developing country Members under this Agreement.

Attachment to Annex 5

Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraphs 6 and 10 of this Annex

1. The calculation of the tariff equivalents, whether expressed as ad valorem or specific rates, shall be made using the actual difference between internal and external prices in a transparent manner. Data used shall be for the years 1986 to 1988. Tariff equivalents:

(a) shall primarily be established at the four-digit level of the HS;

(b) shall be established at the six-digit or a more detailed level of the HS wherever appropriate;

(c) shall generally be established for worked and/or prepared products by multiplying the specific tariff equivalent(s) for the primary agricultural product(s) by the proportion(s) in value terms or in physical terms as appropriate of the primary agricultural product(s) in the worked and/or prepared products, and take account, where necessary, of any additional elements currently providing protection to industry.

2. External prices shall be, in general, actual average c.i.f. unit values for the importing country. Where average c.i.f. unit values are not available or appropriate, external prices shall be either:

(a) appropriate average c.i.f. unit values of a near country; or

(b) estimated from average f.o.b. unit values of (an) appropriate major exporter(s) adjusted by adding an estimate of insurance, freight and other relevant costs to the importing country.

3. The external prices shall generally be converted to domestic currencies using the annual average market exchange rate for the same period as the price data.

4. The internal price shall generally be a representative wholesale price ruling in the domestic market or an estimate of that price where adequate data is not available.

5. The initial tariff equivalents may be adjusted, where necessary, to take account of differences in quality or variety using an appropriate coefficient.

6. Where a tariff equivalent resulting from these guidelines is negative or lower than the current bound rate, the initial tariff equivalent may be established at the current bound rate or on the basis of national offers for that product.

7. Where an adjustment is made to the level of a tariff equivalent which would have resulted from the above guidelines, the Member concerned shall afford, on request, full opportunities for consultation with a view to negotiating appropriate solutions.

B. INTERPRETATION AND APPLICATION OF ANNEX 5

No jurisprudence or decision of a competent WTO body.

XXVIII. RELATIONSHIP WITH OTHER WTO AGREEMENTS

A. SCM AGREEMENT

129. The Appellate Body, in *Canada – Dairy* and *US – FSC*, referred to the *SCM Agreement*, in defining the term "subsidy" under the *Agreement on Agriculture*. See paragraph 6 above.[189]

130. Also, the Appellate Body, in *US – FSC*, referred to the *SCM Agreement*, in interpreting the concept of export contingency under the *Agreement on Agriculture*. See paragraph 9 above.[190]

[189] See also Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 187–196.

[190] See also Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 187–196.

XXIX. DECISION ON MEASURES CONCERNING THE POSSIBLE NEGATIVE EFFECTS OF THE REFORM PROGRAMME ON LEAST-DEVELOPED AND NET FOOD-IMPORTING DEVELOPING COUNTRIES (THE "NFIDC DECISION")

A. TEXT OF THE DECISION

1. *Ministers recognize* that the progressive implementation of the results of the Uruguay Round as a whole will generate increasing opportunities for trade expansion and economic growth to the benefit of all participants.

2. *Ministers recognize* that during the reform programme leading to greater liberalization of trade in agriculture least-developed and net food-importing developing countries may experience negative effects in terms of the availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term difficulties in financing normal levels of commercial imports of basic foodstuffs.

3. *Ministers* accordingly *agree* to establish appropriate mechanisms to ensure that the implementation of the results of the Uruguay Round on trade in agriculture does not adversely affect the availability of food aid at a level which is sufficient to continue to provide assistance in meeting the food needs of developing countries, especially least-developed and net food-importing developing countries. To this end *Ministers agree*:

(i) to review the level of food aid established periodically by the Committee on Food Aid under the Food Aid Convention 1986 and to initiate negotiations in the appropriate forum to establish a level of food aid commitments sufficient to meet the legitimate needs of developing countries during the reform programme;

(ii) to adopt guidelines to ensure that an increasing proportion of basic foodstuffs is provided to least-developed and net food-importing developing countries in fully grant form and/or on appropriate concessional terms in line with Article IV of the Food Aid Convention 1986;

(iii) to give full consideration in the context of their aid programmes to requests for the provision of technical and financial assistance to least-developed and net food-importing developing countries to improve their agricultural productivity and infrastructure.

4. *Ministers* further *agree* to ensure that any agreement relating to agricultural export credits makes appropriate provision for differential treatment in favour of least-developed and net food-importing developing countries.

5. *Ministers recognize* that as a result of the Uruguay Round certain developing countries may experience short-term difficulties in financing normal levels of commercial imports and that these countries may be eligible to draw on the resources of international financial institutions under existing facilities, or such facilities as may be established, in the context of adjustment programmes, in order to address such financing difficulties. In this regard Ministers take note of paragraph 37 of the report of the Director-General to the CONTRACTING PARTIES to GATT 1947 on his consultations with the Managing Director of the International Monetary Fund and the President of the World Bank (MTN.GNG/NG14/W/35).

6. The provisions of this Decision will be subject to regular review by the Ministerial Conference, and the follow-up to this Decision shall be monitored, as appropriate, by the Committee on Agriculture.

B. INTERPRETATION AND APPLICATION OF THE DECISION

1. Paragraph 3

(a) Paragraphs 3(i) and (ii)

131. In accordance with the mandate in paragraphs 3(i) and (ii), the Doha Ministerial Conference adopted the following recommendations, submitted by the Committee on Agriculture[191]:

"(a) That early action be taken within the framework of the Food Aid Convention 1999 (which unless extended, with or without a decision regarding its renegotiation, would expire on 30 June 2002) and of the UN World Food Programme by donors of food aid to review their food aid contributions with a view to better identifying and meeting the food aid needs of least-developed and WTO net food-importing developing countries;

(b) WTO Members which are donors of food aid shall, within the framework of their food aid policies, statues, programmes and commitments, take appropriate measures aimed at ensuring: (i) that to the maximum extent possible their levels of food aid to developing countries are maintained during periods in which trends in world market prices of basic foodstuffs have been increasing; and (ii) that all food aid to least developed countries is provided in fully grant form and, to the maximum extent possible to WTO net food-importing developing countries as well."[192]

(i) Extension of the Food Aid Convention

132. With regard to the recommendation in paragraph (a) above, which noted that the Food Aid

[191] Document G/AG/11.
[192] WT/MIN(01)/17, para. 2.2.

Convention,1999, was due to expire on 30 June 2002, the meeting of the Food Aid Committee in December 2002, agreed in principle to a two-year extension of the Convention from 1 July 2003. The further extension of the Convention to 30 June 2005 was decided by the Food Aid Committee at its Session on 23 June 2003.[193]

(b) Paragraph 3(iii)

133. The mandate in paragraph 3(iii) was developed by the following two recommendations on Technical and Financial Assistance in the Context of Aid Programmes to Improve Agricultural Productivity and Infrastructure, adopted at the Doha Ministerial Conference:

"(a) . . . developed country WTO Members should continue to give full and favourable consideration in the context of their aid programmes to requests for the provision of technical and financial assistance by least-developed and net food-importing developing countries to improve their agricultural productivity and infrastructure;

(b) . . . in support of the priority accorded by least-developed and net food-importing developing countries to the development of their agricultural productivity and infrastructure, the WTO General Council call upon relevant international developed organisations, including the World Bank, the FAO, IFAD, the UNDP and the Regional Development Banks to enhance their provision of, and access to, technical and financial assistance to least-developed and net food-importing developing countries, on terms and conditions conducive to the better use of such facilities and resources, in order to improve agricultural productivity and infrastructure in these countries under existing facilities and programmes, as well as under such facilities and programmes as may be introduced."[194]

2. Paragraph 4

134. In relation to paragraph 4, the Doha Ministerial Conference adopted the following recommendation:

"(a) that the provision of paragraph 4 of the Marrakesh Ministerial Decision, which provide for differential treatment in favour of least-developed and WTO net food-importing developing countries, shall be taken fully into account in any agreement to be negotiated on disciplines on agricultural export credits pursuant to Article 10.2 of the Agreement on Agriculture;"[195]

3. Paragraph 5

(a) The Inter-Agency Panel

135. In relation to paragraph 5 and in order to counter the difficulties in financing normal levels of commercial imports of basic foodstuff faced by certain developing countries, Members at the Doha Ministerial Conference adopted the recommendation, submitted by the Committee on Agriculture, to establish an Inter-Agency Panel on Short-Term Difficulties in Financing Normal Levels of Commercial Imports of Basic Foodstuffs ("Inter-Agency Panel"):

"(b) That an inter-agency panel of financial and commodity experts be established, with the requested participation of the World Bank, the IMF, the FAO, the International Grains Council and the UNCTAD, to explore ways and means for improving access by least-developed and WTO net food-importing developing countries to multilateral programs and facilities to assist with short term difficulties in financing normal levels of commercial imports of basic foodstuffs, as well as the concept and feasibility of the proposal for the establishment of a revolving fund in G/AG/W/49 and Add.1 and Corr.1. The detailed terms of reference, drawing on the Marrakesh NFIDC Decision, should be submitted by the Vice-Chairman of the WTO Committee on Agriculture, following consultations with Members, to the General Council for approval by not later than 31 December 2001. The inter-agency panel shall submit its recommendation to the General Council by not later than 30 June 2002."[196]

136. In accordance with the recommendations adopted by the Doha Ministerial Conference, the General Council at its meeting on 19 and 20 December 2001 adopted the following terms of reference for the Inter-Agency Panel within the framework of the NFIDC Decision:[197]

"1. To examine the terms and conditions of existing facilities of the international financial institutions (namely: IMF and the World Bank) to which the least-developed and WTO net food-importing developing countries could have recourse in order to address short-term difficulties in financing normal levels of commercial imports of basic foodstuffs, principally cereals, rice, basic dairy products, pulses, vegetable oils and sugar, during periods of rising world prices for such basic foodstuffs, including, as appropriate, other relevant sources of concessional financing; this examination shall take into account, *inter alia*, such submissions as may be submitted to the Panel by least-developed and WTO net food-importing developing countries, donors and the relevant international financial institutions, by no later than end-March 2002;

[193] G/AG/16.
[194] WT/MIN(01)/17, para. 2.2. The text of the adopted recommendations can be found in G/AG/11.
[195] WT/MIN(01)/17, para. 2.2. The text of the adopted recommendation can be found in G/AG/11.
[196] WT/MIN(01)/17, para. 2.2. The text of the adopted document can be found in G/AG/11.
[197] WT/GC/70, (para. j).

2. To examine the concept and feasibility of the proposal for the establishment of a revolving fund in documents G/AG/W/49 and Add.1 and Corr.1, together with any further elaboration of those proposals as may be submitted to the Panel by the sponsoring Members concerned before the end of March 2002;

3. In the light of its review and examination under paragraphs (1) and (2) above and having regard to the Marrakesh NFIDC Decision, to make such recommendations for the consideration of the WTO General Council as the Panel considers appropriate regarding: ways and means for improving access by least-developed and WTO net food-importing developing countries to multilateral programmes and facilities to assist with short-term difficulties in financing normal levels of commercial imports of basic foodstuffs;

4. In carrying out its task the Panel may consult with such bodies or institutions as it considers appropriate;

5. The Panel shall submit its report and recommendations to the WTO General Council by no later than 30 June 2002."[198]

137. The Inter-Agency Panel submitted its report to the General Council on 28 June 2002.[199] In its Report, the Inter-Agency Panel made four recommendations:

"[C]oncerning ways and means for improving access by LDCs and NFIDCs to multilateral programme and facilities to assist with short-term difficulties in financing normal levels of commercial imports of basic foodstuffs:

(a) that in the context of the impending review of the CFF of the IMF, consideration be given by member governments to

  (i) extending the product coverage of the facility to cover all basic foodstuffs,

  (ii) clarifying access in the context of an existing arrangement with the IMF,

  (iii) providing a greater degree of automaticity without requiring an IMF-supported programme,

  (iv) reviewing the procedures and timeliness of disbursements, as well as encouraging governments to come forward with purchase requests;

(b) that in the light of the limited potential usefulness of an ex-post revolving fund to support food imports in time of need, the feasibility of an ex-ante financing mechanism aimed at food importers be explored;

(c) that the terms of reference of the Diagnostic Trade Integration Studies to be undertaking in the context of the Integrated Framework include, as appropriate and if requested by the beneficiary country, the items of

  (i) food security implications of trade development strategies,

  (ii) availability of, and access to, adequate financing, in particular by the private sector, to support food imports;

(d) that strategies of commodity price risk management from the perspective of developing country food importers be addressed by the Commodity Price Risk Management Group of the World Bank."[200]

138. At its meeting on 15 October 2002 the General Council approved these four recommendations, with the amendments proposed by the Committee on Agriculture:

"[W]ith regard to the recommendations in Paragraphs 168 (a), (c) and (d), that the General Council authorize him, as Chairman [of the General Council], to write to the IMF, World Bank and the Integrated Framework Agencies requesting them to review the Panel report as it related to the issue within their competence. Finally, with regard to the recommendation in Paragraph 168 (b), he proposed that the General Council approve to the recommendation of the Committee on Agriculture that the question on feasibility of an ex-ante financing mechanism aimed at food importers be pursued by Committee, on the understanding that a proposal regarding the establishment of an ex-ante financing mechanism would be submitted by the WTO net food-importing developing countries, and follow-up report concerning the discussion of the proposal be submitted to the General Council following the regular meeting of the Committee in November."[201]

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[198] G/AG/12 and WT/GC/M/72, paragraphs 61–63.
[199] G/AG/13/WT/GC/62.
[200] G/AG/13, para. 168.
[201] WT/GC/M/76, paras. 63 and 64.

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Reaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade;

Desiring to improve the human health, animal health and phytosanitary situation in all Members;

Noting that sanitary and phytosanitary measures are often applied on the basis of bilateral agreements or protocols;

Desiring the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade;

Recognizing the important contribution that international standards, guidelines and recommendations can make in this regard;

Desiring to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health;

Recognizing that developing country Members may encounter special difficulties in complying with the sanitary or phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary or phytosanitary measures in their own territories, and desiring to assist them in their endeavours in this regard;

Desiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)[1];

(*footnote original*) [1] In this Agreement, reference to Article XX(b) includes also the chapeau of that Article.

Hereby agree as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

1. "international standards, guidelines and recommendations"

1. In 1995, the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention provided the SPS Committee with lists of international standards they had adopted.[1]

2. The precautionary principle

(a) Status in international law

2. With respect to the "precautionary principle" invoked by the European Communities in support of its claim in *EC – Hormones* that it had complied with Article 5.1 of the *SPS Agreement*, the Appellate Body declined to take a position on the status of the precautionary principle in international law:

> "The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation."[2]

(b) Relationship with the SPS Agreement

3. As regards the relationship between the "precautionary principle" and the *SPS Agreement*, the Appellate Body noted the following four elements, one of which concerns the Preamble to the *SPS Agreement*:

[1] G/SPS/W/18 and Corr.1 (Codex); G/SPS/W/21 (OIE) and G/SPS/W/23 (IPPC). See also G/SPS/W/107/Rev.1, G/SPS/GEN/177, G/SPS/GEN/185, G/SPS/GEN/266, G/SPS/GEN/271, G/SPS/GEN/282 and G/SPS/GEN/327.
[2] Appellate Body Report on *EC – Hormones*, para. 123.

"First, the principle has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement . . . It is reflected also in the sixth paragraph of the preamble . . . These explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations . . . Lastly, however, the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the *SPS Agreement*".[3]

4. See also paragraph 22 below.

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1
General Provisions

1. This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.

2. For the purposes of this Agreement, the definitions provided in Annex A[4] shall apply.

3. The annexes are an integral part of this Agreement.

4. Nothing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. Article 1.1

(a) Scope of the SPS Agreement

(i) General

5. The Panel on *EC – Hormones* identified two elements in order for a measure to fall under the *SPS Agreement*:

"According to Article 1.1 of the *SPS Agreement*, two requirements need to be fulfilled for the *SPS Agreement* to apply: (i) the measure in dispute is a sanitary or phytosanitary measure; and (ii) the measure in dispute may, directly or indirectly, affect international trade".[5]

(ii) Applicable to all SPS measures in force

6. In *EC – Hormones*, in discussing the applicability of the *SPS Agreement* to a measure which was enacted before the entry into force of the Agreement, the Appellate Body held that the *SPS Agreement* would apply to situations or measures that had not ceased to exist, unless the *SPS Agreement* revealed a contrary intention. Furthermore, the Appellate Body noted that certain measures of the *SPS Agreement* "expressly contemplate applicability to SPS measures that already existed on 1 January 1995":

"We addressed the issue of temporal application in our Report in *Brazil – Measures Affecting Desiccated Coconut* and concluded on the basis of Article 28 of the *Vienna Convention* that:

> Absent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force.

We agree with the Panel that the *SPS Agreement* would apply to situations or measures that did not cease to exist, such as the 1981 and 1988 Directives, unless the *SPS Agreement* reveals a contrary intention. We also agree with the Panel that the *SPS Agreement* does not reveal such an intention. The *SPS Agreement* does not contain any provision limiting the temporal application of the *SPS Agreement*, or of any provision thereof, to SPS measures adopted after 1 January 1995. In the absence of such a provision, it cannot be assumed that central provisions of the *SPS Agreement*, such as Articles 5.1 and 5.5, do not apply to measures which were enacted before 1995 but which continue to be in force thereafter. If the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 from the disciplines of provisions as important as Articles 5.1 and 5.5, it appears reasonable to us to expect that they would have said so explicitly. Articles 5.1 and 5.5 do not distinguish between SPS measures adopted before 1 January 1995 and measures adopted since; the relevant implication is that they are intended to be applicable to both. Furthermore, other provisions of the *SPS Agreement*, such as Articles 2.2, 2.3, 3.3 and 5.6, expressly contemplate applicability to SPS measures that already existed on 1 January 1995."[6]

(b) Article 1.2: Reference to Annex A

7. As regards the interpretation of Annex A, see Section XVI.B below.

[3] Appellate Body Report on *EC – Hormones*, para. 124.
[4] See Section XVI.
[5] Panel Report on *EC – Hormones (Canada)*, para. 8.39; Panel Report on *EC – Hormones (US)*, para. 8.36.
[6] Appellate Body Report on *EC – Hormones*, para. 128.

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2
Basic Rights and Obligations

1. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.

2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

3. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

4. Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. Article 2.2

(a) "maintained without sufficient scientific evidence"

(i) General

8. In *EC – Hormones*, the Appellate Body referred to the requirement of "sufficient scientific evidence" under Article 2.2. as part of the negotiated balance contained in the *SPS Agreement* between the promotion of international trade and the protection of human life and health.[7]

(ii) "Sufficient"

Meaning

9. In *Japan – Agricultural Products II*, with respect to the term "sufficient" in Article 2.2, the Appellate Body required an adequate relationship between the SPS measure and the scientific evidence:

> "The ordinary meaning of 'sufficient' is 'of a quantity, extent, or scope adequate to a certain purpose or object'. From this, we can conclude that 'sufficiency' is a relational concept. 'Sufficiency' requires the existence of a sufficient or adequate relationship between two elements, *in casu,* between the SPS measure and the scientific evidence".[8]

Context

10. The Appellate Body on *Japan – Agricultural Products II* also stated that "[t]he context of the word 'sufficient' or, more generally, the phrase 'maintained without sufficient scientific evidence' in Article 2.2, includes Article 5.1 as well as Articles 3.3 and 5.7 of the *SPS Agreement*".[9]

"Patent insufficiency" standard

11. After an examination of the context of the term "sufficient", the Appellate Body on *Japan – Agricultural Products II* disagreed with Japan on the notion of a standard of "patent insufficiency":

> "We do not agree with Japan's proposition that direct application of Article 2.2 of the *SPS Agreement* should be limited to situations in which the scientific evidence is 'patently' insufficient, and that the issue raised in this dispute should have been dealt with under Article 5.1 of the *SPS Agreement*. There is nothing in the text of either Articles 2.2 or 5.1, or any other provision of the *SPS Agreement*, that requires or sanctions such limitation of the scope of Article 2.2".[10]

(iii) "Scientific evidence"

12. In addition to the meaning of the term "sufficient" under Article 2.2, the Panel on *Japan – Apples* looked into the meaning of "scientific evidence" – i.e. the nature of the evidence that should be considered – and concluded that Article 2.2 excludes not only insufficiently substantiated information, but also a non-demonstrated hypothesis:

> "We consider that . . . we must give full meaning to the term 'scientific' and conclude that, in the context of Article 2.2, the evidence to be considered should be evidence gathered through scientific methods, excluding by the same token information not acquired through a scientific method. We further note that scientific evidence may include evidence that a particular risk may occur . . . as well as evidence that a particular requirement may reduce or eliminate that risk . . . .
>
> Likewise, the use of the term 'evidence' must also be given full significance. Negotiators could have used the

[7] Appellate Body Report on *EC – Hormones*, para. 177. See the discussion on the precautionary principle in *EC – Hormones* in para. 3 above.
[8] Appellate Body Report on *Japan – Agricultural Products II*, paras. 73.
[9] Appellate Body Report on *Japan – Agricultural Products II*, paras. 74.
[10] Appellate Body Report on *Japan – Agricultural Products II*, para. 82.

term 'information', as in Article 5.7, if they considered that any material could be used. By using the term 'scientific evidence', Article 2.2 excludes in essence not only insufficiently substantiated information, but also such things as a non-demonstrated hypothesis.

. . .

[R]equiring 'scientific evidence' does not limit the field of scientific evidence available to Members to support their measures. 'Direct' or 'indirect' evidence may be equally considered. The only difference is not one of scientific quality, but one of probative value within the legal meaning of the term, since it is obvious that evidence which does not directly prove a fact might not have as much weight as evidence directly proving it, if it is available."[11]

(iv) A rational and objective relationship

13. The Appellate Body on *Japan – Agricultural Products II* established that Article 2.2 requires a rational or objective relationship between the SPS measure and the scientific evidence:

"[W]e agree with the Panel that the obligation in Article 2.2 that an SPS measure not be maintained without sufficient scientific evidence requires that there be a rational or objective relationship between the SPS measure and the scientific evidence. Whether there is a rational relationship between an SPS measure and the scientific evidence is to be determined on a case-by-case basis and will depend upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence."[12]

(v) Case-by-case methodology

14. In *Japan – Agricultural Products II*, the Appellate Body considered that the determination whether there is a rational relationship between the SPS measure and the scientific evidence must be conducted on a case-by-case basis. In this regard, see paragraph 12 above.

15. The Panel on *Japan – Apples* had come up with its own methodology to assess whether a measure was maintained without sufficient scientific evidence. The Panel considered both the risk of transmission of fire blight inherent in mature, symptomless apples and the risk associated with apples other than mature, symptomless apples that might enter Japanese territory as a result of human/technical errors in the sorting of apples or illegal actions.[13] On appeal, the Appellate Body emphasized that whether a given approach or methodology used to assess 'sufficient scientific evidence' within the meaning of Article 2.2 is appropriate should be determined on a case-by-case basis. The Appellate Body upheld the Panel's methodology as appropriate to the particular circumstances of the case before it:

"We emphasize, following the Appellate Body's statement in *Japan – Agricultural Products II*, that whether a given approach or methodology is appropriate in order to assess whether a measure is maintained 'without sufficient scientific evidence', within the meaning of Article 2.2, depends on the 'particular circumstances of the case', and must be 'determined on a case-by-case basis'.[14] Thus, the approach followed by the Panel in this case – disassembling the sequence of events to identify the risk and comparing it with the measure – does not exhaust the range of methodologies available to determine whether a measure is maintained 'without sufficient scientific evidence' within the meaning of Article 2.2. Approaches different from that followed by the Panel in this case could also prove appropriate to evaluate whether a measure is maintained without sufficient scientific evidence within the meaning of Article 2.2. Whether or not a particular approach is appropriate will depend on the 'particular circumstances of the case'.[15] The methodology adopted by the Panel was appropriate to the particular circumstances of the case before it and, therefore, we see no error in the Panel's reliance on it."[16]

(vi) Measure to be proportionate to risk

16. Based on its conclusion that all the individual requirements contained in the measure should be treated altogether as the phytosanitary measure at issue in the case, the Panel on *Japan – Apples* considered that a measure as a whole should be considered to be maintained 'without sufficient scientific evidence' if one or more of its elements are not justified by the relevant scientific evidence addressing the risk at issue. The Appellate Body found that the Panel's approach was appropriate in the circumstances:

"[W]e concluded, on the basis of the elements before us, that there was *not sufficient scientific evidence* to support the view that apples are likely to serve as a pathway for the entry, establishment or spread of fire blight within Japan. Given the negligible risk identified on the basis of the scientific evidence and the nature of the elements composing the phytosanitary measure at issue, the measure on the face of it is disproportionate to that risk.

More particularly, . . ., we have found that the following requirements are instances of elements of the measure at issue which are most obviously 'maintained without sufficient scientific evidence', either as such or when applied in cumulation with others, . . .

[11] Panel Report on *Japan – Apples*, paras. 8.92–8.93, 8.98.
[12] Appellate Body Report on *Japan – Agricultural Products II*, para. 84.
[13] Panel Report on *Japan – Apples*, paras. 8.119–8.121.
[14] (*footnote original*) Appellate Body Report on *Japan – Agricultural Products II*, para. 84.
[15] (*footnote original*) Appellate Body Report on *Japan – Agricultural Products II*, para. 84.
[16] Appellate Body Report on *Japan – Apples*, para. 164.

For the reasons mentioned above, we conclude that the phytosanitary measure at issue is clearly disproportionate to the risk identified on the basis of the scientific evidence available. . . ."[17]

(b) Burden of proof

(i) Presumption of "no relevant studies or report"

17. The Panel on *Japan – Agricultural Products II* had limited its finding of violation of Article 2.2 to only four of the eight products at issue on the grounds that in respect of the other four products, the United States had not adduced sufficient evidence to raise a *prima facie* case. The Appellate Body agreed with the Panel and rejected the United States' claim that the Panel had imposed on it an erroneous burden of proof:

"[W]e disagree with the United States that the Panel imposed on the United States an impossible and, therefore, erroneous burden of proof by requiring it to prove a negative, namely, that there are no relevant studies and reports which support Japan's varietal testing requirement. In our view, it would have been sufficient for the United States to raise a presumption that there are no relevant studies or reports. Raising a presumption that there are no relevant studies or reports is not an impossible burden. The United States could have requested Japan, pursuant to Article 5.8 of the *SPS Agreement*, to provide 'an explanation of the reasons' for its varietal testing requirement, in particular, as it applies to apricots, pears, plums and quince. Japan would, in that case, be obliged to provide such explanation. The failure of Japan to bring forward scientific studies or reports in support of its varietal testing requirement as it applies to apricots, pears, plums and quince, would have been a strong indication that there are no such studies or reports. The United States could also have asked the Panel's experts specific questions as to the existence of relevant scientific studies or reports or it could have submitted to the Panel the opinion of experts consulted by it on this issue. The United States, however, did not submit any evidence relating to apricots, pears, plums and quince".[18]

18. Applying the same reasoning, the Panel on *Japan – Apples* said that the United States had to raise a presumption that there were no relevant scientific studies or reports to prove that the measure at issue imposed by Japan was not supported by sufficient scientific evidence:

"Japan argues, that, in order for the Untied States to establish a prima facie case under Article 2.2, it has to positively prove the 'insufficiency' of scientific evidence. The United States claims that there is simply no scientific evidence supporting the measure at issue. Under these circumstances, and in application of the reasoning of the Appellate Body in *Japan – Agricultural Products II*, we consider that the Untied States should raise a presumption that there are no *relevant* scientific studies or reports in order to demonstrate that the measure at issue is not supported by sufficient scientific evidence.[19] If Japan submits elements to rebut that presumption, we would have to weigh the evidence before us."[20]

(ii) Allocation of burden of proof

19. On the allocation of the burden of proof, the Appellate Body on *Japan – Apples* said that although the complaining party bears the burden of proving its case, the responding party is responsible for proving the case it seeks to make in response:

"In this case, the United States seeks a finding that Japan's measure is inconsistent with Article 2.2 of the *SPS Agreement*. Therefore, the initial burden lies with the United States to establish a *prima facie* case that the measure is inconsistent with Article 2.2. . . . Following the Appellate Body's ruling in *EC – Hormones*, if this *prima facie* case is made, it would be for Japan to counter or refute the claim that the measure is 'maintained without sufficient scientific evidence'.

That said, the Appellate Body's statement in *EC – Hormones* does not imply that the complaining party is responsible for providing proof of all facts raised in relation to the issue of determining whether a measure is consistent with a given provision of a covered agreement. In other words, although the complaining party bears the burden of proving its case, the responding party must prove the case it seeks to make in response. In *US – Wool Shirts and Blouses*, the Appellate Body stated

> '. . . *the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof*.'[21]

In this case, the United States made a series of allegations of fact relating to mature, symptomless apples as a possible pathway for fire blight, and sought to substantiate these allegations. Japan sought to counter the case made by the United States . . . Japan was thus responsible for providing proof of the allegations of fact it advanced in relation to apples other than mature, symptomless apples being exported to Japan as a result of errors of handling or illegal actions. . . ."[22]

(iii) Establishing prima facie case of inconsistency

20. Regarding the concept of *prima facie*, the Appellate Body further explained in *Japan – Apples* that the complainant could establish a *prima facie* case of

[17] Panel Report on *Japan – Apples*, paras. 8.179, 8.182 and 8.198.
[18] Appellate Body Report on *Japan – Agricultural Products II*, para. 137.
[19] (*footnote original*) Appellate Body Report on *Japan – Agricultural Products II*, para. 137.
[20] Panel Report on *Japan – Apples*, para. 8.106.
[21] (*footnote original*) Appellate Body Report on *US – Wool Shirts and Blouses*, p.14, DSR 1997:I, 323, at 335.
[22] Appellate Body Report on *Japan – Apples*, paras. 153–156.

inconsistency with Article 2.2 of the *SPS Agreement* even though it confined its arguments to a claim asserted by it:

> "Japan . . . submits that, 'in order to establish a *prima facie* case of insufficient scientific evidence under Article 2.2 of the *SPS Agreement*, the complaining party must establish that there is not sufficient evidence for *any* of the perceived risks underlying the measure.' . . . We find no basis for the approach advocated by Japan. . . . In the present case, the Panel appears to have concluded that in order to demonstrate a *prima facie* case that Japan's measure is maintained without sufficient scientific evidence, it sufficed for the United States to address only the question of whether mature, symptomless apples could serve as a pathway for fire blight.
>
> The Panel's conclusion seems appropriate to us for the following reasons. First, the claim pursued by the United States was that Japan's measure is maintained without sufficient scientific evidence to the extent that it applies to mature, symptomless apples exported from the United States to Japan. What is required to demonstrate a *prima facie* case is necessarily influenced by the nature and the scope of the claim pursued by the complainant. A complainant should not be required to prove a claim it does not seek to make. Secondly, the Panel found that mature, symptomless apple fruit is the commodity 'normally exported' by the United States to Japan.[23] The Panel indicated that the risk that apples fruit other than mature, symptomless apples may actually be imported into Japan would seem to arise primarily as a result of human or technical error, or illegal actions[24], and noted that the experts characterized errors of handling and illegal actions as 'small' or 'debatable' risks.[25] Given the characterization of these risks, in our opinion it was legitimate for the Panel to consider that the United States could demonstrate a *prima facie* case of inconsistency with Article 2.2 of the *SPS Agreement* through argument based solely on mature, symptomless apples. Thirdly, the record contains no evidence to suggest that apples other than mature, symptomless ones have ever been exported to Japan from the United States as a result of errors of handling or illegal actions. . . ."[26]

21. As regards the burden of proof in general, see Section XXXVI(D) of the Chapter on the *DSU*.

(c) Standard of review

(i) Panel to take into account the prudence commonly exercised by governments

22. In *EC – Hormones*, the Appellate Body, while addressing the relationship between the precautionary principle and the *SPS Agreement* in the context of its analysis of whether a measure was maintained without sufficient scientific evidence, noted that the Panel should take into account in its examination the prudence commonly exercised by governments in the event of irreversible risks:

> "[A] panel charged with determining, for instance, whether 'sufficient scientific evidence' exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned".[27]

(ii) Panel not to conduct own risk assessment

23. The Panel on *Japan – Agricultural Products II* emphasized that in reviewing whether the measure at issue was being maintained without sufficient scientific evidence, it would not conduct its own risk assessment:

> "To determine whether or not the varietal testing requirement is maintained without sufficient scientific evidence . . . we need to refer to the opinions we received from the experts advising the Panel. We recall that these expert opinions are opinions on the evidence submitted by the parties. We are not empowered, nor are the experts advising the Panel, to conduct our own risk assessment".[28]

(iii) Panel to assess relevant allegations of fact

24. The Appellate Body on *Japan – Apples* also found that the Panel acted within the limits of its investigative authority when the Panel assessed relevant allegations of fact asserted by Japan as the respondent:

> "Japan also contends that the Panel did not have the authority to make certain findings of fact[29] and, in support of this contention, refers to the Appellate Body's statement in *Japan – Agricultural Products II:*

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[23] (*footnote original*) Panel Report, para. 8.141. The Panel also found that "the importation of immature, infected apples may only occur as a result of a handling error or an illegal action". (*Ibid.*, footnote 2275 to para. 8.121).

[24] (*footnote original*) Panel Report, para. 8.174.

[25] (*footnote original*) Panel Report, para. 8.161.

[26] Appellate Body Report on *Japan – Apples*, paras. 158–160.

[27] Appellate Body Report on *EC – Hormones*, para.124. See also paras. 2–4 above.

[28] Panel Report on *Japan – Agricultural Products II*, para. 8.32. For the same statement made in the context of Article 5, see paras. 94–95 below.

[29] (*footnote original*) Japan refers to the following findings of the Panel:

> [W]e are of the opinion that the prohibition of imported apples from any orchard (whether or not it is free of fire blight) should fire blight be detected within a 500–meter buffer zone surrounding such orchard is not supported by sufficient scientific evidence; [and]
>
> [W]e are of the opinion that the requirement that export orchards be inspected at least three times yearly (at blossom, fruitlet, and harvest stages) for the presence of fire blight is not supported by sufficient scientific evidence. (footnotes omitted)
>
> (Japan's appellant's submission, para. 35, quoting Panel Report, paras. 8.185 and 8.195)

> Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it.[30]

We disagree with Japan. We note first that we are not persuaded that the findings of the Panel, identified by Japan in relation to this argument, relate specifically to, or address apples other than mature, symptomless apples, as Japan seems to assume. Also, the Appellate Body's finding in *Japan – Agricultural Products II* does not support Japan's argument that the Panel was barred from making findings of fact in connection with apples other than mature, symptomless apples. Those findings were relevant to the claim pursued by the United States under Article 2.2 of the *SPS Agreement*, and were responsive to relevant allegations of fact advanced by Japan in the context of its rebuttal of the United States' claim. The Panel acted within the limits of its investigative authority because it did nothing more than assess relevant allegations of fact asserted by Japan, in the light of the evidence submitted by the parties and the opinions of the experts".[31]

(iv) Panel to take into account views of experts while evaluating scientific evidence

25. The Appellate Body on *Japan – Apples* held that the Panel was entitled to take into account the views of the experts in assessing whether the United States had established a *prima facie* case, recalling the similar approaches taken in other cases involving the evaluation of scientific evidence:

> "In order to assess whether the United States had established a *prima facie* case, the Panel was entitled to take into account the view of the experts. Indeed, in *India – Quantitative Restrictions,* the Appellate Body indicated that it may be useful for a panel to consider the views of the experts it consults in order to determine whether a *prima facie* case has been made.[32] Moreover, on several occasions, including disputes involving the evaluation of scientific evidence, the Appellate Body has stated that panels enjoy discretion as the trier of facts[33]; they enjoy 'a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence.'[34] Requiring panels, in their assessment of the evidence before them, to give precedence to the importing Member's evaluation of scientific evidence and risk is not compatible with this well-established principle."[35]

(v) Panel not obliged to give precedence to importing Member's approach to scientific evidence and risk

26. The Appellate Body on *Japan – Apples* held that a panel was not obliged to give precedence to the *importing* Member's approach to scientific evidence and risk over the views of the experts when analyzing and assessing scientific evidence to determine whether a complainant established a *prima facie* case under Article 2.2. On appeal, the Appellate Body rejected Japan's argument that the Panel erred in the application of Article 2.2 by focusing on the experts' views rather than according a "certain degree of discretion" to the importing Member in the manner in which it chooses, weighs, and evaluates scientific evidence:

> "Regarding Japan's contention that the Panel should have made its assessment under Article 2.2 in light of Japan's approach to risk and scientific evidence, we recall that, in *EC – Hormones*, the Appellate Body addressed the question of the standard of review that a panel should apply in the assessment of scientific evidence submitted in proceedings under the *SPS Agreement*. It stated that Article 11 of the DSU sets out the applicable standard, requiring panels to make an 'objective assessment of the facts'. It added that, as regards fact-finding by panels and the appreciation of scientific evidence, total deference to the findings of the national authorities would not ensure an objective assessment as required by Article 11 of the DSU.[36] In our view, Japan's submission that the Panel was obliged to favour Japan's approach to risk and scientific evidence over the view of experts conflicts with the Appellate Body's articulation of the standard of 'objective assessment' of fact.
>
> . . . For these reasons, we reject the contention that, under Article 2.2, a panel is obliged to give precedence to the importing Member's approach to scientific evidence and risk when analyzing and assessing scientific evidence. Consequently, we disagree with Japan that the Panel erred in assessing whether the United States had established a *prima facie* case when it did so from a perspective different from that inherent in Japan's approach to scientific evidence and risk. . . ."[37]

27. As regards the panels' standard of review in general, see Article XI of the Chapter on the *DSU*.

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[30] Appellate Body Report on *Japan – Agricultural Products II*, para. 129; Japan's appellant's submission, paras. 18 and 44.
[31] Appellate Body Report on *Japan – Apples*, para. 158
[32] (*footnote original*) Appellate Body Report on *India – Quantitative Restrictions*, para. 142.
[33] (*footnote original*) Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; Appellate Body Report on *EC – Sardines*, para. 229; Appellate Body Report on *Korea – Alcoholic Beverages*, paras. 161–162; Appellate Body Report on *EC – Hormones*, para. 132, and Appellate Body Report on *US – Wheat Gluten*, para. 151. See also, Appellate Body Report on *Australia – Salmon*, paras. 262–267; Appellate Body Report on *Japan – Agricultural Products II*, paras. 140–142; and Appellate Body Report on *Korea – Dairy*, paras. 137–138.
[34] (*footnote original*) Appellate Body Report on *EC – Asbestos*, para. 161.
[35] Appellate Body Report on *Japan – Apples*, paras. 166.
[36] (*footnote original*) Appellate Body Report on *EC – Hormones*, para. 117.
[37] Appellate Body Report on *Japan – Apples*, paras. 165 & 167.

(d) Relationship with other Articles

(i) Article 1.1

28. As regards applicability of the *SPS Agreement* to measures adopted before 1 January 1995 and measures adopted since, see paragraph 6 above.

(ii) Article 4

29. The Panel on *Japan – Apples* rejected Japan's argument that the Panel should consider Article 4 of the *SPS Agreement* in its assessment of Article 2.2:

> "[W]e agree that other provisions of the *SPS Agreement* are part of the context of Article 2.2, as recalled by the Appellate Body in *Japan – Agricultural Products II*[38]. Article 4 deals with the specific question of the recognition of equivalence of measures. Unlike Article 3.3, 5.1 and 5.7, the purpose of Article 4 is clearly different from that of Article 2.2. We also note that the United States did not raise any claim under Article 4 and that this Article is not a defence against violations of other provisions of the *SPS Agreement*. As a result, we see no other reason to consider Japan's arguments regarding Article 4 in our assessment of Article 2.2, other than to the extent that Article 4 might form part of the relevant context in the interpretation of Article 2.2."[39]

(iii) Article 5

Article 5.1

30. In *EC – Hormones*, the Appellate Body stated that Articles 2.2 and 5.1 should "constantly be read together":

> "[T]he Panel considered that Article 5.1 may be viewed as a specific application of the basic obligations contained in Article 2.2 of the *SPS Agreement*, which reads as follows: . . .
>
> We agree with this general consideration and would also stress that Articles 2.2 and 5.1 should constantly be read together. Article 2.2 informs Article 5.1: the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1."[40]

31. The Appellate Body on *Japan – Agricultural Products II also* considered it useful in interpreting Article 2.2, and, in particular, the meaning of the word "sufficient", to recall its statement on Article 5.1 in its Report on *EC – Hormones*.[41]

32. In *Australia – Salmon*, the Appellate Body concluded that a violation of Article 5.1 also implied an inconsistency with Article 2.2 (see paragraph 128 below):

> "[B]y maintaining an import prohibition on fresh, chilled or frozen ocean-caught Pacific salmon, in violation of Article 5.1, Australia has, by implication, also acted inconsistently with Article 2.2 of the *SPS Agreement*."[42]

Articles 5.4 and 5.6

33. On the relationship between Articles 5.4 to 5.6 and Article 2.2, the Panel on *EC – Hormones*, in a statement not reviewed by the Appellate Body, noted:

> "Articles 5.4 to 5.6 may be viewed as specific applications of the basic obligations provided for in Article 2.2 which, *inter alia*, states that 'Members shall ensure that any sanitary or phytosanitary measure is *applied only to the extent necessary to protect* human, animal or plant life or health' (emphasis added) and Article 2.3 which provides that 'Members shall ensure that their sanitary and phytosanitary measures do *not arbitrarily or unjustifiably discriminate between Members* where identical or similar conditions prevail . . .' and that 'Sanitary and phytosanitary measures *shall not be applied in a manner which would constitute a disguised restriction* on international trade' (emphasis added)."[43]

34. The Panel on *Japan – Apples* emphasized that the requirement not to maintain a measure without sufficient scientific under Article 2.2 should not be confused with the requirement of Article 5.6:

> "[W]e should also be careful not to confuse the requirement that a measure is not maintained without sufficient scientific evidence with the requirement of Article 5.6 of the *SPS Agreement* that the measure is 'not more trade-restrictive than required to achieve [Japan's] appropriate level of . . . phytosanitary protection'. In other words, while we might find that some specific requirements of the measure at issue are not supported by sufficient scientific evidence, our findings should be limited to Article 2.2."[44]

Article 5.7

35. The Panel on *Japan – Agricultural Products II* stated that a measure consistent with Article 5.7 cannot be found inconsistent with Article 2.2:

> "[B]efore we can find . . . whether or not Article 2.2 is violated in this dispute – we recall that Article 2.2 provides that 'Members shall ensure that any . . . phytosanitary measure . . . is not maintained without sufficient scientific evidence, *except as provided for in paragraph 7 of Article 5*' (emphasis added). We note that Japan invokes Article 5.7 in support of its varietal testing requirement. We therefore need to examine next whether the varietal testing requirement is a measure meeting the requirements in Article 5.7. If the varietal

[38] (*footnote original*) Appellate Body Report in *Japan – Agricultural Products II*, para. 74.
[39] Panel Report on *Japan – Apples*, para. 8.107.
[40] Appellate Body Report on *EC – Hormones*, para. 180.
[41] (*footnote original*) *European Communities – Hormones*, *supra*, footnote 12, para. 194.
[42] Appellate Body Report on *Australia – Salmon*, para. 138.
[43] Panel Report on *EC – Hormones (Canada)*, para. 8.99; Panel Report on *EC – Hormones (US)*, para. 8.96.
[44] Panel Report on *Japan – Apples*, para. 8.78.

testing requirement meets these requirements, we cannot find that it violates Article 2.2."[45]

36. In *Japan – Agricultural Products II*, the Appellate Body addressed the relationship between the requirement of sufficient scientific evidence under Article 2.2 and Article 5.7 and considered that Article 5.7 operates as a qualified exemption from the obligation under Article 2.2:

> "[I]t is clear that Article 5.7 of the *SPS Agreement,* to which Article 2.2 explicitly refers, is part of the context of the latter provision and should be considered in the interpretation of the obligation not to maintain an SPS measure without sufficient scientific evidence. Article 5.7 allows Members to adopt provisional SPS measures '[i]n cases where relevant scientific evidence is insufficient' and certain other requirements are fulfilled. Article 5.7 operates as a *qualified* exemption from the obligation under Article 2.2 not to maintain SPS measures without sufficient scientific evidence. An overly broad and flexible interpretation of that obligation would render Article 5.7 meaningless."[46]

37. The Panel on *Japan – Apples* also followed the approach by the Panel on *Japan – Agricultural Products II* and refrained from making final findings with respect to the consistency of the measure at issue with Article 2.2 until the Panel had completed its analysis under Article 5.7. The Panel further stated that the only situation where it would not need to address Article 5.7 after the examination of the Article 2.2 claim would be if the measure was found to be "not maintained without sufficient scientific evidence" within the meaning of Article 2.2:

> "[W]e believe it appropriate to follow, in this case too, the approach of the panel in *Japan – Agricultural Products II*. There is only one situation where it may not be necessary to address Article 5.7. This is if we find that the measure or measures as a whole is/are 'not maintained without sufficient scientific evidence' within the meaning of Article 2.2. If we were to find, however, that part or all of the measure or measures at issue is/are maintained without sufficient scientific evidence, we would suspend our final conclusion on the consistency of the measure(s) at issue with that provision until we have completed our examination under Article 5.7 of the *SPS Agreement*."[47]

2. Article 2.3

(a) Elements of violation

38. The Panel on *Australia – Salmon (Article 21.5 – Canada)* identified three elements necessary to find a violation of Article 2.3:

> "[T]hree elements, cumulative in nature, are required for a violation of this provision:
>
> (1) the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member;
>
> (2) the discrimination is arbitrary or unjustifiable; and
>
> (3) identical or similar conditions prevail in the territory of the Members compared."[48]

(b) Scope of discrimination

39. In *Australia – Salmon (Article 21.5 – Canada)*, while the Panel found no violation of Article 2.3[49], it also stated that Article 2.3 prohibits not only discrimination between similar products, but also between different products:

> "[W]e are of the view that discrimination in the sense of Article 2.3, first sentence, may also include discrimination between *different* products, e.g. not only discrimination between Canadian salmon and New Zealand salmon, or Canadian salmon and Australian salmon; but also discrimination between Canadian salmon and Australian fish including non-salmonids".[50]

(c) Relationship with other Articles

(i) Article 1.1

40. On the the applicability of the *SPS Agreement* to measures adopted before 1 January 1995 and measures adopted since, see paragraph 6 above.

(ii) Article 5.5

41. In *EC – Hormones* the Appellate Body noted the close relationship between Articles 2.3 and 5.5:

> "Article 5.5 must be read in context. An important part of that context is Article 2.3 of the *SPS Agreement*, . . . When read together with Article 2.3, Article 5.5 may be seen to be marking out and elaborating a particular route leading to the same destination set out in Article 2.3."[51]

42. In the context of examining the European Communities' measure at issue in the light of Article 5.5, the Appellate Body on *EC – Hormones* made the following statement with respect to Article 2.3:

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[45] Panel Report on *Japan – Agricultural Products II*, para. 8.48; Panel Report on *Japan – Apples*, para. 8.200.
[46] Appellate Body Report on *Japan – Agricultural Products II*, para. 80.
[47] Panel Report on *Japan – Agricultural Products II*, para. 8.4.
[48] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111.
[49] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.113–7–114.
[50] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.112.
[51] Appellate Body Report on *EC – Hormones*, para. 212.

"It is well to bear in mind that, after all, the difference in levels of protection that is characterizable as arbitrary or unjustifiable is only an element of (indirect) proof that a Member may actually be applying an SPS measure in a manner that discriminates between Members or constitutes a disguised restriction on international trade, prohibited by the basic obligations set out in Article 2.3 of the *SPS Agreement*".[52]

43. The Appellate Body on *EC – Hormones* further discussed the relationship between Articles 2.3 and 5.5 with respect to the Panel's decision to examine the claim under Articles 3 and 5 that under Article 2:

"We recall the reading that we have given above to Articles 2 and 5 . . . and that similarly Article 2.3 informs Article 5.5 – but believe that further analysis of their relationship should await another case."[53]

44. The Panel on *Australia – Salmon*, in a finding upheld by the Appellate Body[54], held that a violation of Article 5.5 implied a violation of Article 2.3:

"Indeed, even though Article 5.5 deals with arbitrary or unjustifiable *distinctions in levels of protection* imposed by one WTO Member for different situations and Article 2.3 addresses, rather, sanitary measures which (1) arbitrary or unjustifiably *discriminate between* WTO Members or (2) are applied in a manner which would constitute a *disguised restriction* on trade; the third element under Article 5.5 also requires that the *measure* in dispute results in discrimination or a disguised restriction on trade. We conclude, therefore, that if we were to find that all three elements under Article 5.5 – including, in particular, the third element – are fulfilled and that, therefore, the more specific Article 5.5 is violated, such finding can be presumed to imply a violation of the more general Article 2.3. We do recognize, at the same time, that, given the more general character of Article 2.3, not all violations of Article 2.3 are covered by Article 5.5."[55]

45. In *Australia – Salmon*, the Appellate Body elaborated on the relationship between Articles 2.3 and 5.5 and considered that a finding of violation of Article 5.5 necessarily implies a violation of Article 2.3:

"We recall that the third – and decisive – element of Article 5.5, discussed above, requires a finding that the SPS measure which embodies arbitrary or unjustifiable restrictions in levels of protection results in 'discrimination or a disguised restriction on international trade'. Therefore, a finding of violation of Article 5.5 will necessarily imply a violation of Article 2.3, first sentence, or Article 2.3, second sentence. Discrimination 'between Members, including their own territory and that of others Members' within the meaning of Article 2.3, first sentence, can be established by following the complex and indirect route worked out and elaborated by Article 5.5. However, it is clear that this route is not the only route leading to a finding that an SPS measure constitutes arbitrary or unjustifiable discrimination according to Article 2.3, first sentence. Arbitrary or unjustifiable discrimination in the sense of Article 2.3, first sentence, can be found to exist without any examination under Article 5.5."[56]

3. Relationship with other Articles

(a) Articles 3 and 5

46. In *EC – Hormones*, with respect to the Panel's decision to examine a claim under Articles 3 and 5 before a claim under Article 2[57], the Appellate Body indicated a preference for beginning the analysis with Article 2:

"We are, of course, surprised by the fact that the Panel did not begin its analysis of this whole case by focusing on Article 2 that is captioned 'Basic Rights and Obligations', an approach that appears logically attractive."[58]

47. In *Australia – Salmon*, where Articles 2, 3 and 5 were at issue, the Panel decided to commence its analysis under Article 5, because (1) Canada, the complaining party, focused initially on this provision with respect to its claims and (2) the provisions under Article 5 "provide for more specific and detailed rights and obligations" than Article 2. The Appellate Body did not address this issue:

"[E]ven if we were to start our examination of this dispute under Article 3, we would in any event be referred to and thus still need to address Articles 2 and 5. To conduct our examination of this case in the most efficient manner, we shall, therefore, first address Articles 2 and 5 . . . Since in this particular case, (1) Canada itself first presents its claims under Article 5, before addressing those under Article 2, and (2) the provisions invoked by Canada under Article 5 (i.e., Articles 5.1, 5.2, 5.5 and 5.6) all provide for more specific and detailed rights and obligations than the 'Basic Rights and Obligations' set out in rather broad wording in the provisions invoked by Canada under Article 2 (i.e., Articles 2.2 and 2.3), we consider it more appropriate in the circumstances of this dispute to first deal with Canada's claims under Article 5".[59]

48. In *Australia – Salmon (Article 21.5 – Canada)*, Canada alleged the violation of Articles 2, 5, 6 and 8. Similarly to the original Panel, the Article 21.5 Panel started its examination with Article 5.[60]

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[52] Appellate Body Report on *EC – Hormones*, para. 240.
[53] Appellate Body Report on *EC – Hormones*, para. 250. See also para. 180, cited in para. 30 above.
[54] Appellate Body Report on *Australia – Salmon*, para. 178.
[55] Panel Report on *Australia – Salmon*, para. 8.109.
[56] Appellate Body Report on *Australia – Salmon*, para. 252.
[57] Panel Report on *EC – Hormones (Canada)*, paras. 8.41–8.43 and 8.254; Panel Report on *EC – Hormones (US)*, paras. 8.45–8.47 and 8.251.
[58] Appellate Body Report on *EC – Hormones*, para. 250.
[59] Panel Report on *Australia – Salmon*, paras. 8.47–8.48.
[60] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.38.

(b) Articles 5, 6, 7 and 8

49. In *Japan – Agricultural Products II*, where claims were made under Articles 2, 5, 7 and 8, the Panel began its examination with Article 2. The Appellate Body did not address this issue.[61]

50. See also paragraph 48 above.

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3
Harmonization

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

2. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.

3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.[2] Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

(*footnote original*) [2] For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

4. Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.

5. The Committee on Sanitary and Phytosanitary Measures provided for in paragraphs 1 and 4 of Article 12 (referred to in this Agreement as the "Committee") shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. General

(a) Object and purpose

51. In *EC – Hormones*, the Appellate Body held that the object and purpose of Article 3 was to promote the harmonization of national SPS measures:

> "In generalized terms, the object and purpose of Article 3 is to promote the harmonization of the SPS measures of Members on as wide a basis as possible, while recognizing and safeguarding, at the same time, the right and duty of Members to protect the life and health of their people. The ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between Members or as a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both 'necessary to protect' human life or health and 'based on scientific principles', and without requiring them to change their appropriate level of protection."[62]

2. Article 3.1

(a) "base[d] . . . on"

52. The Appellate Body on *EC – Hormones* while examining the meaning of the term "based on" as used in this Article, also held that the Panel's interpretation of the term "based on" was not in accordance with the object and purpose of Article 3, which the Appellate Body held was to harmonize SPS measures in the future:

> "In the third place, the object and purpose of Article 3 run counter to the Panel's interpretation. That purpose, Article 3.1 states, is '[t]o harmonize [SPS] measures on as wide a basis as possible . . . It is clear to us that harmonization of SPS measures of Members on the basis of international standards is projected in the Agreement, as a *goal*, yet to be realized *in the future*. To read Article 3.1 as requiring Members to harmonize their SPS measures *by conforming those measures with international standards*, guidelines and recommendations, *in the here and now*, is, in effect, to vest such international standards,

[61] Panel Report on *Japan – Agricultural Products II*, para. 8.16.
[62] Appellate Body Report on *EC – Hormones*, para. 177.

guidelines and recommendations (which are by the terms of the Codex *recommendatory* in form and nature) with *obligatory* force and effect. The Panel's interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding *norms*. But, as already noted, the *SPS Agreement* itself sets out no indication of any intent on the part of the Members to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the *SPS Agreement* would be necessary."[63]

(b) "international standards, guidelines or recommendations where they exist"

(i) Panel's mandate

53. With respect to the phrase "international standards . . . where they exist", the Panel on *EC – Hormones* noted as follows:

"Article 3.1 unambiguously prescribes that '. . . Members shall base their sanitary . . . measures on international standards . . . *where they exist* . . .' (emphasis added). Paragraph 3 of Annex A of the *SPS Agreement* states equally clearly that the international standards mentioned in Article 3:1 are 'for food safety, the standards . . . *established by the Codex Alimentarius Commission* relating to . . . *veterinary drug* . . . *residues* . . .' (emphasis added). No other conditions are imposed in the *SPS Agreement* on the relevance of international standards for the purposes of Article 3. Therefore, as a panel making a finding on whether or not a Member has an obligation to base its sanitary measure on international standards in accordance with Article 3.1, we only need to determine whether such international standards exist. For these purposes, we need not consider (i) whether the standards reflect *levels* of protection or sanitary *measures* or the *type* of sanitary measure they recommend, or (ii) whether these standards have been adopted by consensus or by a wide or narrow majority, or (iii) whether the period during which they have been discussed or the date of their adoption was before or after the entry into force of the *SPS Agreement*."[64]

(ii) Relevance of international standards for individual diseases

54. In *Australia – Salmon*, in the context of animal health, the Panel held that even if no international standards existed for the entire range of fish diseases at issue, this fact did not signify that an international standard applying to only one of the diseases at issue could not be relevant in the case before it:

"Paragraph 3(b) of Annex A to the *SPS Agreement* indicates that the international standards, guidelines or recommendations referred to in Article 3 *for animal health* (the concern at issue in this dispute) are those developed under the auspices of the International Office of Epizooties ('OIE'). Both parties agree that the International Aquatic Animal Health Code adopted by the OIE in 1995 ('OIE Code') provides international guidelines on a disease-by-disease basis. However, they also agree that as of today no relevant OIE guideline exists which deals with salmon on a product specific basis. Moreover, both parties also agree that OIE guidelines do not exist for all of the 24 diseases of concern to Australia. Therefore, even if we were to examine first, if and how many relevant international guidelines exist and second address the question of whether Australia deviates from these guidelines, we would thereafter still need to examine either (1) in the event Australia does deviate from any such guidelines contrary to Article 3, whether the measure in dispute could not be based on Australia's concern for any of the other diseases for which no international guideline exists (*in casu*, under Articles 2 and 5); or (2) in the event Australia's measure is based on and/or conforms to any such guidelines, whether that part of the measure for which no guidelines exist, is consistent with the provisions of the *SPS Agreement* other than Article 3 (*in casu*, Articles 2 and 5). In this respect, we are of the view, however, that the fact that in this case no international guidelines exist for *all* 24 diseases of concern does not mean that an international guideline which applies to only *one* of these diseases cannot be relevant (or, according to the language of Article 3.1, does not 'exist') for the measure at issue."[65]

(iii) Validity of OIE standards, guidelines and recommendations

55. The Panel on *Australia – Salmon* held with respect to standards developed by the International Office of Epizootics (OIE) as follows:

"[T]he *SPS Agreement* (paragraph 3(b) of Annex A) explicitly directs us to the OIE and the standards, guidelines and recommendations it develops . . . The fact that the OIE Code is subject to revision or the way it has been adopted in our view does not change its validity for our purposes."[66]

56. With respect to existing international standards, see paragraph 1 above.

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[63] Appellate Body Report on *EC – Hormones*, para. 165.
[64] Panel Report on *EC – Hormones (Canada)*, para. 8.72; Panel Report on *EC – Hormones (US)*, para. 8.69.
[65] Panel Report on *Australia – Salmon*, para. 8.46.
[66] Panel Report on *Australia – Salmon*, para. 7.11.

(c) Burden of proof

(i) Exemptions from establishing prima facie inconsistency

57. In *EC – Hormones*, the Appellate Body disagreed with the Panel which had held that if a measure enacted by a Member does not conform to an international standard, the complaining Member is exempted from making a *prima facie* case of inconsistency of this measure with the *SPS Agreement* or with the *GATT 1994*[67]:

> "Under Article 3.1 of the *SPS Agreement*, a Member may choose to establish an SPS measure that is based on the existing *relevant* international standard, guideline or recommendation. Such a measure may adopt some, not necessarily all, of the elements of the international standard. The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2; but, as earlier observed, the Member is not penalized by exemption of a complaining Member from the normal burden of showing a *prima facie* case of inconsistency with Article 3.1 or any other relevant Article of the *SPS Agreement* or of the GATT 1994."[68]

(d) Relationship with other paragraphs of Article 3

(i) Paragraphs 1, 2 and 3

58. The Panel on *EC – Hormones* identified a relationship of rule and exception between paragraphs 1, 2 and 3 of Article 3. The Appellate Body disagreed:

> "It appears to us that the Panel has misconceived the relationship between Articles 3.1, 3.2 and 3.3, a relationship discussed below, which is qualitatively different from the relationship between, for instance, Articles I or III and Article XX of the GATT 1994. Article 3.1 of the *SPS Agreement* simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement, that is, where a Member has projected for itself a higher level of sanitary protection than would be achieved by a measure based on an international standard."[69]

59. The Appellate Body on *EC – Hormones* then distinguished the meaning of Articles 3.1, 3.2 and 3.3 in the following terms:

> "Under Article 3.2 of the *SPS Agreement*, a Member may decide to promulgate an SPS measure that conforms to an international standard. Such a measure would embody the international standard completely and, for practical purposes, converts it into a municipal standard. Such a measure enjoys the benefit of a presumption (albeit a rebuttable one) that it is consistent with the relevant provisions of the *SPS Agreement* and of the GATT 1994.
>
> Under Article 3.1 of the *SPS Agreement*, a Member may choose to establish an SPS measure that is based on the existing relevant international standard, guideline or recommendation. Such a measure may adopt some, not necessarily all, of the elements of the international standard. The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2; but, as earlier observed, the Member is not penalized by exemption of a complaining Member from the normal burden of showing a *prima facie* case of inconsistency with Article 3.1 or any other relevant Article of the *SPS Agreement* or of the GATT 1994."[70]
>
> Under Article 3.3 of the *SPS Agreement*, a Member may decide to set for itself a level of protection different from that implicit in the international standard, and to implement or embody that level of protection in a measure not 'based on' the international standard. The Member's appropriate level of protection may be higher than that implied in the international standard. The right of a Member to determine its own appropriate level of sanitary protection is an important right."[71]

3. Article 3.2

(a) ". . . conform to . . ."

(i) Distinction from "based on"

60. In *EC – Hormones*, the Appellate Body reversed the Panel's finding that Article 3.2 "equates measures *based on* international standards with measures which *conform to* such standards".[72] The Appellate Body first drew a distinction between the terms "based on" and "conform to" and noted certain requirements for a measure to "conform to" an international standard:

> "In the first place, the ordinary meaning of 'based on' is quite different from the plain or natural import of 'conform to'. A thing is commonly said to be 'based on' another thing when the former 'stands' or is 'founded' or 'built' upon or 'is supported by' the latter. In contrast, much more is required before one thing may be regarded as 'conform[ing] to' another: the former must 'comply with', 'yield or show compliance' with the latter. The reference of 'conform to' is to 'correspondence in form or manner', to 'compliance with' or 'acquiescence', to 'follow[ing] in form or nature'. A measure that 'conforms to' and incorporates a Codex standard is, of course, 'based on' that standard. A measure, however, based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure."[73]

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[67] Panel Report on *EC – Hormones (United States)* paras. 8.86–8.88; Panel Report on *EC – Hormones* (*Canada*) paras. 9.81– 9.91.
[68] Appellate Body Report on *EC – Hormones*, para. 171.
[69] Appellate Body Report on *EC – Hormones*, para. 104.
[70] (*footnote original*) Appellate Body Report on *EC – Hormones*, para. 171.
[71] Appellate Body Report on *EC – Hormones*, paras. 170–172.
[72] Panel Report on *EC – Hormones (Canada)*, para. 8.75; Panel Report on *EC – Hormones (US)*, para. 8.72.
[73] Appellate Body Report on *EC – Hormones*, para. 163.

(ii) Distinction as used in different parts of SPS Agreement

61. The Appellate Body on *EC–Hormones*, after distinguishing between the ordinary meaning of "based on" and "conform to", as referred to in paragraph 60 above, noted that they were used in different provisions of the *SPS Agreement* and rejected the view that such different usage was "merely inadvertent":

> "In the second place, 'based on' and 'conform to' are used in different articles, as well as in differing paragraphs of the same article. Thus, Article 2.2 uses 'based on', while Article 2.4 employs 'conform to'. Article 3.1 requires the Members to 'base' their SPS measures on international standards; however, Article 3.2 speaks of measures which 'conform to' international standards. Article 3.3 once again refers to measures 'based on' international standards. The implication arises that the choice and use of different words in different places in the *SPS Agreement* are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement. Canada has suggested the use of different terms was 'accidental' in this case, but has offered no convincing argument to support its suggestion. We do not believe this suggestion has overturned the inference of deliberate choice."[74]

(b) Burden of proof

(i) Presumption of consistency

62. The Appellate Body on *EC – Hormones*, in the context of addressing the burden of proof under the *SPS Agreement*, stated the following with respect to the presumption in Article 3.2:

> "The presumption of consistency with relevant provisions of the *SPS Agreement* that arises under Article 3.2 in respect of measures that conform to international standards may well be an *incentive* for Members so to conform their SPS measures with such standards. It is clear, however, that a decision of a Member not to conform a particular measure with an international standard does not authorize imposition of a special or generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*."[75]

63. The Appellate Body on *EC – Hormones* also noted that measures pursuant to Article 3.2 enjoy the benefit of a presumption, albeit a rebuttable one.[76] See also paragraph 59 above.

(c) Relationship with other paragraphs of Article 3

64. The Appellate Body on *EC – Hormones* clarified the meaning of Article 3.2 while discussing the relationship between Article 3.1, 3.2 and 3.3. See paragraph 59 above.

(d) Relationship with other Articles

65. The Panel on *Australia – Salmon* referred to Article 3 in the context of its analysis under Article 5.6:

> "Given the repeated reference made in the *SPS Agreement* to the relevant international organizations, in this dispute the OIE [International Office of Epizootics], and the recommendations they produce (e.g., Articles 3.1 and 5.1), as well as to the more general objective of harmonization (e.g., Articles 3.4 and the sixth preamble), we consider that appropriate weight should be given to [the] opinion on Option 5 [i.e., evisceration of the fish, proposed by the OIE]".[77]

4. Article 3.3

(a) General

66. In *EC – Hormones*, the Appellate Body held that the "right of a Member to establish its own level of sanitary protection under Article 3.3 of the *SPS Agreement* is an autonomous right and *not* an 'exception' from a 'general obligation' under Article 3.1".[78] In this respect, see also the excerpts from the Appellate Body report in paragraph 59 above.

67. The Appellate Body on *EC – Hormones* also found that the right of a Member to define its appropriate level of protection is not an absolute or unqualified right:

> "The right of a Member to define its appropriate level of protection is not, however, an absolute or unqualified right. Article 3.3 also makes this clear . . ."[79]

68. Regarding the relationship between Article 3.3 and the "precautionary principle", the Appellate Body on *EC – Hormones* also noted that the precautionary principle is reflected in Article 3.3.[80] See paragraph 3 above.

(b) "based on"

69. On the Panel's finding that "for a sanitary measure to be *based on* an international standard . . ., that *measure* needs to reflect the same level of sanitary protection as the *standard*" (emphasis original)[81], the Appellate Body on *EC – Hormones* noted as follows:

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[74] Appellate Body Report on *EC – Hormones*, para. 164.
[75] Appellate Body Report on *EC – Hormones*, para. 102. See also para. 170 of the Appellate Body report and para. 59 above of this Chapter.
[76] Appellate Body Report on *EC – Hormones* para. 170.
[77] Panel Report on *Australia – Salmon*, para. 8.180.
[78] Appellate Body Report on *EC – Hormones*, para. 172.
[79] Appellate Body Report on *EC – Hormones*, para. 173
[80] Appellate Body Report on *EC – Hormones*, para. 124.
[81] Panel Report on *EC – Hormones (Canada)*, para. 8.76; Panel Report on *EC – Hormones (US)*, para. 8.73.

"It appears to us that the Panel reads much more into Article 3.3 than can be reasonably supported by the actual text of Article 3.3. Moreover, the Panel's entire analysis rests on its flawed premise that 'based on', as used in Articles 3.1 and 3.3, means the same thing as 'conform to' as used in Article 3.2. As already noted, we are compelled to reject this premise as an error in law. The correctness of the rest of the Panel's intricate interpretation and examination of the consequences of the Panel's litmus test, however, have to be left for another day and another case".[82]

70. For further interpretation of this term as it appears in Article 3.1, see paragraph 52 above.

(c) Clarification of conditions

71. The Appellate Body on *EC – Hormones*, distinguished between two situations in Article 3.3, but ultimately held that Article 3.3 was not "a model of clarity in drafting and communication" and that the distinction was "more apparent than real":

"Article 3.3 is evidently not a model of clarity in drafting and communication. The use of the disjunctive 'or' does indicate that two situations are intended to be covered. These are the introduction or maintenance of SPS measures which result in a higher level of protection:

(a) 'if there is a scientific justification'; or

(b) 'as a consequence of the level of . . . protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5'.

It is true that situation (a) does not speak of Articles 5.1 through 5.8. Nevertheless, two points need to be noted. First, the last sentence of Article 3.3 requires that 'all measures which result in a [higher] level of . . . protection', that is to say, measures falling within situation (a) as well as those falling within situation (b), be 'not inconsistent with any other provision of [the SPS] Agreement'. 'Any other provision of this Agreement' textually includes Article 5. Secondly, the footnote to Article 3.3, while attached to the end of the first sentence, defines 'scientific justification' as an 'examination and evaluation of available scientific information in conformity with relevant provisions of this Agreement . . .'. This examination and evaluation would appear to partake of the nature of the risk assessment required in Article 5.1 and defined in paragraph 4 of Annex A of the *SPS Agreement*.

On balance, we agree with the Panel's finding that although the European Communities has established for itself a level of protection higher, or more exacting, than the level of protection implied in the relevant Codex standards, guidelines or recommendations, the European Communities was bound to comply with the requirements established in Article 5.1. We are not unaware that this finding tends to suggest that the distinction made in Article 3.3 between two situations may have very limited effects and may, to that extent, be more apparent than real. Its involved and layered language actually leaves us with no choice".[83]

(d) "scientific justification"

(i) Rational relationship

72. In *Japan – Agricultural Products II*, with respect to the terms "scientific justification", the Appellate Body noted that:

"[I]n our opinion, there is a 'scientific justification' for an SPS measure, within the meaning of Article 3.3, if there is a rational relationship between the SPS measure at issue and the available scientific information."[84]

(e) Relationship with other paragraphs of Article 3

73. As regards the relationship between Articles 3.1, 3.2 and 3.3, see paragraph 59 above.

(f) Relationship with other Articles

(i) Article 1.1

74. As relates to applicability of the *SPS Agreement* to measures adopted before 1 January 1995 and measures adopted since, see paragraph 6 above.

(ii) Article 5.1

75. Based on its analysis of Article 3.3 referenced in paragraph 71 above, the Appellate Body in *EC – Hormones* concluded that "the Panel's finding that the European Communities is required by Article 3.3 to comply with the requirements of Article 5.1 is correct".[85]

5. Article 3.5

76. With respect to the procedures to monitor the process of international harmonization, see section XIII.B.3 below.

6. Relationship with other Articles

77. With respect to the relationship between Articles 3 and Articles 2 and 5, see paragraphs 46–47 above.

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4
Equivalence

1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these

[82] Appellate Body Report on *EC – Hormones*, para. 168.
[83] Appellate Body Report on *EC – Hormones*, paras. 173, 175–176.
[84] Appellate Body Report on *Japan – Agricultural Products II*, para. 79.
[85] Appellate Body Report on *EC – Hormones*, para. 177.

measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

2. Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

(a) Decision on equivalence

(i) General

78. At its meeting of 26 October 2001, the SPS Committee adopted a Decision on the Implementation of Article 4 ("Decision on Equivalence").[86] At its meetings of 7–8 November 2002 and 24–25 June 2003, the SPS Committee agreed on clarifications of paragraphs 5, 6 and 7 of the Decision[87], as foreseen in the Programme for Further Work adopted by the SPS Committee in March 2002.[88] A further clarification to paragraph 5 was agreed by the Committee at its meeting of 17–18 March 2004.[89]

(ii) Concept of equivalence

79. The Preamble of the Decision on Equivalence notes that equivalence requires "acceptance of alternative measures that meet an importing Member's appropriate level of sanitary or phytosanitary protection", but not duplication or "sameness" of measures. Paragraph 1 of the Decision on Equivalence provides:

"1. Equivalence can be accepted for a specific measure or measures related to a certain product or categories of products, or on a systems-wide basis. Members shall, when so requested, seek to accept the equivalence of a measure related to a certain product or category of products. An evaluation of the product-related infrastructure and programmes within which the measure is being applied may also be necessary.[90] Members may further, where necessary and appropriate, seek more comprehensive and broad-ranging agreements on equivalence. The acceptance of the equivalence of a measure related to a single product may not require the development of a systems-wide equivalence agreement."

(iii) Explanation of SPS measures taken by importing Member

80. In order to facilitate the implementation of the provisions of Article 4, the Decision on Equivalence describes the elements to be included in an explanation of the sanitary and phytosanitary measures taken by an importing Member, when so requested by an exporting Member:

"2. In the context of facilitating the implementation of Article 4, on request of the exporting Member, the importing Member should explain the objective and rationale of the sanitary or phytosanitary measure and identify clearly the risks that the relevant measure is intended to address. The importing Member should indicate the appropriate level of protection which its sanitary or phytosanitary measure is designed to achieve.[91] The explanation should be accompanied by a copy of the risk assessment on which the sanitary or phytosanitary measure is based or a technical justification based on a relevant international standard, guideline or recommendation. The importing Member should also provide any additional information which may assist the exporting Member to provide an objective demonstration of the equivalence of its own measure."

(iv) Procedure for the recognition of equivalence

General

81. The Decision on Equivalence provides for a number of requirements and recommendations regarding the procedure to be followed for the recognition of equivalence:

"3. An importing Member shall respond in a timely manner to any request from an exporting Member for consideration of the equivalence of its measures, normally within a six-month period of time.

4. The exporting Member shall provide appropriate science-based and technical information to support its objective demonstration that its measure achieves the appropriate level of protection identified by the importing Member. This information may include, *inter alia*, reference to relevant international standards, or to relevant risk assessments undertaken by the importing Member or by another Member. In addition, the exporting Member shall provide reasonable access, upon request, to the importing Member for inspection, testing and other relevant procedures for the recognition of equivalence.

. . .

[86] G/SPS/19.
[87] G/SPS/19/Add.1 and Add.2.
[88] G/SPS/20.
[89] G/SPS/19/Add.3.
[90] Product-related infrastructure and programmes is in reference to testing, inspection and other relevant requirements specific to product safety.
[91] In doing so, Members should take into account the *Guidelines to Further the Practical Implementation of Article 5.5* adopted by the Committee on Sanitary and Phytosanitary Measures at its meeting of 21–22 June 2000 (document G/SPS/15, dated 18 July 2000).

> 7. When considering a request for recognition of equivalence, the importing Member should analyze the science-based and technical information provided by the exporting Member on its sanitary or phytosanitary measures with a view to determining whether these measures achieve the level of protection provided by its own relevant sanitary or phytosanitary measures."[92]

Accelerated procedure

82. Paragraph 5 of the Decision on Equivalence provides that "[t]he importing Member should accelerate its procedure for determining equivalence in respect of those products which it has historically imported from the exporting Member."[93]

83. In order to clarify paragraph 5 (and paragraph 6) of the Decision on Equivalence, the SPS Committee adopted another Decision at its meeting on 7–8 November 2002 ("the 7–8 November 2002 Decision").[94] In the latter Decision the SPS Committee notes that the importance of knowledge based on historic trade reasons has been fully recognized by other international organizations and international agencies:

> "This information and experience, if directly relevant to the product and measure under consideration, should be taken into account in the recognition of equivalence of measures proposed by the exporting Member. In particular, information already available to the importing Member should not be sought again with respect to procedures to determine the equivalence of measures proposed by the exporting Member."[95]

84. In its 7–8 November 2002 Decision, the SPS Committee requests the Interim Commission on Phytosanitary Measures (ICPM) to take into consideration both the Decision on Equivalence and the Decision clarifying certain aspects of it:

> "3. The Committee draws the attention of the Interim Commission on Phytosanitary Measures (ICPM) to the Decision on Equivalence (G/SPS/19), and to the above clarification with respect to Paragraph 5 of the Decision. The Committee requests that the ICPM take into consideration the Decision and this clarification in its future work on judgement of equivalence with regard to sanitary measures to address plant pests and diseases."[96]

Duty not to interrupt or suspend imports

85. Paragraph 6 of the Decision on Equivalence[97] establishes that "a request by an exporting Member for recognition of the equivalence of its measures with regard to a specific product [by an importing Member] shall not be in itself a reason to disrupt or suspend ongoing imports from that Member of the product in question."[98]

86. The 7–8 November 2002 Decision of the SPS Committee clarifies paragraph 6 of the Decision on Equivalence as follows:

> "[S]ince a request for recognition of equivalence does not in itself alter the way in which trade is occurring, there is no justification for disruption or suspension of trade. If an importing Member were to disrupt or suspend trade solely because it had received a request for an equivalence determination, it would be in apparent violation of its obligations under the *SPS Agreement* (e.g. under Article 2)."[99]

87. Also in relation to paragraph 6 of the Decision on Equivalence, the 7–8 November 2002 Decision of the SPS Committee provides, however, that a request for recognition of equivalence does not preclude an importing Member from taking measures necessary to achieve the appropriate level of protection:

> "[A] request for recognition of equivalence does not impede the right of an importing Member to take any measure it may decide is necessary to achieve its appropriate level of protection, including in response to an emergency situation. However, if the decision to impose some additional control measure were to coincide with consideration by the same Member of a request for recognition of equivalence, this might lead an exporting Member whose trade is affected to suspect that the two events were linked. To avoid any misinterpretation of this kind, the Committee recommends that the importing Member should give an immediate and comprehensive explanation of the reasons for its action in restricting trade to any other Members affected, and that it should also follow the normal or emergency notification procedures established under the *SPS Agreement*."[100]

88. Paragraph 7 of G/SPS/19/Add.1 draws the attention of Office International des Epizooties and ICPM to this further clarification.

(v) Technical assistance

89. Paragraph 8 of the Decision on Equivalence provides further that, in line with Article 9 of the *SPS Agreement*, Members shall give full consideration to requests for appropriate technical assistance to facilitate the implementation of Article 4, especially when those requests come from developing countries:

> "In accordance with Article 9 of the Agreement on the Application of Sanitary and Phytosanitary Measures, a

[92] G/SPS/19, paras. 1–4.
[93] G/SPS/19, para. 5.
[94] G/SPS/19/Add.1, paras. 1–4 and 7.
[95] G/SPS/19/Add.1, para. 2.
[96] G/SPS/19/Add.1, para. 3.
[97] See para. 79.
[98] G/SPS/19, para. 6.
[99] G/SPS/19/Add.1, para. 5.
[100] G/SPS/19/Add.1, para. 6.

Member shall give full consideration to requests by another Member, especially a developing country Member, for appropriate technical assistance to facilitate the implementation of Article 4. This assistance may, *inter alia*, be to help an exporting Member identify and implement measures which can be recognized as equivalent, or to otherwise enhance market access opportunities. Such assistance may also be with regard to the development and provision of the appropriate science-based and technical information referred to in paragraph 4, above."[101]

(vi) International cooperation outside the WTO

90. In order to improve international cooperation in this sphere outside the WTO, paragraph 9 of the Decision on Equivalence advises active participation of Members in the ongoing work in the Codex Alimentarius Commission and in any work related to equivalence undertaken by the Office International des Epizooties and in the framework of the International Plant Protection Convention.

91. Paragraph 10 of the Decision on Equivalence outlines a number of actions to be taken by the SPS Committee in this regard:

"10. The Committee on Sanitary and Phytosanitary Measures recognizes the urgency for the development of guidance on the judgement of equivalence and shall formally encourage the Codex Alimentarius Commission to complete its work with regard to equivalence as expeditiously as possible. The Committee on Sanitary and Phytosanitary Measures shall also formally encourage the Office International des Epizooties and the Interim Commission on Phytosanitary Measures to elaborate guidelines, as appropriate, on equivalence of sanitary and phytosanitary measures and equivalence agreements in the animal health and plant protection areas. The Codex Alimentarius Commission, the Office International des Epizooties and the Interim Commission on Phytosanitary Measures shall be invited to keep the Committee on Sanitary and Phytosanitary Measures regularly informed regarding their activities relating to equivalence."[102]

(vii) Notification

92. In accordance with paragraph 12 of the Decision on Equivalence, Members should regularly inform the SPS Committee of their experiences concerning the implementation of Article 4. In particular, the Decision encourages Members to inform the SPS Committee of the successful conclusion of any bilateral equivalence agreement.[103] As regards the notification procedures, see paragraph 179 below.

(b) Specific programme for the further implementation of Article 4

93. Paragraph 13 of the Decision on Equivalence asks the SPS Committee to develop a specific programme to further the implementation of Article 4, paying particular attention to the problems encountered by developing country Members.[104] At the Doha Ministerial Conference, Members also instructed the SPS Committee to develop the same specific programme.[105] At its meeting of 21 March 2002, the SPS Committee adopted a specific programme for the further implementation of Article 4.[106] The programme established the timetable and the agendas of the meetings for the discussion of the Decision on Equivalence.

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5
Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection

1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

4. Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

5. With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each

[101] G/SPS/19, para. 8.
[102] G/SPS/19 paras. 9 and 10.
[103] G/SPS/19, para. 12.
[104] G/SPS/19/para. 13.
[105] WT/MIN(01)/17, para. 3.3.
[106] G/SPS/20.

Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

6. Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.[3]

(*footnote original*) [3] For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

7. In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

8. When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure.[107]

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. Article 5.1

(a) Standard of review

94. With regards to the role of panels in reviewing whether an SPS measure is based on a risk assessment, the Panels on *EC – Hormones*, in a finding not addressed by the Appellate Body, stated:

> "[I]t is for the European Communities to submit evidence before the Panel that its measures are based on a risk assessment; it is not for the Panel itself to conduct its own risk assessment on the basis of scientific evidence gathered by the Panel or submitted by the parties during the Panel proceedings."[108]

95. The Panel on *Australia – Salmon*, in a finding not addressed by the Appellate Body, made a similar statement, holding that it did not attempt to conduct its own risk assessment, but merely examined and evaluated evidence:

> "[W]e stress that in examining this case we did not attempt (nor are we, in our view, allowed) to conduct our own risk assessment or to impose any scientific opinion on Australia. We only examined and evaluated the evidence – including the information we received from the experts advising the Panel – and arguments put before us in light of the relevant WTO provisions and, following the rules on burden of proof set out above, based our findings on this evidence and these arguments."[109]

96. The Appellate Body on *Japan – Apples* considered it unnecessary to express its view on the question of whether the conformity of a risk assessment with Article 5.1 should be evaluated solely against the scientific evidence available at the time of the risk assessment, as Japan had failed to establish that the Panel utilized subsequent scientific evidence in evaluating the risk assessment at issue.[110]

(b) "based on" an assessment of the risks

(i) Taking into account risk assessment techniques

97. In *EC – Hormones*, the Panel had held that the European Communities' measure was in violation of Article 5.1 since "the European Communities did not provide any evidence that the studies . . . or the scientific conclusions reached therein '*have actually been taken into account by the competent EC institutions* either when it *enacted* those measures (in 1981 and 1988) or *at any later point in time*'" (emphasis original).[111] The Appellate Body characterized this "minimum procedural element" as "some subjectivity . . . present in certain individuals" and disagreed with this standard:

> "We are bound to note that, as the Panel itself acknowledges, no textual basis exists in Article 5 of the *SPS Agreement* for such a 'minimum procedural requirement'. The

[107] See also paras. 4 and 5 of Annex 1A.
[108] Panel Report on *EC – Hormones (Canada)*, para. 8.104; Panel Report on *EC – Hormones (US)*, para. 8.101.
[109] Panel Report on *Australia – Salmon*, para. 8.41. A similar statement was made by the Panel on *Japan – Agricultural Products II*, referenced in para. 23 of this Chapter.
[110] Appellate Body Report on *Japan – Apples*, para. 215.
[111] Appellate Body Report on *EC – Hormones*, para. 188.

term 'based on', when applied as a 'minimum procedural requirement' by the Panel, may be seen to refer to a human action, such as particular human individuals 'taking into account' a document described as a risk assessment. Thus, 'take into account' is apparently used by the Panel to refer to some subjectivity which, at some time, may be present in particular individuals but that, in the end, may be totally rejected by those individuals. We believe that 'based on' is appropriately taken to refer to a certain *objective relationship* between two elements, that is to say, to an *objective situation* that persists and is observable between an SPS measure and a risk assessment. Such a reference is certainly embraced in the ordinary meaning of the words 'based on' and, when considered in context and in the light of the object and purpose of Article 5.1 of the *SPS Agreement*, may be seen to be more appropriate than 'taking into account'. We do not share the Panel's interpretative construction and believe it is unnecessary and an error of law as well.

Article 5.1 . . . . only requires that the SPS measures be 'based on an assessment, as appropriate for the circumstances . . .'. The 'minimum procedural requirement' constructed by the Panel, could well lead to the elimination or disregard of available scientific evidence that rationally supports the SPS measure being examined. This risk of exclusion of available scientific evidence may be particularly significant for the bulk of SPS measures which were put in place before the effective date of the *WTO Agreement* and that have been simply maintained thereafter."[112]

(ii) Rational relationship between the SPS measure and the risk assessment

98. The Appellate Body on *EC – Hormones* held that the requirement of Article 5.1 – that an SPS measure be "based on" a risk assessment – was a substantive requirement that "there be a rational relationship between the measure and the risk assessment":

"We consider that, in principle, the Panels' approach of examining the scientific conclusions implicit in the SPS measure under consideration and the scientific conclusion yielded by a risk assessment is a useful approach. The relationship between those two sets of conclusions is certainly relevant; they cannot, however, be assigned relevance to the exclusion of everything else. We believe that Article 5.1, when contextually read as it should be, in conjunction with and as informed by Article 2.2 of the *SPS Agreement*, requires that the results of the risk assessment must sufficiently warrant – that is to say, reasonably support – the SPS measure at stake. The requirement that an SPS measure be 'based on' a risk assessment is a substantive requirement that there be a rational relationship between the measure and the risk assessment.

We do not believe that a risk assessment has to come to a monolithic conclusion that coincides with the scientific conclusion or view implicit in the SPS measure. The risk assessment could set out both the prevailing view representing the 'mainstream' of scientific opinion, as well as the opinions of scientists taking a divergent view. Article 5.1 does not require that the risk assessment must necessarily embody only the view of a majority of the relevant scientific community. . . . In most cases, responsible and representative governments tend to base their legislative and administrative measures on 'mainstream' scientific opinion. In other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources. By itself, this does not necessarily signal the absence of a reasonable relationship between the SPS measure and the risk assessment, especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety"[113]

(iii) Determination of relationship on "a case-by-case" basis

99. The Appellate Body on *EC – Hormones* also noted that determination of the presence or absence of that relationship can only be done on a case-by-case basis, after account is taken of all considerations rationally bearing upon the issue of potential adverse health effects.[114]

(c) "risk assessment"

(i) General

100. The Appellate Body on *EC – Hormones*, when addressing the requirements under Article 3.3, also considered the object and purpose of Article 3 and of the *SPS Agreement* as a whole and noted its "belief that compliance with Article 5.1 was intended as a countervailing factor in respect of the right of Members to set their appropriate level of protection . . . The requirements of a risk assessment under Article 5.1, . . . are essential for the maintenance of the delicate and carefully negotiated balance in the *SPS Agreement* between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings."[115]

101. In *Australia – Salmon*, the Appellate Body held that the presence of unknown and uncertain elements did not affect the requirements of Articles 5.1, 5.2 and 5.3:

"[T]he existence of unknown and uncertain elements does not justify a departure from the requirements of Articles 5.1, 5.2 and 5.3, read together with paragraph

[112] Appellate Body Report on *EC – Hormones*, paras. 189–190.
[113] Appellate Body Report on *EC – Hormones*, paras. 193–194.
[114] Appellate Body Report on *EC – Hormones*, para. 194.
[115] Appellate Body Report on *EC – Hormones*, para. 177.

4 of Annex A, for a risk assessment. We recall that Article 5.2 requires that 'in the assessment of risk, Members shall take into account available scientific evidence'. We further recall that Article 2, entitled 'Basic Rights and Obligations', requires in paragraph 2 that 'Members shall ensure that any sanitary . . . measure . . . is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5'."[116]

(ii) Concept of risk assessment versus risk management

102. The Appellate Body on *EC – Hormones* rejected the distinction between "risk assessment" and "risk management" used by the original Panel in its findings under Article 5.1:

"The Panel observed that an assessment of risk is, at least with respect to risks to human life and health, a 'scientific' examination of data and factual studies; it is not, in the view of the Panel, a 'policy' exercise involving social value judgments made by political bodies.[117] The Panel describes the latter as 'non-scientific' and as pertaining to 'risk management' rather than to 'risk assessment'.[118] We must stress, in this connection, that Article 5 and Annex A of the *SPS Agreement* speak of 'risk assessment' only and that the term 'risk management' is not to be found either in Article 5 or in any other provision of the *SPS Agreement*. Thus, the Panel's distinction, which it apparently employs to achieve or support what appears to be a restrictive notion of risk assessment, has no textual basis. The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used."[119]

(iii) Three aspects of risk assessment

103. In *Australia – Salmon*, the Appellate Body identified three aspects of a risk assessment:

"On the basis of [the] definition [prescribed in the first part of paragraph 4 of Annex A], we consider that, in this case, a risk assessment within the meaning of Article 5.1 must:

(1) *identify* the diseases whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases;

(2) *evaluate the likelihood* of entry, establishment or spread of these diseases, as well as the associated potential biological and economic consequences; and

(3) evaluate the likelihood of entry, establishment or spread of these diseases *according to the SPS measures which might be applied*."[120]

(iv) Completing the analysis of a risk assessment

104. The Panel on *Australia – Salmon* found that the Australian heat treatment requirement was not "based on" a risk assessment within the meaning of Article 5.1, because the Final Report (the risk assessment) made "no substantive assessment of the risk or the risk reduction related to the heat requirements in effect imposed by the measure at issue" . . . but stated that "there is insufficient data on whether or not heat treatment inactivates the disease agents in dispute".[121] The Appellate Body, reversed this finding[122] and completed the analysis by examining whether the import prohibition on fresh, chilled and frozen salmon was based on a risk assessment. It found that the 1996 Final Report did not fulfil the requirements needed to constitute a "risk assessment" within the meaning of Article 5.1:[123]

"Applying our three-pronged test set out in paragraph 128 above, to the 1996 Final Report in order to determine whether that Report meets the requirements of a risk assessment within the meaning of Article 5.1 and the first definition in paragraph 4 of Annex A, we note that the Panel found that the 1996 Final Report identifies the diseases whose entry, establishment or spread Australia wants to prevent as well as the potential biological and economic consequences associated with the entry, establishment or spread of such diseases. The Panel, therefore, concluded that 'the 1996 Final Report meets the first requirement of a risk assessment'.[124] We agree with the Panel.

With regard to the second requirement for a risk assessment of the type applicable in this case . . . We believe . . . that on the basis of the facts found by the Panel, it could, and should, have come to the conclusion that the 1996 Final Report does not contain the 'evaluation of the likelihood of entry, establishment or spread' of the diseases of concern 'and of the associated potential biological and economic consequences' as required by paragraph 4 of Annex A of the *SPS Agreement*. As we have already emphasized, *some* evaluation of the likelihood is not enough.[125]

. . . We turn now to the third requirement of a risk assessment . . . We agree with the Panel that the measures

[116] Appellate Body Report on *Australia – Salmon*, para. 130.
[117] (*footnote original*) Panel Report on *EC – Hormones (US)*, para. 8.94; and Panel Report on *EC – Hormones (Canada)*, para. 8.97.
[118] (*footnote original*) Panel Report on *EC – Hormones (US)*, para. 8.95; and Panel Report on *EC – Hormones (Canada)*, para. 8.98.
[119] Appellate Body Report on *EC – Hormones*, para. 181.
[120] Appellate Body Report on *Australia – Salmon*, para. 121. In *Japan – Agricultural Products II*, the Appellate Body endorsed the aforesaid three-pronged test, para. 112. This test was also used by the Panel in *Australia – Salmon (Article 21.5 – Canada)*, para. 7.41.
[121] Panel Report on *Australia – Salmon*, para. 8.98.
[122] Appellate Body Report on *Australia – Salmon*, para. 104.
[123] Appellate Body Report on *Australia – Salmon*, para. 136.
[124] (*footnote original*) Panel Report, para. 8.73.
[125] (*footnote original*) *Supra.*, para. 124.

which might be applied are those which reduce the risks of concern, and are referred to in the 1996 Final Report as risk reduction factors . . .On the basis of its factual findings, the Panel should have come to the conclusion that the 1996 Final Report does not fulfil the third requirement for the type of risk assessment applicable in this case, i.e., it does not contain the required evaluation of the likelihood of entry, establishment or spread of the diseases of concern according to the SPS measures which might be applied. We recall that, contrary to the Panel, we consider that *some* evaluation of the likelihood is not enough.[126]

We conclude, on the basis of the factual findings made by the Panel and the requirements for a risk assessment as set forth above, that the 1996 Final Report meets neither the second nor the third requirement for the type of risk assessment applicable in this case, and, therefore, that the 1996 Final Report is *not* a proper risk assessment within the meaning of Article 5.1 and the first definition in paragraph 4 of Annex A."[127]

105. Regarding the definition of risk assessment within the meaning of Annex A paragraph 4, see Section XVI.B.2 below.

(v) Scope of the risk assessment

Assessment of each individual substance

106. In *EC – Hormones*, the Appellate Body upheld the Panel's finding that "there was no risk assessment with regard to MGA"[128], one of the six growth hormones at issue, stating that "[i]n other words, there was an almost complete absence of evidence on MGA in the panel proceedings."[129] On this point, the Panels had explained that "one of the basic principles of a risk assessment appears to be that it needs to be carried out for each individual substance."[130]

Different product categories

107. The Panel on *Australia – Salmon* held that studies on one particular product category could be relevant for a risk assessment in respect of another product category:

"We do, however, agree with Australia that some of the evidence, assessments and conclusions contained in the 1996 Final Report might be relevant for the risk assessment to be carried out (or relied upon) for the other categories of salmon products and that, therefore, a completely new risk assessment for these other categories of salmon products might not be necessary".[131]

(vi) Studies not sufficiently specific to the case at hand

108. The Appellate Body on *EC – Hormones* also rejected certain studies submitted by the European Communities as risk assessment for the purpose of Article 5.1, holding that these studies were general and "not sufficiently specific to the case at hand":

"[The studies submitted by the respondent] constitute general studies which do indeed show the existence of a general risk of cancer; but they do not focus on and do not address the particular kind of risk here at stake – the carcinogenic or genotoxic potential of the residues of those hormones found in meat derived from cattle to which the hormones had been administered for growth promotion purposes – as is required by paragraph 4 of Annex A of the *SPS Agreement*. Those general studies, are in other words, relevant but do not appear to be sufficiently specific to the case at hand".[132]

(vii) Who should carry out the risk assessment?

109. In *EC – Hormones*, the Appellate Body addressed the question of whether a Member should carry out its own risk assessment for a SPS measure:

"Article 5.1 does not insist that a Member that adopts a sanitary measure shall have carried out its own risk assessment . . . The SPS measure might well find its objective justification in a risk assessment carried out by another Member, or an international organization".[133]

(viii) Format of the risk assessment

110. The Panel on *Australia – Salmon* held that a risk assessment need not be an official government report:

"We note that these reports do not form part of Australia's formal risk assessment nor represent Australia's official government policy. However, to the extent they constitute relevant available scientific information which was submitted to the Panel, we consider it our task to take this evidence into account. We consider that, for purposes of our examination, the scientific and technical content of these reports and studies is relevant, not their administrative status (i.e., whether they are official government reports or not).

. . . Whether or not this evidence is part of official Australian government policy does not, in our mind, change the scientific weight to be given to it".[134]

(ix) Relevance of the timing of publication of risk assessment

111. With respect to the risk assessment requirement for SPS measures enacted *before* the entry into force of the *SPS Agreement*, the Panel on *EC – Hormones* noted:

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[126] (*footnote original*) *Supra.*, para 124.
[127] Appellate Body Report on *Australia – Salmon*, para. 135.
[128] Appellate Body Report on *EC – Hormones*, para. 201.
[129] Appellate Body Report on *EC – Hormones*, para. 201.
[130] Panel Reports on *EC – Hormones (US)*, para. 8.257; *EC – Hormones (Canada)*, para. 8.258.
[131] Panel Report on *Australia – Salmon*, para. 8.58.
[132] Appellate Body Report on *EC – Hormones*, para. 200.
[133] Appellate Body Report on *EC – Hormones*, para. 190.
[134] Panel Report on *Australia – Salmon*, paras. 8.136–8.137.

"[Article 5.1] does not prevent that with respect to a sanitary measure enacted *before* the entry into force of the *SPS Agreement*, the risk assessment is carried out or invoked *after* the entry into force of that Agreement (and thus *after* the enactment of the sanitary measure in question). However, the fact that a sanitary measure may be enacted *before* the entry into force of the *SPS Agreement* does not mean that, once the *SPS Agreement* entered into force, there is no obligation for the Member in question to base that measure on a risk assessment."[135]

112. The Panel on *Australia – Salmon* while addressing Canada's complaint that Australia's measure was maintained without any form of risk assessment added in this respect:

"Article 5.1 does not qualify – either in terms of application in time or product coverage – the substantive obligation imposed on all WTO Members to base their sanitary measures on a risk assessment.

. . .

We note Australia's statement that its policy of allowing imports of salmon products heat-treated in accordance with the 1988 Conditions will be reviewed and that for these purposes an import risk analysis is scheduled. It is possible that this risk analysis provides a rational basis for the measure at issue. However, as of today and on the basis of the risk assessment before us, we do not detect such basis."[136]

113. In *Australia – Salmon (Article 21.5 – Canada)*, Canada claimed that the new Australian measures could not be said to be based on a risk assessment, because the 1999 Import Risk Analysis (IRA) (the Australian risk assessment for the amended measure) was only published in its final form on 12 November 1999, i.e. after the publication of the new measures which had occurred on 19 July 1999. The Panel rejected this argument as follows:

"We note that the final form of the 1999 IRA, though only edited and published in book form on 12 November 1999, is still dated July 1999 and that . . . the amendments made in the final 1999 IRA 'do not alter the substance or the conclusions of the report as announced on 19 July'.

On these grounds, we find that the fact that the 1999 IRA was only published in final form subsequent to the date the new sanitary measures were taken, does not, in this case, preclude the measures from being *based on* the 1999 IRA. All substantive elements of the risk assessment we looked at earlier were already included in the draft 1999 IRA of July 1999, i.e. *before* the new measures were taken."[137]

(x) Identifying the SPS measure

114. The Panel on *Australia – Salmon* defined the sanitary measure enacted by Australia to be an import prohibition on, *inter alia*, fresh, chilled and frozen salmon. The Panel then went on to state that the measure effectively imposed heat treatment "as a sanitary solution to the risk posed by the importation of salmon" and concluded that "these two perspectives [the import prohibition on fresh, chilled and frozen salmon and the heat treatment requirement] are two sides of a single coin: a consequence of Australia's sanitary requirement that salmon be heat-treated before it can be imported, is that imports of fresh, chilled and frozen salmon are prohibited".[138] The Appellate Body disagreed with this characterization of the Australian measure:

"In our view, the SPS measure at issue in this dispute can *only* be the measure which is *actually* applied to the product at issue. The product at issue is fresh, chilled or frozen salmon and the SPS measure applicable to fresh, chilled or frozen salmon is the import prohibition set forth in QP86A. The heat-treatment requirement provided for in the 1988 Conditions applies only to smoked salmon and salmon roe, not to fresh, chilled or frozen salmon.

We also do not share the Panel's view that the import prohibition and the heat-treatment requirement are 'two sides of the same coin'. Smoked salmon and fresh, chilled or frozen salmon are different products and the SPS measures applied to each are not 'two sides of the same coin'. We agree with Australia that it is not a consequence of the requirement that *smoked* salmon be heat-treated that imports of *fresh, chilled or frozen* salmon are prohibited. Imports of fresh, chilled or frozen salmon are prohibited as a direct consequence of the application of QP86A, and this prohibition has not been revoked, but has, in fact, been continuously maintained since 1975. We likewise do not share the Panel's view that the 1996 Requirements apply to fresh, chilled or frozen salmon. These requirements clearly apply only to imports of small amounts of smoked salmon."[139]

(xi) Evaluation of risk in a risk assessment ("Zero risk")

115. The Panel on *Australia – Salmon* held that "a risk assessment, on which to base an import prohibition in accordance with Article 5.1, cannot be premised on the concept of 'zero risk'. Otherwise, all import prohibitions would be based on a risk assessment since there is a risk

[135] Panel Report on *EC – Hormones (Canada)*, para. 8.102; Panel Report on *EC – Hormones (US)*, para. 8.99.
[136] Panel Report on *Australia – Salmon*, paras. 8.56 and 8.100.
[137] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.76–7.77.
[138] Panel Report on *Australia – Salmon*, para. 8.95.
[139] Appellate Body Report on *Australia – Salmon*, paras. 103–104.

(i.e., a *possibility* of an adverse event occurring), however remote, associated with most (if not all) imports".[140] On appeal, the Appellate Body emphasized the distinction between risk assessment under Article 5.1 and the determination, by a Member, of its own appropriate level of protection:

> "[I]t is important to distinguish – perhaps more carefully than the Panel did – between the evaluation of 'risk' in a risk assessment and the determination of the appropriate level of protection. As stated in our Report in *European Communities – Hormones*, the 'risk' evaluated in a risk assessment must be an ascertainable risk; theoretical uncertainty is 'not the kind of risk which, under Article 5.1, is to be assessed.' This does not mean, however, that a Member cannot determine its own appropriate level of protection to be 'zero risk'."[141]

(xii) No threshold level of risk required

116. In *EC – Hormones*, the Appellate Body addressed the European Communities' appeal that the original Panel was "in effect requiring a Member carrying out a risk assessment to quantify the potential for adverse effects on human health".[142] The Appellate Body elaborated on the term "scientifically identified risk" that the Panel had employed and the notion of "theoretical uncertainty" in the context of Article 5.1. The Appellate Body indicated that Article 5.1 does not address theoretical uncertainty: that is to say, "uncertainty that theoretically always remains since science can *never* provide *absolute* certainty that a given substance will not *ever* have adverse health effects":

> "It is not clear in what sense the Panel uses the term 'scientifically identified risk'. The Panel also frequently uses the term 'identifiable risk'[143], and does not define this term either. The Panel might arguably have used the terms 'scientifically identified risk' and 'identifiable risk' simply to refer to an ascertainable risk: if a risk is not ascertainable, how does a Member ever know or demonstrate that it exists? In one part of its Reports, the Panel opposes a requirement of an 'identifiable risk' to the uncertainty that theoretically always remains since science can *never* provide *absolute* certainty that a given substance will not *ever* have adverse health effects.[144] We agree with the Panel that this theoretical uncertainty is not the kind of risk which, under Article 5.1, is to be assessed. In another part of its Reports, however, the Panel appeared to be using the term 'scientifically identified risk' to prescribe implicitly that a certain *magnitude* or threshold level of risk be demonstrated in a risk assessment if an SPS measure based thereon is to be regarded as consistent with Article 5.1.[145] To the extent that the Panel purported to require a risk assessment to establish a minimum magnitude of risk, we must note that imposition of such a quantitative requirement finds no basis in the *SPS Agreement*. A panel is authorized only to determine whether a given SPS measure is 'based on' a risk assessment. As will be elaborated below, this means that a panel has to determine whether an SPS measure is sufficiently supported or reasonably warranted by the risk assessment."[146]

117. In *Japan – Apples*, the Appellate Body agreed with the Panel that "scientific prudence" displayed by the experts in this case did not relate to the "theoretical uncertainty" that is inherent in the scientific method:

> "The comments of the Panel in response to the argument of the United States on 'theoretical risk' should be viewed in their appropriate context. . . . We understand that the 'scientific prudence' displayed by the experts in this case related to risks that might arise from radical changes in Japan's current system of phytosanitary controls, taking into account Japan's island environment and climate. The scientific prudence displayed by the experts did not relate to the 'theoretical uncertainty' that is inherent in the scientific method and which stems from the intrinsic limits of experiments, methodologies, or instruments deployed by scientists to explain a given phenomenon. Therefore, we agree with the Panel that the scientific prudence displayed by the experts should not be 'completely assimilated' to the 'theoretical uncertainty' that the Appellate Body discussed in *EC – Hormones* as being beyond the purview of risks to be addressed by measures subject to the *SPS Agreement* . . ."[147]

(d) "as appropriate to the circumstances"

(i) Flexibility

118. When addressing the applicability of the *SPS Agreement* to measures adopted before the entry into force of the *WTO Agreement* the Appellate Body on *EC – Hormones* noted that the phrase "as appropriate to the circumstances" provides for a certain degree of flexibility:

> "We are aware that the applicability, as from 1 January 1995, of the requirement that an SPS measure be based on a risk assessment to the many SPS measures already in existence on that date, may impose burdens on Members. It is pertinent here to note that Article 5.1 stipulates that SPS measures must be based on a risk assessment, *as appropriate to the circumstances*, and this makes

[140] Panel Report on *Australia – Salmon*, para. 8.81.
[141] Appellate Body Report on *Australia – Salmon*, para. 125.
[142] Appellate Body Report on *EC – Hormones*, para. 185.
[143] In the footnote to this sentence, the Appellate Body cited Panel Reports on *EC – Hormones (US)*, paras. 8.124, 8.134, 8.136, 8.151, 8.153, 8.161, and 8.162; *EC – Hormones (Canada)*, paras. 8.127, 8.137, 8.139, 8.154, 8.156, 8.164, and 8.165.
[144] In the footnote to this sentence, the Appellate Body cited Panel Reports on *EC – Hormones (US)*, paras. 8.152–8.153; *EC – Hormones (Canada)*, paras. 8.155–8.156.
[145] (*footnote original*) US Panel Report, footnote 331; Canada Panel Report, footnote 437.
[146] Appellate Body Report on *EC – Hormones*, para. 186.
[147] Appellate Body Report on *Japan – Apples*, para. 241.

clear that the Members have a certain degree of flexibility in meeting the requirements of Article 5.1."[148]

119. The Panel on *Australia – Salmon* held that the phrase "as appropriate to the circumstances" created the possibility "to assess the risk, on a case-by-case basis, in terms of product, origin and destination, including, in particular, country-specific situations":

"Following Article 5.1, a risk assessment needs to be 'appropriate to the circumstances'. Answering a Panel question in this respect, Canada is of the view that the circumstances thus referred to are the source of the risk (e.g., an animal pathogen or a chemical contaminant) and the subject of the risk (i.e., whether it is to human, animal or plant life or health). For Australia, the phrase 'as appropriate to the circumstances' confers a right and obligation on WTO Members to assess the risk, on a case by case basis, in terms of product, origin and destination, including, in particular, country specific situations. We agree that both interpretations may be covered by the term 'as appropriate to the circumstances'. In our view, also the OIE risk assessment techniques as well as the scientific opinions we gathered, may shed light on what is a risk assessment 'appropriate to the circumstances'."[149]

(ii) Does not waive duty of risk assessment

120. The Panel on *Australia – Salmon* held that the phrase "as appropriate to the circumstances" did not alleviate the duty to base a measure on a risk assessment:

"As to the product coverage of Article 5.1, the reference contained in Article 5.1 to base sanitary measures on an assessment 'as appropriate to the circumstances' cannot, in our view, annul or supersede the substantive obligation resting on Australia to base the sanitary measure in dispute (irrespective of the products that measure may cover) on a risk assessment. We consider that the reference 'as appropriate to the circumstances' relates, rather, to the way in which such risk assessment has to be carried out.[150] Only Article 5.7 allows for an exception to the obligation to base sanitary measures on a risk assessment."[151]

(e) Taking into account risk assessment techniques

(i) Mention of scientific studies in preambular sections of the domestic directives

121. The Appellate Body on *EC – Hormones* disagreed with the Panel's finding that certain scientific studies were not taken into consideration, *inter alia*, because these studies were not mentioned in the preambles to the relevant European Communities' directives:

"In the course of demanding evidence that EC authorities actually 'took into account' certain scientific studies, the Panel refers to the preambles of the EC Directives here involved. The Panel notes that such preambles did not mention any of the scientific studies referred to by the European Communities in the panel proceedings. Preambles of legislative or quasi-legislative acts and administrative regulations commonly fulfil requirements of the internal legal orders of WTO Members. Such preambles are certainly not required by the *SPS Agreement*; they are not normally used to demonstrate that a Member has complied with its obligations under international agreements. The absence of any mention of scientific studies in the preliminary sections of the EC Directives does not, therefore, prove anything so far as the present case is concerned".[152]

(f) Relationship with other paragraphs of Article 5

(i) Article 5.2

122. For discussion on the risk factors to be taken into account, see Section VI.B.2(a) below.

(ii) Article 5.5

123. On the relationship between Articles 5.1 and 5.5, the Panel on *Australia – Salmon* stated that "the obligations contained in Article 5.1 (risk assessment) and Article 5.5 are complementary, not mutually exclusive. We consider, therefore, that a WTO Member cannot justify the inconsistency with one Article on the ground that such inconsistency avoids an additional inconsistency with another Article."[153]

(g) Relationship with other Articles

(i) Article 1.1

124. As relates to the applicability of the *SPS Agreement* to measures adopted before 1 January 1995 and measures adopted since, see paragraph 5 above.

2. Article 5.2

(a) Risk factors to be taken into account

(i) Risk ascertainable by scientific and non scientific processes

125. With respect to the risk factors to be examined in the context of a risk assessment, the Appellate Body on *EC – Hormones* agreed with the Panel's emphasis of the scientific nature of risk assessment, but added a qualification on the nature of the "risk":

"The listing in Article 5.2 begins with 'available scientific evidence'; this, however, is only the beginning. We note in this connection that the Panel states that, for purposes

[148] Appellate Body Report on *EC – Hormones*, para. 129.
[149] Panel Report on *Australia – Salmon*, para. 8.71.
[150] (*footnote original*) See further in para. 8.70.
[151] Panel Report on *Australia – Salmon*, para. 8.57.
[152] Appellate Body Report on *EC – Hormones*, para. 191.
[153] Panel Report on *Australia – Salmon*, para. 8.126.

of the EC measures in dispute, a risk assessment required by Article 5.1 is 'a *scientific* process aimed at establishing the *scientific* basis for the sanitary measure a Member intends to take'.[154] To the extent that the Panel intended to refer to a process characterized by systematic, disciplined and objective enquiry and analysis, that is, a mode of studying and sorting out facts and opinions, the Panel's statement is unexceptionable. However, to the extent that the Panel purports to exclude from the scope of a risk assessment in the sense of Article 5.1, all matters not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences, we believe that the Panel is in error. Some of the kinds of factors listed in Article 5.2 such as 'relevant processes and production methods' and 'relevant inspection, sampling and testing methods' are not necessarily or wholly susceptible of investigation according to laboratory methods of, for example, biochemistry or pharmacology. Furthermore, there is nothing to indicate that the listing of factors that may be taken into account in a risk assessment of Article 5.2 was intended to be a closed list. It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die."[155]

(ii) Risks arising from control of compliance with certain requirements

126. Having held that "risk assessment" did not only refer to the risk ascertainable in a science laboratory operating under strictly controlled conditions, the Appellate Body on *EC – Hormones* considered that, for instance, risks arising from difficulties of control of compliance with certain requirements could be taken into account in the context of a risk assessment:

"It should be recalled that Article 5.2 states that in the assessment of risks, Members shall take into account, in addition to 'available scientific evidence', 'relevant processes and production methods; [and] relevant inspection, sampling and testing methods'. We note also that Article 8 requires Members to 'observe the provisions of Annex C in the operation of control, inspection and approval procedures . . .'. The footnote in Annex C states that 'control, inspection and approval procedures include, *inter alia*, procedures for sampling, testing and certification'. We consider that this language is amply sufficient to authorize the taking into account of risks arising from failure to comply with the requirements of good veterinary practice in the administration of hormones for growth promotion purposes, as well as risks arising from difficulties of control, inspection and enforcement of the requirements of good veterinary practice."[156]

(iii) Risks arising from abuse of controlled substances not to be excluded on an a priori basis

127. The Appellate Body on *EC – Hormones* added a caveat to its finding referred to in paragraphs 126 above. It held that risks arising from the potential abuse of controlled substances in practice need not necessarily be taken into account in each and every case; it explained that its findings in paragraphs 126 above were to be interpreted as meaning that such types of risk should not be excluded *a priori*:

"[T]he *SPS Agreement* requires assessment of the potential for adverse effects on human health arising from the presence of contaminants and toxins in food. We consider that the object and purpose of the *SPS Agreement* justify the examination and evaluation of all such risks for human health whatever their precise and immediate origin may be. We do not mean to suggest that risks arising from potential abuse in the administration of controlled substances and from control problems need to be, or should be, evaluated by risk assessors in each and every case. When and if risks of these types do in fact arise, risk assessors may examine and evaluate them. Clearly, the necessity or propriety of examination and evaluation of such risks would have to be addressed on a case-by-case basis. What, in our view is a fundamental legal error is to exclude, on an *a priori* basis, any such risks from the scope of application of Articles 5.1 and 5.2."[157]

(b) Relationship with other Articles

(i) Articles 2.2 and 5.1

128. In *Australia – Salmon*, the Appellate Body agreed[158] with the finding of the Panel, whereby the Panel held that a violation of Article 5.1 or 5.2 would imply a violation of the more general provision of Article 2.2:

"Articles 5.1 and 5.2 – in the words of the Appellate Body in *EC – Hormones* when dealing with the relationship between Articles 2.3 and 5.5 – 'may be seen to be marking out and elaborating a particular route leading to the same destination set out in' Article 2.2. Indeed, in the event a sanitary measure is not based on a risk assessment as required in Articles 5.1 and 5.2, this measure can be presumed, more generally, not to be based on scientific principles or to be maintained without sufficient scientific evidence. We conclude, therefore, that if we find a violation of the more specific Article 5.1 or 5.2 such finding can be presumed to imply a violation of the more general provisions of Article 2.2. We do recog-

[154] (*footnote original*) Panel Reports on *EC – Hormones (US)*, para. 8.107 and *EC – Hormones (Canada)*, para. 8.110.
[155] Appellate Body Report on *EC – Hormones*, para. 187.
[156] Appellate Body Report on *EC – Hormones*, para. 205.
[157] Appellate Body Report on *EC – Hormones*, para. 206.
[158] Appellate Body Report on *Australia – Salmon*, para. 138.

nize, at the same time, that given the more general character of Article 2.2 not all violations of Article 2.2 are covered by Articles 5.1 and 5.2."[159]

3. Article 5.3

129. In assessing risk and determining the measure to be applied, the Appellate Body on *Australia – Salmon* noted that the presence of unknown and uncertain elements does not affect the requirements under Article 5.3. See paragraph 101 above.

4. Article 5.4

(a) General

130. The Panel on *EC – Hormones*, in a finding not reviewed by the Appellate Body, held that Article 5.4 was of an hortatory nature:

"Guided by the wording of Article 5.4, in particular the words 'should' (not 'shall') and 'objective', we consider that this provision of the *SPS Agreement* does not impose an obligation. However, this objective of minimizing negative trade effects has nonetheless to be taken into account in the interpretation of other provisions of the *SPS Agreement*."[160]

(b) Relationship with other paragraphs of Article 5

131. In *Australia – Salmon*, the Appellate Body determined that the *SPS Agreement* contains an implicit obligation that WTO Members determine their appropriate level of protection.[161] See paragraph 151 below.

5. Article 5.5

(a) Standard of review

132. While examining whether Australia imposed different levels of protection in respect of "different situations" in the sense of Article 5.5, the Panel addressed an argument made by Australia, the responding party, that for a situation to be so compared, a risk assessment in respect of it would need to have been carried out. The Panel emphasized that it could not conduct its own risk assessment, but rather had to weigh the evidence before it:

"We cannot conduct our own risk assessment. Nor do we attempt to do so in this report. The fact that one of the experts advising the Panel stated that 'if you are trying to say which [of two products] is the most risky, then you need to know something about and possibly do a full assessment for [the other] product' and that 'it would be sensible to assess that which you have prioritized initially to have the highest risk first, but until you have done the risk assessment, you actually cannot be sure you have got that right', does not change our position. Nor do we disagree with these statements. Indeed, for a scientist to say with scientific certainty that one product represents a higher risk than the other, there may be a need to have two, more or less, complete sets of data, including two risk assessments. And even on that basis a scientist would probably not be able to state with absolute certainty that one product is riskier than the other. Our mandate is different. We are not asked to make a scientific risk comparison nor to state with scientific certainty that one product is riskier than the other. We can only weigh the evidence put before us and, on the basis of the rules of burden of proof we adopted, including the use of factual presumptions, decide whether sufficient evidence is before us – evidence which has not been rebutted – in order to state that it can be presumed that one product is riskier than the other."[162]

(b) Cumulative elements of Article 5.5

133. In *EC – Hormones*, the Appellate Body considered the three elements of Article 5.5 and held that these elements were cumulative in nature. It emphasized in particular, that the third element, should be demonstrated positively and independently of the second element:

"The first element is that the Member imposing the measure complained of has adopted its own appropriate levels of sanitary protection against risks to human life or health in several different situations. The second element to be shown is that those *levels of protection* exhibit arbitrary or unjustifiable differences ('distinctions' in the language of Article 5.5) in their treatment of different situations. The last element requires that the arbitrary or unjustifiable differences result in discrimination or a disguised restriction of international trade. We understand the last element to be referring to the *measure* embodying or implementing a particular level of protection as resulting, in its application, in discrimination or a disguised restriction on international trade. . . .

We consider the above three elements of Article 5.5 to be cumulative in nature; all of them must be demonstrated to be present if violation of Article 5.5 is to be found. In particular, both the second and third elements must be found. The second element alone would not suffice. The third element must also be demonstrably present: the implementing measure must be shown to be applied in such a manner as to result in discrimination or a disguised restriction on international trade. The presence of the second element – the arbitrary or unjustifiable character of differences in *levels of protection* considered by a Member as appropriate in differing situations – may in practical effect operate as a 'warning' signal that the implementing *measure* in its application *might* be a discriminatory measure or *might*

[159] Panel Report on *Australia – Salmon*, para. 8.52.
[160] Panel Report on *EC – Hormones (Canada)*, para. 8.169; Panel Report on *EC – Hormones (US)*, para. 8.166.
[161] Appellate Body Report on *Australia – Salmon*, paras. 205–207.
[162] Panel Report on *Australia – Salmon*, para. 8.126.

be a restriction on international trade disguised as an SPS measure for the protection of human life or health. Nevertheless, the measure itself needs to be examined and appraised and, in the context of the differing levels of protection, shown to result in discrimination or a disguised restriction on international trade."[163]

(c) "appropriate level of protection"

(i) Legal status of the first part of Article 5.5

134. In *EC – Hormones*, with respect to the first part of Article 5.5, the Appellate Body held that the statement of the goal of consistency did not establish a legal obligation of consistency of appropriate levels of protection. Rather, only certain types of inconsistencies were to be avoided:

"The objective of Article 5.5 is formulated as the 'achieving [of] consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection'. Clearly, the desired consistency is defined as a goal to be achieved in the future. To assist in the realization of that objective, the Committee on Sanitary and Phytosanitary Measures is to develop *guidelines for the practical implementation of Article 5.5*, bearing in mind, among other things, that ordinarily, people do not voluntarily expose themselves to health risks. Thus, we agree with the Panel's view that the statement of that goal [consistency] does not establish a *legal obligation* of consistency of appropriate levels of protection. We think, too, that the goal set is not absolute or perfect consistency, since governments establish their appropriate levels of protection frequently on an *ad hoc* basis and over time, as different risks present themselves at different times. It is only arbitrary or unjustifiable inconsistencies that are to be avoided."[164]

(ii) "distinctions in the levels of protection in different situations"

Different situations

135. The Panel on *EC – Hormones* found that the "different situations" that can be compared under Article 5.5 were situations "where the same substance or the same adverse health effect is involved".[165] On appeal, the Appellate Body stated:

"Clearly, comparison of *several* levels of sanitary protection deemed appropriate by a Member is necessary if a panel's inquiry under Article 5.5 is to proceed at all. The situations exhibiting differing levels of protection cannot, of course, be compared unless they are comparable, that is, unless they present some common element or elements sufficient to render them comparable. If the situations proposed to be examined are *totally* different from one another, they would not be rationally comparable and the differences in levels of protection cannot be examined for arbitrariness."[166]

Comparable situations

136. In *Australia – Salmon*, the Appellate Body held that comparable situations under Article 5.5 were those where either the same or a similar disease, or where the same biological and economic consequences were involved:

"Situations which involve a risk of entry, establishment or spread of the same or a similar disease have some common elements sufficient to render them comparable under Article 5.5. Likewise, situations with a risk of the same or similar associated potential biological and economic consequences also have some common elements sufficient to render them comparable under Article 5.5. We, therefore, consider that for 'different' situations to be comparable under Article 5.5, there is no need for both the disease *and* the biological and economic consequences to be the same or similar."[167]

Level of protection as reflected in SPS Measures

137. The Panel on *Australia – Salmon*, addressed the question of how to ascertain the level of sanitary protection chosen by a Member. The Panel found that this level of sanitary protection will be reflected in the sanitary measure itself, but noted that "imposing the same sanitary measure for different situations does not necessarily result in the same level of protection".[168] The Appellate Body did not disagree with these statements in particular, but reversed the Panel's related findings, because it disagreed with the statement by the Panel that "the level of protection implied or reflected in a sanitary *measure* or regime imposed by a WTO Member can be presumed to be at least as high as the level of protection considered to be appropriate by that Member."[169]

138. In response to Australia's argument that a "situation" cannot be compared under Article 5.5 if no risk assessment has been made in respect of it, the Panel on *Australia – Salmon*, in a finding not reviewed by the Appellate Body, found that since Australia had a sanitary regime to address situations in respect of which no risk assessment existed, a level of protection existed:

"[W]e consider that even though Australia has not yet conducted import risk analyses for the other products compared under Article 5.5, Australia does, nevertheless, have a level of protection it considers to be appropriate for these other products. Australia currently has a sanitary regime, imposing specific sanitary measures or refraining from such regulation, for these other prod-

[163] Appellate Body Report on *EC – Hormones*, paras. 214–215.
[164] Appellate Body Report on *EC – Hormones*, para. 213.
[165] Panel Report on *EC – Hormones (Canada)*, para. 8.179; Panel Report on *EC – Hormones (US)*, para. 8.176.
[166] Appellate Body Report on *EC – Hormones*, para. 217.
[167] Appellate Body Report on *Australia – Salmon*, para. 146.
[168] Panel Report on *Australia – Salmon*, paras. 8.123–8.124.
[169] Appellate Body Report on *Australia – Salmon*, para. 196.

ucts. This sanitary regime (whether or not specific measures are enacted) reflects a level of protection. To have a specific level of protection, there is no need to first complete a risk assessment . . . Article 5.5 directs us to compare for different situations the related levels of protection as they are currently considered to be appropriate by Australia and this whether or not the sanitary measures enacted to achieve that level are based on a risk assessment. Of course, such comparison would be easier and more accurate if for both situations an appropriate risk assessment were available. However, according to Article 5.5 and our mandate set out in Article 11 of the DSU (to make an 'objective assessment of the matter before [us], including an objective assessment of the facts of the case'), we are called upon in this case to make this comparison and to do so on the basis of the evidence before us."[170]

(iii) "Arbitrary or unjustifiable" distinctions in levels of protection

139. The Panel on *EC – Hormones* found arbitrary or unjustifiable distinction in the level of protection in the European Communities' regulation in that while the European Communities prohibited added natural hormones with respect to beef, it did not attempt to limit naturally occurring hormones.[171] The Appellate Body disagreed:

"We do not share the Panel's conclusions that the above differences in levels of protection in respect of added hormones in treated meat and in respect of naturally-occurring hormones in food, are merely arbitrary and unjustifiable. We consider there is a fundamental distinction between added hormones (natural or synthetic) and naturally-occurring hormones in meat and other foods. In respect of the latter, the European Communities simply takes no regulatory action; to require it to prohibit totally the production and consumption of such foods or to limit the residues of naturally-occurring hormones in food, entails such a comprehensive and massive governmental intervention in nature and in the ordinary lives of people as to reduce the comparison itself to an absurdity."[172]

(iv) Distinctions which "result in discrimination or a disguised restriction on international trade"

Factors that result in a disguised restriction on international trade

140. The Panel on *Australia – Salmon* found three "warning signals" and three "other factors more substantial in nature" with respect to the issue of whether there was a disguised restriction on trade arising from the distinct levels of protection existing in Australia. The three warning signals that the Panel indicated were: (1) "the arbitrary character of the differences in levels of protection"[173]; (2) "the rather substantial difference in levels of protection"[174]; and (3) its earlier "two findings of inconsistency (with both Article 5.1 and 2.2)" which make it "seem that the measure at issue constitutes an import prohibition, i.e., a restriction on international trade, 'disguised' as a sanitary measure".[175] The three "other factors" were: (1) Australia was applying two different implementing measures to products which represented the same risk, leading to discrimination between salmon, on the one hand, and herring used as bait and live ornamental finfish on the other; (2) the change in conclusions in a preliminary report and in f the final report one year later; and (3) the fact that Australia was imposing a very strict measure upon importation of salmon, but not similarly strict standards for the internal movement of salmon products within Australia. The Appellate Body agreed with the Panel with respect to the first two warning signals. On the first warning signal it added that "the Panel considered the arbitrary or unjustifiable character of differences in levels of protection as a 'warning signal' for, and not as 'evidence' of, a disguised restriction on international trade".[176] The Appellate Body was also in agreement with the Panel that the rather substantial difference in levels of protection should be treated as a separate (second) warning signal.[177] The Appellate Body also approved of the third "warning factor". However, while it also agreed with the Panel on the second and third of the "other factors", the Appellate Body held, with respect to the first of these "other factors":

"We believe that the first 'additional factor' should indeed be excluded from the examination of the third element of Article 5.5. All 'arbitrary or unjustifiable distinctions' in levels of protection will lead logically to discrimination between products, whether the products are the same (e.g., discrimination between imports of salmon from different countries or between imported salmon and domestic salmon) or different (e.g., salmon versus herring used as bait and live ornamental finfish). The first 'additional factor' is therefore not different from the first warning signal, and should not be taken into account as a *separate* factor in the determination of

[170] Panel Report on *Australia – Salmon*, paras. 8.125–8.126.
[171] Panel Report on *EC – Hormones (Canada)*, para. 8.193; Panel Report on *EC – Hormones (US)*, para. 8.190.
[172] Appellate Body Report on *EC – Hormones*, para. 221. When comparing the levels of protection for hormones used for growth promotion purposes and hormones used for therapeutic and zootechnical purposes – a comparison not further pursued by the panels – the Appellate Body, referring to the differences in frequency and scale of the two treatments and the strict mode of administration of the latter treatment, found that the distinction in levels of protection "is not, in itself, 'arbitrary or unjustifiable'." (see paras. 222–225 of the Report).
[173] Panel Report on *Australia – Salmon*, para. 8.149.
[174] Panel Report on *Australia – Salmon*, para. 8.150.
[175] Panel Report on *Australia – Salmon*, para. 8.151.
[176] Appellate Body Report on *Australia – Salmon*, para. 162.
[177] Appellate Body Report on *Australia – Salmon*, para. 164.

whether an SPS measure results in a 'disguised restriction on international trade'."[178]

Applicability of GATT Articles III and XX jurisprudence

141. The Panel on *EC – Hormones* considered pertinent, in its analysis of the terms "discrimination" and "disguised restriction on international trade", the Appellate Body's jurisprudence under Articles III and XX of the *GATT 1994*. The Appellate Body disagreed with this finding:

"We agree with the Panel's view that 'all three elements [of Article 5.5] need to be distinguished and addressed separately'.[179] We also recall our interpretation that Article 5.5 and, in particular, the terms 'discrimination or a disguised restriction on international trade', have to be read in the context of the basic obligations contained in Article 2.3, which requires that 'sanitary . . . *measures* shall not be *applied in a manner which would constitute a disguised restriction on international trade*'. (emphasis added)

However, we disagree with the Panel on two points. First, in view of the structural differences between the standards of the *chapeau* of Article XX of the GATT 1994 and the elements of Article 5.5 of the *SPS Agreement*, the reasoning in our Report in *United States – Gasoline*, quoted by Panel, cannot be casually imported into a case involving Article 5.5 of the *SPS Agreement*. Secondly, in our view, it is similarly unjustified to assume applicability of the reasoning of the Appellate Body in *Japan – Alcoholic Beverages* about the inference that may be drawn from the sheer size of a tax differential for the application of Article III:2, second sentence, of the GATT 1994, to the quite different question of whether arbitrary or unjustifiable differences in levels of protection against risks for human life or health, 'result in discrimination or a disguised restriction on international trade'."[180]

142. The Appellate Body on *EC Hormones* explained its reluctance to apply its jurisprudence under Article III:2 of the *GATT 1994* to Article 5.5 of the *SPS Agreement* by noting that while there was a "clear and linear relationship" between a tax differential and protection given to domestic products, no such clear relationship existed between differentials of levels of protection of human health and protection given to domestic products:

"The differential involved in *Japan – Alcoholic Beverages* was a tax differential, which is very different from a differential in levels of protection. Unlike a differential in levels of protection, a tax differential is always expressed in quantitative terms and a significant tax differential in favour of domestic products will inevitably affect the competitiveness of imported products and thus afford protection to domestic products. There is a clear and linear relationship between a tax differential and the protection afforded to domestic products. There is, however, no such relationship between a differential in levels of human health protection and discrimination or disguised restriction on trade."[181]

Differences in levels of protection for comparable situations not sufficient

143. After making its findings referenced in paragraphs 141–142 above, the Appellate Body on *EC – Hormones* reversed the Panel's finding that the EC measure in question constituted "discrimination or a disguised restriction on international trade". The Appellate Body held with respect to the difference in levels of protection for certain comparable situations:

"[T]he degree of difference, or the extent of the discrepancy, in the levels of protection, is only one kind of factor which, along with others, may cumulatively lead to the conclusion that discrimination or a disguised restriction on international trade in fact results from the application of a measure or measures embodying one or more of those different levels of protection. Thus, we do not think that the difference between a 'no residues' level and 'unlimited residues' level is, together with a finding of an arbitrary or unjustifiable difference, sufficient to demonstrate that the third, and most important, requirement of Article 5.5 has been met . . . Evidently, the answer to the question whether arbitrary or unjustifiable differences or distinctions in levels of protection established by a Member do in fact result in discrimination or a disguised restriction on international trade must be sought in the circumstances of each individual case."[182]

(d) "guidelines to further practical implementation . . ."

144. At its meeting of 21–22 June 2000, the SPS Committee adopted the Guidelines to Further the Practical Implementation of Article 5.5.[183] These guidelines address the objective of achieving consistency in the application of the concept of the appropriate level of protection.[184]

(e) Relationship with other paragraphs of Article 5

145. On the relationship between Articles 5.1 and 5.5, see paragraph 123 above.

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[178] Appellate Body Report on *Australia – Salmon*, para. 169.
[179] The Appellate Body cited Panel Reports on *EC – Hormones (US)*, para. 8.184; and *EC – Hormones (Canada)*, para. 8.187.
[180] Appellate Body Report on *EC – Hormones*, paras. 238 and 239.
[181] Appellate Body Report on *EC – Hormones*, fn. 251.
[182] Appellate Body Report on *EC – Hormones*, para. 240.
[183] G/SPS/R/19, Section VII. The text of the adopted Guidelines can be found in G/SPS/15.
[184] G/SPS/15.

(f) Relationship with other Articles

(i) Article 1.1

146. As relates to applicability of the *SPS Agreement* to measures adopted before 1 January 1995 and measures adopted since, see paragraph 6 above.

6. Article 5.6

(a) Cumulative elements

147. In *Australia – Salmon*, with respect to the structure of Article 5.6, the Appellate Body identified three separate elements and found that these elements applied cumulatively:

> "We agree with the Panel that Article 5.6 and, in particular, the footnote to this provision, clearly provides a three-pronged test to establish a violation of Article 5.6. As already noted, the three elements of this test under Article 5.6 are that there is an SPS measure which:
>
> (1) is reasonably available taking into account technical and economic feasibility;
>
> (2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and
>
> (3) is significantly less restrictive to trade than the SPS measure contested.
>
> These three elements are cumulative in the sense that, to establish inconsistency with Article 5.6, all of them have to be met. If any of these elements is not fulfilled, the measure in dispute would be consistent with Article 5.6. Thus, if there is no alternative measure available, taking into account technical and economic feasibility, *or* if the alternative measure does not achieve the Member's appropriate level of sanitary or phytosanitary protection, *or* if it is not significantly less trade-restrictive, the measure in dispute would be consistent with Article 5.6."[185]

148. In *Japan – Agricultural Products II*, the Appellate Body confirmed the finding referenced in paragraph 147 above:[186]

(b) "achieves the appropriate level of . . . protection"

(i) Determining "appropriate level of . . . protection" as a "prerogative" of the Member concerned

149. The Appellate Body on *Australia – Salmon* emphasized that determining the appropriate level of protection is the *prerogative* of the Member concerned:

> "We do not believe that Article 11 of the DSU, or any other provision of the DSU or of the *SPS Agreement*, entitles the Panel or the Appellate Body, for the purpose of applying Article 5.6 in the present case, to substitute its own reasoning about the implied level of protection for that expressed consistently by Australia. The determination of the appropriate level of protection, a notion defined in paragraph 5 of Annex A . . . is a *prerogative* of the Member concerned and not of a panel or of the Appellate Body."[187]

150. In *Japan – Agricultural Products II*, the Panel emphasized that it was up to Japan to determine its appropriate level of protection:

> "Both parties agree that it is up to Japan to determine its appropriate level of phytosanitary protection with respect to codling moth. We agree since the *SPS Agreement* (in paragraph 5 of Annex A) defines the 'appropriate level of . . . phytosanitary protection' as '[t]he level of protection *deemed appropriate by the Member* establishing a . . . phytosanitary measure to protect . . . plant life or health within its territory'[188], *in casu*, the level deemed appropriate by Japan."[189]

(ii) Implied or explicit level of protection

<u>General</u>

151. In *Australia – Salmon*, the question arose whether a WTO Member is obliged to determine, positively, its appropriate level of protection. While the Panel had held that no such obligation existed[190], the Appellate Body determined that such an obligation exists under the *SPS Agreement*, albeit only implicitly. However, it also held that where a Member fails to determine its appropriate level of protection, this level of protection can be established by a panel on the basis of existing relevant SPS measures:

> "We recognize that the *SPS Agreement* does not contain an *explicit* provision which obliges WTO Members to determine the appropriate level of protection. Such an obligation is, however, implicit in several provisions of the *SPS Agreement*, in particular, in paragraph 3 of Annex B, Article 4.1, Article 5.4 and Article 5.6 of the *SPS Agreement* . . .
>
> We thus believe that the *SPS Agreement* contains an implicit obligation to determine the appropriate level of protection. We do not believe that there is an obligation to determine the appropriate level of protection in quantitative terms. This does not mean, however, that an importing Member is free to determine its level of protection with such vagueness or equivocation that the application of the relevant provisions of the *SPS Agreement,* such as Article 5.6, becomes impossible. It would obviously be wrong to interpret the *SPS Agreement* in a way that would render nugatory entire

[185] Appellate Body Report on *Australia – Salmon*, para. 194.
[186] Appellate Body Report on *Japan – Agricultural Products II*, para. 95.
[187] Appellate Body Report on *Australia – Salmon*, para. 199.
[188] (*footnote original*) Emphasis added.
[189] Panel Report on *Japan – Agricultural Products II*, para. 8.81.
[190] Panel Report on *Australia – Salmon*, para. 8.107.

> Articles or paragraphs of Articles of this Agreement and allow Members to escape from their obligations under this Agreement.
>
> . . . we believe that in cases where a Member does not determine its appropriate level of protection, or does so with insufficient precision, the appropriate level of protection may be established by panels on the basis of the level of protection reflected in the SPS measure actually applied. Otherwise, a Member's failure to comply with the implicit obligation to determine its appropriate level of protection – with sufficient precision – would allow it to escape from its obligations under this Agreement and, in particular, its obligations under Articles 5.5 and 5.6."[191]

Statement by Member

152. In *Australia – Salmon*, the Panel had found that "the *level of* protection implied or reflected in a sanitary *measure* or regime imposed by a WTO Member can be presumed to be at least as high as the level of protection considered to be *appropriate* by that Member."[192] The Appellate Body disagreed with this statement, in particular because Australia had explicitly stated that its level of protection was different from the one reflected in its measure. The Appellate Body stressed that an explicit statement by a Member about its level of protection could not be questioned by a Panel or the Appellate Body. See paragraph 149 above.

As reflected by SPS measure

153. The Appellate Body on *Australia – Salmon*, also emphasized the differences between the "appropriate level of protection" and the SPS measure:

> "The 'appropriate level of protection' established by a Member and the 'SPS measure' have to be clearly distinguished.[193] They are not one and the same thing. The first is an *objective*, the second is an *instrument* chosen to attain or implement that objective.
>
> It can be deduced from the provisions of the *SPS Agreement* that the determination by a Member of the 'appropriate level of protection' logically precedes the establishment or decision on maintenance of an 'SPS measure'.
>
> . . . The words of Article 5.6, in particular the terms '*when establishing or maintaining* sanitary . . . protection', demonstrate that the determination of the level of protection is an element in the decision-making process which logically *precedes* and is *separate* from the establishment or maintenance of the SPS measure. It is the appropriate level of protection which determines the SPS measure to be introduced or maintained, not the SPS measure introduced or maintained which determines the appropriate level of protection. To imply the appropriate level of protection from the existing SPS measure would be to assume that the measure always achieves the appropriate level of protection determined by the Member. That clearly cannot be the case."[194]

(c) "significantly less restrictive to trade"

154. In *Australia – Salmon*, the Panel examined whether the measure at issue met the requirement of an alternative measure which is "significantly less restrictive to trade".[195] The Panel found:

> "Canada argues that all four alternative options set out in the 1996 Final Report are significantly less trade restrictive. In its request for access to the Australian market, Canada examined in particular headless, eviscerated product and advocated that these products could be safely imported. We recall that the measure imposed by Australia (in effect, certain heat treatment requirements) *prohibits* the importation into Australia of fresh, chilled or frozen salmon, including the salmon products further examined. All four alternative options outlined above would *allow* imports of the salmon products further examined, albeit under specific conditions (e.g., the salmon products would have to be retail-ready fillets, eviscerated, headless or gilled, etc. . .). We consider that even imposing the most stringent of these specific conditions would still be significantly less restrictive to trade than an outright prohibition. As opposed to any of the other conditions, heat treatment actually changes the nature of the product and limits its use. Heat-treated salmon can obviously no longer be consumed as fresh salmon. Eviscerated, headless or filleted salmon, on the other hand, can either be consumed as fresh salmon or cooked salmon.[196] We consider, therefore, that Canada has raised a presumption that all four alternatives outlined in the 1996 Final Report are 'significantly less restrictive to trade' than the measure in dispute and that Australia has not rebutted this presumption."[197]

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[191] Appellate Body Report on *Australia – Salmon*, paras. 205–207.

[192] Panel Report on *Australia – Salmon*, para. 8.173

[193] (*footnote original*) That the level of protection and the SPS measure applied have to be clearly distinguished results already from our Report in *European Communities – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 214.

[194] Appellate Body Report on *Australia – Salmon*, paras. 200–201, 203.

[195] Panel Reports on *Australia – Salmon*, para. 8.182; *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.150–7.153; and *Japan – Agricultural Products II*, paras. 8.79, 8.89, 8.95–8.96 and 8.103–8.104.

[196] (*footnote original*) Out of a total of 66,234 tonnes of Canadian salmon exports in 1996, 50,838 tonnes were fresh and frozen salmon; the rest was canned salmon. As opposed to canned or heat-treated salmon, Canada submits that "recent trends indicate consumer preference for fresh and frozen salmon" (Canada, First Submission, para. 31). Australia seems to recognize this when it states that: "For [Australian] farmed Atlantic salmon [the main salmon species commercialized in Australia] supply to both the domestic and export market is predominantly of whole fresh fish" (Australia, Second Submission, para. 58).

[197] Panel Report on *Australia – Salmon*, para. 8.182.

(d) "taking into account technical and economic feasibility"

155. The Panel on *Australia – Salmon* found that there existed alternatives to the Australian measure, as evidenced by the Australian report at issue, and found that nothing implied that any of these four alternatives would be technically or economically unfeasible.[198] The Appellate Body reversed this finding, because it had earlier found that the Panel had examined the wrong measure.[199]

(ii) "Reasonably available"

156. The Panel on *Australia – Salmon (Article 21.5 – Canada)*, while examining one of the four alternatives proposed by Canada, stated with respect to whether a measure was "reasonably available" within the meaning of footnote 3 in Article 5.6:

> "[S]ince one can assume that current Australian requirements are 'reasonably available taking into account technical and economic feasibility', also a regime without the consumer-ready requirements [the current Australian requirements] . . . would be so. Given that inspection and control to release from quarantine only product that meets the consumer-ready requirements would no longer be necessary, a regime without the consumer ready requirements would be even more reasonably available in the sense of Article 5.6."[200]

157. With regard to the phrase "achieves [the Member's] appropriate level of . . . protection" under Article 5.6, see Section VI.B.6(b) above.

(iii) Burden of proof

158. In *Japan – Agricultural Products II*, concerning the issue of the burden of proof, the Appellate Body reversed the Panel's findings on Article 5.6, holding that the Panel could not have made the finding at issue, because the United States as the complaining party had not made a relevant claim and, *a fortiori*, had not established a prima facie case. The Appellate Body then stressed that the investigative authority of a panel did not stretch so far as to "make the case for a complaining party":

> "Pursuant to the rules on burden of proof set out above, we consider that it was for the United States [complainant] to establish a *prima facie* case that there is an alternative measure that meets all three elements under Article 5.6 in order to establish a *prima facie* case of inconsistency with Article 5.6. Since the United States did not even claim before the Panel that the 'determination of sorption levels' is an alternative measure which meets the three elements under Article 5.6, we are of the opinion that the United States did not establish a *prima facie* case that the 'determination of sorption levels' is an alternative measure within the meaning of Article 5.6."[201]

(iv) Relationship with other Articles

Article 1.1

159. On the applicability of the *SPS Agreement* to measures adopted before 1 January 1995 and measures adopted since, see paragraph 6 above.

Article 2.2

160. In *Australia – Salmon*, the Panel noted that "Article 5.6 must be read in context . . . an important part of the context of Article 5 is Article 2. We consider that Article 5.6 should, in particular, be read in light of Article 2.2".[202] The Appellate Body reversed the Panel's finding because it found that the Panel had examined the wrong measure.[203] The Panel on *Japan – Agricultural Products II* reached the same conclusion on the relationship between Articles 2.2 and 5.6, but the Appellate Body did not address this issue on appeal.[204]

161. In *Japan – Agricultural Products II*, the Panel noted that its "findings under Article 5.6 would stand even if the measure in dispute were not in violation of Article 2.2".[205] It added that "even if we were to have found that Japan's measure is maintained with sufficient scientific evidence in accordance with Article 2.2, we would then be called upon to examine whether the measure is consistent with Article 5.6."[206] The Appellate Body did not specifically address this statement on appeal.

7. Article 5.7

(a) General

162. The Appellate Body on *Japan – Agricultural Products II* referred to Article 5.7 as a "qualified exemption". See paragraph 36 above:

> "Article 5.7 operates as a *qualified* exemption from the obligation under Article 2.2 not to maintain SPS measures without sufficient scientific evidence. An overly broad and flexible interpretation of that obligation would render Article 5.7 meaningless."[207]

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198 Panel Report on *Australia – Salmon*, para. 8.171.
199 Appellate Body Report on *Australia – Salmon*, para. 204.
200 Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.146.
201 Appellate Body Report on *Japan – Agricultural Products II*, para. 126.
202 Panel Report on *Australia – Salmon*, para. 8.165.
203 Appellate Body Report on *Australia – Salmon*, para. 213.
204 Panel Report on *Japan – Agricultural Products II*, para. 8.71.
205 Panel Report on *Japan – Agricultural Products II*, para. 7.4.
206 Panel Report on *Japan – Agricultural Products II*, para. 8.102.
207 Appellate Body Report on *Japan – Agricultural Products II*, para. 80.

(i) Four cumulative requirements

163. In *Japan – Agricultural Products II*, the Appellate Body identified four requirements imposed upon a Member having recourse to this provision. The Appellate Body added that these four requirements are cumulative in nature:

> "Article 5.7 of the *SPS Agreement* sets out four requirements which must be met in order to adopt and maintain a provisional SPS measure. Pursuant to the first sentence of Article 5.7, a Member may provisionally adopt an SPS measure if this measure is:
>
> (1) imposed in respect of a situation where 'relevant scientific information is insufficient'; and
>
> (2) adopted 'on the basis of available pertinent information'.
>
> Pursuant to the second sentence of Article 5.7, such a provisional measure may not be maintained unless the Member which adopted the measure:
>
> (1) 'seek[s] to obtain the additional information necessary for a more objective assessment of risk'; and
>
> (2) 'review[s] the . . . measure accordingly within a reasonable period of time'.
>
> These four requirements are clearly cumulative in nature and are equally important for the purpose of determining consistency with this provision. Whenever *one* of these four requirements is not met, the measure at issue is inconsistent with Article 5.7."[208]

(b) "where relevant scientific evidence is insufficient"

(i) Meaning

164. Upholding the Panel's finding that Japan's phytosanitary measure at issue was not imposed in a situation "where relevant scientific evidence is insufficient", the Appellate Body on *Japan – Apples* said that "relevant scientific evidence" will be "insufficient" within the meaning of Article 5.7 if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the *SPS Agreement*:

> "[J]apan's reliance on the opposition between evidence 'in general' and evidence relating to specific aspects of a particular subject matter is misplaced. The first requirement of Article 5.7 is that there must be insufficient scientific evidence. When a panel reviews a measure claimed by a Member to be provisional, that panel must assess whether 'relevant scientific evidence is insufficient'. This evaluation must be carried out, not in the abstract, but in the light of a particular inquiry. The notions of 'relevance' and 'insufficiency' in the introductory phrase of Article 5.7 imply a relationship between the scientific evidence and something else. Reading this introductory phrase in the broader context of Article 5. of the *SPS Agreement*, which is entitled 'Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection', is instructive in ascertaining the nature of the relationship to be established. Article 5.1 sets out a key discipline under Article 5, namely that 'Members shall ensure that their sanitary or phytosanitary measures are based on an assessment . . . of the risks to human, animal or plant life or health'.[209] This discipline informs the other provisions of Article 5, including Article 5.7. We note, as well, that the second sentence of Article 5.7 refers to a 'more objective assessment of risks'. These contextual elements militate in favour of a link or relationship between the first requirement under Article 5.7 and the obligation to perform a risk assessment under Article 5.1: 'relevant scientific evidence' will be 'insufficient' within the meaning of Article 5.7 if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the *SPS Agreement*. Thus, the question is not whether there is sufficient evidence of a general nature or whether there is sufficient evidence related to a specific aspect of a phytosanitary problem, or a specific risk. The questions is whether the relevant evidence, be it 'general' or 'specific', in the Panel's parlance, is sufficient to permit the evaluation of the likelihood of entry, establishment or spread of, in this case, fire blight in Japan."[210]

165. The Appellate Body on *Japan – Apples* also rejected Japan's interpretation of Article 5.7 through the concept of "scientific uncertainty", and said that the application of Article 5.7 is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence and these two concepts – "insufficiency of scientific evidence" and "scientific uncertainty" – are not interchangeable:

> "Japan challenges the Panel's statement that Article 5.7 is intended to address only 'situations where little, or no, reliable evidence was available on the subject matter at issue'[211] because this does not provide for situations of 'unresolved uncertainty'. Japan draws a distinction between 'new uncertainty' and 'unresolved uncertainty'[212], arguing that both fall within Article 5.7. According to Japan, 'new uncertainty' arises when a new risk is identified; Japan argues that the Panel's characterization that 'little, or no, reliable evidence was available

[208] Appellate Body Report on *Japan – Agricultural Products II*, para. 89. In this case, the Panel examined whether the measure at issue met with these four requirements. See Panel Report on *Japan – Agricultural Products II*, paras. 8.56–8.57 and 8.60.

[209] (*footnote original*) The risk assessment referred to in Article 5.1 is defined in Annex A of the *SPS Agreement*.

[210] Appellate Body Report on *Japan – Apples*, para. 179.

[211] (*footnote original*) Panel Report, para. 8.219.

[212] (*footnote original*) Japan's appellant's submission, para. 101.

on the subject matter at issue' is relevant to a situation of 'new uncertainty'.[213] We understand that Japan defines 'unresolved uncertainty' as uncertainty that the scientific evidence is not able to resolve, despite accumulated scientific evidence.[214] According to Japan, the risk of transmission of fire blight through apple fruit relates essentially to a situation of 'unresolved uncertainty'.[215] Thus, Japan maintains that, despite considerable scientific evidence regarding fire blight, there is still uncertainty about certain aspects of transmission of fire blight. Japan contends that the reasoning of the Panel is tantamount to restricting the applicability of Article 5.7 to situations of 'new uncertainty' and to excluding situations of 'unresolved uncertainty'; and that, by doing so, the Panel erred in law.[216]

We disagree with Japan. The application of Article 5.7 is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence. The text of Article 5.7 is clear: it refers to 'cases where relevant scientific evidence is insufficient', not to 'scientific uncertainty'. The two concepts are not interchangeable. Therefore, we are unable to endorse Japan's approach of interpreting Article 5.7 through the prism of 'scientific uncertainty'."[217]

(c) "seek to obtain additional information"

166. In *Japan – Agricultural Products II*, in respect of the third requirement under Article 5.7, the Appellate Body stated that the additional information to be sought must be "germane" to conducting a more objective risk assessment:

"Neither Article 5.7 nor any other provision of the *SPS Agreement* sets out explicit prerequisites regarding the additional information to be collected or a specific collection procedure. Furthermore, Article 5.7 does not specify what actual results must be achieved; the obligation is to 'seek to obtain' additional information. However, Article 5.7 states that the additional information is to be sought in order to allow the Member to conduct 'a more objective assessment of risk'. Therefore, the information sought must be germane to conducting such a risk assessment, i.e., the evaluation of the likelihood of entry, establishment or spread of, *in casu*, a pest, according to the SPS measures which might be applied. We note that the Panel found that the information collected by Japan does not 'examine the appropriateness' of the SPS measure at issue and does not address the core issue as to whether 'varietal characteristics cause a divergency in quarantine efficacy'. In the light of this finding, we agree with the Panel that Japan did not seek to obtain the additional information necessary for a more objective risk assessment."[218]

(d) "review . . . within a reasonable period of time"

167. The Appellate Body on *Japan – Agricultural Products II* found that the "reasonable period of time" had to be established on a case-by-case basis:

"In our view, what constitutes a 'reasonable period of time' has to be established on a case-by-case basis and depends on the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review *and* the characteristics of the provisional SPS measure. In the present case, the Panel found that collecting the necessary additional information would be relatively easy. Although the obligation 'to review' the varietal testing requirement has only been in existence since 1 January 1995, we agree with the Panel that Japan has not reviewed its varietal testing requirement 'within a reasonable period of time'."[219]

(e) Burden of proof

168. In *Japan – Apples*, concerning Japan's *argument in the alternative* under Article 5.7, which was made in the event that the Panel rejected Japan's view that "sufficient scientific evidence" exists to maintain the measure within the meaning of Article 2.2, the Panel assigned the burden of proof to Japan. The Panel's assignment of the burden of proof was not appealed.[220]

"We understand Japan to be claiming that the phytosanitary measure at issue is justified under Article 5.7 'in the alternative', should the Panel find that the measure is maintained without sufficient scientific evidence within the meaning of Article 2.2. We first note that arguing in the alternative is a well-established judicial practice and arguing a point in the alternative of another point often implies that there may be some contradictions between the two lines of argumentation if they were presented concurrently.

In this instance, we have determined above that Japan's measure is maintained without sufficient scientific evidence within the meaning of Article 2.2, which is the circumstance in which Japan invokes Article 5.7 in the alternative and claims that this provisional measure has been in place since the date of entry into force of the *SPS Agreement* in 1995.

We will therefore now consider whether the measure at issue can be justified as a provisional measure within the meaning of Article 5.7 of the *SPS Agreement*. Before doing so, however, we find it relevant to recall that the burden is on Japan, as the party invoking Article 5.7 to make a prima facie case in support of its position."[221]

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[213] (*footnote original*) *Ibid.*, footnote 76 to para. 98.
[214] (*footnote original*) *Ibid.*, para. 98.
[215] (*footnote original*) Japan's appellant's submission, paras. 105–110.
[216] (*footnote original*) *Ibid.*, para. 110.
[217] Appellate Body Report on *Japan – Apples*, paras. 183–184.
[218] Appellate Body Report on *Japan – Agricultural Products II*, para. 92.
[219] Appellate Body Report on *Japan – Agricultural Products II*, para. 93.
[220] Panel Report on *Japan – Apples*, para. 8.212.
[221] Panel Report on *Japan – Apples*, paras. 8.210 – 8.212.

(f) Treatment of the precautionary principle

169. The Appellate Body on *EC – Hormones* noted the following concerning Article 5.7 and the precautionary principle: "[T]he precautionary principle indeed finds reflection in Article 5.7 of the *SPS Agreement*. We agree, at the same time, with the European Communities, that there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle . . ."[222]

(g) Relationship with other Articles

(i) Article 2.2

170. Regarding the relationship between Article 5.7 and Article 2.2, see paragraphs 35–37 above.

8. Article 5.8

(a) General

171. The Panel on *EC – Hormones* allocated the burden of proof to the responding party, where the responding party enacted a measure not based on an international standard. In doing so, the Panel based its finding partially upon Article 5.8. The Appellate Body disagreed and indicated that Article 5.8 is not intended to address the burden of proof problem:

> "Article 5.8 of the *SPS Agreement* does not purport to address burden of proof problems; it does not deal with a dispute settlement situation. To the contrary, a Member seeking to exercise its right to receive information under Article 5.8 would, most likely, be in a pre-dispute situation, and the information or explanation it receives may well make it possible for that Member to proceed to dispute settlement proceedings and to carry the burden of proving on a *prima facie* basis that the measure involved is not consistent with the *SPS Agreement*."[223]

(b) Relationship with other Articles

(i) Article 2.2

172. While discussing the burden of proof under Article 2.2, the Appellate Body on *Japan – Agricultural Products II* made reference to Article 5.8. See paragraph 17 above.

(c) Article 3

173. The Panel on *Australia – Salmon* discussed the relationship between Article 5 on the one hand, and Articles 2 and 3 on the other. See paragraphs 46–48 above.

174. Also, the Appellate Body in *Japan – Agricultural Products II* touched on the relationship of Article 5 with Articles 2.2 and 3.3. See Section III.B.1(a)(ii) above.

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6

Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence

1. Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area – whether all of a country, part of a country, or all or parts of several countries – from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, *inter alia*, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.

2. Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.

3. Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

175. In *Australia – Salmon*, Australia argued that the Panel had exceeded its terms of reference by referring to Article 6.1; Australia claimed that the Panel had made an implicit finding of inconsistency of the Australian measure with Article 6, although the Canadian request for the establishment of a panel had not included a claim under Article 6. The Appellate Body rejected the Australian argument:

> "Canada's request for the establishment of a panel did not include a claim of violation of Article 6 of the *SPS Agreement*. The Panel's terms of reference are determined by Canada's request for the establishment of a panel. We, therefore, agree with Australia that Article 6

[222] Appellate Body Report on *EC – Hormones*, para. 124.
[223] Appellate Body Report on *EC – Hormones*, para. 102. This was confirmed by the Panel in *Japan – Apples*, para. 8.41.

of the *SPS Agreement* is not within the terms of reference of the Panel. However, we disagree with Australia that the Panel exceeded its terms of reference in quoting Article 6.1 in a footnote, attached to a paragraph in which the Panel examined a violation of Article 5.5. More precisely, we reject Australia's contention that the Panel, by merely referring to Article 6.1 in a footnote, made an implied finding of inconsistency with Article 6. In our view, the statement of the Panel with regard to Article 6, in footnote 430 of its Report, is similar in character to the statement of the panel in *United States – Shirts and Blouses*, with regard to the powers of the Textile Monitoring Body ('TMB'). India appealed from this statement, but we found it to be 'purely a descriptive and gratuitous comment providing background concerning the Panel's understanding of how the TMB functions'.[224] We did not consider that statement to be 'a legal finding or conclusion' which the Appellate Body 'may uphold, modify or reverse'. Likewise, we consider that in this case, the Panel's statement in footnote 430 of its Report regarding Article 6.1 of the *SPS Agreement* is a purely gratuitous comment and not 'a legal finding or conclusion'. By making such a comment, the Panel did not exceed its terms of reference."[225]

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7
Transparency

Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.[226]

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. General

176. In *Japan – Agricultural Products II*, the Panel concluded that: "Japan, by not having published the varietal testing requirement, acts inconsistently with its obligations under paragraph 1 of Annex B of the *SPS Agreement* and, for that reason, with its obligations contained in Article 7 of that Agreement."[227] The Appellate Body while examining Japan's appeal on publication requirements under paragraph 1 of Annex B concluded that the varietal testing requirement, as set out in the *Experimental Guide*, is a phytosanitary regulation within the meaning of paragraph 1 of Annex B, and upheld the Panel's finding that Japan had acted inconsistently with this provision and hence with Article 7 of the *SPS Agreement*,[228] see paragraph 225 below.

2. Notification requirements

(a) Recommended notification procedures

177. At its meeting of 29–30 March 1995, the SPS Committee adopted notification procedures recommended by the informal contact group, subject to certain conditions.[229] At its meeting of 29–30 May 1996, the SPS Committee revised the notification procedures to be followed for notifications required under paragraphs 5 and 6 of Annex B.[230] Further, at its meeting of 10–11 March 1999, the SPS Committee again revised the notification procedures.[231] The last revision of the notification procedures was carried out by the SPS Committee at its meeting of 2 April 2002.[232]

178. In November 2000, a handbook entitled "How to apply the Transparency Provisions of the *SPS Agreement*" was prepared by the Secretariat.[233] The Handbook was further revised in September 2002. This handbook, which is available in English, French and Spanish, provides guidance on the establishment and operation of notification authorities and enquiry points. The handbook also covers all three areas of transparency: the publication of regulations, notifications, and responding to enquiries.

179. At its meeting of 26 October 2001, the SPS Committee adopted the following provision relating to the notification of the conclusion of equivalence agreements between Members further to the Decision on Equivalence (see paragraphs 79–92 above):

"The Committee on Sanitary and Phytosanitary Measures shall revise its recommended notification procedures to provide for the notification of the conclusion of agreements between Members which recognize the equivalence of sanitary and phytosanitary measures.[234] Furthermore, the procedures shall reinforce the existing obligation in paragraph 3(d) of Annex B of the Agreement on the Application of Sanitary and Phytosanitary Measures for national Enquiry Points to provide information, upon request, on the participation in any bilateral or multilateral equivalence agreements of the Member concerned."[235]

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[224] (*footnote original*) Appellate Body Report on *US – Wool Shirts and Blouses*, p. 17.
[225] Appellate Body Report on *Australia – Salmon*, para. 110.
[226] See Section XVII.
[227] Panel Report on *Japan – Agricultural Products II*, para. 8.116.
[228] Appellate Body Report on *Japan – Agricultural Products II*, para. 108.
[229] G/SPS/R/1, paras. 8–11. The recommended procedures can be found in PC/IPL/6.
[230] G/SPS/R/5, para. 16. The revised procedures can be found in G/SPS/7.
[231] G/SPS/7/Rev.1, preamble. The revised procedures can be found in G/SPS/7/Rev.1.
[232] G/SPS/7/Rev.2 and G/SPS/7/Rev.2/Add.1.
[233] This handbook is publicly available on the WTO website (www.wto.org).
[234] (*footnote original*) G/SPS/7/Rev.1.
[235] G/SPS/19, para. 11.

(b) "significant effect on trade of other Members"

180. The notification procedures adopted and revised by the SPS Committee define the term "significant effect on trade of other Members" as follows:

> "For the purposes of Annex B, paragraphs 5 and 6 in the *SPS Agreement*, the concept of 'significant effect on trade of other Members' may refer to the effect on trade:
>
> - of one sanitary or phytosanitary regulation only or of various sanitary or phytosanitary regulations in combination;
> - in a specific product, group of products or products in general; and
> - between two or more Members (countries).
>
> When assessing whether the sanitary or phytosanitary regulation may have a significant effect on trade, the Member concerned should take into consideration, using relevant information which is available, such elements as the value or other importance of imports in respect of the importing and/or exporting Members concerned, whether from other Members individually or collectively, the potential development of such imports, and difficulties for producers in other Members to comply with the proposed sanitary or phytosanitary regulations. The concept of a significant effect on trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant."[236]

3. Reference to Annex B

181. With respect to Annex B, see Section XVII.B below.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8
Control, Inspection and Approval Procedures

Members shall observe the provisions of Annex C[237] in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

No jurisprudence or decision of a competent WTO body.

X. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9
Technical Assistance

1. Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations. Such assistance may be, *inter alia*, in the areas of processing technologies, research and infrastructure, including in the establishment of national regulatory bodies, and may take the form of advice, credits, donations and grants, including for the purpose of seeking technical expertise, training and equipment to allow such countries to adjust to, and comply with, sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary or phytosanitary protection in their export markets.

2. Where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

No jurisprudence or decision of a competent WTO body.

XI. ARTICLE 10

A. TEXT OF ARTICLE 10

Article 10
Special and Differential Treatment

1. In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.

2. Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.

3. With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.

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[236] G/SPS/7, section 7, as revised.
[237] See Section XVIII.

4. Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.

B. INTERPRETATION AND APPLICATION OF ARTICLE 10

1. General

182. At the Doha Ministerial Conference, Members resolved to "provide, to the extent possible, the financial and technical assistance necessary to enable least-developed countries to respond adequately to the introduction of any new SPS measures which may have significant negative effects on their trade."[238]

183. At the same Ministerial Conference, Members also decided to ensure a level of technical assistance necessary to enable least-developed countries to respond to the special problems they face in implementing the *SPS Agreement*.[239]

184. In 2003, the SPS Committee adopted in principle a proposal by Canada to enhance the transparency of special and differential treatment, subject to elaboration of the procedure.[240] Following discussions on this elaboration in the Committee meetings in March and June 2004, at the October meeting, the Committee adopted the elaboration.[241]

2. Article 10.2: "phased introduction of new sanitary and phytosanitary measures"

(a) "longer time frame for compliance"

185. At the Doha Ministerial Conference, Members adopted a decision in order to establish a time-frame for the gradual introduction of new sanitary and phytosanitary measures:

> "Where the appropriate level of sanitary and phytosanitary protection allows scope for the phased introduction of new sanitary and phytosanitary measures, the phrase 'longer time-frame for compliance' referred to in Article 10.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures, shall be understood to mean normally a period of not less than 6 months. . . ."[242]

(b) Impossibility of phased introduction of SPS measures

186. At the same Ministerial Conference, Members adopted a decision that established a process to be applied in cases where the phased introduction of a new measure may not be possible:

> "Where the appropriate level of sanitary and phytosanitary protection does not allow scope for the phased introduction of a new measure, but specific problems are identified by a Member, the Member applying the measure shall upon request enter into consultations with the country with a view to finding a mutually satisfactory solution to the problem while continuing to achieve the importing Member's appropriate level of protection."[243]

XII. ARTICLE 11

A. TEXT OF ARTICLE 11

Article 11
Consultations and Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

2. In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative.

3. Nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 11

1. General

187. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the *SPS Agreement* were invoked:

	Case Name	Case Number	Invoked Articles
1	*Australia – Salmon*	WT/DS18	Articles 2, 3 and 5 and Annexes A, B and C
2	*EC – Hormones (US)*	WT/DS26	Articles 2, 3 and 5
3	*EC – Hormones (Canada)*	WT/DS48	Articles 2, 3 and 5
4	*Japan – Agricultural Products II*	WT/DS76	Articles 2, 5, 7 and 8 and Annexes A and B
5	*Japan – Apples*	WT/DS245	Articles 2, 5, and 7 and Annex B

[238] WT/MIN(01)/17, para. 3.6 (i).
[239] WT/MIN(01)/17, para. 3.6 (ii).
[240] G/SPS/W/127.
[241] G/SPS/33.
[242] WT/MIN(01)/17, para. 3.1.
[243] WT/MIN(019/17, para. 3.1.

2. Article 11.2

(a) Appointment of scientific experts advising the panel

(i) Individual experts

188. In *EC – Hormones*, the Appellate Body agreed with the Panel's decision to hear from individual experts rather than to establish an expert review group:[244]

> "[I]n disputes involving scientific or technical issues, neither Article 11.2 of the *SPS Agreement,* nor Article 13 of the DSU prevents panels from consulting with individual experts. Rather, both the *SPS Agreement* and the DSU leave to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate."[245]

189. As regards, *ad hoc* proceedings for the appointment of individual experts, see paragraph 191 below.

(ii) Expert appointment procedures

General

190. The procedures for the selection of scientific experts were described by the Panel on *EC – Hormones*, paragraphs 6.6–6.7, the Panel on *Australia – Salmon*, paragraphs 6.2–6.3, the Panel on *Japan – Agricultural Products II*, paragraph 6.2 and the Panel on *Australia – Salmon (Article 21.5 – Canada)*, paragraph 6.2.

Ad hoc procedures for individual experts

191. On the procedures followed by the Panel on *EC – Hormones* in appointing experts, the Appellate Body noted the following:

> "The rules and procedures set forth in Appendix 4 of the DSU apply in situations in which expert review groups have been established. However, this is not the situation in this particular case. Consequently, once the panel has decided to request the opinion of individual scientific experts, there is no legal obstacle to the panel drawing up, in consultation with the parties to the dispute, *ad hoc* rules for those particular proceedings."[246]

Parties' nomination of scientific experts

192. In *EC – Hormones*, the Panel gave each party the right to nominate one scientific expert:

> "The parties were invited to nominate one expert each, not necessarily from the list provided by the Panel. The Panel then selected three additional individuals from the list taking into account the comments of the parties."[247]

193. In contrast, in *Australia – Salmon*, the Panel did not give the parties the right to nominate any expert.[248] Also in *Japan – Agricultural Products II* and *Australia – Salmon (Article 21.5 – Canada)*, the Panels proceeded in similar fashion.[249]

(iii) Procedures for obtaining advice from scientific experts

194. The procedures for obtaining advice from scientific experts were described by the Panels on *EC – Hormones*[250]; *Australia – Salmon*[251]; *Australia – Salmon (Article 21.5 – Canada)*[252] *Japan – Agricultural Products II*[253]; and *Japan – Apples.*[254]

(iv) Role of scientific experts

195. In *EC – Hormones*, with respect to the role of scientific experts, the Panel noted as follows:

> "It is of particular importance that we made clear to the experts advising the Panel that we were not seeking a consensus position among the experts but wanted to hear all views."[255]

(b) Standard of review

196. In *Japan – Agricultural Products II*, the Appellate Body stressed that the investigative authority of a panel did not stretch so far as to "make the case for a complaining party":

> ". . . Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party."[256]

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[244] Panel Report on *EC – Hormones (Canada)*, para. 8.7. See also the Panel Report on *EC – Hormones (US)*, para. 8.7.
[245] Appellate Body Report on *EC – Hormones*, para. 147.
[246] Appellate Body Report on *EC – Hormones*, para. 148.
[247] Panel Report on *EC – Hormones (US)*, para. 8.8.
[248] See Panel Report on *Australia – Salmon*, para. 6.3.
[249] See Panel Reports on *Japan – Agricultural Products II*, para. 6.3, and *Australia – Salmon (Article 21.5 – Canada)*, para. 6.2.
[250] Panel Report on *EC – Hormone(US)*, paras. 8.8–8.9.
[251] Panel Report on *Australia – Salmon*, paras. 6.4–6.5.
[252] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, paras. 6.3–6.4.
[253] Panel Report on *Japan – Agricultural Products II*, paras. 6.2–6.3.
[254] Panel Report on *Japan – Apples*, paras. 6.2–6.4.
[255] Panel Report on *EC – Hormones (Canada)*, para. 8.9; Panel Report on *EC – Hormones (US)*, para. 8.9.
[256] Appellate Body Report on *Japan – Agricultural Products II*, paras. 126 and 129.

XIII. ARTICLE 12

A. TEXT OF ARTICLE 12

Article 12
Administration

1. A Committee on Sanitary and Phytosanitary Measures is hereby established to provide a regular forum for consultations. It shall carry out the functions necessary to implement the provisions of this Agreement and the furtherance of its objectives, in particular with respect to harmonization. The Committee shall reach its decisions by consensus.

2. The Committee shall encourage and facilitate ad hoc consultations or negotiations among Members on specific sanitary or phytosanitary issues. The Committee shall encourage the use of international standards, guidelines or recommendations by all Members and, in this regard, shall sponsor technical consultation and study with the objective of increasing coordination and integration between international and national systems and approaches for approving the use of food additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs.

3. The Committee shall maintain close contact with the relevant international organizations in the field of sanitary and phytosanitary protection, especially with the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention, with the objective of securing the best available scientific and technical advice for the administration of this Agreement and in order to ensure that unnecessary duplication of effort is avoided.

4. The Committee shall develop a procedure to monitor the process of international harmonization and the use of international standards, guidelines or recommendations. For this purpose, the Committee should, in conjunction with the relevant international organizations, establish a list of international standards, guidelines or recommendations relating to sanitary or phytosanitary measures which the Committee determines to have a major trade impact. The list should include an indication by Members of those international standards, guidelines or recommendations which they apply as conditions for import or on the basis of which imported products conforming to these standards can enjoy access to their markets. For those cases in which a Member does not apply an international standard, guideline or recommendation as a condition for import, the Member should provide an indication of the reason therefor, and, in particular, whether it considers that the standard is not stringent enough to provide the appropriate level of sanitary or phytosanitary protection. If a Member revises its position, following its indication of the use of a standard, guideline or recommendation as a condition for import, it should provide an explanation for its change and so inform the Secretariat as well as the relevant international organizations, unless such notification and explanation is given according to the procedures of Annex B.

5. In order to avoid unnecessary duplication, the Committee may decide, as appropriate, to use the information generated by the procedures, particularly for notification, which are in operation in the relevant international organizations.

6. The Committee may, on the basis of an initiative from one of the Members, through appropriate channels invite the relevant international organizations or their subsidiary bodies to examine specific matters with respect to a particular standard, guideline or recommendation, including the basis of explanations for non-use given according to paragraph 4.

7. The Committee shall review the operation and implementation of this Agreement three years after the date of entry into force of the WTO Agreement, and thereafter as the need arises. Where appropriate, the Committee may submit to the Council for Trade in Goods proposals to amend the text of this Agreement having regard, *inter alia*, to the experience gained in its implementation.

B. INTERPRETATION AND APPLICATION OF ARTICLE 12

1. General

197. At its meeting of 19–20 March 1997, the SPS Committee agreed that the Rules of Procedure for meetings of the General Council[257] shall apply *mutatis mutandis* for its meetings, except as otherwise provided in the Working Procedures.[258]

2. Article 12.3

198. With reference to paragraph 3, the WTO and the OIE agreed on a cooperation agreement on 4 May 1998.[259]

199. The list of observers at meetings of the SPS Committee is as follows:

(a) International Intergovernmental Organizations having observer status on a regular basis

- Food and Agriculture Organization (FAO)
- FAO International Plant Protection Convention (IPPC)
- FAO/WHO Joint Codex Alimentarius Commission (Codex)

[257] WT/L/161.
[258] G/L/170.
[259] WT/L/272. This Agreement has been approved by the SPS Committee at its meeting of 1–2 July 1997 (G/SPS/R/8), and subsequently by the Council for Trade in Goods at its meeting of 21 July 1997 (G/C/M/22) and the General Council at its meeting of 22 October 1997 (WT/GC/M/23).

- International Monetary Fund (IMF)*
- International Organization for Standardization (ISO)
- International Trade Centre (ITC)
- Office international des épizooties (OIE)
- United Nations Conference on Trade and Development (UNCTAD)
- World Bank*
- World Health Organization (WHO)

(b) International Intergovernmental Organizations having observer status on an *ad hoc* basis

- African, Caribbean and Pacific Group of States (ACP Group)
- European Free Trade Association (EFTA)
- Inter-American Institute for Agricultural Cooperation (IICA)
- Organization for Economic Co-operation and Development (OECD)
- Regional International Organization for Plant Protection and Animal Health (OIRSA)
- Latin American Economic System (SELA)

(c) International Intergovernmental Organizations whose request is pending

- Asian and Pacific Coconut Community (APCC)
- International Vine and Wine Office (OIV)
- Convention on Biological Diversity (CBD)

200. As regards cooperation in accordance with the Decision on Equivalence, see paragraph 91 above.

3. Article 12.4

201. At its meeting of 15–16 October 1997, the SPS Committee adopted provisional procedures to monitor the use of international standards[260], and also agreed to review the operation of the provisional monitoring procedure 18 months after its implementation, with a view to deciding at that time whether to continue with the same procedure, amend it or develop another one.[261] After agreeing to a number of extensions on the provisional procedure to monitor the use of international standards, at its meeting of 27–28 October 2004, the SPS Committee adopted modifications to the provisional procedure to monitor the use of international standards.[262]

4. Article 12.7

202. At its meeting on 15–16 October 1997, the SPS Committee agreed on procedures for conducting the review of the implementation and operation of the *SPS Agreement*.[263]

203. At the Doha Ministerial Conference, Members adopted a deadline for reviewing the operation and implementation of the *SPS Agreement*:

> "Pursuant to the provisions of Article 12.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures, the Committee on Sanitary and Phytosanitary Measures is instructed to review the operation and implementation of the Agreement on Sanitary and Phytosanitary Measures at least once every four years."[264]

204. At its meeting of 22–23 June 2004, the Committee decided on the process for the review of the *SPS Agreement*. The review is to be conducted by means of open-ended, informal meetings of the Committee and Members will be invited to identify issues for discussion as part of that process.

XIV. ARTICLE 13

A. TEXT OF ARTICLE 13

Article 13
Implementation

Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies. Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that

* Observer status in WTO subsidiary bodies provided through the WTO Agreements with the Fund and the World Bank (WT/L/194 and WT/L/195).

260 G/SPS/11. At its meeting of 8 July 1999, the Committee adopted the First Annual Report on the monitoring procedure. G/SPS/13. The Sixth Annual Report on the Procedure to Monitor the Process of International Harmonization was adopted by the Committee in June 2004.

261 G/SPS/R/9/Rev.1, para. 21. The text of the procedures can be found in G/SPS/11.

262 G/SPS/11/Rev.1.

263 G/SPS/R/9/Rev.1, paras. 35–37. The procedures can be found in G/SPS/10.

264 WT/MIN(01)/17, para. 3.4.

they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 13

1. Scope of the SPS Agreement

(a) Measures of a provincial government

205. In *Australia – Salmon (Article 21.5 – Canada)*, with respect to a measure taken by a provincial government (Tasmania), the Panel held that in the light of Article 13, measures taken by a non-central government body of Australia fell under the scope of the *SPS Agreement*:

> "Article 13 of the *SPS Agreement* provides unambiguously that: (1) 'Members are fully responsible under [the SPS] Agreement for the observance of all obligations set forth herein'; and (2) 'Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies'. Reading these two obligations together . . ., we consider that sanitary measures taken by the Government of Tasmania, being an 'other than central government' body as recognized by Australia, are subject to the *SPS Agreement* and fall under the responsibility of Australia as WTO Member when it comes to their observance of SPS obligations".[265]

XV. RELATIONSHIP WITH OTHER WTO AGREEMENTS

A. WTO AGREEMENT

1. Article XVI:4

206. In coming to the conclusion referred to in paragraph 6 above, the Appellate Body on *EC – Hormones* also referred to Article XVI:4 of the *WTO Agreement*:

> "Finally, we observe, more generally, that Article XVI.4 of the *WTO Agreement* stipulates that:
>
> > Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.
>
> Unlike the GATT 1947, the *WTO Agreement* was accepted definitively by Members, and therefore, there are no longer 'existing legislation' exceptions (so-called 'grandfather rights')".[266]

B. TBT AGREEMENT

1. Article 1.5

207. The Panel on *EC – Hormones*, referring to Article 1.5 of the *TBT Agreement*[267], stated that "[s]ince the measures in dispute are sanitary measures, we find that the TBT Agreement is not applicable to this dispute."[268]

C. GATT 1994

1. Order of analysis

208. The Panel on *EC – Hormones*, in a finding not reviewed by the Appellate Body decided that both the *SPS Agreement* and the *GATT 1994* applied to the European Communities' measure at issue, and then addressed the question of which of the two Agreements to examine first:

> "The *SPS Agreement* specifically addresses the type of measure in dispute. If we were to examine GATT first, we would in any event need to revert to the *SPS Agreement*: if a violation of GATT were found, we would need to consider whether Article XX(b) could be invoked and would then necessarily need to examine the *SPS Agreement*; if, on the other hand, no GATT violation were found, we would still need to examine the consistency of the measure with the *SPS Agreement* since nowhere is consistency with GATT presumed to be consistency with the *SPS Agreement*. For these reasons, and in order to conduct our consideration of this dispute in the most efficient manner, we shall first examine the claims raised under the *SPS Agreement*."[269]

2. Article III and Article XI

209. In *EC – Hormones*, exercising judicial economy, the Panel stated: "Since we have found that the EC measures in dispute are inconsistent with the requirements of the *SPS Agreement*, we see no need to further examine whether the EC measures in dispute are also inconsistent with Articles III or XI of GATT."[270] Also, in *Australia – Salmon*, the Panel stated: "Since we have found that the measure in dispute is inconsistent with the requirements of the *SPS Agreement*, we see no need to further examine whether it is also inconsistent with Article XI of GATT 1994."[271] The Appellate Body did not address either of these two findings.

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[265] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.13.

[266] Appellate Body Report on *EC – Hormones* paras. 128–129.

[267] Article 1.5 of the *TBT Agreement* provides: "The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures."

[268] Panel Report on *EC – Hormones (Canada)*, para. 8.32; Panel Report on *EC – Hormones (US)*, para. 8.29.

[269] Panel Report on *EC – Hormones (Canada)*, para. 8.45; Panel Report on *EC – Hormones (US)*, para. 8.42.

[270] Panel Report on *EC – Hormones (Canada)*, para. 8.275. The Panel on *EC – Hormones (US)* exercised judicial economy with respect to the US claim under Articles I and III. Panel Report on *EC – Hormones (US)*, para. 8.272.

[271] Panel Report on *Australia – Salmon*, para. 8.185. With respect to judicial economy in general, see Chapter on *DSU*, paras. Section XXXVI.F.

3. Article XX(b)

210. In *EC – Hormones*, the European Communities submitted that "the 'substantive' provisions of the *SPS Agreement* can only be addressed if recourse is made to GATT Article XX(b), *i.e.*, if, and only if, a violation of another provision of GATT is first established". The Panel, in a finding not addressed by the Appellate Body, rejected this argument, indicating as follows:

> "According to Article 1.1 of the *SPS Agreement*, two requirements need to be fulfilled for the *SPS Agreement* to apply: (i) the measure in dispute is a sanitary or phytosanitary measure; and (ii) the measure in dispute may, directly or indirectly, affect international trade. There are no additional requirements. The *SPS Agreement* contains, in particular, no explicit requirement of a prior violation of a provision of GATT which would govern the applicability of the *SPS Agreement*, as asserted by the European Communities."[272]

211. The Panel on *EC – Hormones* then added, with respect to the relationship between the *SPS Agreement* and Article XX(b) of the *GATT 1994*, that "[m]any provisions of the *SPS Agreement* impose 'substantive' obligations which go significantly beyond and are additional to the requirements for invocation of Article XX(b)":

> "[W]e find the EC claim that the *SPS Agreement* does not impose 'substantive' obligations additional to those already contained in Article XX(b) of GATT not to be persuasive. It is clear that some provisions of the *SPS Agreement* elaborate on provisions already contained in GATT, in particular Article XX(b). The final preambular paragraph of the *SPS Agreement* provides, indeed, that the Members desired 'to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)'. Examples of such rules are, arguably, some of the obligations contained in Article 2 of the *SPS Agreement*. However, on this basis alone we cannot conclude that the *SPS Agreement* only applies, as Article XX(b) of GATT does, if, and only if, a prior violation of a GATT provision has been established. Many provisions of the *SPS Agreement* impose 'substantive' obligations which go significantly beyond and are additional to the requirements for invocation of Article XX(b). These obligations are, *inter alia,* imposed to 'further the use of harmonized sanitary and phytosanitary measures between Members'[273] and to 'improve the human health, animal health and phytosanitary situation in all Members'.[274] They are not imposed, as is the case of the obligations imposed by Article XX(b) of GATT, to justify a violation of another GATT obligation (such as a violation of the non-discrimination obligations of Articles I or III)."[275]

212. The Panel on *Australia – Salmon* also dealt with the question whether to address first the provisions of the *GATT 1994* or those of the *SPS Agreement*:

> "Canada recognizes that the *SPS Agreement* provides for obligations additional to those contained in GATT 1994, but, nevertheless, first addresses its claim under Article XI of GATT 1994. Australia invokes Article 2.4 of the *SPS Agreement*, which presumes GATT consistency for measures found to be in conformity with the *SPS Agreement*, to first address the *SPS Agreement*. We note, moreover, that (1) the *SPS Agreement* specifically addresses the type of measure in dispute, and (2) we will in any case need to examine the *SPS Agreement*, whether or not we find a GATT violation (since GATT consistency is nowhere presumed to constitute consistency with the *SPS Agreement*). In order to conduct our consideration of this dispute in the most efficient manner, we shall, therefore, first address the claims made by Canada under the *SPS Agreement* before addressing those put forward under GATT 1994."[276]

XVI. ANNEX A

A. TEXT OF ANNEX A

ANNEX A
DEFINITIONS[4]

(*footnote original*) [4] For the purpose of these definitions, "animal" includes fish and wild fauna; "plant" includes forests and wild flora; "pests" include weeds; and "contaminants" include pesticide and veterinary drug residues and extraneous matter.

1. *Sanitary or phytosanitary measure* – Any measure applied:

(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

(b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;

(c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or

(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

[272] Panel Report on *EC – Hormones (Canada)*, para. 8.39; Panel Report on *EC – Hormones (US)*, para. 8.36.
[273] (*footnote original*) Preambular para. 6 of the SPS Agreement.
[274] (*footnote original*) Preambular para. 2 of the SPS Agreement.
[275] Panel Report on *EC – Hormones (Canada)*, para. 8.41; Panel Report on *EC – Hormones (US)*, para. 8.38.
[276] Panel Report on *Australia – Salmon*, para. 8.39.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

2. *Harmonization* – The establishment, recognition and application of common sanitary and phytosanitary measures by different Members.

3. *International standards, guidelines and recommendations*

(a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice;

(b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;

(c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and

(d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee.

4. *Risk assessment* – The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

5. *Appropriate level of sanitary or phytosanitary protection* – The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.

NOTE: Many Members otherwise refer to this concept as the "acceptable level of risk".

6. *Pest- or disease-free area* – An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur.

NOTE: A pest- or disease-free area may surround, be surrounded by, or be adjacent to an area – whether within part of a country or in a geographic region which includes parts of or all of several countries – in which a specific pest or disease is known to occur but is subject to regional control measures such as the establishment of protection, surveillance and buffer zones which will confine or eradicate the pest or disease in question.

7. *Area of low pest or disease prevalence* – An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease occurs at low levels and which is subject to effective surveillance, control or eradication measures.

B. INTERPRETATION AND APPLICATION OF ANNEX A

1. Relationship between paragraph 1(a) and 1(b) of Annex A

213. In *Australia – Salmon*, the Panel examined whether an Australian prohibition on imports of dead salmon was a "sanitary measure" within the meaning of paragraph 1(b) of Annex A of the *SPS Agreement*. While the definition in paragraph 1(a) of Annex A focuses on measures intended to protect animal or plant life or health from risks arising as a result of pests and diseases, paragraph 1(b) speaks of measures intended to protect human or animal life or health from disease-causing organisms contained in food, beverages or feedstuffs. The Panel held:

> "In the circumstances at hand, we consider that the definition of a 'sanitary measure' in paragraph 1(a) encompasses the coverage sought by Australia under the definition in paragraph 1(b). The definition in paragraph 1(a) deals with risks arising from 'the entry, establishment or spread of pests, diseases . . . or disease-causing organisms' in general. In the context of disease-causing organisms, the definition in paragraph 1(b) is limited in the sense that it only addresses risks arising from 'disease-causing organisms in foods, beverages or feedstuffs' (hereafter also referred to as food-borne risks). We are of the view that, even though both definitions of a 'sanitary measure' invoked by Australia might be applicable to the measure in dispute, the objectives for which that measure is being applied are more appropriately covered by the definition in paragraph 1(a). These objectives have been clearly expressed by Australia on several occasions."[277]

[277] Panel Report on *Australia – Salmon*, para. 8.34.

214. With respect to the two definitions of risk assessment under paragraph 4, see Section XVI.B.2 below.

2. Paragraph 4: "risk assessment"

(a) General

215. The Panel on *Australia – Salmon (Article 21.5 – Canada)* rejected the interpretation of "risk assessment" put forward by Canada, the complaining party. The Panel held that a requirement that Members assess risk "according to the [sanitary] measures which might be applied" could not be read into the definition of "risk assessment"; rather, the requirement of a linkage between the risk assessment on the one hand, and the final measure and the necessity to use such measure on the other, were to be derived from other provisions of the *SPS Agreement*:

> "Canada's claim . . . raises the question of whether the definition of risk assessment *as such*, requiring Members to assess risk 'according to the [sanitary] measures which might be applied', can be construed so as to include the obligation to make the link between the assessment, the measures *finally selected* and the necessity to use these measures in order to achieve the [appropriate level of sanitary or phytosanitary protection]. We find it difficult to read such a requirement into paragraph 4 of Annex A.
>
> In our view, the rights and obligations in respect of these linkages are set out *not* in the definition of risk assessment itself – which logically *precedes* the selection of measures – but, *inter alia*, in the obligation to *base* sanitary measures *on* a risk assessment in Article 5.1 and to ensure that sanitary measures are not more trade-restrictive than required to achieve the [appropriate level of sanitary or phytosanitary protection] in the sense of Article 5.6. To examine these questions of relationship between the risk assessment, the measures selected and the [appropriate level of sanitary or phytosanitary protection] under the definition of risk assessment – as Canada . . . seem[s] to do – would, in our view, run the risk of adding to or diminishing the more specific rights and obligations of Members set out in other SPS obligations, contrary to Article 19.2 of the DSU.
>
> . . . In any event, we prefer to address this question of relationship between the measures selected and the risk assessment under the obligation to *base* measures *on* a risk assessment pursuant to Article 5.1 rather than under the very definition of risk assessment referred to in the same provision."[278]

(b) First part of paragraph 4: First definition of risk assessment

(i) Types of risks

216. Referring to the first of the two definitions of "risk assessment" in paragraph 4 of Annex A, the Panel on *Australia – Salmon* in a finding with which the Appellate Body later expressly agreed[279], considered the two types of risk contained therein:

> "Examining the definition of risk assessment applicable to the measure at issue, i.e., the 'evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences', we consider, first of all, that the risk thus to be assessed includes (1) the risk of 'entry, establishment or spread' of a disease and (2) the risk of the 'associated potential biological and economic consequences'. When we refer hereafter to the risk related to a disease, this risk thus includes the risk of entry, establishment or spread of that disease as well as the biological and economic consequences associated therewith.
>
> . . .
>
> In this dispute, the measure at issue is intended to protect animal health as a sanitary measure defined in paragraph 1(a) of Annex A and is to be based on a risk assessment in the sense of the first definition in paragraph 4 of Annex A. According to this first definition in paragraph 4, such risk assessment has to take into account risks arising not only from the 'entry, establishment or spread of a pest or disease', but also from the 'associated biological and economic consequences'."[280]

(ii) Elements of a "risk assessment"

217. On the three aspects of a risk assessment, see paragraph 103 above.

(iii) Identifying risk on a disease-specific basis

218. The Panel on *Australia – Salmon* stated that where several diseases were involved in the risk assessment, such risk assessment at least had to identify risk on a disease-specific basis. The Panel also referred to the Appellate Body's findings in *EC – Hormones*:

> "[G]iven the definition of risk assessment applicable in this case (the 'evaluation of the likelihood of entry, establishment or spread of a . . . *disease*', in the singular form), a risk assessment for the measure at issue in this dispute at least has to *identify* risk on a disease specific basis, i.e., it has to identify the risk for any given disease of concern separately, not simply address the overall risk related to the combination of all diseases of concern. . . . The experts advising the Panel on this issue confirmed this. In the *EC – Hormones* case as well, both the panels and the Appellate Body required some degree of specificity for a risk assessment – or a study or report allegedly part

[278] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.68–7.70.
[279] Appellate Body Report on *Australia – Salmon*, para. 120.
[280] Panel Report on *Australia – Salmon*, paras. 8.72 and 8.116.

thereof – to be in accordance with the requirements imposed in Article 5.1."[281]

(iv) "likelihood"

219. In *Australia – Salmon*, the Appellate Body recalled its finding in *EC – Hormones* where it had distinguished between the terms "potential" and "probability". Finding that the term "likelihood" was synonymous with the term "probability", the Appellate Body disagreed with the Panel's finding that a risk assessment required only *some* evaluation of likelihood or probability:

> "We note that the first definition in paragraph 4 of Annex A speaks about the evaluation of 'likelihood.' In our report in *European Communities – Hormones,* we referred to the dictionary meaning of 'probability' as 'degrees of likelihood' and 'a thing that is judged likely to be true', for the purpose of distinguishing the terms 'potential' and 'probability'. For the present purpose, we refer in the same manner to the ordinary meaning of 'likelihood', and we consider that it has the same meaning as 'probability'. On this basis, as well as on the basis of the definition of 'risk' and 'risk assessment' developed by the Office international des épizooties ('OIE') and the OIE *Guidelines for Risk Assessment,* we maintain that for a risk assessment to fall within the meaning of Article 5.1 and the first definition in paragraph 4 of Annex A, it is not sufficient that a risk assessment conclude that there is a *possibility* of entry, establishment or spread of diseases and associated biological and economic consequences. A proper risk assessment of this type must evaluate the 'likelihood', i.e., the 'probability', of entry, establishment or spread of diseases and associated biological and economic consequences as well as the 'likelihood', i.e., 'probability', of entry, establishment or spread of diseases *according to the SPS measures which might be applied*.
>
> We note that, although the Panel stated that the definition of a risk assessment for this type of measure requires an 'evaluation of the likelihood', for the purpose of satisfying the second and third requirements, it subsequently was hesitant in applying these requirements, by stating or suggesting in paragraphs 8.80, 8.83, 8.89 and 8.91, that *some* evaluation of the likelihood or probability would suffice. We consider this hesitation unfortunate. We do not agree with the Panel that a risk assessment of this type needs only *some* evaluation of the likelihood or probability. The definition of this type of risk assessment in paragraph 4 of Annex A refers to 'the evaluation of the likelihood' and not to *some* evaluation of the likelihood. We agree, however, with the Panel's statements in paragraph 8.80 that the *SPS Agreement* does not require that the evaluation of the likelihood needs to be done quantitatively. The likelihood may be expressed either quantitatively or qualitatively. Furthermore, we recall, as does the Panel, that we stated in *European Communities – Hormones* that there is no requirement for a risk assessment to establish a certain magnitude or threshold level of degree of risk."[282]

219bis. The Panel in *Japan – Apples* recalled the Appellate Body's finding in *EC – Hormones* that the evaluation of likelihood involves more than a mere identification of 'possibilities' and requires an assessment of *probability* of entry, which implies a higher degree or a 'threshold of potentiality or possibility'. The Panel further added that such probability need not be expressed in quantitative terms, but may be expressed in qualitative terms.[283]

(v) "according to . . . which might be applied"

220. Regarding the requirement to evaluate the likelihood of entry, establishment or spread of the diseases according to the SPS measures which might be applied, the Appellate Body on *Japan – Apples* agreed with the Panel and found that the phrase "according to the . . . which might be applied" implies that a risk assessment should not be limited to an examination of the measure already in place:

> "[A]ccording to the Panel, the terms in the definition of 'risk assessment' set out in paragraph 4 of Annex A to the *SPS Agreement* – more specifically, the phrase 'according to the sanitary or phytosanitary measures which might be applied' – suggest that 'consideration should be given not just to those specific measures which are currently in application, but at least to a potential range of relevant measures.'[284] . . .
>
> The definition of 'risk assessment' in the *SPS Agreement* requires that the evaluation of the entry, establishment or spread of a disease be conducted 'according to the sanitary or phytosanitary measure which might be applied.' We agree with the Panel that this phrase 'refers to the measures *which might* be applied, not merely to the measures which *are being* applied.'[285] The phrase 'which might be applied' is used in the conditional tense. In this sense, 'might' means: 'were or would be or have been able to, were or would be or have been allowed to, were or would perhaps'.[286] We understand this phrase to imply that a risk assessment should not be limited to an examination of the measure already in place or favoured by the importing Member. In other words, the evaluation contemplated in paragraph 4 of Annex A to the *SPS Agreement* should not be distorted by preconditioned views on the nature and the content of the measure to be taken; nor should it develop into an exercise tailored to and carried out for the purpose of justifying decisions *ex post facto*."[287]

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[281] Panel Report on *Australia – Salmon*, para. 8.74.
[282] Appellate Body Report on *Australia – Salmon*, paras. 123–124.
[283] Panel Report on *Japan – Apples*, para. 8.273, referring to Appellate Body Report in *EC – Hormones*, para. 184.
[284] (*footnote original*) Panel Report, para. 8.285.
[285] (*footnote original*) Panel Report, para. 8.283. (original italics)
[286] (*footnote original*) *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 1725.
[287] Appellate Body Report on *Japan – Apples*, paras. 207–208.

(vi) "Evaluation of likelihood of entry, establishment or spread of a pest or disease . . ."

Risk assessment to be specific about the product at issue

221. In *Japan – Apples*, the Appellate Body upheld the Panel's finding that Japan's risk assessment did not evaluate the likelihood of entry, establishment or spread of fire blight because its risk assessment was not specific enough about the product at issue – apple fruit:

> "[U]nder the *SPS Agreement*, the obligation to conduct an assessment of 'risk' is not satisfied merely by a general discussion of the disease sought to be avoided by the imposition of a phytosanitary measure.[288] The Appellate Body found the risk assessment at issue in *EC – Hormones* not to be 'sufficiently specific' even though the scientific articles cited by the importing Member had evaluated the 'carcinogenic potential of entire *categories* of hormones, or of the hormones at issue *in general*.'[289] In order to constitute a 'risk assessment' as defined in the *SPS Agreement*, the Appellate Body concluded, the risk assessment should have reviewed the carcinogenic potential, not of the relevant hormones in general, but of 'residues of those hormones found in meat derived from cattle to which the hormones had been administered for growth promotion purposes'.[290] Therefore, when discussing the risk to be specified in the risk assessment in *EC – Hormone*, the Appellate Body referred in general to the harm concerned (cancer or genetic damage) *as well as* to the precise agent that may possibly cause the harm (that is, the specific hormones when used in a specific manner and for specific purposes).
>
> In this case, the Panel found that the conclusion of the 1999 PRA with respect to fire blight was 'based on an overall assessment of possible modes of contamination, where apple fruit is only one of the possible hosts/vectors considered.'[291] . . . Given that the measure at issue relates to the risk of transmission of fire blight through apple fruit, in an evaluation of whether the risk assessment is 'sufficiently specific to the case at hand'[292], the nature of the risk addressed by the measure at issue is a factor to be taken into account. In light of these considerations, we are of the view that the Panel properly determined that the 1999 PRA 'evaluat[ion of] the risks associated with all possible hosts taken together'[293] was not sufficiently specific to qualify as a 'risk assessment' under the *SPS Agreement* for the evaluation of the likelihood of entry, establishment or spread of fire blight in Japan through apple fruit."[294]

(c) Second part of paragraph 4: Second definition of risk assessment

(i) General

222. With respect to the second definition of "risk assessment" contained in paragraph 4 of Annex A, the Appellate Body on *Australia – Salmon* noted that while the first definition speaks of "likelihood", the second definition speaks of "potential" for adverse effects:

> "We note that the first type of risk assessment in paragraph 4 of Annex A is substantially different from the second type of risk assessment contained in the same paragraph. While the second requires only the evaluation of the *potential* for adverse effects on human or animal health, the first type of risk assessment demands an evaluation of the *likelihood* of entry, establishment or spread of a disease, and of the associated potential biological and economic consequences. In view of the very different language used in paragraph 4 of Annex A for the two types of risk assessment, we do not believe that it is correct to diminish the substantial differences between these two types of risk assessments, as the European Communities seems to suggest when it argues that 'the object, purpose and context of the *SPS Agreement* indicate that no greater level of probability can have been intended for the first type of risk assessment than for the second type, [as b]oth types can apply both to human life or health and to animal or plant life or health'. (Third participant's submission of the European Communities, para. 7)."[295]

(ii) Methodology of risk assessment

Two-step analysis

223. In *EC – Hormones*, with respect to the methodology for a risk assessment under the second definition of paragraph 4 of Annex A of the *SPS Agreement*, the Panels stated that "in this dispute, a risk assessment carried out in accordance with the *SPS Agreement* should (i) *identify* the *adverse effects* on human health (if any) arising from the presence of the hormones at issue when used as growth promoters *in meat or meat products*, and (ii) if any such adverse effects exist, *evaluate* the *potential* or probability of occurrence of these effects".[296] The Appellate Body did not disagree with the Panels' finding

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[288] (*footnote original*) Indeed, we are of the view that, as a general matter, "risk" cannot usually be understood only in terms of the disease or adverse effects that may result. Rather, an evaluation of risk must connect the possibility of adverse effects with an antecedent or cause. For example, the abstract reference to the "risk of cancer" has no significance, in and of itself, under the *SPS Agreement*; but when one refers to the "risk of cancer from smoking cigarettes", the particular risk is given content.

[289] (*footnote original*) Appellate Body Report, para. 199. (original italics) In other words, the risk assessment proffered by the importing Member in *EC – Hormones* considered the relationship between the broad *grouping* of hormones that were the subject of the measure and cancer.

[290] (*footnote original*) Appellate Body Report, para. 200.

[291] (*footnote original*) Panel Report, para. 8.270.

[292] (*footnote original*) Appellate Body Report, para. 7.14.

[293] (*footnote original*) Panel Report, para. 7.14.

[294] Appellate Body Report on *Japan – Apples*, paras. 202–203.

[295] Appellate Body Report on *Australia – Salmon*, fn. 69.

[296] Panel Report on *EC – Hormones (Canada)*, para. 8.101; Panel Report on *EC – Hormones (US)*, para. 8.98.

but cautioned against equating the terms "potential" and "probability":

> "Although the utility of a two-step analysis may be debated, it does not appear to us to be substantially wrong. What needs to be pointed out at this stage is that the Panel's use of 'probability' as an alternative term for 'potential' creates a significant concern. The ordinary meaning of 'potential' relates to 'possibility' and is different from the ordinary meaning of 'probability'. 'Probability' implies a higher degree or a threshold of potentiality or possibility. It thus appears that here the Panel introduces a quantitative dimension to the notion of risk."[297]

Specific attribution of risk

224. While the Appellate Body on *Japan – Apples* agreed with Japan that whether to analyse the risk on the basis of the particular pest or disease, or on the basis of a particular commodity, is a "matter of methodology" that lies within the discretion of the importing Member, it found that the Panel's reading of *EC – Hormones* did not suggest, as Japan had argued, that there was an obligation to follow any particular methodology in conducting a risk assessment. The Appellate Body further elaborated that Members are free to consider in their risk analysis multiple agents in relation to one disease, provided that the risk assessment attributes a likelihood of entry, establishment or spread of the disease to each agent specifically:

> "Japan contends that the 'methodology' of the risk assessment is not directly addressed by the *SPS Agreement*. In particular, Japan suggests that, whether to analyze the risk on the basis of the particular pest or disease, or on the basis of a particular commodity, is a 'matter of methodology' not directly addressed by the *SPS Agreement*.[298] We agree. Contrary to Japan's submission, however, the Panel's reading of *EC – Hormones* does not suggest that there is an obligation to follow any particular methodology for conducting a risk assessment. In other words, even though, in a given context, a risk assessment must consider a specific agent or pathway through which contamination might occur, Members are not precluded from organizing their risk assessments along the lines of the disease or pest at issue, or of the commodity to be imported. Thus, Members are free to consider in their risk analysis multiple agents in relation to one disease, provided that the risk assessment attribute a likelihood of entry, establishment or spread of the disease to each agent specifically. Members are also free to follow the other 'methodology' identified by Japan and focus on a particular commodity, subject to the same proviso."[299]

XVII. ANNEX B

A. TEXT OF ANNEX B

ANNEX B
TRANSPARENCY OF SANITARY AND PHYTOSANITARY REGULATIONS

Publication of regulations

1. Members shall ensure that all sanitary and phytosanitary regulations[5] which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them.

(*footnote original*) [5] Sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally.

2. Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member.

Enquiry points

3. Each Member shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents regarding:

(a) any sanitary or phytosanitary regulations adopted or proposed within its territory;

(b) any control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures, which are operated within its territory;

(c) risk assessment procedures, factors taken into consideration, as well as the determination of the appropriate level of sanitary or phytosanitary protection;

(d) the membership and participation of the Member, or of relevant bodies within its territory, in international and regional sanitary and phytosanitary organizations and systems, as well as in bilateral and multilateral agreements and arrangements within the scope of this Agreement, and the texts of such agreements and arrangements.

4. Members shall ensure that where copies of documents are requested by interested Members, they are supplied at the same price (if any), apart from the cost of delivery, as to the nationals[6] of the Member concerned.

(*footnote original*) [6] When "nationals" are referred to in this Agreement, the term shall be deemed, in the case of a separate

[297] Appellate Body Report on *EC – Hormones*, para. 184.
[298] Japan's appellant's submission, paras. 127–128.
[299] Appellate Body Report on *Japan – Apples*, para. 204.

customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

Notification procedures

5. Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:

(a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;

(b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;

(c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;

(d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

6. However, where urgent problems of health protection arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 5 of this Annex as it finds necessary, provided that the Member:

(a) immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);

(b) provides, upon request, copies of the regulation to other Members;

(c) allows other Members to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.

7. Notifications to the Secretariat shall be in English, French or Spanish.

8. Developed country Members shall, if requested by other Members, provide copies of the documents or, in case of voluminous documents, summaries of the documents covered by a specific notification in English, French or Spanish.

9. The Secretariat shall promptly circulate copies of the notification to all Members and interested international organizations and draw the attention of developing country Members to any notifications relating to products of particular interest to them.

10. Members shall designate a single central government authority as responsible for the implementation, on the national level, of the provisions concerning notification procedures according to paragraphs 5, 6, 7 and 8 of this Annex.

General reservations

11. Nothing in this Agreement shall be construed as requiring:

(a) the provision of particulars or copies of drafts or the publication of texts other than in the language of the Member except as stated in paragraph 8 of this Annex; or

(b) Members to disclose confidential information which would impede enforcement of sanitary or phytosanitary legislation or which would prejudice the legitimate commercial interests of particular enterprises.

B. INTERPRETATION AND APPLICATION OF ANNEX B

1. Paragraphs 1 and 2: Publication requirements

225. In *Japan – Agricultural Products II*, with reference to the footnote to paragraph 1 of Annex B, the Appellate Body held that the list of instruments contained therein was not exhaustive in nature and referred to the object and purpose of paragraph 1 of Annex B:

> "We consider that the list of instruments contained in the footnote to paragraph 1 of Annex B is, as is indicated by the words 'such as', not exhaustive in nature. The scope of application of the publication requirement is not limited to 'laws, decrees or ordinances', but also includes, in our opinion, other instruments which are applicable generally and are similar in character to the instruments explicitly referred to in the illustrative list of the footnote to paragraph 1 of Annex B.
>
> The object and purpose of paragraph 1 of Annex B is 'to enable interested Members to become acquainted with' the sanitary and phytosanitary regulations adopted or maintained by other Members and thus to enhance transparency regarding these measures. In our opinion, the scope of application of the publication requirement of paragraph 1 of Annex B should be interpreted in the light of the object and purpose of this provision.

> We note that it is undisputed that the varietal testing requirement is applicable generally. Furthermore, we consider in the light of the actual impact of the varietal testing requirement on exporting countries, as discussed by the Panel in paragraphs 8.112 and 8.113 of the Panel Report, that this instrument is of a character similar to laws, decrees and ordinances, the instruments explicitly referred to in the footnote to paragraph 1 of Annex B."[300]

2. Paragraph 2: "reasonable interval"

226. At the Doha Ministerial conference, Members decided that the "reasonable interval" in respect of paragraph 2 should normally be understood as a period of not less than six months:

> "Subject to the conditions specified in paragraph 2 of Annex B to the Agreement on the Application of Sanitary and Phytosanitary Measures, the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months. It is understood that timeframes for specific measures have to be considered in the context of the particular circumstances of the measure and actions necessary to implement it. The entry into force of measures which contribute to the liberalization of trade should not be unnecessarily delayed."[301]

3. Paragraph 3: Enquiry points

227. The Panel on *Australia – Salmon* found that there was no obligation under the *SPS Agreement* for a Member to positively identify its chosen appropriate level of protection. In the context of this finding, the Panel held that paragraph 3 of Annex B did not impose a "substantive obligation on Members to identify or quantify their appropriate level of protection", but rather merely a "mainly procedural obligation to provide 'answers to all reasonable questions from all interested Members'".[302] The Appellate Body reversed the Panel's finding and held that there was such an – albeit implicit – obligation, *inter alia*, in paragraph 3 of Annex B.[303]

(a) Paragraph 3(d)

228. In relation to the reinforcement of the transparency obligation of the agreements on equivalence between Members, see paragraph 179 above.

4. Paragraph 5: Conditions for notification requirements

229. The Panel on *Japan – Apples* found that, in determining whether any changes in Members' SPS measures constitute changes that must be notified under Article 7, the most important factor is "whether the change affects the conditions of market access for the product concerned, that is, would the exported product still be permitted to enter [the market (Japan in this case)] if they complied with the prescription contained in the previous regulations[304]" under the chapeau of paragraph 5 of Annex B. The Panel considered that if that was not the case, then they should decide whether the change could be considered to potentially have a *significant* effect on the trade of other Members. In this connection, the Panel further held that the party making an allegation must establish a prima facie case by specifying, through sufficient evidence, in what respect any changes in SPS regulations departed from previous ones:

> "It is not disputed that the present situation is one where 'an international standard, guideline or recommendation does not exist [regarding *E. amylovora*] or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation'. Therefore, we must determine whether the changes identified above constitute changes which are required to be notified under Article 7 because, *inter alia*, they 'may have a significant effect on trade of other Members' in the context of the chapeau to Paragraph 5 of Annex B.
>
> We consider that the most important factor in this regard is whether the change affects the conditions of market access for the product concerned, that is, would the exported product (apple fruit from the United States in this case) still be permitted to enter Japan if they complied with the prescription contained in the previous regulations.[305] If this is not the case, then we must consider whether the change could be considered to potentially have a *significant* effect on trade of other Members. In this regard, it would be relevant to consider whether the change has resulted in any increase in production, packaging and sales costs, such as more onerous treatment requirements or more time-consuming administrative formalities.
>
> . . . We recall that, in *EC – Hormones*, the Appellate Body noted that
>
> > '. . . Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its

[300] Appellate Body Report on *Japan – Agricultural Products II*, paras. 105–107.
[301] WT/MIN(01)/17, para. 3.2.
[302] Panel Report on *Australia – Salmon*, para. 7.15.
[303] Appellate Body Report on *Australia – Salmon*, para. 205.
[304] (*footnote original*) This approach is in line with the discussion of the concept of "significant effect on trade of other Members" in the notification procedures adopted and revised by the SPS Committee G/SPS/7/Rev.2, para. 7).
[305] This approach is in line with the discussion of the concept of "significant effect on trade of other Members" in the notification procedures adopted and revised by the SPS Committee G/SPS/7/Rev.2, para. 7).

own findings and conclusions on the matter under its consideration.'

However, the Appellate Body clarified in *Korea – Dairy* that '[B]oth "claims" and "arguments" are distinct from the "evidence" which the complainant or respondent presents to support its assertions of facts and arguments'.[306] We note in this regard that the party making an allegation must provide sufficient evidence in support of this allegation, and that a panel should not entertain a claim for which a prima facie case has not been made.[307] In the present case, the United States has effectively argued that Japan had substantially changed its fire blight measures since the entry into force of the *SPS Agreement*. However, the United States limited its argumentation to mention that new regulations had been implemented and to attach translations of the regulations to its first written submission. It did not specify in what respect these new regulations departed from the previous ones.

Indeed, either the United States knows in which respect the 1997 texts differ from the ones they replace – in which case it could and should have mentioned it in its submissions – or it does not, in which case it cannot be deemed to have established a prima facie case. In either situation, for the Panel to examine the regulations at issue to identify differences would be equivalent to 'making a case' for the United States, something we are not allowed to do. For these reasons we conclude that the United States did not establish a prima facie case in relation to the violation of Article 7 and Annex B of the *SPS Agreement*."[308]

XVIII. ANNEX C

A. TEXT OF ANNEX C

ANNEX C
CONTROL, INSPECTION AND APPROVAL PROCEDURES[7]

(*footnote original*) [7] Control, inspection and approval procedures include, *inter alia*, procedures for sampling, testing and certification.

1. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:

(a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;

(b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

(c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs;

(d) the confidentiality of information about imported products arising from or supplied in connection with control, inspection and approval is respected in a way no less favourable than for domestic products and in such a manner that legitimate commercial interests are protected;

(e) any requirements for control, inspection and approval of individual specimens of a product are limited to what is reasonable and necessary;

(f) any fees imposed for the procedures on imported products are equitable in relation to any fees charged on like domestic products or products originating in any other Member and should be no higher than the actual cost of the service;

(g) the same criteria should be used in the siting of facilities used in the procedures and the selection of samples of imported products as for domestic products so as to minimize the inconvenience to applicants, importers, exporters or their agents;

(h) whenever specifications of a product are changed subsequent to its control and inspection in light of the applicable regulations, the procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the regulations concerned; and

(i) a procedure exists to review complaints concerning the operation of such procedures and

[306] Appellate Body in *Korea – Dairy*, para. 139.
[307] (*footnote original*) Appellate Body Report in *Japan – Agricultural Products II*, para.126.
[308] Panel Report on *Japan – Apples*, paras. 8.314–8–318.

to take corrective action when a complaint is justified.

Where an importing Member operates a system for the approval of the use of food additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs which prohibits or restricts access to its domestic markets for products based on the absence of an approval, the importing Member shall consider the use of a relevant international standard as the basis for access until a final determination is made.

2. Where a sanitary or phytosanitary measure specifies control at the level of production, the Member in whose territory the production takes place shall provide the necessary assistance to facilitate such control and the work of the controlling authorities.

3. Nothing in this Agreement shall prevent Members from carrying out reasonable inspection within their own territories.

B. INTERPRETATION AND APPLICATION OF ANNEX C

1. Paragraph 1(c)

230. In *Australia – Salmon (Article 21.5 – Canada)*, Canada claimed a violation of paragraph 1(c) of Annex C by Australia. The Panel noted that only "procedures to check and ensure the fulfilment of sanitary or phytosanitary measures" fall under the scope of paragraph 1(c) of Annex C. It also considered that the Australian requirements referred to by Canada were "substantive sanitary measures in their own right" and not "procedures to check and ensure the fulfilment of sanitary or phytosanitary measures". The Panel thus concluded that no violation of paragraph 1(c) could be found.[309]

[309] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.154–7.157.

Agreement on Textiles and Clothing

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Recalling that Ministers agreed at Punta del Este that "negotiations in the area of textiles and clothing shall aim to formulate modalities that would permit the eventual integration of this sector into GATT on the basis of strengthened GATT rules and disciplines, thereby also contributing to the objective of further liberalization of trade";

Recalling also that in the April 1989 Decision of the Trade Negotiations Committee it was agreed that the process of integration should commence following the conclusion of the Uruguay Round of Multilateral Trade Negotiations and should be progressive in character;

Recalling further that it was agreed that special treatment should be accorded to the least-developed country Members;

Hereby *agree* as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

No jurisprudence or decision of a competent WTO body.

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1

1. This Agreement sets out provisions to be applied by Members during a transition period for the integration of the textiles and clothing sector into GATT 1994.

2. Members agree to use the provisions of paragraph 18 of Article 2 and paragraph 6(b) of Article 6 in such a way as to permit meaningful increases in access possibilities for small suppliers and the development of commercially significant trading opportunities for new entrants in the field of textiles and clothing trade.[1]

(*footnote original*) [1] To the extent possible, exports from a least-developed country Member may also benefit from this provision.

3. Members shall have due regard to the situation of those Members which have not accepted the Protocols extending the Arrangement Regarding International Trade in Textiles (referred to in this Agreement as the "MFA") since 1986 and, to the extent possible, shall afford them special treatment in applying the provisions of this Agreement.

4. Members agree that the particular interests of the cotton-producing exporting Members should, in consultation with them, be reflected in the implementation of the provisions of this Agreement.

5. In order to facilitate the integration of the textiles and clothing sector into GATT 1994, Members should allow for continuous autonomous industrial adjustment and increased competition in their markets.

6. Unless otherwise provided in this Agreement, its provisions shall not affect the rights and obligations of

Members under the provisions of the WTO Agreement and the Multilateral Trade Agreements.

7. The textile and clothing products to which this Agreement applies are set out in the Annex.[1]

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. General

1. The Panel on *US – Underwear* examined whether a certain transitional safeguard measure imposed by the United States was consistent with Article 6. In so doing, the Panel referred to Article 1 in explaining the overall purpose of the *Agreement on Textiles and Clothing (ATC)*:

> "[T]he overall purpose of the ATC is to integrate the textiles and clothing sector into GATT 1994. Article 1 of the ATC makes this point clear. To this effect, the ATC requires notification of all existing quantitative restrictions (Article 2 of the ATC) and provides that they will have to be terminated by the year 2004 (Article 9 of the ATC)."[2]

2. Article 1.2

(a) "meaningful increases in access possibilities for small suppliers"

2. See the excerpt from the TMB's comprehensive report to the Council for Trade in Goods on the implementation of the *ATC* during the first stage of the integration process (the "Implementation Report"), referenced in paragraph 23 below.

(b) Footnote 1 to Article 1

3. In its Implementation Report, the TMB stated:

> "[T]he TMB recalls the particular importance of a full and faithful implementation of the provisions of the ATC in favour of least-developed country Members, [. . .] and invites Members to examine the possibilities for providing, whenever possible, substantially increased market access opportunities for the textile and clothing products of the least-developed country Members. In such cases, the TMB expects that it will be notified accordingly."[3]

3. Article 1.4

4. In the Implementation Report, the TMB noted, *inter alia*, that Members have different perceptions on how the interests of cotton-producing exporting Members should be reflected in the implementation of the provisions of the *ATC*. The TMB thus encouraged Members to have consultations in order to clarify implementation issues related to Article 1.4:

> "[I]t appears to the TMB that Members have different perceptions on how the particular interests of the cotton-producing exporting Members should be – and were – reflected in the implementation of the provisions of the ATC. The TMB notes in this respect that the Members maintaining restrictions under Article 2 had stated that they were prepared to have consultations on this matter with the Members concerned. The TMB encourages interested Members to enter into consultations with a view to clarifying the issues related to the implementation of Article 1.4. The TMB also recalls in this regard that, should the need arise, the provisions of Article 8.4 are available for this purpose."[4]

4. Article 1.5

5. The TMB's Implementation Report contains, *inter alia*, the following statement on the implementation of the integration provisions of the *ATC* with reference to Article 1.5:

> "One preoccupation of the TMB is how the implementation of the integration provisions of the ATC has ensured the full and faithful implementation of the ATC within the time-frames established therein. In the view of the TMB, one of the conditions of such an implementation is a steady progress in terms of structural adjustment and, also, as a result of this, an increased competition in the Members' markets. This interrelation is recognized by Article 1.5.
>
> . . .
>
> [T]he TMB does not have information or empirical evidence regarding what has been the progress and accomplishment in terms of increasing the competition and implementing autonomous industrial adjustment. The TMB believes that it would be useful to have a better appreciation of the progress and trends of autonomous industrial adjustment, as foreseen in Article 1.5."[5]

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2

1. All quantitative restrictions within bilateral agreements maintained under Article 4 or notified under Article 7 or 8 of the MFA in force on the day before the entry into force of the WTO Agreement shall, within 60 days following such entry into force, be notified in detail, including the restraint levels, growth rates and flexibility provisions, by the Members maintaining such restrictions to the Textiles Monitoring Body provided for in Article 8 (referred to in this Agreement as the "TMB"). Members agree that as of the date of entry into force of the WTO

[1] With respect to the Annex, see Section XI. (The list of textile and clothing products is omitted).
[2] Panel Report on *US – Underwear*, para. 7.19.
[3] G/L/179, para. 308.
[4] G/L/179, para. 316.
[5] G/L/179, paras. 74 and 77.

Agreement, all such restrictions maintained between GATT 1947 contracting parties, and in place on the day before such entry into force, shall be governed by the provisions of this Agreement.

2. The TMB shall circulate these notifications to all Members for their information. It is open to any Member to bring to the attention of the TMB, within 60 days of the circulation of the notifications, any observations it deems appropriate with regard to such notifications. Such observations shall be circulated to the other Members for their information. The TMB may make recommendations, as appropriate, to the Members concerned.

3. When the 12–month period of restrictions to be notified under paragraph 1 does not coincide with the 12–month period immediately preceding the date of entry into force of the WTO Agreement, the Members concerned should mutually agree on arrangements to bring the period of restrictions into line with the agreement year[2], and to establish notional base levels of such restrictions in order to implement the provisions of this Article. Concerned Members agree to enter into consultations promptly upon request with a view to reaching such mutual agreement. Any such arrangements shall take into account, *inter alia*, seasonal patterns of shipments in recent years. The results of these consultations shall be notified to the TMB, which shall make such recommendations as it deems appropriate to the Members concerned.

(*footnote original*) [2] The "agreement year" is defined to mean a 12–month period beginning from the date of entry into force of the WTO Agreement and at the subsequent 12–month intervals.

4. The restrictions notified under paragraph 1 shall be deemed to constitute the totality of such restrictions applied by the respective Members on the day before the entry into force of the WTO Agreement. No new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions.[3] Restrictions not notified within 60 days of the date of entry into force of the WTO Agreement shall be terminated forthwith.

(*footnote original*) [3] The relevant GATT 1994 provisions shall not include Article XIX in respect of products not yet integrated into GATT 1994, except as specifically provided in paragraph 3 of the Annex.

5. Any unilateral measure taken under Article 3 of the MFA prior to the date of entry into force of the WTO Agreement may remain in effect for the duration specified therein, but not exceeding 12 months, if it has been reviewed by the Textiles Surveillance Body (referred to in this Agreement as the "TSB") established under the MFA. Should the TSB not have had the opportunity to review any such unilateral measure, it shall be reviewed by the TMB in accordance with the rules and procedures governing Article 3 measures under the MFA. Any measure applied under an MFA Article 4 agreement prior to the date of entry into force of the WTO Agreement that is the subject of a dispute which the TSB has not had the opportunity to review shall also be reviewed by the TMB in accordance with the MFA rules and procedures applicable for such a review.

6. On the date of entry into force of the WTO Agreement, each Member shall integrate into GATT 1994 products which accounted for not less than 16 per cent of the total volume of the Member's 1990 imports of the products in the Annex, in terms of HS lines or categories. The products to be integrated shall encompass products from each of the following four groups: tops and yarns, fabrics, made-up textile products, and clothing.[6]

7. Full details of the actions to be taken pursuant to paragraph 6 shall be notified by the Members concerned according to the following:

(a) Members maintaining restrictions falling under paragraph 1 undertake, notwithstanding the date of entry into force of the WTO Agreement, to notify such details to the GATT Secretariat not later than the date determined by the Ministerial Decision of 15 April 1994. The GATT Secretariat shall promptly circulate these notifications to the other participants for information. These notifications will be made available to the TMB, when established, for the purposes of paragraph 21;

(b) Members which have, pursuant to paragraph 1 of Article 6, retained the right to use the provisions of Article 6, shall notify such details to the TMB not later than 60 days following the date of entry into force of the WTO Agreement, or, in the case of those Members covered by paragraph 3 of Article 1, not later than at the end of the 12th month that the WTO Agreement is in effect. The TMB shall circulate these notifications to the other Members for information and review them as provided in paragraph 21.

8. The remaining products, i.e. the products not integrated into GATT 1994 under paragraph 6, shall be integrated, in terms of HS lines or categories, in three stages, as follows:

(a) on the first day of the 37th month that the WTO Agreement is in effect, products which

[6] With respect to Article 2.6, in Marrakesh, the Ministerial Conference took the following Decision on Notification of First Integration under Article 2.6 of the *ATC*:

"*Ministers agree* that the participants maintaining restrictions falling under paragraph 1 of Article 2 of the Agreement on Textiles and Clothing shall notify full details of the actions to be taken pursuant to paragraph 6 of Article 2 of that Agreement to the GATT Secretariat not later than 1 October 1994. The GATT Secretariat shall promptly circulate these notifications to the other participants for information. These notifications will be made available to the Textiles Monitoring Body, when established, for the purposes of paragraph 21 of Article 2 of the Agreement on Textiles and Clothing."

accounted for not less than 17 per cent of the total volume of the Member's 1990 imports of the products in the Annex. The products to be integrated by the Members shall encompass products from each of the following four groups: tops and yarns, fabrics, made-up textile products, and clothing;

(b) on the first day of the 85th month that the WTO Agreement is in effect, products which accounted for not less than 18 per cent of the total volume of the Member's 1990 imports of the products in the Annex. The products to be integrated by the Members shall encompass products from each of the following four groups: tops and yarns, fabrics, made-up textile products, and clothing;

(c) on the first day of the 121st month that the WTO Agreement is in effect, the textiles and clothing sector shall stand integrated into GATT 1994, all restrictions under this Agreement having been eliminated.

9. Members which have notified, pursuant to paragraph 1 of Article 6, their intention not to retain the right to use the provisions of Article 6 shall, for the purposes of this Agreement, be deemed to have integrated their textiles and clothing products into GATT 1994. Such Members shall, therefore, be exempted from complying with the provisions of paragraphs 6 to 8 and 11.

10. Nothing in this Agreement shall prevent a Member which has submitted an integration programme pursuant to paragraph 6 or 8 from integrating products into GATT 1994 earlier than provided for in such a programme. However, any such integration of products shall take effect at the beginning of an agreement year, and details shall be notified to the TMB at least three months prior thereto for circulation to all Members.

11. The respective programmes of integration, in pursuance of paragraph 8, shall be notified in detail to the TMB at least 12 months before their coming into effect, and circulated by the TMB to all Members.

12. The base levels of the restrictions on the remaining products, mentioned in paragraph 8, shall be the restraint levels referred to in paragraph 1.

13. During Stage 1 of this Agreement (from the date of entry into force of the WTO Agreement to the 36th month that it is in effect, inclusive) the level of each restriction under MFA bilateral agreements in force for the 12–month period prior to the date of entry into force of the WTO Agreement shall be increased annually by not less than the growth rate established for the respective restrictions, increased by 16 per cent.

14. Except where the Council for Trade in Goods or the Dispute Settlement Body decides otherwise under paragraph 12 of Article 8, the level of each remaining restriction shall be increased annually during subsequent stages of this Agreement by not less than the following:

(a) for Stage 2 (from the 37th to the 84th month that the WTO Agreement is in effect, inclusive), the growth rate for the respective restrictions during Stage 1, increased by 25 per cent;

(b) for Stage 3 (from the 85th to the 120th month that the WTO Agreement is in effect, inclusive), the growth rate for the respective restrictions during Stage 2, increased by 27 per cent.

15. Nothing in this Agreement shall prevent a Member from eliminating any restriction maintained pursuant to this Article, effective at the beginning of any agreement year during the transition period, provided the exporting Member concerned and the TMB are notified at least three months prior to the elimination coming into effect. The period for prior notification may be shortened to 30 days with the agreement of the restrained Member. The TMB shall circulate such notifications to all Members. In considering the elimination of restrictions as envisaged in this paragraph, the Members concerned shall take into account the treatment of similar exports from other Members.

16. Flexibility provisions, i.e. swing, carryover and carry forward, applicable to all restrictions maintained pursuant to this Article, shall be the same as those provided for in MFA bilateral agreements for the 12–month period prior to the entry into force of the WTO Agreement. No quantitative limits shall be placed or maintained on the combined use of swing, carryover and carry forward.

17. Administrative arrangements, as deemed necessary in relation to the implementation of any provision of this Article, shall be a matter for agreement between the Members concerned. Any such arrangements shall be notified to the TMB.

18. As regards those Members whose exports are subject to restrictions on the day before the entry into force of the WTO Agreement and whose restrictions represent 1.2 per cent or less of the total volume of the restrictions applied by an importing Member as of 31 December 1991 and notified under this Article, meaningful improvement in access for their exports shall be provided, at the entry into force of the WTO Agreement and for the duration of this Agreement, through advancement by one stage of the growth rates set out in paragraphs 13 and 14, or through at least equivalent changes as may be mutually agreed with respect to a different mix of base levels, growth and flexibility provisions. Such improvements shall be notified to the TMB.

19. In any case, during the duration of this Agreement, in which a safeguard measure is initiated by a Member under Article XIX of GATT 1994 in respect of a particular product during a period of one year immediately following the integration of that product into GATT 1994 in accordance with the provisions of this Article,

the provisions of Article XIX, as interpreted by the Agreement on Safeguards, will apply, save as set out in paragraph 20.

20. Where such a measure is applied using non-tariff means, the importing Member concerned shall apply the measure in a manner as set forth in paragraph 2(d) of Article XIII of GATT 1994 at the request of any exporting Member whose exports of such products were subject to restrictions under this Agreement at any time in the one-year period immediately prior to the initiation of the safeguard measure. The exporting Member concerned shall administer such a measure. The applicable level shall not reduce the relevant exports below the level of a recent representative period, which shall normally be the average of exports from the Member concerned in the last three representative years for which statistics are available. Furthermore, when the safeguard measure is applied for more than one year, the applicable level shall be progressively liberalized at regular intervals during the period of application. In such cases the exporting Member concerned shall not exercise the right of suspending substantially equivalent concessions or other obligations under paragraph 3(a) of Article XIX of GATT 1994.

21. The TMB shall keep under review the implementation of this Article. It shall, at the request of any Member, review any particular matter with reference to the implementation of the provisions of this Article. It shall make appropriate recommendations or findings within 30 days to the Member or Members concerned, after inviting the participation of such Members.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. General

6. At its meeting in December 1999, the TMB addressed the concern expressed by a number of Members that the United States had introduced a new restraint measure on exports of certain products from Turkey. The measure was published under the United States domestic procedures, but not notified to the TMB, since, according to the United States and Turkey, it "was taken pursuant to a provision of the ATC which does not require notification to the TMB".[7] The TMB "examine[d] briefly all the provisions of the ATC with a view to identifying under which provision such a measure could have been agreed without requiring its notification to the TMB", stating as follows:

> "Furthermore, restrictions maintained under Article 2 had to be notified, in detail, within 60 days following the entry into force of the WTO Agreement. A measure that had not been notified at all, obviously could not fall under the provisions of Article 2. Article 2.4 for its part states, *inter alia*, that '[n]o new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions', but no provision under Article 2 provides the possibility of introducing new restrictions. The TMB noted, therefore, that the particular measure subject to its examination could not have been taken pursuant to Article 2."[8]

2. Article 2.1

7. In *Turkey – Textiles*, the Panel established that the notification requirement related to MFA restrictions set out in Article 2.1 which required that such notification should be made within 60 days following the entry into force of the WTO Agreement is mandatory. The Panel noted that all Members that maintained MFA-derived restrictions upon the entry into force of the WTO Agreement, and were accordingly vested the maintenance of that right under the *ATC*, had notified the maintained restrictions restrictions to the TMB:

> "The lists of restrictions notified pursuant to Article 2.1 set the starting point for the treatment of the restraints carried over from the former MFA regime. Four WTO Members notified the TMB pursuant to Article 2.1 of the ATC: Canada, the European Communities, Norway and the United States. We consider that the notification requirement of 60 days referred to in Article 2.1 of the ATC is mandatory both for formal and substantive reasons. The wording of Article 2.1 is unequivocal with the use of the term 'shall'. Moreover, since the purpose of the ATC is to provide exceptions to the general application of Articles XI and XIII of GATT during an integration period to be completed by 1 January 2005, these exceptions should be interpreted narrowly.[9] Stemming from this provision, only the four Members above had the right to and did notify measures which allowed them to maintain MFA-derived quantitative restrictions for a maximum period of 10 years during which import quotas must increase annually until the products they cover are integrated into GATT. In the absence of an exception under the ATC or a justification under GATT, no new quantitative restrictions introduced by a Member can benefit from the exceptions provided for in Article 2.1 of the ATC after this 60 day period."[10]

3. Article 2.4

(a) Jurisprudence

8. In *Turkey – Textiles*, the complainant, India, claimed that Turkey's increase in restrictions were "new"

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[7] G/TMB/R/60, para. 29.
[8] G/TMB/R/60, para. 30.
[9] (*footnote original*) See for instance in Panel Report on *Indonesia – Certain Measures Affecting the Automobile Industry*, adopted 23 July 1998, WT/DS54, 55, 59 and 64/R, ("*Indonesia – Autos*") (Not appealed), para. 14.92, where the period allowed for notification to the TRIMS Committee under Article 5 of the TRIMS Agreement, in order for a Member to benefit from the transition provisions of the TRIMS Agreement, was considered mandatory.
[10] Panel Report on *Turkey – Textiles*, para. 9.69.

measures and therefore inconsistent with Article 2.4 of the *ATC*. The Panel held that any increase of an existing restriction was a "new measure" and hence a violation of Article 2.4:

> "The prohibition on 'new restrictions' must be interpreted taking into account the preceding sentence: 'The restrictions notified under paragraph 1 shall be deemed to constitutes the *totality of such restrictions* applied by the respective Members on the day before the entry into force of the WTO Agreement'. The ordinary meaning of the words indicates that WTO Members intended that as of 1 January 1995, the incidence of restrictions under the ATC could only be reduced. We are of the view that any legal fiction whereby an existing restriction could simply be increased and not constitute a 'new restriction', would defeat the clear purpose of the ATC which is to reduce the scope of such restrictions, starting from 1 January 1995 (but for the exceptional situations referred to in Article 2.4 of the ATC). Thus, we consider that, setting aside the possibility of exceptions and justifications mentioned in Article 2.4 of the ATC, any increase of an ATC compatible quantitative restriction notified under Article 2.1 of the ATC, constitutes a 'new' restriction."[11]

(b) TMB statements

9. In its report of the meeting in December 1999, when examining a new restriction introduced by the United States on Turkey's exports of certain textile products, as part of a broader understanding reached between the two Members, the TMB recalled the content of Article 2.4 of the *ATC* and concluded that the measure agreed upon by Turkey and the United States had "not been demonstrated to be in conformity with the provisions of the ATC".[12]

> "In concluding its examination of the measure mutually agreed between Turkey and the United States, the TMB recalled that Article 2.4 of the ATC states that '[n]o new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions'. After having considered the new measure against the different provisions of the ATC on the basis of the information available to it [. . .], the TMB concluded that the measure agreed upon by Turkey and the United States, affecting imports by the United States of category 352/652 products, had not been demonstrated to be in conformity with the provisions of the ATC."[13]

4. Article 2.6

(a) The issue of "ex-positions"

10. At its meeting in May 1997, the TMB examined a notification by Colombia, on behalf of itself and certain other WTO Members, regarding certain aspects of the European Communities' integration programme notified under Article 2.6. With respect to the treatment of certain products for which only a respective part (defined as "ex-position" in the Harmonized System) is included in "List of Products covered by this Agreement", the TMB stated as follows:

> "The TMB agreed with Colombia that the integration programme of the European Community for the first stage had also included certain imports which did not qualify for integration as they did not fall under the coverage of the ATC, as defined in its Annex. The TMB observed that with respect to a number of HS expositions concerned this was not contested by the European Community, which in particular referred to difficulties or the impossibility of providing trade data for these products strictly conforming to the description contained in the Annex to the ATC.
>
> . . .
>
> Also due to the lack of reliable statistical information, the TMB was not in a position to pronounce itself on the magnitude of the discrepancies which had occurred. It appeared however possible that after necessary corrections, the EC's integration programme could account for less than 16 per cent of the EC's total volume of 1990 imports. The TMB believed that the size of the shortfall, if any, could best be assessed by the importing Member itself.
>
> The TMB, therefore, recommended that the European Community re-examine its first stage integration programme in light of the TMB's comments and findings, [. . .]. The TMB expected the European Community to report on the results of this examination as rapidly as possible. The TMB agreed that it would keep this matter under review."[14]

11. On the issue of "ex-positions", at its meeting in May 1997, the TMB further stated:

> "During its review [. . .] of the notification made by Colombia, [. . .] alleging certain discrepancies in the programme of integration notified by the European Community under paragraph 6 of Article 2 of the ATC [. . .], the TMB noted the statement of the EC's representative that several other WTO Members had included in the list of products to be integrated in the first and/or second stages of implementation of the ATC products of those HS lines in the Annex for which only part of the line fell under the coverage of the ATC (indicated as 'ex' HS lines in the Annex).
>
> With regard to the programmes for the first stage of integration which had already been reviewed by the TMB, the Body noted that it had not ascertained whether the statistical information provided by Mem-

[11] Panel Report on *Textiles – Turkey*, para. 7.71.
[12] G/TMB/R/60, para. 33.
[13] G/TMB/R/60, para. 33.
[14] G/TMB/R/29, paras. 39, 41 and 42.

bers referred to the whole HS line or only to that portion of the HS line covered by the ATC. The TMB, therefore, decided to verify with the Members concerned whether the volume of imports they had notified for the 'ex HS lines' related precisely to the products described in the Annex.

With respect to the second stage of integration the review of which had not yet been completed by the TMB, the Body decided to pay due regard to these issues."[15]

12. Again, on the issue of "ex-positions", at its meeting in July 1997, the TMB concluded that, in principle, all Members that had notified integration programmes could be affected by technical problems due to the non-availability of statistical information in respect to the precise product descriptions included in the Annex to the ATC:

"The TMB had a follow-up discussion on this matter which led to a conclusion according to which, in principle, all the Members which had notified integration programmes may be affected by technical problems resulting essentially from the non-availability of statistical information corresponding to the precise product descriptions contained in the Annex to the ATC, independently of whether or not they had included 'ex HS items' in their respective integration programmes for Stage 1 and/or Stage 2. This resulted from the fact that in quantifying and notifying the total volume of 1990 imports each Member concerned had to include the relevant data related to the 'ex HS lines' defined in the Annex to the ATC. Therefore, the TMB decided to request that all Members which had submitted integration programmes, including those which had not as yet included in such programmes 'ex HS items', ascertain whether the statistical data counted in calculating the total volume of the Member's 1990 imports of the products in the Annex referred to the whole HS lines, or only to that portion of those HS lines which was covered by the ATC. The TMB expected that Members would report to it on the outcome of such verification."[16]

13. In its Implementation Report in July 1997, the TMB observed that several integration programmes did not fully meet the particular technical criteria established under Article 2.6, but before examining this data the TMB noted that it had not been possible to provide more accurate data:

"[T]he TMB in some instances took note of integration programmes which, in certain respects, did not fully meet the technical criteria established under Article 2.6. This concerned cases where the data were not available in volume, or for the year 1990, or where the share of integration was calculated relative to data for the textiles and clothing sector as a whole since data for the exact product coverage of the ATC were not available. Prior to taking note of such notifications, the TMB was assured that no better data could be obtained."[17]

5. Article 2.7(b)

14. As regards late notifications, at its meeting in December 1996, the TMB stated:

"With respect to notifications addressed to the TMB after the respective deadlines foreseen in the ATC, the TMB reiterated that its taking note of late notifications was without prejudice to the legal status of such notifications."[18]

6. Article 2.8

15. At its meeting in May 1997, in examining the notifications of a number of Members pursuant to Articles 2.8(a) and 2.11, the TMB held:

"With regard to those notifications mentioned above for which the calculation of the share of the products integrated had been made on the basis of value, or of volume of imports of a different base year other than 1990, the TMB ensured that no better data were available and that the Members concerned had followed the same approach as for the notification they had made pursuant to paragraphs 6 and 7(b) of Article 2."[19]

7. Article 2.11

16. With respect to the treatment of late notifications, see paragraph 14 above.

8. Articles 2.13 and 2.14

(a) Implementation of the growth-on-growth provisions

17. At its meeting in July 2002, the TMB considered it necessary, in the context of the review of several notifications received pursuant to Articles 2.1 and 2.2, to address the cross-cutting issue of the manner in which the growth-on-growth provisions provided for in Articles 2.13 and 2.14 had to be implemented with respect to recently acceded Members, such as China and Chinese Taipei.[20]

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[15] G/TMB/R/29, paras. 43–45.
[16] G/TMB/R/34, para. 7.
[17] G/L/179, para. 29.
[18] G/TMB/R/22, para. 16. This statement was subsequently repeated on a number of occasions.
[19] G/TMB/R/30, para. 8. At its forty-second (March 1998) and forty-fourth meetings (May 1998), the TMB reiterated the aforesaid position. G/TMB/R/41, para. 28; G/TMB/R/43, para. 5.
[20] In order to discharge its responsibilities, the TMB was also required to examine and to reach an understanding on the modalities agreed and guidance provided by Members in the respective legal instruments of accession *vis-à-vis* the implementation of the growth-on-growth provisions of the ATC. Only such a common understanding could provide a basis and serve as a benchmark for the TMB, enabling it to verify if the actual implementation had been effected in compliance with the requirements established by the Members.

18. In relation to China, the TMB noted that the increase in the growth rates should have been ideally implemented on the date of China's accession on 11 December 2001. The TMB observed that the four Members maintaining restrictions on imports from China with reference to Article 2.1 had actually taken into account the growth rates only on 1 January 2002. This raised the issue whether the provisions of the accession instrument allowed for the implementation of the growth-on-growth provisions on 1 January 2002 only:

> "In considering this aspect of the subject-matter, the TMB noted that the increase in the respective growth rates, as far as, when applicable, Stage 1 and in any event, Stage 2 were concerned, should have been ideally implemented on 11 December 2001. At the same time, the TMB recalled that it had already accepted that in any possible reading of the third sentence of paragraph 241 of the Working Party report, the term 'as appropriate' could (also) be related to the very last part of the sentence which indicated that the respective commitments should be applied 'as from the date of China's accession'. Based on this flexibility inherent in the formulation, practical considerations could also be raised in support of why an actual implementation starting on 1 January 2002 could be found to be appropriate. In terms of the administration of restraints under the ATC, the beginning of a new calendar year has always been a turning-point, since it represented the start of a new 'quota-year', *inter alia*, by establishing the new annual restraint levels, also as a result of the application of the respective annual growth rates. Since the time difference between China's accession and the start of the implementation of the new annual restraint levels for the year 2002 did not exceed three weeks, this delayed actual implementation could be explained by practical administrative considerations and the time-lag could not be considered to be too excessive.
>
> In light of the above considerations, the TMB concluded that though some of the measures in question could have already been implemented as from 11 December 2001, they had to be implemented at latest by 1 January 2002, and this had been done by Canada, the European Communities, Turkey and the United States."[21]

19. The TMB also discussed which increases in the growth rate should apply, i.e. the growth rate increase of 16 per cent in paragraph 13 or the rates in paragraph 14. In the absence of clarity with regard to this issue, the TMB referred to the minimum requirements incumbent on Members:

> "[S]ince the relevant provisions of the legal instruments of China's accession did not provide an unambiguous guidance, it was not possible to provide a clear answer to the question of whether the restraining Members had also been required to apply the not less than 16 per cent increase in the respective growth rates, as provided for in Article 2.13, for the Stage 1 integration process. The lack of a clear answer regarding this aspect had led the TMB to consider those minimum requirements which had to be implemented by the Members concerned. These minimum requirements could be summarized in the following: as from 1 January 2002, the base levels in force on 10 December 2001 had to be increased by the respective growth rates applied for the year 2001 (prior to China's accession), increased by the full 25 per cent applicable to Stage 2 and further increased by the 27 per cent applicable to Stage 3."[22] (emphasis original)

20. Concerning Chinese Taipei, the TMB reiterated its holding in its examination of the rights of China with regard to this issue:

> "[S]ince the relevant provisions of the legal instruments of Chinese Taipei's accession did not provide unambiguous guidance in this regard, it was not possible to give a clear answer to the question of whether restraining Members had also been required to apply the not less than 16 per cent, followed by the not less than 25 per cent increase in the respective growth rates, as provided for in Articles 2.13 and 2.14(a) for Stages 1 and 2, respectively. The lack of a clear reply regarding this aspect led the TMB to consider those minimum requirements which had to be implemented by the Members concerned. The TMB concluded that these minimum requirements implied that on 1 January 2002, the base levels in force on 31 December 2001 had to be increased by the respective growth rates applied in 2001, as further increased by 27 per cent which was applicable for Stage 3."[23] (emphasis original)

9. Article 2.17

21. Concerning a mutually agreed solution notified by Pakistan under Article 2.17 and by the United States under Article 5, which provided for, *inter alia*, the introduction of a new restraint (on United States imports from Pakistan on products falling under US categories 666–S and 666–P), the TMB indicated that:

> "The TMB also recalled that according to Article 2.17, '[a]dministrative arrangements, as deemed necessary in relation to the implementation of any provision' of Article 2 could be agreed between the Members concerned. As the restrictions on category 666 – S and 666 – P products had not been notified pursuant to Article 2.1 and, therefore, did not fall under the scope of the provisions of Article 2, the TMB did not see how the imposition of these new restrictions, even if mutually agreed between the two Members, could be considered to be necessary in relation to the implementation of the provisions of Article 2. The TMB also observed that the administrative arrangements concluded between the United States and

[21] G/TMB/R, paras. 30–31.
[22] (*footnote original*) G/TMB/R/90, para. 32.
[23] (*footnote original*) G/TMB/R/90, para. 43.

Pakistan . . . did not provide for the introduction of new quantitative restrictions . . .

The TMB, therefore, concluded that there appeared to be no justification to apply new quantitative restrictions under Article 2.17."[24]

22. With respect to the same subject-matter examined under Article 5, see also the excerpts from the reports of the TMB referenced in paragraphs 31–38 below.

10. Article 2.18

23. In examining the notifications provided by some Members on the improvements in access provided to those Members whose exports had been subject to restrictions on 31 December 1994 and whose restrictions represented 1.2 per cent or less of the total volume of the importing Members' restrictions on 31 December 1991, the TMB stated as follows:

"The TMB observed that the implementation of this provision of the ATC had been made by the Members concerned using different methodologies and no Member used the option of equivalent changes with respect to a different mix of base levels, growth and flexibility provisions. It was observed that Article 2.18 does not provide precise guidance as to how to implement the advancement by one stage of the growth rates set out in Articles 2.13 and 2.14, or how to apply 'at least equivalent changes as may be mutually agreed with respect to a different mix of base levels, growth and flexibility provisions'. However, it was noted that the result in terms of market access in the first stage would have been improved if the methodology chosen for the advancement by one stage of the growth rates included the growth factor of the first stage, as done by one Member."[25]

11. Article 2.21

24. See the excerpts from the reports of the TMB referenced above.

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3

1. Within 60 days following the date of entry into force of the WTO Agreement, Members maintaining restrictions[4] on textile and clothing products (other than restrictions maintained under the MFA and covered by the provisions of Article 2), whether consistent with GATT 1994 or not, shall (*a*) notify them in detail to the TMB, or (*b*) provide to the TMB notifications with respect to them which have been submitted to any other WTO body. The notifications should, wherever applicable, provide information with respect to any GATT 1994 justification for the restrictions, including GATT 1994 provisions on which they are based.

(*footnote original*) [4] Restrictions denote all unilateral quantitative restrictions, bilateral arrangements and other measures having a similar effect.

2. Members maintaining restrictions falling under paragraph 1, except those justified under a GATT 1994 provision, shall either:

(a) bring them into conformity with GATT 1994 within one year following the entry into force of the WTO Agreement, and notify this action to the TMB for its information; or

(b) phase them out progressively according to a programme to be presented to the TMB by the Member maintaining the restrictions not later than six months after the date of entry into force of the WTO Agreement. This programme shall provide for all restrictions to be phased out within a period not exceeding the duration of this Agreement. The TMB may make recommendations to the Member concerned with respect to such a programme.

3. During the duration of this Agreement, Members shall provide to the TMB, for its information, notifications submitted to any other WTO bodies with respect to any new restrictions or changes in existing restrictions on textile and clothing products, taken under any GATT 1994 provision, within 60 days of their coming into effect.

4. It shall be open to any Member to make reverse notifications to the TMB, for its information, in regard to the GATT 1994 justification, or in regard to any restrictions that may not have been notified under the provisions of this Article. Actions with respect to such notifications may be pursued by any Member under relevant GATT 1994 provisions or procedures in the appropriate WTO body.

5. The TMB shall circulate the notifications made pursuant to this Article to all Members for their information.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. General

25. With respect to the measure concerning the United States and Turkey, referred to in paragraphs 6 and 8 above, the TMB confirmed that all restrictive measures that touch upon the subject matter of the *ATC*, even if they have been adopted on a basis other than *ATC* provisions, have to be notified to the TMB:

"Since restrictions other than those covered by the provisions of Article 2 also had to be notified within 60 days

[24] G/TMB/R/45, paras. 27–28.
[25] G/L/179, para. 210.

following the date of entry into force of the WTO Agreement, the TMB observed that the restraint could not have been agreed between Turkey and the United States under the provisions of Article 3.1 either. Article 3.3 does not exclude the possibility, *inter alia*, of introducing new restrictions on textile and clothing products. However, it contains not only the requirement of 'double' notification (i.e. to the appropriate WTO body and also to the TMB, for its information), but also limits the possibility of applying, *inter alia*, new restrictions to those cases where the measures were taken under any GATT 1994 provision. As to the restraint agreed between Turkey and the United States, the TMB noted that, according to the joint communication submitted by the two Members concerned, this measure had not been introduced under a GATT 1994 provision, but that it had been taken pursuant to a provision of the ATC. On this basis the TMB observed that the new restraint in question could not have been introduced pursuant to the provisions of Article 3."[26]

2. Article 3.1

(a) "restrictions"

26. At its meeting in November 2002, while reviewing an Article 3.1 notification received from China, following its accession to the WTO, the TMB considered, *inter alia*, the scope of the application of Article 3, i.e. whether it also applies to export restrictions. The TMB noted that the term "restriction" in Article 3.1 is not subject to any additional qualifications and that the language of the Article does not support an interpretation whereby Article 3.1 only applies to imports:

> "[A]rticle 3.1 uses the word 'restrictions' without any additional qualifications and that the footnote to this provision related to the same term states the following: 'Restrictions denote all unilateral quantitative restrictions, bilateral arrangements and other measures having a similar effect.'[27] The language of Article 3 does not limit the application of this provision to any specific type of restriction. The export quotas maintained by China affecting silk yarn and woven fabrics of silk are, undoubtedly, unilateral quantitative restrictions, corresponding to the definition provided in the footnote referred to above. Therefore, also in view of the lack of any further precision in the respective provision of the ATC, export restrictions are not *a priori* excluded from the scope of application of Article 3. This conclusion is also in line with past practice in the TMB, whereby the notification under Article 3 of certain measures affecting exports of some textile products was not questioned.[28]
>
> The TMB noted, furthermore, that the additional notification by China referred to 'restrictions on certain textile products which fall under the coverage of ATC and are subject to Article 3 of [that] Agreement'. This reference presumably indicated that, in the view of China, the measures in question should be considered under the applicable provisions of the ATC. It was observed that the notification of these export restrictions under Articles 3.1 and 3.2(b) did not appear to be in contradiction with the relevant portion of the Report of the Working Party on the Accession of China.[29]"[30]

3. Article 3.2(b)

27. At its meeting in February 1996, the TMB considered a notification by Hungary of the phase-out programme to be applied to the restrictions maintained by that Member under Article 3.1. In taking note of this programme, the TMB:

> "[O]bserved that, in view of the general nature of this programme, it expected that the details of its implementation in the respective stages would be notified to the Body prior to their implementation, for the Body's consideration".[31]

28. At its meeting in March 1996, "[t]he TMB reverted to its consideration of a notification made by Japan, under Article 3.2(b), of the phase out of the measures notified under Article 3.1. In taking note of this phase-out programme the TMB expressed the expectation that its implementation, in conformity with paragraph 2(b) of Article 3, would be such as to provide appropriate progressive increases to the level of restrictions on imports of silk yarn and silk fabric from Korea."[32]

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4

1. Restrictions referred to in Article 2, and those applied under Article 6, shall be administered by the exporting Members. Importing Members shall not be obliged to accept shipments in excess of the restrictions notified under Article 2, or of restrictions applied pursuant to Article 6.

2. Members agree that the introduction of changes, such as changes in practices, rules, procedures and categorization of textile and clothing products, including those changes relating to the Harmonized System, in the implementation or administration of those restrictions notified or applied under this Agreement should not: upset the balance of rights and obligations between the

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[26] G/TMB/R/60, para. 30.
[27] (*footnote original*) See footnote 4 of the ATC.
[28] (*footnote original*) Japan notified the application of an export approval system affecting certain products with certain specified destinations (United States, European Communities). For details see G/TMB/N/82 and G/TMB/N/175.
[29] (*footnote original*) See WT/ACC/CHN/49, paragraph 165.
[30] G/TMB/R/93, paras. 19–20.
[31] G/TMB/R/9, para. 12.
[32] G/TMB/R/11, para. 8.

Members concerned under this Agreement; adversely affect the access available to a Member; impede the full utilization of such access; or disrupt trade under this Agreement.

3. If a product which constitutes only part of a restriction is notified for integration pursuant to the provisions of Article 2, Members agree that any change in the level of that restriction shall not upset the balance of rights and obligations between the Members concerned under this Agreement.

4. When changes mentioned in paragraphs 2 and 3 are necessary, however, Members agree that the Member initiating such changes shall inform and, wherever possible, initiate consultations with the affected Member or Members prior to the implementation of such changes, with a view to reaching a mutually acceptable solution regarding appropriate and equitable adjustment. Members further agree that where consultation prior to implementation is not feasible, the Member initiating such changes will, at the request of the affected Member, consult, within 60 days if possible, with the Members concerned with a view to reaching a mutually satisfactory solution regarding appropriate and equitable adjustments. If a mutually satisfactory solution is not reached, any Member involved may refer the matter to the TMB for recommendations as provided in Article 8. Should the TSB not have had the opportunity to review a dispute concerning such changes introduced prior to the entry into force of the WTO Agreement, it shall be reviewed by the TMB in accordance with the rules and procedures of the MFA applicable for such a review.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

1. General

29. In the context of examining the measure introduced by the United States on exports of certain products from Turkey, referred to in paragraphs 6 and 8 above, the TMB and held that the provisions of Article 4 have to be read in conjunction with the other provisions of the Agreement:

"[A]rticle 4.1 deals with the administration of 'restrictions referred to in Article 2, and those applied under Article 6'. Article 4.2 states that 'Members agree that the introduction of changes, such as changes in practices, rules, procedures and categorization of textile and clothing products including those changes relating to the Harmonized System, in the implementation or administration of those restrictions notified or applied under this Agreement should not: upset the balance of rights and obligations between Members concerned under this Agreement; adversely affect the access available to a Member; impede the full utilization of such access; or disrupt trade under this Agreement.' Article 4.4 provides, *inter alia*, the possibility to reach a 'mutually acceptable solution regarding appropriate and equitable adjustment' between Members when necessary changes, in the sense of Article 4.2, are introduced in the implementation or administration of existing restrictions. The TMB noted that, according to Article 4.4, such mutually acceptable solutions did not have to be notified to the TMB. The TMB recalled its findings that the new restriction could not have been agreed pursuant to the provisions of Articles 2 and 6. It was also observed that Article 4.4 does not provide explicit guidance regarding the scope of the adjustment that can be agreed between the Members concerned in the framework of the mutually acceptable solution. A reading according to which the introduction of a new restriction, in the sense of Article 2.4, can be agreed upon pursuant to Article 4.4 as an adjustment to balance possible improvements in the implementation or administration of restrictions maintained pursuant to Article 2 was, however, in the view of the TMB not consistent with the intention of the drafters of the ATC, since Article 4 relates to the implementation or administration of the restrictions referred to in Article 2, or applied under Article 6. Also, the construction of Article 4 and its language seem to suggest that when changes, in the sense of Article 4.2 are introduced, the appropriate and equitable adjustment referred to in Article 4.4 can only involve and affect the restrictions that have already been in place and notified pursuant to Article 2 or Article 6."[33]

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5

1. Members agree that circumvention by transshipment, re-routing, false declaration concerning country or place of origin, and falsification of official documents, frustrates the implementation of this Agreement to integrate the textiles and clothing sector into GATT 1994. Accordingly, Members should establish the necessary legal provisions and/or administrative procedures to address and take action against such circumvention. Members further agree that, consistent with their domestic laws and procedures, they will cooperate fully to address problems arising from circumvention.

2. Should any Member believe that this Agreement is being circumvented by transshipment, re-routing, false declaration concerning country or place of origin, or falsification of official documents, and that no, or inadequate, measures are being applied to address and/or to take action against such circumvention, that Member should consult with the Member or Members concerned with a view to seeking a mutually satisfactory solution. Such consultations should be held promptly, and within 30 days when possible. If a mutually satisfactory solution

[33] G/TMB/R/60, para. 31.

is not reached, the matter may be referred by any Member involved to the TMB for recommendations.

3. Members agree to take necessary action, consistent with their domestic laws and procedures, to prevent, to investigate and, where appropriate, to take legal and/or administrative action against circumvention practices within their territory. Members agree to cooperate fully, consistent with their domestic laws and procedures, in instances of circumvention or alleged circumvention of this Agreement, to establish the relevant facts in the places of import, export and, where applicable, transshipment. It is agreed that such cooperation, consistent with domestic laws and procedures, will include: investigation of circumvention practices which increase restrained exports to the Member maintaining such restraints; exchange of documents, correspondence, reports and other relevant information to the extent available; and facilitation of plant visits and contacts, upon request and on a case-by-case basis. Members should endeavour to clarify the circumstances of any such instances of circumvention or alleged circumvention, including the respective roles of the exporters or importers involved.

4. Where, as a result of investigation, there is sufficient evidence that circumvention has occurred (e.g. where evidence is available concerning the country or place of true origin, and the circumstances of such circumvention), Members agree that appropriate action, to the extent necessary to address the problem, should be taken. Such action may include the denial of entry of goods or, where goods have entered, having due regard to the actual circumstances and the involvement of the country or place of true origin, the adjustment of charges to restraint levels to reflect the true country or place of origin. Also, where there is evidence of the involvement of the territories of the Members through which the goods have been transshipped, such action may include the introduction of restraints with respect to such Members. Any such actions, together with their timing and scope, may be taken after consultations held with a view to arriving at a mutually satisfactory solution between the concerned Members and shall be notified to the TMB with full justification. The Members concerned may agree on other remedies in consultation. Any such agreement shall also be notified to the TMB, and the TMB may make such recommendations to the Members concerned as it deems appropriate. If a mutually satisfactory solution is not reached, any Member concerned may refer the matter to the TMB for prompt review and recommendations.

5. Members note that some cases of circumvention may involve shipments transiting through countries or places with no changes or alterations made to the goods contained in such shipments in the places of transit. They note that it may not be generally practicable for such places of transit to exercise control over such shipments.

6. Members agree that false declaration concerning fibre content, quantities, description or classification of merchandise also frustrates the objective of this Agreement. Where there is evidence that any such false declaration has been made for purposes of circumvention, Members agree that appropriate measures, consistent with domestic laws and procedures, should be taken against the exporters or importers involved. Should any Member believe that this Agreement is being circumvented by such false declaration and that no, or inadequate, administrative measures are being applied to address and/or to take action against such circumvention, that Member should consult promptly with the Member involved with a view to seeking a mutually satisfactory solution. If such a solution is not reached, the matter may be referred by any Member involved to the TMB for recommendations. This provision is not intended to prevent Members from making technical adjustments when inadvertent errors in declarations have been made.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. General

30. In the context of examining the measure introduced by the United States on exports of certain products from Turkey, referred to in paragraphs 6 and 8 above, the TMB stated that all measures adopted on the basis of Article 5 shall be notified to the TMB, unless the parties reach a mutually agreed solution:

> "[P]rovides, *inter alia*, the possibility of taking certain actions, after consultations had been held between the Members concerned with a view to arriving at a mutually satisfactory solution between them. Article 5.4 stipulates, *inter alia*, that '. . . where there is evidence of the involvement of territories of the Members through which the goods have been transshipped, such action may include the introduction of restraints with respect to such Members.' Article 5.4 also states that '[t]he Members concerned may agree on other remedies in consultation'. However, any action taken pursuant to Article 5.4 has to be notified to the TMB. In case of evidence that the ATC is being circumvented by false declaration concerning fibre content, quantities, description or classification of merchandise, Article 5.6 allows the Members concerned to consult with a view to seeking a mutually satisfactory solution and the same Article does not require the notification of such mutually agreed solutions to the TMB. At the same time, the TMB observed that Article 5 refers to situations of 'circumvention by transshipment, re-routing, false declaration concerning country or place of origin, and falsification of official documents', and that neither Turkey nor the United States had invoked or reported such a situation. Without prejudice as to whether in particular circumstances a new restriction can be introduced, or not, pur-

suant to the provisions of Article 5, the TMB, on the basis of the information available to it, concluded that the provision of the ATC referred to by both Turkey and the United States could not be Article 5."[34]

2. Article 5.4

(a) "appropriate action, to the extent necessary to address the problem"

31. In reviewing a number of administrative arrangements agreed between the United States and several other Members under which triple charges could be imposed on quotas to counter circumventions, the TMB stated:

"[T]hat Article 5 of the ATC contained detailed descriptions of the rules and procedures to be followed. It appeared to the TMB that some aspects of the related provisions included in the administrative arrangements could go beyond what was specified in Article 5. The TMB noted, *inter alia*, that paragraph 4 of Article 5 of the ATC seemed to provide some flexibility in terms of remedies or agreed actions that could be foreseen in cases when circumvention has occurred. It observed, however, that Article 5 contained no mention of the possibility for the importing Member to impose triple charges on quotas, as a deterrent to circumvention. The TMB noted in this regard that this provision had not been utilized by the United States.

The TMB recalled that the United States had stated that when provisions of the administrative arrangements were inconsistent with the ATC, the provisions of the ATC would apply. The TMB understood that this statement applied to each and every provision of the arrangements notified. The TMB expected, therefore, that all the provisions of these administrative arrangements would be implemented by the respective Members in conformity with the relevant provisions of the ATC."[35]

(b) "Members concerned may agree on other remedies in consultation"

32. Concerning a mutually agreed solution notified by Pakistan under Article 2.17 and by the United States under Article 5, referenced in paragraph 21 above, which provided, *inter alia*, for the introduction of a new restraint (on United States imports from Pakistan on products falling under United States categories 666–S and 666–P), the TMB examined whether a new quantitative restriction, can be considered as an "appropriate action" in the light of Article 5.4 of the *ATC*:

"The TMB observed that, apart from the third sentence of Article 5.4, the introduction of a new restriction, even if mutually agreed between the Members concerned, was not mentioned in Article 5.4 as an 'appropriate action, to the extent necessary to address the problem' when circumvention as defined in Article 5.1 had occurred. Furthermore, the TMB understood that the introduction of restrictions, set out in the third sentence of Article 5.4, related only to the true country or place of origin in case there had been evidence of its involvement in the transshipment. This provision, therefore, could not *per se* allow the introduction of new restrictions on imports from Pakistan in the particular case when circumvention had occurred.

The TMB also observed that while the second and third sentences of Article 5.4 specified possible actions that could be taken when circumvention had occurred, they did not provide an exhaustive list for such actions. This was made clear by the language of the second sentence as well as by the fifth sentence of Article 5.4, the latter providing that '[t]he Members concerned may agree on other remedies in consultation'."[36]

33. While examining the measure referred to in paragraph 32 above, the TMB noted with respect to the fifth sentence of Article 5.4 that "the Agreement did not specify what, in the context of this paragraph, could or could not constitute the 'other remedies'". It also held that Article 5.4 was sufficiently clear that an objective interpretation of "other remedies" could not be asserted as to grant Members the right to adopt new quantitative restrictions:

"It could be argued that the 'other remedies' referred to in Article 5.4 did not include the permission to introduce new quantitative restrictions, since Article 5.4 in itself as well as the broader context as determined by the ATC provided sufficient guidance to the Members concerned to develop a correct understanding on what could or could not constitute such 'other remedies' in the sense of Article 5.4. It could be contended that Article 5.4 was sufficiently specific in defining what type of actions can be taken in response to well defined circumstances. The second sentence of this Article, in addressing the issue of what kind of action could be taken in the relationship between the importing Member (the United States) and the Member constituting the true place of origin (Pakistan) of the goods allegedly circumvented (cotton bedsheets), specified that '[s]uch action may include . . ., where goods have entered, having due regard to the actual circumstances and the involvement of the country or place of true origin, the adjustment of charges to restraint levels to reflect the true country or place of origin'. This formulation seemed to imply that the action taken should affect the product that was subject to circumvention. Since only the exports of products that had already been subject to restrictions could be circumvented, the remedy for such circumvention could not affect products other than those with respect to which circumvention had been claimed. Reading the second

[34] G/TMB/R/60, para. 30.
[35] G/TMB/R/31, paras. 20–21.
[36] G/TMB/R/45, paras. 33–34.

sentence of Article 5.4 in conjunction with the fifth sentence, it appeared, therefore, that the two Members could have agreed on adjustments of charges to the restraint level established for the category 361 products or on 'other remedies' affecting the same products, but not on 'other remedies' affecting other products, like category 666 – S and 666 – P products.

In addition, the third sentence of Article 5.4 explicitly allowed the introduction of new restrictions, but did so only in cases where there was evidence of the involvement of the territories of (third) Members through which the goods had been transhipped [. . .]. If this provision were read together with the fifth sentence of Article 5.4, it appeared that remedies other than the introduction of restrictions on imports of category 361 products could also have been foreseen, but these actions had to be limited to the products transshipped and to the Member through which the transshipment was effected. The TMB understood that no restrictions had been introduced by the United States against imports of category 361 products from the Member through which the products of Pakistani origin had allegedly been transhipped. Also, the TMB was not aware of any other action taken by the United States *vis-à-vis* imports of the transshipped products from the Member involved in this transshipment. In any case, this sentence did not provide authorization for the introduction of new restrictions on imports from Pakistan."[37]

34. As further support for the proposition that the quantitative restriction at issue was not permitted under Article 5.4, the TMB referred to "the broader context" of the *ATC*. The TMB considered that as the *ATC* expressly provides for an exception to the prohibition on introducing new quantitative measures and that as it aims to achieve a complete integration of this sector in the covered agreements of the *GATT 1994*, these were conclusive in the determination that quantitative restrictions cannot be introduced on the basis of Article 5.4:

"It could be contended that the broader context as defined by the ATC also confirmed the statements included in [the] paragraphs [cited in paragraph 32 above]. It could be argued that, since the Agreement sets out provisions to be applied by Members during a transition period for the integration of the textiles and clothing sector into GATT 1994 and thus the ultimate objective of the Agreement was to ensure the full integration of trade in the covered products into the GATT 1994 rules and disciplines, the ATC carefully circumscribed the possibilities for maintaining or introducing quantitative restrictions; (apart from the third sentence of Article 5.4) the relevant provisions were contained in Articles 2, 3 and 6. As indicated earlier, the provisions of Articles 2 and 3 were not applicable to the particular case in question. While Article 6 allowed for the introduction of new restrictions for a limited duration, if the conditions specified in that Article were fully met, it was observed, however, that neither of the two Members had invoked the provisions of Article 6 as a justification for the introduction of the new restrictions. Keeping in mind also the provisions of Article 2.4, it could be concluded on the basis of the arguments presented above that the introduction of the new restrictions on imports of category 666 products from Pakistan, even if mutually agreed between the two Members, could not be justified under the ATC."[38]

35. With a view to giving due consideration to possible readings to the fifth sentence of Article 5.4 other than its interpretation referenced in paragraphs 32–34 above, the TMB also noted:

"It could also appear, however, that the language of the fifth sentence of Article 5.4 was vague and permissive, not setting any limitation on the kind of actions that would constitute possible 'other remedies'. It could, therefore, be argued that this formulation provided broad discretion to the Members concerned in reaching an agreement, in consultation, on what they consider in a particular case to be appropriate remedies (other than those defined in the preceding sentences of the same Article). On the basis of such a reasoning, one could not exclude an argument that the introduction of restrictions on products previously not subject to such restrictions could be considered as a possibility for providing 'other remedies'."[39]

36. With respect to the treatment of the measure at issue under Article 2.17, see the excerpts from the reports of the TMB referenced in paragraph 21 above. Also, with respect to the same issue under Article 5.6, see the excerpt from the report of the TMB referenced in paragraph 37 below.

3. Article 5.6

37. Concerning a mutually agreed solution notified by Pakistan under Article 2.17 and by the United States under Article 5, which provided, *inter alia*, for the introduction of a new restraint (on United States imports from Pakistan on products falling under United States categories 666–S and 666–P), the TMB examined, with respect to the measure referenced in paragraphs 21 and 32 above, whether the introduction of new quantitative import restrictions was permitted under Article 5.6, and held that "it could be argued that the introduction of the new restraints, even if mutually agreed between the two Members, could not be justified in the context of Article 5.6":

"It could be argued that Article 5.6 did not allow for taking such measures as the introduction of new quan-

[37] G/TMB/R/45, paras. 36–37.
[38] G/TMB/R/45, para. 38.
[39] G/TMB/R/45, para. 39.

titative restrictions. The second sentence of Article 5.6 envisaged that appropriate measures, consistent with domestic laws and procedures, should be taken against the exporters or importers involved. Therefore, it appeared that a mutually satisfactory solution reached pursuant to this provision would encompass appropriate measures against the firms involved (exporters and/or importers), as opposed to those against governments. In addition, while Article 5.6 was not precise in providing Members with modalities for taking 'appropriate measures' in cases where false declarations had been made for purposes of circumvention, it could be contended that the loose disciplines attached to this provision (e.g. there was no requirement to notify the appropriate measures agreed to the TMB), compared to other provisions concerning the taking of measures having a restrictive effect embodied in the ATC, raised doubts as to whether the introduction of new restrictions could be contemplated under this particular provision. Based on these considerations as well as on the analysis regarding the broader context defined by the ATC, . . . it could be argued that the introduction of the new restraints, even if mutually agreed between the two Members, could not be justified in the context of Article 5.6.

It could also be argued, that if one accepted that (i) incorrect marking of cotton bedsheets had been, at least in part, the root of the problem identified and that (ii) this practice amounted to a false declaration as defined in Article 5.6, the language of this Article authorized the Members concerned to agree, in case when no, or inadequate, administrative measures were being applied to address and/or to take action against such circumvention, on any kind of mutually satisfactory solution, possibly including the introduction of new restraints. Such a conclusion would rely, *inter alia,* on the lack in this language of any explicit indication regarding the possible nature of the measures that could be agreed between the Members as a mutually satisfactory solution. The TMB declined to take a definitive position at this stage regarding the applicability of this provision, as well as on the conformity of the actions taken with Article 5.6."[40]

38. With respect to the treatment of the measure at issue under Article 2.17, see excerpts from the reports of the TMB referenced in the section dealing with Article 2.17, paragraph 21 above.

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6

1. Members recognize that during the transition period it may be necessary to apply a specific transitional safeguard mechanism (referred to in this Agreement as "transitional safeguard"). The transitional safeguard may be applied by any Member to products covered by the Annex, except those integrated into GATT 1994 under the provisions of Article 2. Members not maintaining restrictions falling under Article 2 shall notify the TMB within 60 days following the date of entry into force of the WTO Agreement, as to whether or not they wish to retain the right to use the provisions of this Article. Members which have not accepted the Protocols extending the MFA since 1986 shall make such notification within 6 months following the entry into force of the WTO Agreement. The transitional safeguard should be applied as sparingly as possible, consistently with the provisions of this Article and the effective implementation of the integration process under this Agreement.

2. Safeguard action may be taken under this Article when, on the basis of a determination by a Member[5], it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. Serious damage or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preference.

(*footnote original*) [5] A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious damage or actual threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious damage, or actual threat thereof, shall be based on the conditions existing in that member State and the measure shall be limited to that member State.

3. In making a determination of serious damage, or actual threat thereof, as referred to in paragraph 2, the Member shall examine the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment; none of which, either alone or combined with other factors, can necessarily give decisive guidance.

4. Any measure invoked pursuant to the provisions of this Article shall be applied on a Member-by-Member basis. The Member or Members to whom serious damage, or actual threat thereof, referred to in paragraphs 2 and 3, is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent[6], from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other sources, market share, and import and domestic prices at a comparable stage of commercial transaction; none of these factors,

[40] G/TMB/R/45, paras. 47–48.

either alone or combined with other factors, can necessarily give decisive guidance. Such safeguard measure shall not be applied to the exports of any Member whose exports of the particular product are already under restraint under this Agreement.

(*footnote original*) [6] Such an imminent increase shall be a measurable one and shall not be determined to exist on the basis of allegation, conjecture or mere possibility arising, for example, from the existence of production capacity in the exporting Members.

5. The period of validity of a determination of serious damage or actual threat thereof for the purpose of invoking safeguard action shall not exceed 90 days from the date of initial notification as set forth in paragraph 7.

6. In the application of the transitional safeguard, particular account shall be taken of the interests of exporting Members as set out below:

(a) least-developed country Members shall be accorded treatment significantly more favourable than that provided to the other groups of Members referred to in this paragraph, preferably in all its elements but, at least, on overall terms;

(b) Members whose total volume of textile and clothing exports is small in comparison with the total volume of exports of other Members and who account for only a small percentage of total imports of that product into the importing Member shall be accorded differential and more favourable treatment in the fixing of the economic terms provided in paragraphs 8, 13 and 14. For those suppliers, due account will be taken, pursuant to paragraphs 2 and 3 of Article 1, of the future possibilities for the development of their trade and the need to allow commercial quantities of imports from them;

(c) with respect to wool products from wool-producing developing country Members whose economy and textiles and clothing trade are dependent on the wool sector, whose total textile and clothing exports consist almost exclusively of wool products, and whose volume of textiles and clothing trade is comparatively small in the markets of the importing Members, special consideration shall be given to the export needs of such Members when considering quota levels, growth rates and flexibility;

(d) more favourable treatment shall be accorded to re-imports by a Member of textile and clothing products which that Member has exported to another Member for processing and subsequent reimportation, as defined by the laws and practices of the importing Member, and subject to satisfactory control and certification procedures, when these products are imported from a Member for which this type of trade represents a significant proportion of its total exports of textiles and clothing.

7. The Member proposing to take safeguard action shall seek consultations with the Member or Members which would be affected by such action. The request for consultations shall be accompanied by specific and relevant factual information, as up-to-date as possible, particularly in regard to: (*a*) the factors, referred to in paragraph 3, on which the Member invoking the action has based its determination of the existence of serious damage or actual threat thereof; and (*b*) the factors, referred to in paragraph 4, on the basis of which it proposes to invoke the safeguard action with respect to the Member or Members concerned. In respect of requests made under this paragraph, the information shall be related, as closely as possible, to identifiable segments of production and to the reference period set out in paragraph 8. The Member invoking the action shall also indicate the specific level at which imports of the product in question from the Member or Members concerned are proposed to be restrained; such level shall not be lower than the level referred to in paragraph 8. The Member seeking consultations shall, at the same time, communicate to the Chairman of the TMB the request for consultations, including all the relevant factual data outlined in paragraphs 3 and 4, together with the proposed restraint level. The Chairman shall inform the members of the TMB of the request for consultations, indicating the requesting Member, the product in question and the Member having received the request. The Member or Members concerned shall respond to this request promptly and the consultations shall be held without delay and normally be completed within 60 days of the date on which the request was received.

8. If, in the consultations, there is mutual understanding that the situation calls for restraint on the exports of the particular product from the Member or Members concerned, the level of such restraint shall be fixed at a level not lower than the actual level of exports or imports from the Member concerned during the 12–month period terminating two months preceding the month in which the request for consultation was made.

9. Details of the agreed restraint measure shall be communicated to the TMB within 60 days from the date of conclusion of the agreement. The TMB shall determine whether the agreement is justified in accordance with the provisions of this Article. In order to make its determination, the TMB shall have available to it the factual data provided to the Chairman of the TMB, referred to in paragraph 7, as well as any other relevant information provided by the Members concerned. The TMB may make such recommendations as it deems appropriate to the Members concerned.

10. If, however, after the expiry of the period of 60 days from the date on which the request for consultations was received, there has been no agreement between the Members, the Member which proposed to take safeguard action may apply the restraint by date of import or date of export, in accordance with the provisions of

this Article, within 30 days following the 60–day period for consultations, and at the same time refer the matter to the TMB. It shall be open to either Member to refer the matter to the TMB before the expiry of the period of 60 days. In either case, the TMB shall promptly conduct an examination of the matter, including the determination of serious damage, or actual threat thereof, and its causes, and make appropriate recommendations to the Members concerned within 30 days. In order to conduct such examination, the TMB shall have available to it the factual data provided to the Chairman of the TMB, referred to in paragraph 7, as well as any other relevant information provided by the Members concerned.

11. In highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair, action under paragraph 10 may be taken provisionally on the condition that the request for consultations and notification to the TMB shall be effected within no more than five working days after taking the action. In the case that consultations do not produce agreement, the TMB shall be notified at the conclusion of consultations, but in any case no later than 60 days from the date of the implementation of the action. The TMB shall promptly conduct an examination of the matter, and make appropriate recommendations to the Members concerned within 30 days. In the case that consultations do produce agreement, Members shall notify the TMB upon conclusion but, in any case, no later than 90 days from the date of the implementation of the action. The TMB may make such recommendations as it deems appropriate to the Members concerned.

12. A Member may maintain measures invoked pursuant to the provisions of this Article: (*a*) for up to three years without extension, or (*b*) until the product is integrated into GATT 1994, whichever comes first.

13. Should the restraint measure remain in force for a period exceeding one year, the level for subsequent years shall be the level specified for the first year increased by a growth rate of not less than 6 per cent per annum, unless otherwise justified to the TMB. The restraint level for the product concerned may be exceeded in either year of any two subsequent years by carry forward and/or carryover of 10 per cent of which carry forward shall not represent more than 5 per cent. No quantitative limits shall be placed on the combined use of carryover, carry forward and the provision of paragraph 14.

14. When more than one product from another Member is placed under restraint under this Article by a Member, the level of restraint agreed, pursuant to the provisions of this Article, for each of these products may be exceeded by 7 per cent, provided that the total exports subject to restraint do not exceed the total of the levels for all products so restrained under this Article, on the basis of agreed common units. Where the periods of application of restraints of these products do not coincide with each other, this provision shall be applied to any overlapping period on a *pro rata* basis.

15. If a safeguard action is applied under this Article to a product for which a restraint was previously in place under the MFA during the 12–month period prior to the entry into force of the WTO Agreement, or pursuant to the provisions of Article 2 or 6, the level of the new restraint shall be the level provided for in paragraph 8 unless the new restraint comes into force within one year of:

> (a) the date of notification referred to in paragraph 15 of Article 2 for the elimination of the previous restraint; or
>
> (b) the date of removal of the previous restraint put in place pursuant to the provisions of this Article or of the MFA

in which case the level shall not be less than the higher of (*i*) the level of restraint for the last 12–month period during which the product was under restraint, or (*ii*) the level of restraint provided for in paragraph 8.

16. When a Member which is not maintaining a restraint under Article 2 decides to apply a restraint pursuant to the provisions of this Article, it shall establish appropriate arrangements which: *(a)* take full account of such factors as established tariff classification and quantitative units based on normal commercial practices in export and import transactions, both as regards fibre composition and in terms of competing for the same segment of its domestic market, and *(b)* avoid over-categorization. The request for consultations referred to in paragraphs 7 or 11 shall include full information on such arrangements.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

1. General

(a) Elements of Article 6

39. In *US – Cotton Yarn*, the Appellate Body held that in applying Article 6 three different, although interrelated, elements of that provision have to be examined, namely "causation", "attribution" and "application":

> "[W]e have to distinguish three different, but interrelated, elements under Article 6: first, *causation* of serious damage or actual threat thereof by increased imports[41]; second, *attribution* of that serious damage to the Member(s) the imports from whom contributed to

[41] (*footnote original*) The element of *causation* of serious damage is referred to in paragraph 2 of Article 6 of the *ATC*. The second sentence of paragraph 2 provides that serious damage "must demonstrably be caused by such increased quantities in total imports of that product" and not by "*other factors*" such as technological changes or changes in consumer preferences.

that damage; and third, *application* of transitional safeguard measures to such Member(s)."[42] [43]

(b) Introduction of a restraint under Article 6 without notification to the TMB

40. In the context of examining a new restriction introduced by the United States on Turkey's exports of certain textile products, as part of a broader understanding reached between the two Members, the TMB held that it required notification of restraint measures under Article 6:

> "Article 6 specifically provides in its paragraph 1 the possibility of introducing 'transitional safeguard' which, as stipulated in other provisions of the same Article, takes the form of restraint measures. However, the restraint measure or measures taken under this Article have to be notified to the TMB, whether agreed or applied unilaterally, as clearly set out in Articles 6.9, 6.10 and 6.11, so as to enable the TMB to examine the measure(s) in question, as required by the provisions of Article 6. Therefore, the measure agreed between Turkey and the United States could not have been taken under Article 6 since that Article requires notification and since both Members had stated to the TMB that the measure had been taken 'pursuant to a provision of the ATC which does not require notification to the TMB'."[44]

(c) Scope of review

(i) Jurisprudence

41. In *US – Underwear*, the United States provided the Panel with the statement issued by the United States authorities on 23 March 1995 (the "March Statement"), based upon which it proposed the transitional safeguard measure in question, and another statement which the United States later provided to the complainant in the TMB review proceedings (the "July Statement"). The Panel, in a statement not reviewed by the Appellate Body, restricted its review to an examination of the March Statement, noting as follows:

> "We believe that statements subsequent to the March Statement should not be viewed as a legally independent basis for establishing serious damage or actual threat thereof in the present case. A restriction may be imposed, in a manner consistent with Article 6 of the ATC, when based on a determination made in accordance with the procedure embodied in Article 6.2 and 6.4 of the ATC. This is precisely the role that the March Statement is called upon to play. Consequently, to review the alleged inconsistency of the US action with the ATC, we must focus our legal analysis on the March Statement as the relevant legal basis for the safeguard action taken by the United States."[45]

42. While it declined to consider a later statement which the United States had provided to the complainant (Costa Rica) in the TMB review proceedings, as referenced in paragraph 41 above, the Panel on *US – Underwear*, in a finding not reviewed by the Appellate Body, held that it could nevertheless "legitimately take the July Statement into account as evidence submitted by the United States in our assessment of the overall accuracy of the March Statement":

> "The March Statement included under the heading 'Market Situation' one sub-heading entitled 'Serious Damage to the Domestic Industry' (sub-heading A), which contained general information about the effect of underwear imports in Category 352/652, and a second sub-heading 'Industry Statements' (sub-heading B), which summarized statements to the US authorities by individual US companies. To some extent, there was an overlap between the information contained under the two sub-headings. The same categories of information were equally discussed in a statement submitted to the TMB by the United States in July 1995 (the 'July Statement'). While we have concluded that the July Statement should not be viewed as a legally independent basis for establishing serious damage or actual threat thereof, we feel that we can legitimately take the July Statement into account as evidence submitted by the United States in our assessment of the overall accuracy of the March Statement. Consequently, we will use the July Statement for this limited purpose only. By doing so, we do not share the concerns expressed by the United States that such use of the July Statement would impair proceedings in the TMB in the future. We consider that a reluctance to submit updated information would normally adversely affect Members concerned. The interest to cooperate as required by Articles 6.7 and 6.9 of the ATC would prevail."[46]

43. Also in the context of the scope of review, the Panel on *US – Underwear* held with respect to the information concerning bilateral negotiation between the parties:

> "In our view, the wording of Article 4.6 of the DSU makes it clear that offers made in the context of consultations are, in case a mutually agreed solution is not reached, of no legal consequence to the later stages of dispute settlement, as far as the rights of the parties to the dispute are concerned. Consequently, we will not base our findings on such information."[47]

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[42] (*footnote original*) The element of *application* of transitional safeguard measures to exporting Member(s) is dealt with in the first and the last sentences of paragraph 4 of Article 6 of the *ATC*. It is also dealt with in various places in paragraphs 6 through 16 of that Article. The first sentence of Article 6.4 provides that transitional safeguard measures "shall be applied on a Member-by-Member basis".

[43] Appellate Body Report on *US – Cotton Yarn*, para. 109.

[44] G/TMB/R/60, para. 30.

[45] Panel Report on *US – Underwear*, para. 7.26.

[46] Panel Report on *US – Underwear*, para. 7.29.

[47] Panel Report on *US – Underwear*, para. 7.27.

44. In *US – Cotton Yarn*, the Appellate Body considered that the Panel, in assessing the due diligence required of the United States in making a determination under Article 6.2, had exceeded its mandate under Article 11 of the DSU by considering certain evidence that could not possibly have been examined by the United States when it made that determination. The Appellate Body concluded:

> "[I]f a Member that has exercised due diligence in complying with its obligations of investigation, evaluation and explanation, were held responsible before a panel for what it *could not have known* at the time it made its determination, this would undermine the right afforded to importing Members under Article 6 to take transitional safeguard action when the determination demonstrates the fulfilment of the specific conditions provided for in this Article".[48]

(ii) TMB statements

45. At its meeting in November 1998, in examining a safeguard measure introduced by Colombia against imports of certain products from Korea and Thailand, the TMB observed:

> "With respect to requesting additional information, as referred to by Colombia, the TMB was of the view that its review of the measures introduced by Colombia had to be based essentially on the information made available by Colombia in accordance with Article 6.7 at the time the request for consultations had been made."[49]

(d) Burden of proof

46. In *US – Wool Shirts and Blouses*, on the issue of the burden of proof regarding whether a certain transitional safeguard measure complied with the requirements in Article 6, the Appellate Body held that it was for India to demonstrate that the United States measure had been imposed in violation of Article 6. In so doing, the Appellate Body also indirectly reversed a statement by the Panel on *US – Underwear*, which had held, in a finding not reviewed by the Appellate Body, that the burden of proof under Article 6 fell upon the Member imposing the safeguard measure. In *US – Wool Shirts and Blouses*, the Appellate Body found that Article 6 embodied "a fundamental part of the rights and obligations of WTO Members concerning non-integrated textile and clothing products covered by the *ATC* during the transitional period":

> "We agree with the Panel that it was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the *ATC*. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the presumption.
>
> . . .
>
> The transitional safeguard mechanism provided in Article 6 of the *ATC* is a fundamental part of the rights and obligations of WTO Members concerning non-integrated textile and clothing products covered by the *ATC* during the transitional period. Consequently, a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim. In this case, India claimed a violation by the United States of Article 6 of the *ATC*. We agree with the Panel that it, therefore, was up to India to put forward evidence and legal argument sufficient to demonstrate that the transitional safeguard action by the United States was inconsistent with the obligations assumed by the United States under Articles 2 and 6 of the *ATC*. India did so in this case. And, with India having done so, the onus then shifted to the United States to bring forward evidence and argument to disprove the claim. This, the United States was not able to do and, therefore, the Panel found that the transitional safeguard action by the United States 'violated the provisions of Articles 2 and 6 of the ATC'."[50]

(e) Standard of review

47. For jurisprudence relating to the standard of review under the *ATC*, see Section XI.B.6(b) of the Chapter on the *DSU*.

(f) Specificity of data

48. At its meeting in March 1997, in examining a transitional safeguard measure taken by Brazil, with respect to the desired nature of information underpinning such measures, the TMB stated:

> "[I]n case of recourse to Article 6, it was important to provide as much factual information and data as possible that was specific to the product category itself, as product-specific information and data should have a major impact on the overall assessment whether serious damage or actual threat thereof could be demonstrated."[51]

49. On the same issue as referenced in paragraph 48 above, the TMB continued:

> "[T]he Body agreed with Hong Kong's main contention according to which a determination of serious damage could not be made almost entirely by reference to, and therefore by inferences drawn from, data relating to

[48] Appellate Body Report on *US – Cotton Yarn*, para. 79.
[49] G/TMB/R/49, para. 25. The TMB repeated this statement on several occasions (G/TMB/R/51, para. 32; G/TMB/R/81, paras. 15, 17; G/TMB/R/83, para. 26).
[50] Appellate Body Report on *US – Wool Shirts and Blouses*, pp. 13, 16 and 17.
[51] G/TMB/R/26, para. 25.

much broader industries in respect of which damage is claimed."[52]

2. Article 6.2

(a) General

50. In *US – Cotton Yarn*, the Appellate Body explained that Article 6.2 provides for three analytical steps which precede the attribution exercise demanded by Article 6.4 (see paragraphs 80–89 below):

> "Attribution is preceded by three analytical steps which are set forth in Article 6.2: (i) an assessment of whether the domestic industry is suffering serious damage (or actual threat thereof) according to Articles 6.2 and 6.3; (ii) an examination of whether there is a surge in imports as envisaged by Article 6.2; and, (iii) an establishment of a causal link between the surge in imports and the serious damage (or actual threat thereof); according to the last sentence of Article 6.2, '[s]erious damage . . . must demonstrably be caused by such increased quantities in *total* imports of that product and not by . . . other factors'. (emphasis added)"[53]

(b) "a particular product is being imported"

51. At its fourth meeting in July 1998, in examining a transitional safeguard measure introduced by Colombia on imports of certain products from Brazil and India, the TMB held the phrase "is being imported" indicated a temporal proximity between the serious damage and the request for consultation:

> "Article 6.2 referred to a situation where 'a particular product *is being imported* [. . .] in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry' (emphasis added). This causal link seemed to indicate that the serious damage had to occur in a period close to the time at which the request for consultation was made. It followed that the information provided to demonstrate the serious damage had to be recent."[54]

(c) "in such increased quantities"

52. At its meeting in January 2000, the TMB considered the reasons given by Argentina for its inability to conform with the TMB's recommendation to rescind a safeguard measure imposed on certain imports from Brazil. The TMB pointed to the decline in imports and held:

> "Regarding the need to consider the increase in imports not only in absolute terms, but 'also in relation to the parameters for determining the damage mentioned in Article 6.3', as claimed by Argentina, the TMB observed that the conditions defined in Article 6.2 did not allow for the application of transitional safeguard measures in cases where imports were declining, even though their share in the apparent market were increasing."[55]

53. At its meeting in September 2001, the TMB examined the safeguard measure imposed by Poland on imports of certain textile products from Romania. The TMB, observing the trend of imports over a five-year period, held that the reference period should be seen in its proper context, taking into account the continuous and significant decrease of imports of the relevant product in the years prior to the reference period:

> "In analysing the above information, the TMB noted that there had been an increase in the volume of total imports in the year 2000, the reference period, compared to the previous year. It could not be ignored, however, that the volume of imports continuously decreased in 1998 and 1999, and that the level achieved in 2000 still remained well below the volume of total imports in 1996 and 1997, respectively. In this light, the trends indicated, at most, a recovery of total imports, but did not appear to substantiate the claim of a significant increase compared to the performance achieved in previous years. As to the argument of Poland that the decrease experienced in 1998 and 1999 was only in absolute terms, but not relative to consumption, the TMB observed that the ATC does not incorporate the concept of increased quantities of imports relative to other factors.
>
> In light of the trends described above, the TMB was of the view that the 10.5 per cent increase in total imports reported for the reference period should be assessed in its proper context. Noting the argument by Romania that it had serious doubts as to whether an increase of total imports of this magnitude could constitute a sufficient demonstration in the meaning of Article 6.2, which requires the demonstration that 'a particular product is being imported into its territory **in such increased quantities** as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products (emphasis added)', the TMB also expressed its doubts that the alleged serious damage could be caused by the 10.5 per cent increase in total imports during the reference period. These doubts notwithstanding, the TMB decided to review the state of the Polish domestic industry and to revert to this aspect of the case, if necessary, at a subsequent stage of its examination."[56]

(d) "serious damage, or actual threat thereof"

(i) Concepts of "serious damage, or actual threat thereof"

54. In *US – Underwear*, the Panel noted that, contrary to the determination of "serious damage", a determination of an "actual threat thereof" requires the

[52] G/TMB/R/26, para. 28.
[53] Appellate Body Report on *US – Cotton Yarn*, para. 112.
[54] G/TMB/R/46, para. 13.
[55] G/TMB/R/60, para. 13.
[56] G/TMB/R/81, para. 21–22.

competent authorities to carry out a prospective analysis in order that they can objectively conclude that unless action is taken, damage will surely occur in the near future:

> "Article 6.2 and 6.4 of the ATC make reference to 'serious damage, or actual threat thereof'. The word 'thereof', in our view, clearly refers to 'serious damage'. The word 'or' distinguishes between 'serious damage' and 'actual threat thereof'. In our view, 'serious damage' refers to a situation that has already occurred, whereas 'actual threat of serious damage' refers to a situation existing at present which might lead to serious damage in the future. Consequently, in our view, a finding on 'serious damage' requires the party that takes action to demonstrate that damage has already occurred, whereas a finding on 'actual threat of serious damage' requires the same party to demonstrate that, unless action is taken, damage will most likely occur in the near future.[57] The March Statement contains no elements of such a prospective analysis. In our view, even if the mention of 'actual threat' in the Diplomatic Note accompanying the March Statement were to be considered, the fact that the March Statement made no reference to actual threat and contained no elements of such a prospective analysis was dispositive *per se*. Consequently, we do not agree with the US argument that the March Statement supports a finding on actual threat of serious damage."[58]

55. In *US – Cotton Yarn*, the Panel quoted the above-mentioned paragraph in *US – Underwear* as support for its finding that when a, "actual threat of serious damage" supplements the determination of existing serious damage, the former is redundant and not an autonomous concept. Consequently, to the extent that the serious damage is established, a determination of an "actual threat thereof" is supplementary and needs not to be followed by a prospective analysis. In a ruling not reviewed by the Appellate Body, the Panel held:

> "In our view, the US finding on actual threat of serious damage contained in the 1998 Market Statement is essentially a finding that the existing 'serious damage' to the domestic industry would continue if imports were to continue as before. It would seem a reasonable inference to assume that if the trend in imports were to continue, the trend in domestic sales would continue, and consequently, the existing 'serious damage' would continue. Under the terms of Article 6.4, there seems to be no basis for demanding any further 'prospective analysis' than taking into consideration the prospect that the price-undercutting of imports from Pakistan would likely continue, in contrast to Pakistan's argument.
>
> However, this US finding of 'actual threat of serious damage' in the 1998 Market Statement is totally dependent on the finding of serious damage. It is based on a finding that there is current serious damage and extrapolates to a conclusion that there is an actual threat of the serious damage continuing. This means that it does not serve as an independent (or alternative) determination of actual threat of serious damage. It is a redundant exercise and that means that if there is a fatal flaw in the serious damage determination, the actual threat determination necessarily falls, too. If the United States were to make an independent finding of actual threat of serious damage, further analysis would need to be done to substantiate the finding. In other words, a prospective analysis is required if an independent finding of actual threat is to be made rather than a redundant and dependant one as was effectively made by the United States in the 1998 Market Statement."[59]

(ii) Indicators of serious damage

56. In *US – Cotton Yarn*, Pakistan had argued that the United States should not have treated as indicators of damage to its domestic industry the fact that establishments producing combed cotton yarn had been retooled to produce carded cotton yarn or any other products. The Panel, in a statement not addressed by the Appellate Body, considered that this issue related to the interpretation of "damage" under Article 6.2 and concluded "the fact that an establishment changed its products to those which are neither like nor directly competitive products should be treated as an indicator of 'serious damage' to a subject domestic industry":

> "In the Panel's view, this issue concerns the interpretation of the term 'damage' under Article 6.2. Transitional safeguard measures are permitted to protect the domestic industry producing – rather than individual companies which are producers of – 'like and/or directly competitive products' from import competition. Pakistan itself argues that the scope of the domestic industry is determined not by producers but by products. Otherwise, changes in ownership of domestic enterprises producing 'like and/or directly competitive products' could be deemed as an indicator of 'serious damage' to the 'domestic industry'.
>
> In this connection, we recall that Pakistan argued that 'if a plant produces carded instead of combed yarn, thrives in its new capacity and retains its workforce, the increase in imports obviously did not cause *grave injury that impaired its value or usefulness*.' However, we disagree with this argument. Assume that, in reaction to import surge, domestic producers of certain textile products merged into companies in another industry; and the establishments of the acquired producers, after retooling

[57] (*footnote original*) See GATT Panel Reports on *United States – Measures Affecting Imports of Softwood Lumber from Canada*, BISD 40S/358, paras. 402, 408; *New Zealand – Imports of Electrical Transformers from Finland*, para. 4.8; and *Korea – Antidumping Duties on Imports of Polyacetal Resins from the United States*, paras. 253, 272, 278.

[58] Panel Report on *US – Underwear*, para. 7.55.

[59] Panel Report on *US – Cotton Yarn*, paras. 7.138–7.139.

to produce totally different products, achieved the same level of production, sales, profit, employment, etc. In this situation, indeed, the 'value' of the retooled establishments may not have been impaired in some overall sense, but it would be obviously unreasonable that no transitional safeguard measure would be permitted since the 'domestic industry' producing the textile products was driven out by the import surge. In our view, the fact that an establishment changed its products to those which are neither like nor directly competitive products should be treated as an indicator of 'serious damage' to a subject domestic industry."[60]

(iii) Choice of investigation period

Length of the investigation period

57. In *US – Cotton Yarn*, Pakistan had argued that the eight-month investigation period chosen by the United States authorities for determining serious damage and causation was not enough. The Panel, in a finding not addressed by the Appellate Body, "deem[ed] it inappropriate to set out a general guideline on the length of the period during which damage or causation occurs, when there is no specific treaty language in the ATC".[61] The Panel further considered that the question of whether an eight-month period was sufficiently long for finding serious damage and causation should be done on a "case-by-case determination".[62] The Panel dismissed Pakistan's claim on the ground that Pakistan had not established that the eight-month period was unjustifiable:

"**The Panel** first notes that Article 6.2 does not explicitly set forth any specific period of time as the minimum period for investigation, or for determining whether damage is serious or, in turn, is caused by the subject imports. The parties agreed on this point.

Second, Article 6.7 of the ATC requires that when the Member invoking a transitional safeguard measure seeks consultations with the Member or Members which would be affected by such action, it shall provide the Member or Members with 'specific and relevant factual information, as up-to-date as possible, particularly in regard to: (a) the factors . . . on which the Member invoking the action has based its determination of the existence of serious damage or actual threat of damage; and (b) the factors . . . on the basis of which it proposes to invoke the safeguard action with respect to the Member or Members concerned.' Also, that Article provides that 'the information shall be related, as closely as possible, to identifiable segments of production and to the reference period set out in paragraph 8', which period is defined under paragraph 8 as 'the 12–month period terminating two months preceding the month in which the request for consultation was made.' In our view, Article 6.7 does not address, directly or indirectly, the length of either investigation periods or periods during which damage occurs. For example, the requirement that the information to be provided to the exporting Member or Members 'be related, as closely as possible, to the [12–month] reference period' does not give any guidance as to how long the investigation period should be or how long damage should continue in order to constitute 'serious damage' and causation thereof.

In this respect, we recall Pakistan's argument that 'since the damage must be determined to be "serious", the period must be adequately long to discern that the effect of imports was more than just temporary.' However, it is unclear how this general consideration demands that the period during which the serious damage occurred must be longer than the eight months utilised by the United States. In our view, whether or not the chosen period is justifiably long would depend on, at least partly, the extent of the damage suffered by a subject domestic industry during that period. Thus, we deem it inappropriate to set out a general guideline on the length of the period during which damage or causation occurs, when there is no specific treaty language in the ATC."[63]

Most recent period

58. At its meeting in October 1999, the TMB examined certain transitional safeguard measures taken by Argentina on imports of several products from Brazil. With respect to the choice of the investigation period, the TMB stated that "a determination of serious damage, in the sense of Article 6, could not be based on developments that had affected the domestic industry years before the actual determination was being made":

"[T]he TMB reiterated that in examining and assessing the determination of serious damage, or actual threat thereof, caused to the domestic industry producing like and/or directly competitive products by increased quantities of imports, decisive guidance had to be provided by the developments which had occurred in the most recent period, while data related to the longer time-period provided supplementary information that could support the justification of the determination made. The evidence that developments in the most recent period should have a decisive role in such a determination was, in the view of the TMB, supported by the time-frame referred to in Articles 6.7 and 6.8, by the requirements defined in Article 6.2 that in a determination it has to be demonstrated that a particular product 'is being imported' in increased quantities, and by the period of validity of a determination of serious damage or actual threat thereof for the purpose of invoking safeguard as stated in Article 6.5. Also, the object and the nature of

[60] Panel Report on *US – Cotton Yarn*, para. 7.104.
[61] Panel Report on *US –Cotton Yarn*, para. 7.115.
[62] Panel Report on *US –Cotton Yarn*, para. 7.120.
[63] Panel Report on *US – Cotton Yarn*, paras. 7.113–7.115.

the ATC (constituting an agreement for a transition period) as well as Article 6.12 (allowing for the maintenance of a transitional safeguard measure for up to three years without extension) confirmed that a determination of serious damage, in the sense of Article 6, could not be based on developments that had affected the domestic industry years before the actual determination was being made."[64]

(e) "the domestic industry producing like and/or directly competitive products"

(i) Product-oriented definition of domestic industry

59. In *US – Cotton Yarn*, which dealt with a safeguard measure introduced by the United States on imports of cotton yarn from Pakistan (see paragraph 70 below), the issue of the exclusion by the United States from the scope of its definition of domestic industry of the vertically integrated fabric producers who produce yarn for their own internal use was considered. The Appellate Body, which upheld the Panel's finding that such an exclusion was inconsistent with Article 6.2[65], was of the view that the definition of domestic industry is "product-oriented and not producer-oriented, and that the definition must be based on the products[66] produced by the *domestic industry* which are to be compared with the imported product in terms of their being like or directly competitive".[67]

(ii) "producing"

60. In *US – Cotton Yarn*, the Appellate Body defined the scope of the term "producing" in Article 6.2 as producing for commercial purposes and concluded that its meaning was not dependent on what the producer chooses to do with its product:

> "[T]he term 'producing' in Article 6.2 means producing for commercial purposes and that it cannot be interpreted, in itself, to be limited to or qualified as producing for sale on the merchant or any other segment of the market. The definition of the domestic industry, in terms of Article 6.2, is determined by what the industry *produces*, that is, like and/or directly competitive products. In our view, the term '*producing*', in itself, cannot be given a different or a qualified meaning on the basis of what a domestic producer chooses to do with its product."[68]

(iii) "directly competitive products"

Article III:2 of GATT 1994: interpretation of "directly competitive"

61. In *US – Cotton Yarn*, the Appellate Body looked into the concept of directly competitive products. In this case, the United States had claimed that its exclusion of yarn produced by vertically integrated fabric producers from the definition of the domestic industry was not because they were not producing a like product, but because they were not producing a directly competitive product.[69] The Appellate Body, which had not yet interpreted this concept in the context of Article 6.2, started its analysis by referring to its previous decisions in *Korea – Alcoholic Beverages* and *Japan – Taxes on Alcoholic Beverages*, interpreting the term "directly competitive" products in the context of Interpretative Note *Ad* Article III:2 of the GATT 1994. (In this respect, see also Section IV.C.3 of the Chapter on the *GATT 1994*.) The Appellate Body described the key elements of its interpretation of "directly competitive":

> "(a) The word '*competitive*' means 'characterised by competition'. The context of the competitive relationship is necessarily the marketplace, since that is the forum where consumers choose different products that offer alternative ways of satisfying a particular need or taste. As competition in the marketplace is a dynamic and evolving process, the competitive relationship between products is not to be analyzed exclusively by current consumer preferences[70]; the competitive relationship extends as well to potential competition.[71]
>
> (b) According to the ordinary meaning of the term 'directly competitive', products are competitive or substitutable when they are interchangeable or if they offer alternative ways of satisfying a particular need or taste.[72]
>
> (c) In the context of Article III:2, second sentence, the qualifying word 'directly' in the *Ad* Article suggests a degree of proximity in the competitive relationship between the domestic and imported products. The word 'directly' does not, however, prevent a consideration of both latent and extant demand.[73]
>
> (d) 'Like' products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products,

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[64] G/TMB/R/58, para. 14.
[65] Panel Report on *US – Cotton Yarn*, paras. 7.90 and 8.1(a). Appellate Body Report on *US – Cotton Yarn*, para. 105.
[66] (*footnote original*) In *United States – Lamb Safeguard*, we also found that the *product* defines the scope of the definition of the domestic industry under the *Agreement on Safeguards*. In that case, the "like" product at issue was lamb *meat*. (Appellate Body Report, . . . paras. 84, 86–88 and 95)
[67] Appellate Body Report on *US – Cotton Yarn*, para. 86.
[68] Appellate Body Report on *US – Cotton Yarn*, para. 87.
[69] Therefore, the Appellate Body concluded that it did not need to consider the concept of like product in the context of Article 6.2 because both parties agreed that the yarn imported from Pakistan and yarn produced by the producers of the United States, regardless of whether they are vertically integrated fabric producers or independent yarn producers, were like products.
[70] (*footnote original*) The Appellate Body refers to its Report on *Korea – Alcoholic Beverages*, paras. 114–115.
[71] (*footnote original*) The Appellate Body refers to its Report on *Korea – Alcoholic Beverages*, paras. 115–116.
[72] (*footnote original*) The Appellate Body refers to its Report on *Korea – Alcoholic Beverages*, para. 115.
[73] (*footnote original*) The Appellate Body refers to its Report on *Korea – Alcoholic Beverages*, para. 116.

whereas not all 'directly competitive or substitutable' products are 'like'.[74]"[75]

62. At the same time, the Appellate Body in *US – Cotton Yarn* dismissed the United States' argument that the above elements could not be applied to a definition of "directly competitive products" under Article 6.2 of the *ATC*, because they have been developed to define not only "directly competitive" products but also "directly substitutable" products pursuant to Article III:2 of the GATT 1994. In the Appellate Body's view, "the mere absence of the word 'substitutable' in Article 6.2 of the *ATC*" does not "[render] our interpretation of the term 'directly competitive' under Article III:2 of the GATT 1994 irrelevant in terms of its contextual significance for the interpretation of that term under Article 6.2 of the *ATC*."[76]

Proximity in competitive relationship

63. As regards the definition of "directly competitive" in the specific context of Article 6.2 of the *ATC*, the Appellate Body in *US – Cotton Yarn* put an emphasis on the critical importance of the degree of proximity between domestic and imported products in their competitive relationship to underpin the reasonableness of a safeguard action against an imported product:

> "We must bear in mind that Article 6.2 permits a safeguard action to be taken in order to protect a domestic industry from serious damage (or actual threat thereof) caused by a surge in imports, provided the domestic industry is identified as the industry producing 'like and/or directly competitive products' in comparison with the imported product. The criteria of 'like' and 'directly competitive' are characteristics attached to the domestic product in order to ensure that the domestic industry is the appropriate industry in relation to the imported product. The degree of proximity between the imported and domestic products in their competitive relationship is thus critical to underpin the reasonableness of a safeguard action against an imported product."[77]

Dynamic competitive relationship

64. The Appellate Body on *US – Cotton Yarn* further indicated that the competitive relationship between domestic and imported products is not static but dynamic since "products which are competitive may not be actually competing with each other in the marketplace at a given moment for a variety of reasons, such as regulatory restrictions or producers' decisions":

> "According to the ordinary meaning of the term 'competitive', two products are in a competitive relationship if they are commercially interchangeable, or if they offer alternative ways of satisfying the same consumer demand in the marketplace. 'Competitive' is a characteristic attached to a product and denotes the *capacity* of a product to compete both in a current or a future situation. The word 'competitive' must be distinguished from the words 'competing' or 'being in actual competition'. It has a wider connotation than 'actually competing' and includes also the notion of a potential to compete. It is not necessary that two products be competing, or that they be in actual competition with each other, in the marketplace at a given moment in order for those products to be regarded as competitive. Indeed, products which are competitive may not be actually competing with each other in the marketplace at a given moment for a variety of reasons, such as regulatory restrictions or producers' decisions. Thus, a static view is incorrect, for it leads to the same products being regarded as competitive at one moment in time, and not so the next, depending upon whether or not they are in the marketplace."[78]

"Directly" as a qualifier and limit to "competitive"

65. The Appellate Body on *US – Cotton Yarn* also stressed the relevance of the word "directly" which qualifies and limits the word "competitive" "to signify the degree of proximity that must obtain in the competitive relationship when the products in question are unlike". In the Appellate Body's view, "[u]nder this definition of 'directly', a safeguard action will not extend to protecting a domestic industry that produces unlike products which have only a remote or tenuous competitive relationship with the imported product".[79] In its view:

> "It is significant that the word 'competitive' is qualified by the word 'directly', which emphasizes the degree of proximity that must obtain in the competitive relationship between the products under comparison. As noted earlier, a safeguard action under the *ATC* is permitted in order to protect the domestic industry against competition from an imported product. To ensure that such protection is reasonable, it is expressly provided that the domestic industry must be producing 'like' and/or 'directly competitive products'. Like products are, necessarily, in the highest degree of competitive relationship in the marketplace.[80] In permitting a safeguard action, the first consideration is, therefore, whether the domestic industry is producing a like product as compared with the imported product in question. If this is so, there can be no doubt as to the reasonableness of the safeguard action against the imported product.

[74] (*footnote original*) The Appellate Body refers to its Report on *Korea – Alcoholic Beverages*, para. 118.
[75] Appellate Body Report on *US – Cotton Yarn*, para. 91.
[76] Appellate Body Report on *US – Cotton Yarn*, para. 94.
[77] Appellate Body Report on *US – Cotton Yarn*, para. 95.
[78] Appellate Body Report on *US – Cotton Yarn*, para. 96.
[79] Appellate Body Report on *US – Cotton Yarn*, para. 98.
[80] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages . . .*, para. 118; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449, at 473. In these cases, we stated that "like" products are perfectly substitutable and that "directly competitive" products are characterized by a high, but imperfect, degree of substitutability.

> When, however, the product produced by the domestic industry is not a 'like product' as compared with the imported product, the question arises how close should be the competitive relationship between the imported product and the 'unlike' domestic product. It is common knowledge that unlike or dissimilar products compete or can compete in the marketplace to varying degrees, ranging from direct or close competition to remote or indirect competition. The more unlike or dissimilar two products are, the more remote or indirect their competitive relationship will be in the marketplace. The term 'competitive' has, therefore, purposely been qualified and limited by the word 'directly' to signify the degree of proximity that must obtain in the competitive relationship when the products in question are unlike. Under this definition of 'directly', a safeguard action will not extend to protecting a domestic industry that produces unlike products which have only a remote or tenuous competitive relationship with the imported product."[81]

Captive production

66. In *US – Cotton Yarn*, the United States had excluded from the scope of its definition of domestic industry those vertically integrated United States' fabric manufacturers producing yarn for their own captive consumption. The United States had argued that such yarn was not directly competitive with imported yarn (in spite of being like products) because it was not offered for sale on the market (except when the captive production was "out of balance", and even then only in *de minimis* quantities). The United States also argued that vertically integrated fabric producers were not dependent on the merchant market for meeting any of their requirements of yarn except to a *de minimis* extent. The Appellate Body did not subscribe to the United States' arguments because it was a "static[82] view which makes the competitive relationship between yarn sold on the merchant market and yarn used for internal consumption by vertically integrated producers dependent on what they choose to do at a particular point in time."[83] The Appellate Body concluded that a proper analysis of the competitive relationship between the two products would clearly show that they were "directly competitive" within the meaning of Article 6.2.[84] The Appellate Body also dismissed the United States' argument that its decision in *US – Hot-Rolled Steel* supported the United States' contention that the captive segment of the market can be separated from the merchant market segment because the Appellate Body had observed that captive production was "shielded from direct competition":

> "We did not hold, however, that captive production can be excluded from either the definition of the domestic industry or from the injury analysis. We said that, while an injury analysis can be carried out segment-by-segment before assessing damage to the domestic industry as a whole, an analysis of the captive segment of the market cannot be excluded. Our observation that captive steel production was 'shielded from direct competition' did not mean that steel produced in the captive market segment is not directly competitive with imported steel destined for the merchant market. Our ruling in *United States – Hot-Rolled Steel*, therefore, does not support the argument of the United States."[85]

(iv) "and/or"

67. In *US – Cotton Yarn*, the parties disagreed on the interpretation of the connectors "and/or" in Article 6.2. According to Pakistan, a subject domestic industry consisted of producers of: (i) like products; or (ii) directly competitive products; or (iii) both like products and directly competitive products. In contrast, the United States argued that Members are permitted to identify a "domestic industry" as an industry producing a product that is: (i) like but not directly competitive; or (ii) unlike but directly competitive; or (iii) both like and directly competitive.[86] The Panel, in a finding not addressed by the Appellate Body[87], analysed the various possible combinations and concluded that the United States' interpretation was flawed because: (i) it included "like but not directly competitive products" which is a meaningless alternative; and (ii) it permitted Members to impose transitional safeguard measures for domestic producers of "unlike but directly competitive products":

> "Both of the parties' interpretations of the term 'and/or' are grammatically possible. However, in our view, the chart shows that the US interpretation is flawed in that among other things, one of the categories of a domestic industry, *i.e.* the producers of [like but not directly competitive products], is a meaningless alternative. Imports of any textile product cannot damage producers of 'like but not directly competitive products' through market competition. The United States itself conceded that 'if the products of domestic producers are *not* directly competitive with imports – such as in the case of yarn manufactured by vertically integrated producers for their internal consumption – the need for safeguard action would not arise.' Indeed, not only would the need not arise, but the case could not be made because causation could not be demonstrated. Thus, the treaty would give a meaningless right. In this respect, the US

[81] Appellate Body Report on *US – Cotton Yarn*, paras. 97–98.
[82] As regards "static" versus "dynamic" approach to the competitive relationship between domestic and imported products, see para. 64.
[83] Appellate Body Report on *US – Cotton Yarn*, paras. 99–100.
[84] Appellate Body Report on *US – Cotton Yarn*, para. 101.
[85] Appellate Body Report on *US – Cotton Yarn*, para. 102.
[86] Panel Report on *US – Cotton Yarn*, para. 7.81.
[87] Appellate Body Report on *US – Cotton Yarn*, para. 104.

interpretation is inconsistent with the principle of effectiveness in treaty interpretation.[88]

. . .

[I]n our view, the US interpretation is problematic in permitting Members to impose transitional safeguard measures for domestic producers of 'unlike but directly competitive products'. This means that 'serious damage' would be found based upon the examination of the situation regarding these producers, without taking into consideration the situation regarding producers of 'like and directly competitive products', which are *core* products competing with subject imports. To give an example of the absurdity of the potential result from the US formulation, take the following example of an investigation with respect to an industry producing directly competitive but unlike products. In such a case the imported products could be combed cotton yarn as in the present case, but the domestic industry would not be the cotton yarn industry; rather, it could be the synthetic yarn industry if such products were found to be directly competitive. But because the chosen category is unlike but directly competitive, then the combed cotton yarn producers would be excluded from the investigation. This would leave open the possibility of finding serious damage and causation thereof even where the domestic combed cotton yarn industry was flourishing, but the synthetic yarn industry was in trouble. This would seem to be in direct conflict with the requirement of the treaty language in Article 6.2 that 'Serious damage or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product *and not by such other factors as technological changes or changes in customer preferences*.'" (emphasis added)[89]

(v) TMB statements

68. At its meeting in November 1998, in examining certain transitional safeguard measures introduced by Colombia on imports from Korea and Thailand, the TMB noted that the *ATC* does not include a definition of "domestic industry" and that this leaves a certain discretion to the Members. However, to only account one company, representing 62 per cent of the total domestic production, as the whole domestic industry hindered the TMB in making a proper assessment of the domestic industry:

"[T]he Colombian investigating authorities had determined that one company, which had requested the application of the safeguard measure on imports, represented on average 62 per cent of the total domestic production of plain polyester filaments and, therefore, could be considered to represent the domestic industry. It followed from this determination that Colombia had provided information regarding the economic variables referred to in Article 6.3 which reflected data pertaining to that one company. The TMB observed in this respect that the ATC does not provide a definition of what constitutes the domestic industry. The TMB noted, however, that Colombia had failed to provide information on a significant part of its domestic industry producing plain polyester filaments. This lack of information brought about important uncertainties and, therefore, hampered the TMB's ability to assess the situation of the Colombian industry producing plain polyester filaments."[90]

69. On the subject referenced in the above-mentioned paragraph, the TMB noted that as a consequence of the incomplete information on the domestic industry, it could not be determined whether the commercial difficulties that the sole concerned domestic producer faced (who had requested the investigation) were due to the increase of imports or whether it was a result of enhanced competition between domestic producers:

"[B]earing in mind in particular the information that had been made available by Colombia pursuant to Article 6.7, continued to be of the view that in the absence of any information on a significant part of the domestic industry, it had not been possible to assess the state of the industry producing plain polyester filaments, in particular the effect of increased imports on the companies constituting the domestic industry producing the particular product. Therefore, it had been impossible to determine whether the difficulties encountered by the company requesting the investigation could be attributed to a possible damage caused by the increased volume of total imports or to other factors such as, for example, an important increase in the production of the other domestic company producing plain polyester filaments, resulting in an increased competition between the domestic producers;

. . .

The TMB observed that it had not provided any interpretation of the definition of the term 'domestic industry', as claimed by Colombia. Similarly, the TMB had not suggested that the information on the domestic industry should cover 100 per cent of the domestic producers of such products."[91]

70. At its meeting in April 1999, the TMB examined a safeguard measure introduced by the United States on

[88] (*footnote original*) Appellate Body, in *US – Gasoline*, stated as follows:

> ". . . One of the corollaries of the 'general rule of interpretation' in the V*ienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."

Appellate Body Report on *US – Gasoline*, op. cit., p. 23. *Also* Appellate Body Reports on *Japan – Alcoholic Beverages*, op. cit., p. 12; *US – Underwear*, op. cit., p. 16; *Argentina – Footwear*, op. cit., para. 95; and *Korea – Dairy*, op. cit., para. 81.

[89] Panel Report on *US – Cotton Yarn*, paras. 7.87 and 7.89.

[90] G/TMB/R/49, para. 18.

[91] G/TMB/R/51, para. 21.

certain imports from Pakistan. The United States had determined, with respect to the term "domestic industry producing like and/or directly competitive products" a category of "vertically integrated firms whose yarn did not ordinarily enter normal channels of trade and did not compete with yarn produced for sale in the open market" and that had not provided the TMB with information concerning this category. The TMB recalled that:

> "[A]ccording to Article 6.2, '[s]afeguard action may be taken under this Article when, on the basis of a determination by a Member, it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. Serious damage or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preference'. It followed from this that the factual information referred to in Article 6.7 had to be provided with respect to the domestic industry producing like and/or directly competitive products."[92]

71. The TMB then went on to hold that it "would ordinarily be up to the Body, on the basis of the detailed information provided pursuant to Article 6.7, to determine whether it was justified in excluding a particular segment of production":

> "The TMB noted that the particular product subject to the safeguard measure introduced by the United States was *combed cotton yarn identified as US category 301*. The TMB observed, furthermore, that *in terms of its characteristics any combed cotton yarn was identical, i.e. alike in all respects, including common end-uses, with respect to the particular product subject to the safeguard measure in question*.
>
> The TMB noted that the United States had defined the domestic industry producing products like and/or directly competitive with imports of combed cotton yarn (category 301) as the US industry segment that produced spun yarn for sale, chief weight combed cotton defined as category 301, sold to other firms for use in the manufacture of fabric and finished textile products. It followed from this that the United States had provided information regarding all the economic variables referred to in Article 6.3 with respect to that segment of the industry. As regards the other segment of the US industry producing cotton spun yarn, chief weight combed cotton, the United States had explained that this segment had been composed of vertically integrated firms whose yarn did not ordinarily enter normal channels of trade and did not compete with yarn produced for sale in the open market.
>
> . . .
>
> The TMB noted that the United States had provided arguments why, in its view, the combed cotton yarn production of the vertically integrated mills should be excluded from the scope of the investigation and, by extension, why it had not provided data pursuant to Article 6.3 with respect to this segment of production. The TMB observed that it *would ordinarily be up to the Body, on the basis of the detailed information provided pursuant to Article 6.7, to determine whether it was justified to exclude a particular segment of production. Therefore the TMB would have expected to receive, to the extent practicable, sufficient information to allow it to do so.*"[93] (emphasis added)

72. At its meeting in June 1999, on the same matter, the TMB confirmed its findings referenced in paragraphs 70–71 above:

> "The United States had claimed, in view of the lack of 'direct competitiveness' between the two segments of the industry, that the vertically integrated segment should be excluded from the definition of the domestic industry and, therefore, from the investigation conducted under Article 6 without the necessity to provide specific information on the economic variables, pursuant to Article 6.7, regarding the vertically integrated firms. The TMB, on the other hand, guided by the fact that the domestic industry producing combed cotton yarn encompassed two segments (i.e. that of the 'for sale' companies as well as that of the vertically integrated firms), had held the view that:
>
> - information reflecting the status of the vertically integrated firms should also have been provided by the United States, to the extent practicable, regarding the economic variables defined in Article 6.3; and
> - on the basis of this information the TMB could have determined whether for the purpose of the particular investigation it was justified, or not, to exclude this segment of the production from the scope of the domestic industry producing like and/or directly competitive products for which serious damage, or actual threat thereof, as a result of increased imports, had been claimed."[94]

(f) Causation

(i) "demonstrably"

73. The Panel on *US – Underwear*, referring to Article 6.2, second sentence, emphasized, in a finding not reviewed by the Appellate Body, the word "demonstrably" and found that it is not sufficient to merely make a mechanical causal link between the increase in imports and the alleged serious damage to the domestic industry in making a determination of whether the imports have caused serious damage to the domestic industry:

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[92] G/TMB/R/53, para. 12.
[93] G/TMB/R/53, paras. 13–14 and 16. Emphases added.
[94] G/TMB/R/55, para. 14.

"Nowhere in the March Statement [on which the United States proposed the subject transitional safeguard measure] could we find a discussion or demonstration of causality as required under this provision, beyond the mere statement that the imports were responsible for the damage. This assertion is inadequate, in our view, because of special factors affecting trade in underwear between the United States and a number of exporting Members including Costa Rica. (As noted above, most of this trade with Costa Rica – at least 94 per cent – is apparently 807 or 807A trade.) While such trade may certainly cause damage to the domestic industry, the nature of the trade is such that it may benefit the domestic firms that participate in it (see paragraph 7.44). Thus, in a discussion of whether such trade has caused serious damage, it is necessary to look at this trade to determine its effects on the industry. Because of the nature of the trade it is not possible in these circumstances to conclude from the simple fact that there has been a fall in production that there has also been serious damage. The March Statement undertakes no such discussion. Moreover, the March Statement suggests other possible causes of serious damage, such as rising cotton prices (see paragraph 7.44), but does not consider their role as a cause of such damage. Thus, it cannot be said that the March Statement 'demonstrably' shows that serious damage was caused by increased levels of imports. We find, therefore, that an objective assessment of the March Statement leads to the conclusion that the United States failed to comply with its obligations under Article 6.2 of the ATC by imposing a restriction on imports of Costa Rican underwear without adequately demonstrating that increased imports had caused serious damage."[95]

74. In *US – Wool Shirts and Blouses*, with respect to the term "demonstrably", the Panel found, in a statement not reviewed by the Appellate Body, that under Article 6.2 of the ACT there is an explicit obligation incumbent on the Member introducing the safeguard measure to demonstrate that the serious damage or actual threat thereof was not due to consumer preferences or technological changes:

"[T]he clear wording of Article 6.2 of the ATC '. . . Serious damage or actual threat thereof must demonstrably be caused by . . . and not by such other factors as technological changes or changes in consumer preference' imposes on the importing Member at least an explicit obligation to address the question whether serious damage or actual threat thereof to the particular domestic industry was caused by changes in consumer preferences or technological changes. The importing Member remains free to choose the method of assessing whether the state of its particular domestic industry was caused by such other factors as technological changes or changes in consumer preferences, but it must demonstrate that it has addressed the issue."[96]

(ii) Choice of investigation period

75. At its meeting in April 2000, the TMB reviewed certain transitional safeguard measures taken by Argentina on certain textile products imported from Korea. Korea claimed that since there was a five-month gap between the end of the period investigated and the application of the safeguard measures, Argentina had failed to establish the substantial increase in imports under Article 6.2 and had violated Article 6.7, which stipulates that "the information shall be related, as closely as possible, to . . . the reference period set out in paragraph 8" of Article 6. The TMB responded as follows:

"In the present case, Argentina should have provided in the relevant factual data information at least with respect to the developments in total imports and imports from Korea for the period August 1998–July 1999. At the same time, the TMB recognized that the formulation of Article 6.7 (i.e. that the information shall be related as closely as possible to the reference period) permitted certain flexibility in providing information on the different economic variables listed in Article 6.3, depending on the availability of the relevant data and information. However, the safeguard measures in question had been applied by Argentina pursuant to the provisions of Article 6.11, which required the existence of 'highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair'. The TMB was of the view that the existence of such circumstances could only be proven if information was provided regarding developments which occurred in the very recent period, i.e. during or very close to the reference period.

With reference to the five-month gap between the end of the period investigated (i.e. May 1999) and the provisional application of the safeguard measures in question (i.e. October 1999), as raised by Korea, the TMB observed that the National Commission for Foreign Trade of Argentina had made its finding regarding the determination of the existence of serious damage caused by increased imports on 30 July 1999, on the basis of information including the 12–month period ending in May 1999. Therefore, had the Government of Argentina decided to invoke the provisions of Article 6 soon thereafter, it could have provided all the information referred to in Articles 6.2 and 6.3 covering the reference period specified in Articles 6.7 and 6.8. The TMB noted the explanation of the representative of Argentina that this finding had only been a step in the internal administrative procedures, and that the formal determination of serious damage could only be made by the Minister for the Economy and Public Works and Services. In view of the administrative procedures involved, this decision was made only on 28 October 1999. The TMB

[95] Panel Report on *US – Underwear*, para. 7.46.
[96] Panel Report on *US – Wool Shirts and Blouses*, para. 7.50.

considered that it would be inappropriate for it to comment on the internal administrative procedures involved in any Member's recourse to the provisions of the ATC. The Body had to observe, however, that possible delays in taking decisions, as a result of such procedures, may have an impact on the findings and conclusions the TMB could reach, in accordance with the provisions of the ATC, regarding the justification of the measures in question or aspects thereof."[97]

76. As regards the investigation period for the determination of causation, see paragraphs 57–58 above.

3. Article 6.3

(a) List of conditions in Article 6.3

77. In *US – Underwear*, the Panel held that the criteria in *inter alia* Article 6.3 had to be fulfilled in order for transitional safeguard measures to be consistent with the *ATC*. Further on in the report, the Panel stated that despite its observation that the United States had failed to analyse all of the listed economic factors of Article 6.3 it could not be concluded that the finding of serious damage was inconsistent with that provision, because the economic factors in Article 6.3 represent only an illustrative list. In a finding, not reviewed by the Appellate Body, the Panel held that "Article 6.3 of the ATC contains an indicative list of economic variables that can be taken into account in order to assess the serious damage or actual threat thereof."[98]

78. In *US – Wool Shirts and Blouses*, which the DSB adopted three months after *US – Underwear*, the Panel did not follow the approach adopted in *US – Underwear*. In a finding not reviewed by the Appellate Body, the Panel held that the criteria in Article 6.3 reflected an exhaustive, and not "indicative", list of economic factors. Hence, all the 11 economic factors included in that paragraph had to be considered in order for the imposition of transitional safeguard measures to be consistent with the *ATC*.[99] The Panel held:

> "In our view, the wording of Article 6.2 and 6.3 of the ATC makes it clear that all relevant economic factors, namely, all those factors listed in Article 6.3 of the ATC, had to be addressed by CITA, whether subsequently discarded or not, with an appropriate explanation. The wording of paragraph 3, which reads
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> > '. . . the Member shall examine the effect of those imports on the state of the particular industry, *as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment*.' (emphasis added),
>
> implies two requirements. First, the relevant economic variables must be examined. Second, output, productivity, utilization of capacity, etc. . . . are relevant economic variables. The wording of Article 6.3 of the ATC '. . . the Member *shall examine* the effects . . . on the state of the particular industry, as reflected in changes in *such relevant economic variables as output, productivity, etc*. . . .' makes clear that each of the listed factors is not only relevant but must be examined. Effectively, the listed economic variables are examples of relevant economic variables, they are presumed to be 'relevant economic variables' and must be examined by the importing country in its determination."
>
> The wording of the first sentence of Article 6.3 of the ATC imposes on the importing Member the obligation to examine, at the time of its determination, at least all of the factors listed in that paragraph. The importing Member may decide – in its assessment of whether or not serious damage or actual threat thereof has been caused to the domestic industry – that some of these factors carry more or less weight. At a minimum, the importing Member must be able to demonstrate that it has considered the relevance or otherwise of each of the factors listed in Article 6.3 of the ATC.
>
> The last part of Article 6.3 of the ATC, which states that 'none of which, either alone or combined with other factors, can necessarily give decisive guidance', confirms that some consideration and a relevant and adequate explanation have to be provided *of how the facts as a whole support the conclusion* that the determination is consistent with the requirements of the ATC."[100] (emphasis original)

79. The conclusions of panels and the Appellate Body on the interpretation of the similarly worded provision can be found in Section V.B.4(a)(viii) of the Chapter on the *Agreement on Safeguards*; in Section III.B.6(c) the Chapter on the *Anti-Dumping Agreement*, and Article 15.4 of the Chapter on the *SCM Agreement*.

4. Article 6.4

(a) Steps preceding the attribution of serious damage to individual Members

80. In *US – Cotton Yarn*, the Appellate Body explained that before carrying out the attribution exercise demanded by Article 6.4 it is necessary to apply the three analytical steps set forth in Article 6.2:

> "Attribution is preceded by three analytical steps which are set forth in Article 6.2: (i) an assessment of whether the domestic industry is suffering serious damage (or actual threat thereof) according to Articles 6.2 and 6.3; (ii) an examination of whether there is a surge in imports as envisaged by Article 6.2; and, (iii) an establishment of

[97] G/TMB/R/64, paras. 23–24.
[98] Panel Report on *US – Underwear*, para. 7.22.
[99] Panel Report on *US – Wool Shirts and Blouses*, para. 7.26.
[100] Panel Report on *US – Wool Shirts and Blouses*, paras. 7.25–7.27.

a causal link between the surge in imports and the serious damage (or actual threat thereof); according to the last sentence of Article 6.2, '[s]erious damage . . . must demonstrably be caused by such increased quantities in *total* imports of that product and not by . . . other factors'. (emphasis added)"[101]

(b) Attribution requirements

81. In *US – Cotton Yarn*, the Appellate Body emphasized the two requirements mandated by Article 6.4 to which the attribution of serious damage to individual Members must conform.[102] The first requirement is that "the attribution be confined to only those Members from whom imports have shown a sharp and substantial increase".[103] The second requirement is "a comparative analysis, in the event that there is more than one Member from whom imports have shown a sharp and substantial increase in its imports."[104]

(i) First requirement: only those Members from whom imports have shown a sharp and substantial increase

82. In *US – Cotton Yarn*, the Appellate Body referred to the first attribution requirement as follows:

"The first requirement is that the attribution be confined to only those Members from whom imports have shown a sharp and substantial increase. Such Members will be identified on an individual basis by virtue of the wording in Article 6.4, second sentence, 'on the basis of a sharp and substantial increase in imports, actual or imminent, from such a Member or Members individually'. The Panel interpreted the term 'sharp' to refer to the rate of the import increase, and the term 'substantial' to the amount of that increase.[105] These interpretations of the Panel have not been appealed and are, therefore, not before us."[106]

"sharp" and "substantial" increase in imports

83. The Panel on *US – Cotton Yarn* interpreted the terms "sharp" and "substantial". These interpretations were not considered by the Appellate Body.[107] The Panel interpreted the "term 'sharp' to refer to the percentage increase and the term 'substantial' to refer to the absolute increase".[108]

Attribution to all Members whose imports cause serious damage or threat thereof

84. In *US – Cotton Yarn*, the Panel had found that the United States had acted inconsistently with Article 6.4 by not examining the effect of imports from Mexico (and possibly other appropriate Members) individually when attributing serious damage to Pakistan.[109] The Panel also ruled that Article 6.4 requires attribution to all Members whose imports cause serious damage or actual threat thereof.[110] The Appellate Body, further to upholding the Panel's first finding regarding US inconsistency with Article 6.4[111], considered that its findings on that first issue[112] resolved the dispute as defined by Pakistan's claims before the Panel. The Appellate Body therefore declined to rule on the issue of whether Article 6.4 requires attribution to all Members whose imports are causing serious damage or actual threat thereof and indicated that "[i]n these circumstances, the Panel's interpretation on this question is of no legal effect".[113]

(ii) Second requirement: comparative analysis

85. In *US – Cotton Yarn*, the Appellate Body referred to the second attribution requirement:

"The second requirement of Article 6.4, second sentence, is a comparative analysis, in the event that there is more than one Member from whom imports have shown a sharp and substantial increase in its imports.[114] The conduct of the comparative analysis is governed by the latter part of the second sentence of Article 6.4, which requires the analysis to address certain specific factors, namely: (i) the level of imports as compared with imports from other sources; (ii) market share; and (iii) import and domestic prices at a comparable stage of commercial transaction. Article 6.4 further specifies that

[101] Appellate Body Report on *US – Cotton Yarn*, para. 112.
[102] Appellate Body Report on *US – Cotton Yarn*, para. 113.
[103] Appellate Body Report on *US – Cotton Yarn*, para. 114.
[104] Appellate Body Report on *US – Cotton Yarn*, para. 115.
[105] (*footnote original*) Panel Report, para. 7.130.
[106] Appellate Body Report on *US – Cotton Yarn*, para. 114.
[107] Appellate Body Report on *US – Cotton Yarn*, para. 114.
[108] Panel Report on *US – Cotton Yarn*, para. 7.130.
[109] Panel Report on *US – Cotton Yarn*, para. 8.1(b).
[110] Panel Report on *US – Cotton Yarn*, paras. 7.126–7.127. The Panel had found that "unlike other safeguard investigations, and resulting applications of measures, which are done on an MFN basis, . . . [t]he Member imposing a safeguard under the ATC must then do a further attribution analysis and narrow the causation down to only those Members whose exports are causing the serious damage."
[111] The Appellate Body upheld the Panel's finding in para. 8.1(b) of its Report "albeit for reasons partly different from those given by the panel". Appellate Body Report on *US – Cotton Yarn*, para. 126.
[112] Appellate Body Report on *US – Cotton Yarn*, paras. 119 and 125–126.
[113] Appellate Body Report on *US – Cotton Yarn*, para. 128.
[114] (*footnote original*) We note that the panel in *United States – Underwear* stressed that such a comparative analysis of the effects of imports is indispensable in attributing serious damage to a Member. The panel noted that, while there had been a significant increase in imports of underwear from Costa Rica, the position of Costa Rica was not significantly different from that of the other five exporting Members considered in the United States' determination. Nonetheless, the determination failed to undertake a *comparative assessment* of the effects of imports from Costa Rica with those five exporting Members. The panel further reasoned that the United States could not enter into agreements permitting an overall increase of imports of 478 percent over the current import levels from those five Members and, at the same time, claim that an import increase of 22 percent from Costa Rica contributed to serious damage. (Panel Report, *supra*, footnote 29, paras. 7.49 and 7.51) The issue of attribution was not appealed in that case.

none of these factors, either alone or combined with other factors, can necessarily give decisive guidance."[115]

Why is a comparative analysis required?

86. In *US – Cotton Yarn*, the Appellate Body faced the question of why a comparative analysis is needed under Article 6.4 as the means to respond to another question, namely how to conduct a comparative analysis since Article 6.4 does not directly address this issue.[116] The Appellate Body concluded that attributing damage actually caused to the domestic industry by imports from a Member to a different Member imports amounted to a "'mis-attribution' of damage and would be inconsistent with the interpretation in good faith of the terms of Article 6.4":

> "Article 6.4 provides, in relevant part, that '[t]he Member or Members to whom serious damage . . . is attributed, shall be *determined on the basis* of a sharp and substantial *increase in imports . . . from such a Member or Members*'. (emphasis added) The clear inference from this phrase is that the sharp and substantial increase of imports from *such a* Member determines not only the basis, but also the *scope* of attribution of serious damage to that Member.
>
> In consequence, where imports from more than one Member contribute to serious damage, it is only that *part* of the total damage which is actually caused by imports from such a Member that can be attributed to that Member under Article 6.4, second sentence. Damage that is actually caused to the domestic industry by imports from one Member cannot, in our view, be attributed to a different Member imports from whom were not the cause of that part of the damage. This would amount to a 'mis-attribution' of damage and would be inconsistent with the interpretation in good faith of the terms of Article 6.4. Therefore, the part of the total serious damage attributed to an exporting Member must be proportionate to the damage caused by the imports from that Member. Contrary to the view of the United States, we believe that Article 6.4, second sentence, does not permit the attribution of the totality of serious damage to one Member, unless the imports from that Member alone have caused all the serious damage."[117]

87. As support for its conclusions on the reasons why a comparative analysis is needed, the Appellate Body in *US – Cotton Yarn* referred to the rules of general international law on State responsibility and Article 22.4 of the *DSU* (suspension of concessions)[118]:

> "Our view is supported further by the rules of general international law on state responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered.[119] In the same vein, we note that Article 22.4 of the DSU[120] stipulates that the suspension of concessions shall be equivalent to the level of nullification or impairment. This provision of the DSU has been interpreted consistently as not justifying punitive damages.[121] These two examples illustrate the consequences of breaches by states of their international obligations, whereas a safeguard action is merely a remedy to WTO-consistent 'fair trade' activity.[122] It would be absurd if the breach of an international obligation were sanctioned by proportionate countermeasures, while, in the absence of such breach, a WTO Member would be subject to a disproportionate and, hence, 'punitive', attribution of serious damage not wholly caused by its exports. In our view, such an exorbitant derogation from the principle of proportionality in respect of the attribution of serious damage could be justified only if the drafters of the *ATC* had expressly provided for it, which is not the case."[123]

88. Also in support for its conclusions on the reasons why a comparative analysis is needed, the Appellate Body pointed out:

> "Finally, and most significantly, if the totality of serious damage could be attributed to only one of those Members the imports from whom have contributed to it, there would be no need to undertake a comparative analysis of the effects of imports from that one Member, once the imports from that Member have been found to have increased sharply and substantially; such an interpretation would reduce a whole segment of Article 6.4 to inutility."[124]

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[115] Appellate Body Report on *US – Cotton Yarn*, para. 115.
[116] Appellate Body Report on *US – Cotton Yarn*, para. 117.
[117] Appellate Body Report on *US – Cotton Yarn*, paras. 118–119.
[118] See Sections III.B.1.(c) and XXII.B.7 of the Chapter on the *DSU*.
[119] (*footnote original*) Article 51 of the International Law Commission's draft articles on Responsibility of States reads:

> "Proportionality
> Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."

(International Law Commission, State Responsibility: Titles and texts of the draft articles on Responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading, A/CN.4/L.602/Rev.1, 26 July 2001)

[120] (*footnote original*) Article 22.4 of the DSU reads:

> "The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment."

[121] (*footnote original*) The Arbitrators in *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* stated that "there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter-measures of a punitive nature." (Decision by the Arbitrators, WT/DS27/ARB, 9 April 1999, para. 6.3) See also, Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, 20 August 2000, para. 3.55.
[122] (*footnote original*) Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, footnote 41, para. 94.
[123] Appellate Body Report on *US – Cotton Yarn*, para. 120.
[124] Appellate Body Report on *US – Cotton Yarn*, para. 121.

How to conduct a comparative analysis

89. Further to responding to the question why a comparative analysis is needed, the Appellate Body in *US – Cotton Yarn* focussed on the question how to conduct a comparative analysis since this is not expressly stated in the wording of Article 6.4, second sentence.[125] In this regard, the Appellate Body considered that such an analysis "is to be seen in the light of the principle of proportionality as the means of determining the scope or assessing the part of the total serious damage that can be attributed to an exporting Member." The Appellate Body further concluded that "an assessment of the share of total serious damage, which is proportionate to the damage actually caused by imports from a particular Member, requires a comparison according to the factors envisaged in Article 6.4 with all other Members (from whom imports have also increased sharply and substantially) taken **individually**" (emphasis added):

> "We now turn to the question of how to conduct the comparative analysis required by Article 6.4. This analysis is to be seen in the light of the principle of proportionality as the means of determining the scope or assessing the part of the total serious damage that can be attributed to an exporting Member. We recall that Article 6.4 enjoins the importing Member to conduct this comparative analysis on a multi-factor basis including "levels of imports", "market share" and "prices", while specifying that none of these factors alone or in combination with other factors can necessarily give decisive guidance. The comparison is to take place between the effects of imports from the Member in question, on the one hand, and those of imports from other sources, on the other. The comparison must thus be based on a variety of factors, each of which has a different significance and weight, and is to be measured on a different scale.
>
> It is of course possible to compare the level of imports of one Member with the level of imports from other sources taken together. Likewise, it is possible to establish the market share of one Member in comparison with all other imports and the output of the domestic industry. However, the full effects of the level of imports from, and the market share of, one Member can only be assessed if this level and this share are compared *individually* with the level of imports from, and the market share of, the other Members from whom imports have also increased sharply and substantially. This conclusion is even more obvious for the comparison of import and domestic prices. The price of imports from one Member can be compared with the average price of imports from other sources and with domestic prices. However, prices of imports from the other Members may vary widely from one another. A fair assessment of the effects of the price of imports from one Member will therefore require a comparison with the price of imports from other Members taken individually. Moreover, these different factors interact in different ways, producing different effects, under different circumstances, not to mention the possible existence of other relevant factors (and their effects) that must be taken into account in the comparison according to the proviso at the end of Article 6.4, second sentence.
>
> An assessment of the share of total serious damage, which is proportionate to the damage actually caused by imports from a particular Member, requires, therefore, a comparison according to the factors envisaged in Article 6.4 with all other Members (from whom imports have also increased sharply and substantially) taken individually."[126]

90. In *US – Underwear*, the Panel considered on a comparative basis whether the attribution of serious damage in the United States' domestic industry to Costa Rican imports was consistent with the requirements under Article 6.4. In this context the Panel analysed the five bilateral agreements that the United States had concluded with five different exporting States which represented a substantial portion of all United States' imports. In these agreements the United States agreed to ensure unrestricted imports to the United States' territory of more than 170 million "dozen units of a product (an increase of 478 per cent over then current import levels)."[127] The Panel concluded, in a finding not reviewed by the Appellate Body, that the attribution of serious damage to Costa Rican imports was inconsistent with the requirements of Article 6.4 as follows:

> "In light of (i) the fact that restrictions under Article 6 of the ATC are to be applied only sparingly, (ii) the fact that the United States has the burden of proving that it has complied with the requirements of Article 6 of the ATC, (iii) the deficiencies detailed above in respect of the evidence on the existence of serious damage, which raise serious questions in our view as to whether there was serious damage shown under Article 6.2 at all, (iv) the fact that the United States failed to demonstrate adequately that the cause of serious damage was imports, and (v) the fact that the United States voluntarily agreed to accept import limits from other countries exporting underwear to the United States that permitted increases over their current export levels that were far in excess of Costa Rica's export levels to the United States, we conclude that the United States failed to demonstrate adequately in the March Statement that its domestic industry suffered serious damage that could be attributed to Costa Rican imports and thus, by imposing import restrictions on imports of Costa Rican underwear, the United States failed to comply with its obligations under Article 6.2 and 6.4 of the ATC."[128]

[125] Appellate Body Report on *US – Cotton Yarn*, para. 117.
[126] Appellate Body Report on *US – Cotton Yarn*, paras. 122–124. See also Section III.B.1(xi) of the Chapter on the *DSU*.
[127] Panel Report on *US – Underwear*, para. 7.51.
[128] Panel Report on *US – Underwear*, para. 7.52.

5. Article 6.6

(a) Article 6.6(a)

91. With respect to the definition of "least-developed country Members", see excerpts referenced in the Chapter on the *WTO Agreement*, Article XI:2.

(b) Article 6.6(d)

92. The Panel on *US – Underwear* examined whether the United States, in its application of the transitional safeguard measure at issue, accorded more favourable treatment to re-imports into its territory in accordance with Article 6.6(d) Specifically, the Panel held that the United States could not have complied with Article 6.6(d) merely by offering Costa Rica enhanced access for its textiles exports under certain other programmes:

> "The 'chapeau' to Article 6.6(d) of the ATC makes it clear that the more favourable treatment must be granted 'in the *application* of the transitional safeguard' (emphasis added). This means, in our view, that Members availing themselves of the Article 6 transitional safeguard are obliged to grant more favourable treatment to re-imports, independently of whether such treatment has been previously rejected by the affected Member during the bilateral consultations or whether other privileges were envisaged to be accorded to such a Member in negotiations based upon the implemented safeguard measure. The term 'more favourable treatment' is not further qualified in the ATC. We, therefore, reject the United States argument (paragraph 5.157) that they had complied with Article 6.6(d) of the ATC by offering Costa Rica enhanced access under GAL programmes during the course of the consultations."[129]

93. In response to the Costa Rican claim for quotas larger than those required under Article 6.8, the Panel on *US – Underwear* rejected the notion that more favourable treatment within the meaning of Article 6.6(d) necessarily implies the availability of larger quotas:

> "We agree with Costa Rica that quantitatively more favourable treatment for the full three-year period is one of the options available to Members in order to comply with the requirements of Article 6.6(d) of the ATC. We do not consider it, however, to be the only option. In our view, a Member could, for example, comply with the requirements under Article 6.6(d) of the ATC by imposing a restriction for a period shorter than three years."[130]

6. Article 6.7

94. At its meeting in July 1998, the TMB examined a transitional safeguard measure taken by Colombia on imports of denim from Brazil and India. The TMB stated that while Article 6.7 "allowed for some flexibility, in particular in view of the availability of most recent data", this "did not provide for the possibility of taking a safeguard measure on the basis of economic variables describing the status of the industry almost two years before the time at which the request for consultation had been made":

> "[T]he TMB addressed the time-lag of about fifteen months that had taken place between the investigation concluded by INCOMEX and the time at which Colombia had requested consultations with, *inter alia*, Brazil and India. The TMB recalled in this respect that, according to Article 6.7, the information referred to in Articles 6.3 and 6.4 shall be related, as closely as possible, to the reference period set out in Article 6.8, i.e. the 12–month period terminating two months preceding the month in which the request for consultation was made [. . .]. The TMB recognised that this formulation allowed for some flexibility, in particular in view of the availability of most recent data. In the view of the TMB, however, this did not provide for the possibility of taking a safeguard measure on the basis of economic variables describing the status of the industry almost two years before the time at which the request for consultation had been made."[131]

95. At its meeting in November 1998, examining a transitional safeguard measure taken by Colombia on imports from Korea and Thailand, the TMB stated as follows:

> "The TMB [. . .] decided to make an examination, on the basis of the information available, of the possible effects of the increased quantities in total imports of plain polyester filaments on the state of the particular industry, as specified in Article 6.3. The TMB noted in this respect that it could not base its assessment on estimates provided by Colombia for the year 1998; and that the monthly averages provided by Colombia could not be considered in most cases as providing reliable indications."[132]

96. At its meeting in January 1999, the TMB provided a clarification on its statement referenced in paragraph 95 above. The TMB agreed that Article 6 did not "lay down a single methodology for the presentation of the information in question". Furthermore, the TMB emphasized that in its statement referenced in paragraph 95 above, it had not made a finding on "how information regarding imports or the variables used for determining serious damage to the domestic industry should be presented under Article 6", but rather "had expressed a view on the difficulties it was facing because of the problems in comparing certain data provided by Colombia in the present case":

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[129] Panel Report on *US – Underwear*, para. 7.57.
[130] Panel Report on *US – Underwear*, para. 7.58.
[131] G/TMB/R/46, para. 12.
[132] G/TMB/R/49, para. 21.

"[T]he TMB agreed with Colombia that Article 6 does not lay down a single methodology for the presentation of the information in question. The TMB had recalled what were the time periods covered by the information presented by Colombia pursuant to Article 6.7. '[T]he technical report prepared by INCOMEX contained data regarding the performance of total imports for the 12–month periods June to May of 1995–1996, 1996–1997 and 1997–1998, the reference period referred to in Article 6.8. The data and information incorporated into the report regarding the economic variables set out in Article 6.3 referred to calendar years; for 1998, it incorporated actual data for the period January to May and provided estimates for the full calendar year. In addition, the report provided monthly averages regarding each variable for 1995, 1996, 1997 and January to May 1998' (G/TMB/R/49, paragraph 11). The TMB could not agree with the contention of Colombia that the TMB had omitted to observe that information had been presented in three different forms. The TMB had not qualified whether these forms were mutually supportive, as claimed by Colombia, since the Body had not found that certain such forms were convincing. This had been reflected in the report adopted by the TMB: '[t]he TMB noted [. . .] that it could not base its assessment on *estimates* provided by Colombia for the year 1998; and that the *monthly averages* provided by Colombia could not be considered in most cases as providing reliable indications.' (G/TMB/R/49, paragraph 21, emphasis added). Therefore, the TMB had added that '[f]or data to be meaningful Colombia would have had *in the present case* to have provided comparisons either on a January/May basis or on a year-ending May basis' (same paragraph, emphasis added). In the view of the TMB, the above excerpts of its report made it clear that (i) the report faithfully reflected the forms of information provided, including the respective time-frames; (ii) the TMB had not provided any interpretation, but had expressed the view that *in the present case* the presentation was such that it did not allow a reliable comparison of the developments or changes in the relevant economic variables referred to in Article 6.3. The reference of the TMB to the January/May comparisons was not an interpretation and was not contrary to any provision of Article 6, since the Body had not suggested that this information should have been provided *in lieu* of the information submitted, but *in addition* to what had been made available. Without such additional information it was not possible for the TMB to assess whether developments during the first five months of 1998 could be an indication of serious damage caused by imports or whether they constituted a seasonal phenomenon which had characterised the domestic industry in the same period of the preceding years as well. The TMB recognized that Colombia had explained that the product subject to safeguard measures was not subject to seasonal factors. This statement, however, had not been substantiated by the information presented pursuant to Article 6.7. The TMB reiterated that it had not provided any interpretation regarding how information regarding imports or the variables used for determining serious damage to the domestic industry should be presented under Article 6. Instead, it had expressed a view on the difficulties it was facing because of the problems in comparing certain data provided by Colombia in the present case." (emphasis original)[133]

97. At its meeting in October 1999, concerning the choice of periods for comparison, the TMB held that two data series for overlapping periods were insufficient for the purposes of Article 6.7. In the specific case, there had been an overlap of eight months. The TMB emphasized that "[r]eliable indications cannot be obtained but by comparing data for identical time-periods":

"The TMB recalled that the relevant provisions of the ATC (Article 6.7) required, *inter alia*, that '[i]n respect of requests [for consultations] made under this paragraph, the information shall be related, as closely as possible, to identifiable segments of production and to the reference period set out in paragraph 8' of Article 6. In the particular cases referred to the TMB and subject to the present review, this reference period, in accordance with Article 6.8, corresponded to the period May 1998/April 1999, for which category-specific information had been provided by Argentina. It had to be observed, however, that in the factual information given by Argentina developments of this most recent period could not be compared to the state of the domestic industry as reflected in the different variables during a preceding corresponding period, i.e. during May 1997/April 1998, since all other data had been provided on a calendar-year basis. Though Argentina gave indications (expressed in terms of percentages) regarding 'changes over 12 months', these indications could not be considered to provide a reliable basis, as they compared data relating to May 1998/April 1999 to those reported for January/December 1998. Therefore, between the two data series compared there had been an overlap of eight months. Reliable indications cannot be obtained but by comparing data for identical time-periods. Though Argentina had explained that there had not been indications referring to the existence of seasonal factors, the TMB was of the view that the availability of data for the calendar-year 1998 and for the period May 1998/April 1999 could give an indication for comparing trends between January-April 1998 and the same period in 1999, but did not allow for more far-reaching comparisons."[134]

98. At its meeting in November 2001, the TMB examined a notification by Poland which considered itself unable to conform with the recommendation the TMB had made regarding a transitional safeguard measure introduced by Poland on imports of certain products

[133] G/TMB/R/51, paras. 26–27.
[134] G/TMB/R/58, para. 13.

from Romania. The TMB found that "developments that occurred prior to the period covered by the factual information provided pursuant to Article 6.7 can hardly be considered as a valid reason for a Member's inability to conform with the TMB's recommendation":

> "[T]he TMB recognized that the ATC does not provide specific guidance as to how long the period of investigation (and, consequently, the period covered in the specific and relevant information in the sense of Article 6.7) should be. Therefore, the definition of the length of the period of investigation is very much left to the discretion of the authorities of the Member invoking the provisions of Article 6. While the use of the present tense of the verb in Article 6.2 (i.e. '. . . a particular product is being imported . . .') and the reference to the information 'as up-to-date as possible' in Article 6.7 appear to indicate that the information to be provided should at the minimum, include developments of the recent past, there is no similar guidance regarding what should be the starting-point of the period covered by the factual information. In view of this, the TMB had proceeded to the examination of the matter under Article 6.10 on the basis of the information provided by Poland for the period of 12 months (from 1 January 2000 to 1 January 2001);
>
> It follows from the above that reference to developments that occurred prior to the period covered by the factual information provided pursuant to Article 6.7 can hardly be considered as a valid reason for a Member's inability to conform with the TMB's recommendation;"[135]

7. Article 6.10

99. In *US – Underwear*, the Appellate Body examined the Panel's finding that a transitional safeguard measure imposed by the United States was inconsistent with Article 6. The Panel had held that the wording of Article 6.10 did not provide any guidance on whether backdating a transitional safeguard measure was permissible. Proceeding to the provisions of the *GATT 1994*, the Panel then took Article X:2 thereof as its applicable and controlling text.[136] The Appellate Body disagreed with these findings of the Panel. As to whether Article 6 permits the retroactive application of transitional safeguard measures, referring to Article 6.10, the Appellate Body held that there was a "presumption [in the] very text of Article 6.10 that such a measure may be applied only prospectively":

> "It is essential to note that, under the express terms of Article 6.10, *ATC*, the restraint measure may be 'applied' only 'after the expiry of the period of 60 days' for consultations, without success, and only within the 'window' of 30 days immediately following the 60–day period. Accordingly, we believe that, in the absence of an express authorization in Article 6.10, *ATC*, to backdate the effectivity of a safeguard restraint measure, a presumption arises from the very text of Article 6.10 that such a measure may be applied only prospectively. This presumption appears to us entirely appropriate in respect of measures which are limitative or deprivational in character or tenor and impact upon Member countries and their rights or privileges and upon private persons and their acts."[137]

100. Further, the Appellate Body considered that the context of Article 6.10, "includ[ing], of course, the whole of Article 6", supported its finding referenced in paragraph 99 above:

> "Article 6.1 directs that transitional safeguard measures be applied 'as sparingly as possible' on the one hand and, on the other, applied 'consistently with the provisions of [Article 6] and the effective implementation of the integration process under [the *ATC*]'. It appears to the Appellate Body that to inject into Article 6.10 an authorization for backdating the effectivity of a restraint measure will encourage return to the practice of backdating restraint measures which appears to have been widespread under the regime of the *MFA*, a regime which has now ended, as discussed below, with the advent of the *ATC*. Such an introjection would moreover loosen up the carefully negotiated language of Article 6.10, which reflects an equally carefully drawn balance of rights and obligations of Members, by allowing the importing Member an enhanced ability to restrict the entry into its territory of goods in the exportation of which no unfair trade practice such as dumping or fraud or deception as to origin, is alleged or proven. For retroactive application of a restraint measure effectively enables the importing Member to exclude more goods by enforcing the quota measure earlier rather than later."[138]

101. Finally, the Appellate Body also held that backdating measures imposed pursuant to Article 6.10 would "diminish the utility and significance of prior consultations with the identified exporting Member or Members":

> "It further appears to us that to read Article 6.10 as somehow authorizing the backdating, as a matter of course, of the effectivity or operation of a restraint measure, will tend to diminish the utility and significance of prior consultations with the identified exporting Member or Members. Article 6.7 of the *ATC* provides for those consultations in very substantial detail. Thus, Article 6.7 requires that the request for consultations be accompanied by specific, relevant and up-to-date information on the factors which led the importing Member to make a determination of 'serious damage' (listed in

[135] G/TMB/R/83, para. 29.
[136] Panel Report on *US – Underwear*, paras. 7.63–7.64.
[137] Appellate Body Report on *US – Underwear*, p. 14.
[138] Appellate Body Report on *US – Underwear*, p. 15.

Article 6.3) and the factors which led to the unilateral attribution of such damage to an identified exporting Member or Members (referred to in Article 6.4). One clear objective of requiring a 60–day period for consultations is to give such Member or Members a real and fair, not merely *pro forma*, opportunity to rebut or moderate those factors. The requirement of consultations is thus grounded on, among other things, due process considerations; that requirement should be protected from erosion or attenuation by a treaty interpreter. It is, again, noteworthy that Article 6.7 refers *repeatedly* to the Member '*proposing* to take safeguard action', or who '*proposes* to invoke the safeguard action' and to the level at which imports of the goods specified 'are *proposed* to be restrained'. The common, day-to-day, implication which arises from this language is clear to us: the restraint is to be applied *in the future*, *after* the consultations, should these prove fruitless and the proposed measure not withdrawn. The principle of effectiveness in treaty interpretation[139] sustains this implication."[140]

102. In addition to its reasoning referenced in paragraphs 99–101 above, the Appellate Body in *US – Underwear* also addressed "the prior existence and demise, as it were, of the *MFA*" and pointed out that one particular provision of the MFA expressly permitted backdating:

"Article 3(5)(i) of the *MFA* expressly permitted backdating of the effectivity of a restraint measure to the date of the importing Member's call for consultations.[141] The above underscored clause of Article 3(5)(i), *MFA*, however, disappeared with the supersession of the *MFA* by the new *ATC*; no comparable clause was carried over into Article 6.10 of the *ATC*. The Panel did not draw any operable inference from the disappearance of the *MFA* clause.[142] Appellant Costa Rica urges that the absence of an equivalent clause in Article 6.10 of the *ATC* means that backdating of a restraint measure may no longer be resorted to under Article 6.10, *ATC*. Appellee United States, in contrast, insists that such backdating is nevertheless available under the regime of the *ATC*."[143]

103. With respect to the fact that a provision of the MFA expressly provided for the possibility to backdate preliminary safeguard measures, the Appellate Body held that the disappearance in the *ATC* of this provision "strongly reinforces the presumption that such retroactive application is no longer permissible":

"We believe the disappearance in the *ATC* of the earlier *MFA* express provision for backdating the operative effect of a restraint measure, strongly reinforces the presumption that such retroactive application is no longer permissible. This is the commonplace inference that is properly drawn from such disappearance. We are not entitled to assume that that disappearance was merely accidental or an inadvertent oversight on the part of either harassed negotiators or inattentive draftsmen. That no official record may exist of discussions or statements of delegations on this particular point is, of course, no basis for making such an assumption. At the oral hearing, the United States stated that since 1974, for over 20 years, all importing countries had 'counted' imports in the textile area against quotas imposed by restraints from the date of the request for consultations. While that may well have been the practice of many importing countries, it was, of course, the practice *under the MFA*. Two considerations bear upon this matter. Firstly, assuming, *arguendo* only, that the WTO Members had wanted to keep that practice, it is very difficult to understand why the treaty basis for such practice was not maintained but was instead wiped out. Secondly, it has not been suggested that such a widely followed practice has arisen *under Article 6.10 of the ATC* notwithstanding the absence of the *MFA* backdating clause. At any rate, it is much too early for practice to have arisen under the *ATC* regime which commenced only on 1 January 1995."[144] (emphasis original)

104. Further, in response to the United States claim that the retroactive application of transitional safeguard measures was needed to deal with flood of imports after an announcement of a request for consultations under the *ATC*, the Appellate Body stated:

"When and to the extent that a speculative 'flood of imports' turns out, in a particular situation, to be a real and serious problem engaging the legitimate interests of the Member proposing a safeguard measure, we consider that recourse may be had to Article 6.11 of the *ATC*. Article 6.11 authorizes the importing Member, 'in highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair', to

[139] (*footnote original*) See Report of the Appellate Body, "*United States – Standards for Reformulated and Conventional Gasoline*", AB-1996–1, (adopted 20 May 1996) p. 23; and Report of the Appellate Body, "*Japan – Taxes on Alcoholic Beverages*", AB-1996–2 (adopted 1 November 1996), p. 12.

[140] Appellate Body Report on *US – Underwear*, pp. 15–16.

[141] (*footnote original*) Simply as a matter of comparative texts, it may be noted that like Article 6.10 of the *ATC*, Article XIX of the *General Agreement* and the *Agreement on Safeguards* do not contain any language expressly permitting backdating of the effectivity of a safeguard restraint measure taken thereunder with respect to categories of goods already integrated into the *General Agreement*. In contrast, it may also be noted that both Article 10(2) of the *Anti-dumping Agreement* and Article 20(2) of the *SCM Agreement expressly authorize, under certain conditions*, the *retroactive levying* of anti-dumping and countervailing duties for the period when provisional measures were in force. (emphasis original)

[142] (*footnote original*) We have noted in page 12 that the Panel "conclude[d] that *the prevalent practice under the MFA* of setting the initial date of a restraint period as the date of request for consultations *cannot be maintained under the ATC*". Immediately thereafter, however, the Panel held that backdating could be resorted to (in 1995, under the *ATC*) provided that the date of initial effectivity is not earlier than the date of publication of the call for consultations. (Panel Report, para. 7.69) This ruling appears at odds with the Panel's own immediately preceding conclusion. (emphasis original)

[143] Appellate Body Report on *US – Underwear*, pp. 16–17.

[144] Appellate Body Report on *US – Underwear*, p. 17.

impose and apply *immediately*, albeit provisionally, the restraint measure authorized under Article 6.10. The request for consultations and the notification to the Textile Monitoring Board must, however, be issued within five working days after the taking of provisional action. In other words, the requirements of Article 6.10 must nevertheless be observed. Action under Article 6.11 of the *ATC* is not in lieu of, and does not supersede, action taken or begun under Article 6.10, *ATC*. Provisional action under Article 6.11 is folded into action under Article 6.10. Considering that Article 6.11 permits the provisional imposition of a restraint measure even *before* consultations, *a fortiori* it would permit such imposition *after* consultations have in fact begun, so long as the requisites of both Articles 6.10 and 6.11 are met or continue to be met.

. . .

The conclusion we have arrived at, in respect of the issue of permissibility of backdating, is that the giving of retroactive effect to a safeguard restraint measure is no longer permissible under the regime of Article 6 of the *ATC* and is in fact prohibited under Article 6.10 of that *Agreement*. The presumption of prospective effect only, has not been overturned; it is a proposition not simply presumptively correct but one requiring our assent. We believe, accordingly, and so hold, that the Panel erred in ruling that Article 6.10 of the *ATC* had nothing to say on the issue of backdating and that such backdating to 21 April 1995, the date of publication of the call for consultations, was permissible under Article X:2 of the *General Agreement*. The importing Member is, however, not defenceless against a speculative 'flood of imports' where it is confronted with the circumstances contemplated in Article 6.11. Its appropriate recourse is, in other words, to action under Article 6.11 of the *ATC*, complying in the process with the requirements of Article 6.10 and Article 6.11."[145] (emphasis original)

105. In this connection, the Appellate Body held therefore with respect to the finding of the Panel on the permissibility of backdating, referenced in paragraph 99 above, that "[o]ur finding, therefore, that the safeguard restraint measure here involved is properly regarded as 'a measure of general application' under Article X:2 does not conflict with, and does not affect our conclusion under the first issue above that backdating the effectivity of a restraint measure is prohibited by Article 6.10 of the *ATC*."[146]

8. Article 6.11

(a) Consultation requirements

106. At its meeting in January 2000, as regards the view of Pakistan that the request for consultations and the notification to the TMB had been made by Argentina more than five working days *after* the action had been taken, contrary to what is stipulated in Article 6.11, the TMB stated as follows:

"The measure had been introduced as from 31 July 1999 and the respective notification and request for consultation had been made on 4 August 1999 'within no more than five working days' as stipulated in Article 6.11, from the implementation of the provisional safeguard measure.

The notion of 'taking' a safeguard action is not defined clearly by Articles 6.10 and 6.11, at least as far as a possible distinction between 'taking' and 'applying' a measure is concerned.

There can be a reading that an action is being taken in the sense of the above provisions when the restraint is effectively implemented, while another reading according to which 'taking' and 'applying' the measure are distinct actions, cannot be excluded either.

In any case, while it could be argued that the effect of a restraint begins immediately once it is announced, the decision in the present case was taken on 13 July 1999, but was published (and, therefore, became known to the foreign and domestic economic operators) only later and the difference of slightly more than two weeks in administrative terms, including the preparation of the implementation through appropriate procedures, did not seem to be excessive."[147]

(b) Notification requirements

107. At its meeting in April 2000, the TMB reviewed certain transitional safeguard measures taken by Argentina on certain textile products imported from Korea. With respect to Article 6.11, the TMB held that "the Member invoking the provisions of Article 6.11 and applying a safeguard measure provisionally was under clear obligation to respect also the relevant procedural requirements, including those related to notifications within established time-frames":

"[T]he language of Article 6.11 does not specify explicitly which of the Members involved has to submit such a notification within the deadline clearly defined. However, it followed from the logic and structure of Article 6, in particular of Articles 6.10 and 6.11, that the Member invoking the provisions of Article 6.11 and applying a safeguard measure provisionally was under clear obligation to respect also the relevant procedural requirements, including those related to notifications within established time-frames. It could be assumed as well that the Member affected by the provisional application of the safeguard measure would also have every interest in informing the TMB about developments as expeditiously as possible, in particular in case of lack of agreement as a result of consultations, since in these circumstances the provisionally applied safeguard measure would remain in place, at least until the TMB would have

[145] Appellate Body Report on *US – Underwear*, pp. 18–19.
[146] Appellate Body Report on *US – Underwear*, p. 21.
[147] G/TMB/R/61, para. 18.

conducted its examination and made appropriate recommendations to the Members concerned. The TMB also observed that the tight deadlines inscribed in Article 6.11 had been defined on purpose: while this provision enabled the importing Member to take action immediately, on a provisional basis, the respective procedures had been accelerated compared to those foreseen under Article 6.10 with a view to limiting the uncertainties regarding the justification of the measures, or lack thereof, thus introduced and limiting also the potentially adverse effects of the safeguards applied in case they were not to be found justified by the TMB under the provisions of Article 6."[148]

(c) "highly unusual and critical circumstances"

108. At its meeting in November 1996, in examining certain transitional safeguard measures taken by Brazil under Article 6.11, the TMB stated as follows:

"The TMB was of the view that in cases where the provisions of paragraph 11 of Article 6 were invoked, the expectation was that the elements envisaged in paragraphs 2, 3 and 4 of Article 6 would indicate as unambiguously as possible the highly unusual and critical character of the circumstances. The TMB was also of the view that, unless such circumstances were met, any action taken under Article 6 should be preceded by consultations between the parties."[149]

109. At its meeting in January 2000, in examining certain transitional safeguard measures introduced by Argentina on imports of certain products from Pakistan, the TMB distinguished between procedural and substantive elements of Article 6.11:

"[T]he TMB noted that Article 6.11 involves procedural and substantive elements. In the view of the TMB, the procedural requirements, in particular the notification of the measure within a narrowly defined time period, had been met. As to the substantive elements, they can be summarized as follows:

- it has to be demonstrated that a particular product is being imported into a Member's territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. In this context the TMB noted that Article 6 defines only one set of criteria for demonstrating serious damage and, therefore, they were the same whether Article 6.10 or 6.11 is invoked;
- in addition, the invoking Member has to provide explanations that would convince the Member affected by the measure, as well as the TMB, regarding the existence of highly unusual and critical circumstances where delay in taking action would cause damage which would be difficult to repair."[150]

110. After distinguishing between procedural and substantive elements of Article 6.11, as referenced in paragraph 109 above, the TMB stated that it was not convinced by Argentina's argument that in the case before it, "the continued increases of such imports during the period investigated had created a situation that was one as described in Article 6.11". The TMB held that:

"[A]rgentina had not provided any explanation in the factual information of the reasons why it had considered that the circumstances were highly unusual and critical. Subsequently, Argentina had explained that developments in total imports could have, in its view, fully justified taking action pursuant to Article 6 earlier, and that the continued increases of such imports during the period investigated had created a situation that was one as described in Article 6.11. The TMB had not found this argument to be a convincing one. It noted, among other things, that the rate of increase of total imports seemed to have decelerated since the beginning of 1999. Consequently, the circumstances could not be highly unusual and critical, since some of the difficulties experienced by the industry had started earlier and the situation had, perhaps, gradually worsened throughout the period investigated.

In light of the above, the TMB continued to be of the view that Argentina's recourse to the procedures laid down in Article 6.11 had not been appropriate. Whether such an inappropriate recourse to Article 6.11 can invalidate a transitional safeguard measure or not, was, in the view of the TMB, a decision to be taken case-by-case, on the basis of the consideration of all the relevant elements involved. In the present case the TMB found, on the one hand, that serious damage caused by increased imports had been demonstrated and that it could be attributed, *inter alia*, to imports from Pakistan. Furthermore, the procedural requirements under Article 6.11 had been met. On the other hand, the detailed examination of the determination of serious damage as well as the lack of convincing explanations pursuant to Article 6.11 revealed that the recourse to this provision, i.e. to apply the restraint provisionally, without having exhausted the possibility of prior consultations, had not been justified. The TMB came to the overall conclusion, however, that in this particular case the inappropriate recourse to Article 6.11, although it constituted an important shortcoming, would not lead to the conclusion that the safeguard measure should be rejected on that basis."[151]

111. At its meeting in April 2000, the TMB examined certain transitional safeguard measures taken by Argentina under Article 6.11 on imports of certain products originating in Korea. With respect to the measure affecting one category of products, the TMB recalled:

[148] G/TMB/R/64, para. 18.
[149] G/TMB/R/20, para. 24. The TMB reiterated this view on several occasions. See G/TMB/R/27, para. 37 and G/TMB/R/58, para. 44.
[150] G/TMB/R/61, para. 53.
[151] G/TMB/R/61, paras. 54–55.

"[T]hat in examining a previous case involving recourse to the provisions of Article 6.11 it had stated, *inter alia*, the following: '[w]hether . . . an inappropriate recourse to Article 6.11 can invalidate a transitional safeguard measure or not, was, in the view of the TMB, *a decision to be taken case-by-case, on the basis of the consideration of all the relevant elements involved*' (*emphasis added*)[152]. In the present case the TMB, in its thorough analysis of the developments affecting the Argentinian industry, was unable to identify any significant element of the case where it could find that the situation corresponded to the circumstances defined in Article 6.11.

The TMB concluded that Argentina had not demonstrated successfully that the products of category 229/629 were being imported into Argentina in the reference period in such increased quantities as to cause serious damage to the domestic industry producing like and/or directly competitive products and, in particular, as to substantiate the highly unusual and critical circumstances where delay would cause damage that would be difficult to repair. The TMB recommended, therefore, that Argentina rescind the safeguard measure applied provisionally on imports of these products originating from Korea."[153]

112. At the same meeting, with respect to another safeguard measure on imports of another category of products, the TMB found a recourse by Argentina to Article 6.11 to be justified, even though no separate analysis had been provided by the National Commission for Foreign Trade of Argentina to support its statement that "the unusual and critical circumstances mentioned in Article 6.11 of the ATC existed":

"The TMB recalled that Argentina had decided to apply provisionally the safeguard measure on imports from Korea pursuant to the provisions of Article 6.11, which refers to 'highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair'. It was observed that in its findings, on 30 July 1999, the National Commission for Foreign Trade of Argentina had considered, *inter alia*, that 'the unusual and critical circumstances mentioned in Article 6.11 of the ATC existe[d], enabling the provisional application of measures'. Though no separate analysis was provided by this Commission to substantiate this statement, on the basis of the examination of this case pursuant to Articles 6.2, 6.3 and 6.4, the TMB came to the view that at the end of July 1999 the existence of the highly unusual and critical circumstances had been demonstrated on the basis of data covering the period June 1998–May 1999. Practically all the elements examined supported such a conclusion: the sharp and continuous rise of imports, both from all sources and from Korea; the significant and continuous decline of output and domestic sales of local production, while consumption continued to increase dynamically; the decline in productivity and employment; the low rate of utilization of capacity and, not the least, the important pressure import prices put on the domestic market. All these, i.e. the elements envisaged in Articles 6.2, 6.3 and 6.4, seemed to indicate without ambiguity the existence of the highly unusual and, in particular, the critical nature of the circumstances."[154]

113. With respect to the relationship with Article 6.10, see the excerpt from the Appellate Body Report on *US – Underwear*, referenced in paragraph 104 above.

9. Relationship with Article 2.4

114. In *US – Underwear*, the Panel examined whether certain transitional safeguard measures imposed by the United States on imports from Costa Rica were inconsistent with Article 6. The Panel, in a finding not addressed by the Appellate Body, stated with respect to the relationship between Articles 2.4 and 6 that "one of the central elements of the ATC is the prohibition, in principle, for Members to have recourse to any new restrictions beyond those notified under Article 2.1 of the ATC". Based on this reasoning, the Panel on *US – Underwear* concluded that "Article 6 of the ATC is an exception to the rule of Article 2.4 of the ATC".[155] The Appellate Body did not address these findings upon review. However, in its report in *US – Wool Shirts and Blouses*, the Appellate Body held that Article 6 was an integral part of the balance of rights and obligations under the *ATC*, that Article 6 did not have exceptional character and that the burden of proof in this context fell upon the complaining party. See paragraph 46 above.

115. In *US – Wool Shirts and Blouses*, the Panel examined whether a certain United States transitional safeguard measure was consistent with Article 6. With respect to the relationship between Articles 2.4 and 6, the Panel, in a statement not reviewed by the Appellate Body, indicated as follows:

"Since we conclude that the safeguard action taken by the United States violated the provisions of Article 6 of the ATC, it is our view that the United States applied a restraint not authorized under the ATC, which, therefore, constitutes also a violation of Article 2.4 of the ATC."[156]

10. Relationship with other WTO Agreements

(a) Article III.2 of the GATT 1994

116. As regards the relationship between Article 6.2 and Article III.2 and the concept of "directly competitive" products, see paragraph 61 above.

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[152] G/TMB/R/61, para. 55.
[153] G/TMB/R/64, paras. 38–39.
[154] G/TMB/R/64, para. 57.
[155] Panel Report on *US – Underwear*, paras. 7.15–7.16.
[156] Panel Report on *US – Wool Shirts and Blouses*, para. 7.59. For same conclusion see Panel Report on *US – Underwear*, paras. 7.70–7.71.

(b) Article X:2 of the GATT 1994

117. In *US – Underwear*, the Appellate Body addressed the Panel's finding on Article X:2 of the *GATT 1994* and its applicability to transitional safeguard measures within the meaning of Article 6 of the *ATC*. The Panel reviewed the measure at issue in the light of Article X:2 of the *GATT 1994* because it had found that Article 6.10 of the *ATC* did not provide guidance on the issue of whether backdating a transitional safeguard measure was permissible; see paragraph 99 above. While the Appellate Body disagreed with the Panel's reading of Article 6.10 of the *ATC*[157], it agreed that the safeguard restraint measure was a measure of general application within the meaning of Article X:2:

> "The Panel found that the safeguard restraint measure imposed by the United States is 'a measure of general application' within the contemplation of Article X:2. We agree with this finding. While the restraint measure was addressed to particular, i.e. named exporting Members, including Appellant Costa Rica, as contemplated by Article 6.4, *ATC*, we note that the measure did not try to become specific as to the individual persons or entities engaged in exporting the specified textile or clothing items to the importing Member and hence affected by the proposed restraint."[158]

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7

1. As part of the integration process and with reference to the specific commitments undertaken by the Members as a result of the Uruguay Round, all Members shall take such actions as may be necessary to abide by GATT 1994 rules and disciplines so as to:

(a) achieve improved access to markets for textile and clothing products through such measures as tariff reductions and bindings, reduction or elimination of non-tariff barriers, and facilitation of customs, administrative and licensing formalities;

(b) ensure the application of policies relating to fair and equitable trading conditions as regards textiles and clothing in such areas as dumping and anti-dumping rules and procedures, subsidies and countervailing measures, and protection of intellectual property rights; and

(c) avoid discrimination against imports in the textiles and clothing sector when taking measures for general trade policy reasons.

Such actions shall be without prejudice to the rights and obligations of Members under GATT 1994.

2. Members shall notify to the TMB the actions referred to in paragraph 1 which have a bearing on the implementation of this Agreement. To the extent that these have been notified to other WTO bodies, a summary, with reference to the original notification, shall be sufficient to fulfil the requirements under this paragraph. It shall be open to any Member to make reverse notifications to the TMB.

3. Where any Member considers that another Member has not taken the actions referred to in paragraph 1, and that the balance of rights and obligations under this Agreement has been upset, that Member may bring the matter before the relevant WTO bodies and inform the TMB. Any subsequent findings or conclusions by the WTO bodies concerned shall form a part of the TMB's comprehensive report.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

No jurisprudence or decision of a competent WTO body.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8

1. In order to supervise the implementation of this Agreement, to examine all measures taken under this Agreement and their conformity therewith, and to take the actions specifically required of it by this Agreement, the Textiles Monitoring Body ("TMB") is hereby established. The TMB shall consist of a Chairman and 10 members. Its membership shall be balanced and broadly representative of the Members and shall provide for rotation of its members at appropriate intervals. The members shall be appointed by Members designated by the Council for Trade in Goods to serve on the TMB, discharging their function on an *ad personam* basis.

2. The TMB shall develop its own working procedures. It is understood, however, that consensus within the TMB does not require the assent or concurrence of members appointed by Members involved in an unresolved issue under review by the TMB.

3. The TMB shall be considered as a standing body and shall meet as necessary to carry out the functions required of it under this Agreement. It shall rely on notifications and information supplied by the Members under the relevant Articles of this Agreement, supplemented by any additional information or necessary details they may submit or it may decide to seek from them. It may also rely on notifications to and reports from other WTO bodies and from such other sources as it may deem appropriate.

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[157] Appellate Body Report on *US – Underwear*, p. 14.
[158] Appellate Body Report on *US – Underwear*, pp. 21–22.

4. Members shall afford to each other adequate opportunity for consultations with respect to any matters affecting the operation of this Agreement.

5. In the absence of any mutually agreed solution in the bilateral consultations provided for in this Agreement, the TMB shall, at the request of either Member, and following a thorough and prompt consideration of the matter, make recommendations to the Members concerned.

6. At the request of any Member, the TMB shall review promptly any particular matter which that Member considers to be detrimental to its interests under this Agreement and where consultations between it and the Member or Members concerned have failed to produce a mutually satisfactory solution. On such matters, the TMB may make such observations as it deems appropriate to the Members concerned and for the purposes of the review provided for in paragraph 11.

7. Before formulating its recommendations or observations, the TMB shall invite participation of such Members as may be directly affected by the matter in question.

8. Whenever the TMB is called upon to make recommendations or findings, it shall do so, preferably within a period of 30 days, unless a different time period is specified in this Agreement. All such recommendations or findings shall be communicated to the Members directly concerned. All such recommendations or findings shall also be communicated to the Council for Trade in Goods for its information.

9. The Members shall endeavour to accept in full the recommendations of the TMB, which shall exercise proper surveillance of the implementation of such recommendations.

10. If a Member considers itself unable to conform with the recommendations of the TMB, it shall provide the TMB with the reasons therefor not later than one month after receipt of such recommendations. Following thorough consideration of the reasons given, the TMB shall issue any further recommendations it considers appropriate forthwith. If, after such further recommendations, the matter remains unresolved, either Member may bring the matter before the Dispute Settlement Body and invoke paragraph 2 of Article XXIII of GATT 1994 and the relevant provisions of the Dispute Settlement Understanding.

11. In order to oversee the implementation of this Agreement, the Council for Trade in Goods shall conduct a major review before the end of each stage of the integration process. To assist in this review, the TMB shall, at least five months before the end of each stage, transmit to the Council for Trade in Goods a comprehensive report on the implementation of this Agreement during the stage under review, in particular in matters with regard to the integration process, the application of the transitional safeguard mechanism, and relating to the application of GATT 1994 rules and disciplines as defined in Articles 2, 3, 6 and 7 respectively. The TMB's comprehensive report may include any recommendation as deemed appropriate by the TMB to the Council for Trade in Goods.

12. In the light of its review the Council for Trade in Goods shall by consensus take such decisions as it deems appropriate to ensure that the balance of rights and obligations embodied in this Agreement is not being impaired. For the resolution of any disputes that may arise with respect to matters referred to in Article 7, the Dispute Settlement Body may authorize, without prejudice to the final date set out under Article 9, an adjustment to paragraph 14 of Article 2, for the stage subsequent to the review, with respect to any Member found not to be complying with its obligations under this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

1. General

118. At the 1996 meeting, in Singapore, with respect to the role of the TMB, the Ministerial Conference declared as follows:

> "We agree that, keeping in view its quasi-judicial nature, the Textiles Monitoring Body (TMB) should achieve transparency in providing rationale for its findings and recommendations. We expect that the TMB shall make findings and recommendations whenever called upon to do so under the Agreement. We emphasize the responsibility of the Goods Council in overseeing, in accordance with Article IV:5 of the WTO Agreement and Article 8 of the ATC, the functioning of the ATC, whose implementation is being supervised by the TMB."[159]

2. Role of the TMB

119. The Panel on *US – Wool Shirts and Blouses*, in statements not addressed by the Appellate Body, elaborated on the difference between the role and the function of dispute settlement panels on the one hand and the role and function of the TMB on the other. The Panel pointed out, *inter alia*, the lack of specific terms of reference for the TMB and the generally more "multi-faceted role" of the TMB, in particular its investigative powers:

> "The wording of the ATC and the DSU confirms that the role and function of DSU panels differ substantially from that of the TMB. For instance, the TMB is not limited to any specific terms of reference as DSU panels are (Article 7 of the DSU). The function of the TMB is to

[159] The Singapore Ministerial Declaration, para. 15.

supervise the implementation of the ATC generally and to examine measures taken, agreements reached and any other matters referred to it. The nature of these broad functions confirms the special and multifaceted role of the TMB. This is also reflected in the TMB's rules of procedure, its decision-making rule and its composition. The TMB members are appointed by WTO Members designated by the Council for Trade in Goods but discharge their function on an ad personam basis. Pursuant to a General Council Decision, the TMB's membership is composed of constituencies, in most cases of several Members, where most members also appoint alternates. Furthermore, a TMB member appointed by a WTO Member involved in a dispute before the TMB, participates in the TMB's deliberations, although such TMB member cannot block a consensus (Article 8.2 of the ATC). On the contrary, panelists under the DSU are not selected on the basis of constituencies and the citizens of any party to a dispute under the DSU cannot participate as panelists, absent agreement of the parties (Article 8.3 of the DSU). In addition, a panelist may issue a dissenting opinion under the DSU, while the TMB can only act by consensus. Moreover, Article 8.3 of the ATC is clear as to the wide investigative authority of the TMB:

> 'The TMB shall be considered as a standing body and shall meet as necessary to carry out the functions required of it under this Agreement. It shall rely on notifications and information supplied by the Members under the relevant Articles of this Agreement, *supplemented by any additional information or necessary details they may submit or it may decide to seek from them*. It may also rely on *notifications to and reports from other WTO bodies and from such other sources as it may deem appropriate*.'"[160]

120. The Panel also noted that after completion of the TMB process, a Member was still free to request the establishment of a panel, but that the TMB process in these circumstances replaced consultations under Article 4 of the *DSU*:

> "We note also that, according to Article 8.10 of the ATC, when the TMB process has been completed, a Member which remains unsatisfied with the TMB recommendations can request the establishment of a panel without having to request consultations under Article 4 of the DSU. This is to say that the TMB process can replace the consultation phase in the dispute settlement process under the DSU and is distinct from the formal adjudication process by panels[161].
>
> Therefore when differences arise, the ATC requires parties first to seek consultations with a view to reaching a mutually satisfactory solution to the problem, within the specific parameters or considerations set out in the relevant provision(s) of the ATC. If a mutually satisfactory solution is not reached in the consultations, the matter may be or shall be, depending on the applicable provision, referred to the TMB for review and recommendations. In the case of recourse to Article 6 of the ATC, the object of the consultations is to see whether there is a mutual understanding that the situation calls for restraint on the exports of the particular product or not. If there is such a mutual understanding, details of the agreed restraint measure shall be communicated to the TMB which has to determine whether the agreement is justified in accordance with the provisions of Article 6 of the ATC. If there is no agreement between the parties concerned and the safeguard action is taken, the matter also has to be referred to the TMB. According to Article 6.10 of the ATC, in order to conduct such an examination, '. . . the TMB shall have available to it the factual data provided to the Chairman of the TMB, referred to in paragraph 7 [of Article 6], as well as any other relevant information provided by the Members concerned'. During the review process, the TMB is not limited to the initial information submitted by the importing Member as parties may submit additional and other information in support of their positions, which, we understand, may relate to subsequent events. Moreover, the TMB may hear witnesses on these facts and perform a genuine fact finding and evidence-building exercise on the continuing situation of the parties concerned with the safeguard action, in order to settle the dispute. TMB members deliberate on the basis of all the information presented to decide whether the safeguard action taken by the importing Member is justified and whether serious damage or actual threat thereof to the domestic industry of the importing Member and causation exist.
>
> The second track is the DSU. If, after recourse to Articles 6.10 and 8.10 of the ATC, the exporting Member is not satisfied with the recommendation of the TMB, such exporting Member can challenge the safeguard action and bring it to the formal dispute settlement process under the DSU. Unlike the TMB, a DSU panel is not called upon, under its terms of reference, to reinvestigate the market situation. When assessing the WTO compatibility of the decision to impose national trade remedies, DSU panels do not reinvestigate the market situation but rather limit themselves to the evidence used by the importing Member in making its determination to impose the measure. In addition, such DSU panels, contrary to the TMB, do not consider developments subsequent to the initial determination. In respect of the US determination at issue in the present case, we consider,

[160] Panel Report on *US – Wool Shirts and Blouses*, para. 7.19(emphasis added).

[161] (*footnote original*) Article 8.10 of the ATC: "If a Member considers itself unable to conform with the recommendations of the TMB, it shall provide the TMB with the reasons therefor not later than one month after receipt of such recommendations. Following thorough consideration of the reasons given, the TMB shall issue any further recommendations it considers appropriate forthwith. If, after such further recommendations, the matter remains unresolved, either Member may bring the matter before the Dispute Settlement Body and invoke paragraph 2 of Article XXIII of GATT 1994 and the relevant provisions of the Dispute Settlement Understanding."

therefore, that this Panel is requested to make an objective assessment as to whether the United States respected the requirements of Article 6.2 and 6.3 of the ATC at the time of the determination."[162]

3. Article 8.1

(a) "The TMB shall consist of a Chairman and 10 members."

121. The General Council decided on the original composition of the TMB at its meeting of 31 January 1995.[163] The General Council further decided on the composition of the TMB at its meeting of 10 December 1997.[164]

(b) TMB members "discharge [. . .] their functions on an *ad personam* basis"

122. The Working Procedures adopted by the TMB state the following:

> "In discharging their functions [. . .], TMB members and alternates undertake not to solicit, accept or act upon instructions from governments, nor to be influenced by any other organisations or undue extraneous factors. They shall disclose to the Chairman any information that they may consider likely to impede their capacity to discharge their functions on an *ad personam* basis. Should serious doubts arise during the deliberations of the TMB regarding the ability of a TMB member to act on an *ad personam* basis, they shall be communicated to the Chairman. The Chairman shall deal with the particular matter as necessary."[165]

123. The Council for Trade in Goods, at its meeting of 27 January 1997, further clarified the status of TMB Members:

> "WTO Members which, pursuant to the decision of the General Council of 31 January 1995, appoint TMB members under Article 8.1 of the Agreement on Textiles and Clothing accept that TMB members discharge their function on an *ad personam* basis and not as government representatives. Consequently, they shall not give TMB members instructions, nor seek to influence them, with regard to matters before the TMB. The same applies to alternates."[166]

4. Article 8.2

(a) "The TMB shall develop its own working procedures"

124. At its first meeting, in March to July 1995, the TMB adopted its working procedures.[167]

125. At its meeting in December 1996, in relation to working procedures, the TMB took note of the decision of the DSB on 3 December 1996 to adopt rules of conduct for the *DSU*[168], "in view of the fact that such Rules apply, *inter alia*, to the Chairman of the TMB and other members of the TMB secretariat called upon to assist the TMB in formulating recommendations, findings or observations pursuant to the ATC, as well as, to the extent prescribed in the relevant Section of the Rules, to members of the TMB."[169]

(b) "consensus within the TMB"

126. The decision of 31 January 1995 by the General Council on the composition of the TMB provides that "[t]he Textiles Monitoring Body will take all decisions by consensus".[170] This general statement is qualified in that decision that "[a]s provided for in Article 8.2 of the Agreement on Textiles and Clothing, in case of an unresolved issue under review by the TMB, it is understood that consensus within the TMB does not require the assent or concurrence of members appointed by members involved in such unresolved issue."[171]

127. The Working Procedures adopted by the TMB state the following:

> "Consensus within the TMB does not require the assent or concurrence of TMB members appointed by WTO Members involved in an unresolved issue under review by the TMB.[172] However, at least seven TMB members shall be present when deciding on such unresolved issues, except in cases where one or two TMB members have been appointed by WTO Members involved in an unresolved issue, where eight TMB members shall be present. For the purpose of this paragraph the term 'TMB members' covers the respective alternates in case a TMB member is absent."[173]

5. Article 8.3

(a) Standard of review

128. In *US – Underwear*, addressing the issue of "standard of review" with reference to Articles 8.3 and 8.5, the Panel stated that it could not engage in a *de novo* review of the national measure at issue and added that such *de novo* review was, "if at all, to be conducted by the TMB":

> "A *de novo* review, if at all, is to be conducted by the TMB. Article 8.3 of the ATC reads as follows: 'The TMB

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[162] Panel Report on *US – Wool Shirts and Blouses*, paras. 7.19–7.21.
[163] WT/GC/M/1, section 5. The text of the adopted decision can be found in WT/L/26. The General Council adopted an addendum to this decision at its meeting of 31 January 1995. See WT/L/26/Add.1.
[164] WT/L/253.
[165] G/TMB/R/1, para. 1.4 of the Annex.
[166] G/L/141.
[167] G/TMB/R/1, para. 5. The text of the adopted working procedures is found in Annex to G/TMB/R/1.
[168] WT/DSB/RC/1.
[169] G/TMB/R/22, para. 17.
[170] WT/L/26, para. 6.
[171] WT/L/26, fn. 3.
[172] (*footnote original*) See paragraph 2, Article 8 of the ATC.
[173] G/TMB/R/1, para. 7.2.

> . . . shall rely on notifications and information supplied by the Members under the relevant Articles of the Agreement, supplemented by any additional information or necessary details they may submit or it may decide to seek from them'. Article 8.5 of the ATC calls for a 'thorough and prompt' review of the matter by the TMB."[174]

6. Article 8.9

129. The Panel on *US – Wool Shirts and Blouses* addressed the issue of the legal force of the TMB's recommendations and found that the recommendations of the TMB are not binding:

> "Concerning India's claim that the US restraint is invalid because the TMB did not endorse the measure which the United States attempted to justify in the Market Statement and on which consultations were held, we note that under Article 6.10 of the ATC, the United States, should it be entitled to impose a restraint, could do so without TMB authorization, although it would be required to refer the matter to the TMB for appropriate recommendations. Article 8.9 of the ATC confirms that the recommendations of the TMB are not binding:
>
> > 'The Members shall endeavour to accept in full the recommendations of the TMB, which shall exercise proper surveillance of the implementation of such recommendations.' (emphasis added)
>
> We, therefore, reject India's claim that under the ATC a safeguard action can be maintained only if adequately endorsed by the TMB."[175]

7. Article 8.10

130. At its meeting in March 1997, with reference to the reasons provided by Hong Kong for its inability to conform to the TMB's recommendations, the TMB noted as follows:

> "[P]aragraph 10 of Article 8 did not provide any express guidance on the reasons which can be given by a Member for its inability to conform with the recommendations of the TMB"[176]

131. At its meeting in November 2001, whilst examining the reasons why Poland considered itself unable to conform with the TMB recommendation made at a previous meeting to rescind the transitional safeguard measure Poland had introduced on imports of certain products from Romania, the TMB addressed, *inter alia*, the question of the period for making notifications pursuant to Article 8.10, as follows:

> "The TMB first addressed the argument made by Romania that Poland's communication regarding its inability to conform with the TMB's recommendation had not been made within the period established by Article 8.10, which requires that the Member concerned submit such a communication 'not later than one month after receipt of such recommendations'. Noting the arguments of Romania in this regard, the TMB took the view that the one-month period started on the date when the report containing the TMB's examination, together with the conclusions reached and recommendations adopted, had been officially communicated to the Member concerned. In this particular case, this had been done on 17 September 2001 when the TMB's report on the examination of the safeguard measure had been circulated to all WTO Members[177] and the Chairman of the TMB had provided a separate official communication to the Polish authorities in this regard. The communication made by Poland under Article 8.10 was dated 17 October 2001 and had been received by the TMB on that same day, i.e. within the deadline specified in Article 8.10."[178]

132. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the *ATC* were invoked:

	Case Name	Case Number	Invoked Articles
1	*US – Underwear*	WT/DS24	Articles 6.2, 6.4, 6.6, 6.10, 8.3
2	*US – Wool Shirts and Blouses*	WT/DS33	Articles 6.2. 6.3 and 8.9
3	*Turkey – Textiles and Clothing*	WT/DS34	Articles 2 and 2.4
4	*US – Cotton Yarn*	WT/DS192	Articles 6.2 and 6.3

8. Article 8.11

(a) "a major review before the end of each stage of the integration process"

133. Pursuant to Article 8.11, to assist in the review by the Council for Trade in Goods, on 31 July 1997, the TMB adopted and subsequently circulated a comprehensive report on the implementation of the ATC during the first stage of integration.[179] The Council for Trade in Goods conducted a major review of the first stage of the integration process.[180] Furthermore, on 26 July 2001, the TMB adopted and subsequently circulated a comprehensive report on the implementation of the ATC during the second stage of the integration process.[181]

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[174] Panel Report on *US – Underwear*, fn. 17.
[175] Panel Report on *US – Wool Shirts and Blouses*, para. 7.57.
[176] G/TMB/R/26, para. 16.
[177] See G/TMB/25.
[178] G/TMB/R/83, para.25.
[179] G/L/179.
[180] The outcome of its review can be found in G/C/W/105. Discussions leading to preparation of the review document are fully set out in the Minutes of the Goods Council G/C/M/23 to G/C/M/29.
[181] G/L/459.

X. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9

This Agreement and all restrictions thereunder shall stand terminated on the first day of the 121st month that the WTO Agreement is in effect, on which date the textiles and clothing sector shall be fully integrated into GATT 1994. There shall be no extension of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

134. This Agreement was terminated as scheduled on 1 January 2005, together with all the restrictions maintained under its jurisdiction.

135. As part of its overall assessment on the implementation of the *ATC*, the TMB submitted a comprehensive report to the Council for Trade in Goods. In its comments on the implementation of the *ATC* during the third and final stage of the integration process[182], the TMB observed:

> "[I]n the respective official notifications repeated assurances have been recently provided regarding the timely and full implementation of the ATC. The Agreement will be fully implemented as scheduled and provided for in Article 9. Thus the ATC and all restrictions thereunder shall stand terminated on 1 January 2005, on which date the textiles and clothing sector shall be fully integrated into GATT 1994, thereby putting an end to a special and discriminatory regime that has been in application for more than four decades."[183]

XI. ANNEX

A. TEXT OF ANNEX

ANNEX
LIST OF PRODUCTS COVERED BY THIS AGREEMENT

1. This Annex lists textile and clothing products defined by Harmonized Commodity Description and Coding System (HS) codes at the six-digit level.

2. Actions under the safeguard provisions in Article 6 will be taken with respect to particular textile and clothing products and not on the basis of the HS lines *per se*.

3. Actions under the safeguard provisions in Article 6 of this Agreement shall not apply to:

(a) developing country Members' exports of handloom fabrics of the cottage industry, or hand-made cottage industry products made of such handloom fabrics, or traditional folklore handicraft textile and clothing products, provided that such products are properly certified under arrangements established between the Members concerned;

(b) historically traded textile products which were internationally traded in commercially significant quantities prior to 1982, such as bags, sacks, carpetbacking, cordage, luggage, mats, mattings and carpets typically made from fibres such as jute, coir, sisal, abaca, maguey and henequen;

(c) products made of pure silk.

For such products, the provisions of Article XIX of GATT 1994, as interpreted by the Agreement on Safeguards, shall be applicable. [The list of products is omitted.]

B. INTERPRETATION AND APPLICATION OF ANNEX

No jurisprudence or decision of a competent WTO body.

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[182] See G/L/683, paras. 663–666.
[183] G/L/683, para. 664.

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Having regard to the Uruguay Round of Multilateral Trade negotiations;

Desiring to further the objectives of GATT 1994;

Recognizing the important contribution that international standards and conformity assessment systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade;

Desiring therefore to encourage the development of such international standards and conformity assessment systems;

Desiring however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;

Recognizing that no country should be prevented from taking measures necessary for the protection of its essential security interest;

Recognizing the contribution which international standardization can make to the transfer of technology from developed to developing countries;

Recognizing that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards, and desiring to assist them in their endeavours in this regard;

Hereby *agree* as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

No jurisprudence or decision of a competent WTO body.

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1
General Provisions

1.1 General terms for standardization and procedures for assessment of conformity shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardizing bodies taking into account their context and in the light of the object and purpose of this Agreement.

1.2 However, for the purposes of this Agreement the meaning of the terms given in Annex 1[1] applies.

1.3 All products, including industrial and agricultural products, shall be subject to the provisions of this Agreement.

1.4 Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage.

1.5 The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.

1.6 All references in this Agreement to technical regulations, standards and conformity assessment procedures shall be construed to include any amendments thereto and any additions to the rules or the product coverage thereof, except amendments and additions of an insignificant nature.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. General

(a) Termination of Tokyo Round TBT Agreement

1. At its meeting on 20 October 1995, the Tokyo Round TBT Committee adopted a decision on the Termination of the Tokyo Round TBT Agreement with effect from 1 January 1996.[2]

(b) Scope of the TBT Agreement

2. In *EC – Asbestos*, the complainant (Canada) contended that the TBT Agreement applied to the French Decree at issue, because it was a "technical regulation" within the meaning of Annex 1, paragraph 1. The measure at issue contained a general prohibition on the importation, marketing and use of asbestos, but provided for a few limited exceptions to this ban. The Panel rejected the Canadian argument and held that "the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products" did not constitute a "technical regulation".[3] The Appellate Body reversed the Panel finding and held that it was necessary to consider the measure at issue in its entirety, i.e. both "the prohibitive and the permissive elements that are part of it":

> "[T]he proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole. . . . the scope and generality of those prohibitions can only be understood in light of the exceptions to it which, albeit for a limited period, *permit*, *inter alia*, the use of certain product products containing asbestos and, principally, products containing chrysotile asbestos fibres. The measure is, therefore, *not* a *total* prohibition on asbestos fibres, because it also includes provisions that *permit*, for a limited duration, the use of asbestos in certain situations. Thus, to characterize the measure simply as a general prohibition, and to examine it as such, overlooks the complexities of the measure, which include both prohibitive and permissive elements. In addition, we observe that the exceptions in the measure would have no autonomous legal significance in the absence of the prohibitions. We, therefore, conclude that the measure at issue is to be examined as an integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it."[4]

2. Article 1.2

3. On the definition of "technical regulation", see paragraphs 58–62 below. On the definition of "standard", see paragraphs 10–12 and 63–65 below.

3. Article 1.5

4. In *EC – Hormones*, the complainants (United States and Canada) claimed that measures taken by the European Communities were inconsistent with: (i) *GATT* Articles III or XI; (ii) Articles 2, 3 and 5 of the *SPS Agreement*; (iii) Article 2 of the *TBT Agreement*; and (iv) Article 4 of the *Agreement on Agriculture*. The Panel, referring to Article 1.5 of the *TBT Agreement*, found that, since the measures at issue were sanitary measures, the *TBT Agreement* was not applicable to the dispute.[5]

TECHNICAL REGULATIONS AND STANDARDS

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2

Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

With respect to their central government bodies:

2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

---

[1] See Section XVII.
[2] TBT/M/50, para. 6. The text of the decision is contained in TBT/W/195.
[3] Panel Report on *EC – Asbestos*, para. 8.72(a).
[4] Appellate Body Report on *EC – Asbestos*, para. 64.
[5] Panel Report on *EC – Hormones (US)*, para. 8.29 and Panel Report on *EC – Hormones (Canada)*, para. 8.32.

2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, related processing technology or intended end-uses of products.

2.3 Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

2.6 With a view to harmonizing technical regulations on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.

2.7 Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.

2.8 Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.

2.9 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:

2.9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;

2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;

2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;

2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

2.10 Subject to the provisions in the lead-in to paragraph 9, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 9 as it finds necessary, provided that the Member, upon adoption of a technical regulation, shall:

2.10.1 notify immediately other Members through the Secretariat of the particular technical regulation and the products covered, with a brief indication of the objective and the rationale of the technical regulation, including the nature of the urgent problems;

2.10.2 upon request, provide other Members with copies of the technical regulation;

2.10.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

2.11 Members shall ensure that all technical regulations which have been adopted are published promptly

or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

2.12 Except in those urgent circumstances referred to in paragraph 10, Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. Article 2.2

(a) Trade-restrictiveness

5. In *EC – Sardines*, the Panel decided to exercise judicial economy with regard to claims based on Article 2.2, but nonetheless included in its analysis under Article 2.4 some developments relating to the trade-restrictiveness of the measure at issue. The Appellate Body found that "the question whether the EC Regulation is trade-restrictive in nature could have been relevant to a legal analysis under Article 2.2 of the TBT Agreement." However, as the Panel had not made legal findings under Article 2.2, the Appellate Body declared that the relevant analysis on trade-restrictiveness did not have legal effect.[6]

2. Article 2.4

(a) Temporal application of Article 2.4

6. In *EC – Sardines*, the Appellate Body upheld the Panel's finding that Article 2.4 applies not only to the "preparation and adoption" of technical regulations, but also to the "application" of *existing* measures adopted *prior to* 1 January, 1995, such as the EC regulations that were adopted in June 1989 and have continued to exist. The Panel had observed, *inter alia*, that:

> "Article 2.4 of the TBT Agreement starts with the language 'where technical regulations are required'. We construe this expression to cover technical regulations that are already in existence as it is entirely possible that a technical regulation that is already in existence can continue to be required. . . . Moreover, we note that the first part of the sentence of Article 2.4 is in the present tense ('exist') and not in the past tense – '[w]here technical regulations are required and relevant international standards *exist or their completion is imminent*', Members are obliged to use such international standards as a basis. This supports the view that Members have to use relevant international standards that currently exist or whose completion is imminent with respect to the technical regulations that are already in existence. We do not consider that the word 'imminent', the ordinary meaning of which is 'likely to happen without delay', is intended to limit the scope of the coverage of technical regulations to those that have yet to be adopted. Rather, the use of the word 'imminent' means that Members cannot disregard a relevant international standard whose completion is imminent with respect to their existing technical regulations."[7]

7. In *EC – Sardines*, the Appellate Body concurred with the Panel's view on the applicability of Article 2.4 to existing technical regulations (see paragraph 6 above), and further noted:

> "[We] fail to see how the terms 'where technical regulations are required', 'exist', 'imminent', 'use', and 'as a basis for' give any indication that Article 2.4 applies only to the two stages of *preparation* and *adoption* of technical regulations. To the contrary, as the panel noted, the use of the present tense suggests a continuing obligation for existing measures, and not one limited to regulations prepared and adopted after the *TBT Agreement* entered into force. . . . The obligation refers to technical regulations generally and without limitations.
>
> . . .
>
> Like the sanitary measure in *EC – Hormones*, the EC Regulation concerned is currently in force. The European Communities has conceded that the EC regulation is an act or fact that has not 'ceased to exist'. Accordingly, following our reasoning in *EC – Hormones*, Article 2.4 of the *TBT Agreement* applies to existing measures unless that provision 'reveals a contrary intention'.
>
> Furthermore, like Articles 5.1 and 5.5 of the *SPS Agreement*, Article 2.4 is a 'central provision' of the *TBT Agreement*, and it cannot just be assumed that such a central provision does not apply to existing measures. Again, following our reasoning in *EC – Hormones*, we must conclude that, if the negotiators had wanted to exempt the very large group of existing technical regulations from the disciplines of a provision as important as Article 2.4 of the TBT Agreement, they would have said so explicitly."[8]

8. In *EC – Sardines*, the Appellate Body also agreed with the panel's analysis of Articles 2.5 and 2.6 as relevant context for Article 2.4, providing support for the argument that Article 2.4 regulates measures adopted before the TBT Agreement entered into force.[9] Finally, in the same case, the Appellate Body found further support for this conclusion in Article XVI:4 of the WTO Agreement and in the object and purpose of the TBT Agreement.[10]

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[6] Appellate Body Report on *EC – Sardines*, paras. 310–311.
[7] Panel Report on *EC – Sardines*, para. 7.74.
[8] Appellate Body Report on *EC – Sardines*, paras. 205 and 207–208.
[9] Appellate Body Report on *EC – Sardines*, paras. 210–212. See also paras. 23–24 of this Chapter.
[10] Appellate Body Report on *EC – Sardines*, paras. 214–215.

(b) Burden of proof

9. In *EC – Sardines*, the Appellate Body reversed the Panel's ruling on the issue of the burden of proof under Article 2.4. The Appellate Body ruled that the burden of proof should be borne by the complaining Member seeking a ruling of inconsistency with Article 2.4.[11] Specifically, the Appellate Body stated that, as with Articles 3.1 and 3.3 of the SPS Agreement, there is no "general rule-exception" relationship between the first and the second parts of Article 2.4:[12]

> "There are strong conceptual similarities between, on the one hand, Article 2.4 of the *TBT Agreement* and, on the other hand, Articles 3.1 and 3.3 of the *SPS Agreement*, and our reasoning in *EC – Hormones* is equally apposite for this case. The heart of Article 3.1 of the *SPS Agreement* is a requirement that Members base their sanitary or phytosanitary measures on international standards, guidelines, or recommendations. Likewise, the heart of Article 2.4 of the *TBT Agreement* is a requirement that Members use international standards as a basis for their technical regulations. Neither of these requirements in these two agreements is absolute. Articles 3.1 and 3.3 of the *SPS Agreement* permit a Member to depart from an international standard if the Member seeks a level of protection higher than would be achieved by the international standard, the level of protection pursued is based on a proper risk assessment, and the international standard is not sufficient to achieve the level of protection pursued. Thus, under the *SPS Agreement*, departing from an international standard is permitted in circumstances where the international standard is ineffective to achieve the objective of the measure at issue. Likewise, under Article 2.4 of the *TBT Agreement*, a Member may depart from a relevant international standard when it would be an 'ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued' by that Member through the technical regulation.
>
> . . . Similarly, the circumstances envisaged in the second part of Article 2.4 are excluded from the scope of application of the first part of Article 2.4. Accordingly, as with Articles 3.1 and 3.3 of the *SPS Agreement*, there is no 'general rule-exception' relationship between the first and the second parts of Article 2.4. Hence, in this case, it is for Peru – as the complaining Member seeking a ruling on the inconsistency with Article 2.4 of the *TBT Agreement* of the measure applied by the European Communities – to bear the burden of proving its claim. This burden includes establishing that Codex Stan 94 has not been used 'as a basis for' the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to fulfil the 'legitimate objectives' pursued by the European Communities through the EC Regulation."[13]

(c) Relevant international standard

(i) "international standard"

10. The Appellate Body on *EC – Sardines* upheld the Panel's conclusion that even if not adopted by consensus, an international standard can constitute a "relevant international standard".[14] The Appellate Body agreed with the following interpretation by the Panel of the last two sentences of the Explanatory note to the definition of the term "standard", as contained in Annex 1 paragraph 2:

> "The first sentence reiterates the norm of the international standardization community that standards are prepared on the basis of consensus. The following sentence, however, acknowledges that consensus may not always be achieved and that international standards that were not adopted by consensus are within the scope of the TBT Agreement.[15] This provision therefore confirms that even if not adopted by consensus, an international standard can constitute a relevant international standard."[16]

11. In *EC – Sardines*, the Appellate Body made the following observation on the issue of consensus in international standards:

> "[T]he text of the Explanatory note supports the conclusion that consensus is not required for standards adopted by the international standardizing community. The last sentence of the Explanatory note refers to 'documents'. The term 'document' is also used in the singular in the first sentence of the definition of a 'standard'. We believe that 'document(s)' must be interpreted as having the same meaning in both the definition and the Explanatory note. . . . Interpreted in this way, the term 'documents' in the last sentence of the Explanatory note must refer to standards *in general*, and not only to those adopted by entities *other than* international bodies . . .
>
> Moreover, the text of the last sentence of the Explanatory note, referring to documents not based on consensus, gives no indication whatsoever that it is departing

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[11] Appellate Body Report on *EC – Sardines*, paras. 274–275.

[12] In *EC – Hormones*, the Panel had assigned the burden of showing that the measure there was justified under Article 3.3 to the respondent, reasoning that Article 3.3 provides an exception to the general obligation contained in Article 3.1. The Panel was of the view that it was the *defending* party that was asserting the *affirmative* of that particular defence. The Appellate Body reversed the panel's finding (see the Appellate Body Report on *EC – Hormones*, para. 104). See also Chapter on the *SPS Agreement*, Section IV.B.2(d).

[13] Appellate Body Report on *EC – Sardines*, paras. 274–275.

[14] Appellate Body Report on *EC – Sardines*, para. 227.

[15] (*footnote original*) The record does not demonstrate that Codex Stan 94 was not adopted by consensus. In any event, we consider that this issue would have no bearing on our determination in light of the explanatory note of paragraph 2 of Annex 1 of the TBT Agreement which states that the TBT Agreement covers "documents that are not based on consensus".

[16] Panel Report on *EC – Sardines*, para. 7.90 and footnote 86 thereto.

from the subject of the immediately preceding sentence, which deals with standards adopted by international bodies. Indeed, the use of the word 'also' in the last sentence suggests that the same subject is being addressed – namely standards prepared by the international standardization community. Hence, the logical assumption is that the last phrase is simply continuing in the same vein, and refers to standards adopted by international bodies, including those not adopted by consensus."[17]

12. In *EC – Sardines*, the Appellate Body also noted that the definition of "standard" in the ISO/IEC Guide includes a consensus requirement and that "the *omission* of a consensus requirement in the definition of a 'standard' in Annex 1.2 of the *TBT Agreement* was a deliberate choice on the part of the drafters of the *TBT Agreement*, and that the last two phrases of the Explanatory note were included to give effect to this choice".[18] In light of this, the Appellate Body upheld the Panel's conclusion that:

"[T]he definition of a 'standard' in Annex 1.2 to the *TBT Agreement* does not require approval by consensus for standards adopted by a 'recognized body' of the international standardization community. We emphasize, however, that this conclusion is relevant only for purposes of the *TBT Agreement*. It is not intended to affect, in any way, the internal requirements that international standard-setting bodies may establish for themselves for the adoption of standards within their respective operations. In other words, the fact that we find that the *TBT Agreement* does not require approval by consensus for standards adopted by the international standardization community should not be interpreted to mean that we believe an international standardization body should not require consensus for the adoption of its standards. That is not for us to decide."[19]

13. Also, on the notion of "standard", see below, the section on the definition of the term "standard" in Annex 1 (see paragraphs 63–64 below).

(ii) "relevant"

14. In *EC – Sardines*, the Appellate Body agreed with the Panel's statement that the ordinary meaning of the term "relevant" is "bearing upon or relating to the matter in hand; pertinent".[20] The Panel reasoned that, to be a "relevant international standard", the standard at issue in the dispute – Codex Stan 94 – would have to "bear upon, relate to, or be pertinent to the EC Regulation".[21] The Panel then noted the following about that standard:

"The title of Codex Stan 94 is 'Codex Standard for Canned Sardines and Sardine-type Products' and the EC Regulation lays down common marketing standards for preserved sardines. The European Communities indicated in its response that the term 'canned sardines' and 'preserved sardines' are essentially identical. Therefore, it is apparent that both the EC Regulation and Codex Stan 94 deal with the same product, namely preserved sardines. The scope of Codex Stan 94 covers various species of fish, including *Sardina pilchardus* which the EC Regulation covers, and includes, *inter alia*, provisions on presentation (Article 2.3), packing medium (Article 3.2), labelling, including a requirement that the packing medium is to form part of the name of the food (Article 6), determination of net weight (Article 7.3), foreign matter (Article 8.1) and odour and flavour (Article 8.2). The EC Regulation contains these corresponding provisions set out in Codex Stan 94, including the section on labelling requirement."[22]

15. In *EC – Sardines*, the Appellate Body upheld the Panel's finding that Codex Stan 94 is a "relevant international standard" under Article 2.4.[23] The Appellate Body disagreed with the European Communities' argument that the EC Regulation dealt only with preserved sardines – understood to mean exclusively preserved Sardina pilchardus – while Codex Stan 94 also covered other species of fish that are "sardine-type":

"We are not persuaded by this argument. First, even if we accepted that the EC Regulation relates only to preserved *Sardina pilchardus*, which we do not, the fact remains that section 6.1.1(i) of Codex Stan 94 also relates to preserved *Sardina pilchardus*. Therefore, Codex Stan 94 can be said to bear upon, relate to, or be pertinent to the EC Regulation because both refer to preserved *Sardina pilchardus*.

Second, we have already concluded that, although the EC Regulation expressly mentions only *Sardina pilchardus*, it has legal consequences for other fish species that could be sold as preserved sardines, including preserved *Sardinops sagax*. Codex Stan 94 covers 20 fish species in addition to *Sardina pilchardus*. These other species also are legally affected by the exclusion in the EC Regulation. Therefore, we conclude that Codex Stan 94 bears upon, relates to, or is pertinent to the EC Regulation."[24]

(d) use . . . "as a basis for"

16. In *EC – Sardines*, the Appellate Body agreed with the panel that an international standard is used "as a basis for" a technical regulation "when it is used as the

[17] Appellate Body Report on *EC – Sardines*, paras. 222–223.
[18] Appellate Body Report on *EC – Sardines*, paras. 222–223. In this respect, see also paras. 63–64 of this Chapter.
[19] Appellate Body Report on *EC – Sardines*, para. 227.
[20] Panel Report on *EC – Sardines*, para. 7.68, quoting *Webster's New World Dictionary* (William Collins & World Publishing Co., Inc. 1976), p. 1199.
[21] Panel Report on *EC – Sardines*, para. 7.68.
[22] Panel Report on *EC – Sardines*, para. 7.69.
[23] Appellate Body Report on *EC – Sardines*, para. 233.
[24] Appellate Body Report on *EC – Sardines*, para. 232.

principal constituent or fundamental principle for the purpose of enacting the technical regulation".[25] The Appellate Body cited certain definitions of the term "basis", and concluded that:

> "From these various definitions, we would highlight the similar terms 'principal constituent', 'fundamental principle', 'main constituent', and 'determining principle' – all of which lend credence to the conclusion that there must be a very strong and very close relationship between two things in order to be able to say that one is 'the basis for' the other."[26]

17. In *EC – Sardines*, in its analysis of the terms "as a basis for", the Appellate Body considered its approach to the interpretation of the term "based on" in the context of Article 3.1 of the *SPS Agreement* as being relevant for the interpretation of Article 2.4.[27] However, it did not consider it necessary to decide in that case whether the term "as a basis", in the context of Article 2.4 of the *TBT Agreement*, has the same meaning as the term "based on", in the context of Article 3.1 of the *SPS Agreement*.[28]

18. In *EC – Sardines*, the Appellate Body rejected the European Communities' argument that a "rational relationship" between an international standard and a technical regulation is sufficient to conclude that the former is used "as a basis for" the latter:

> "[W]e see nothing in the text of Article 2.4 to support the European Communities' view, nor has the European Communities pointed to any such support. Moreover, the European Communities does not offer any arguments relating to the context or the object and purpose of that provision that would support its argument that the existence of a 'rational relationship' is the appropriate criterion for determining whether something has been used 'as a basis for' something else.
>
> We see no need here to define in general the nature of the relationship that must exist for an international standard to serve 'as a basis for' a technical regulation. Here we need only examine this measure to determine if it fulfils this obligation. In our view, it can certainly be said – at a minimum – that something cannot be considered a 'basis' for something else if the two are *contradictory*. Therefore, under Article 2.4, if the technical regulation and the international standard *contradict* each other, it cannot properly be concluded that the international standard has been used 'as a basis for' the technical regulation."[29]

19. With regard to the requirement in Article 2.4 that Members use relevant international standards "or the relevant parts of them" as a basis for their technical regulations, the Appellate Body observed in *EC – Sardines*:

> "In our view, the phrase '*relevant parts of them*' defines the appropriate focus of an analysis to determine whether a relevant international standard has been used 'as a basis for' a technical regulation. In other words, the examination must be limited to those parts of the relevant international standards that relate to the subject-matter of the challenged prescriptions or requirements. In addition, the examination must be broad enough to address all of those relevant parts; the regulating Member is not permitted to select only *some* of the 'relevant parts' of an international standard. If a part is relevant, then it must be one of the elements which is a basis for the technical regulation."[30]

(e) "ineffective or inappropriate means" of fulfilment of "legitimate objectives"

(i) "ineffective or inappropriate means"

20. The Appellate Body on *EC – Sardines* upheld the Panel's statement regarding "ineffective or inappropriate means". The Panel pointed out that the term "ineffective" "refers to something that does not 'hav[e] the function of accomplishing', 'having a result', or 'brought to bear', whereas [the term] 'inappropriate' refers to something which is not 'specially suitable', 'proper', or 'fitting'":

> "Thus, in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued. An inappropriate means will not necessarily be an ineffective means and vice versa. That is, whereas it may not be *specially suitable* for the fulfilment of the legitimate objective, an inappropriate means may nevertheless be *effective* in fulfilling that objective, despite its 'unsuitability'. Conversely, when a relevant international standard is found to be an effective means, it does not automatically follow that it is also an appropriate means. The question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed."[31]

21. In addition, the Appellate Body, in *EC – Sardines*, shared the Panel's view that the terms "ineffective" and "inappropriate" have different meanings, and "that it is conceptually possible that a measure could be effective but inappropriate, or appropriate but ineffective."[32]

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[25] Appellate Body Report on *EC – Sardines*, para. 240–245.
[26] Appellate Body Report on *EC – Sardines*, para. 245.
[27] Appellate Body Report on *EC – Sardines*, para. 242. See also Chapter on the *SPS Agreement*, Section IV.B.2(a).
[28] Footnote 169 of the Appellate Body Report on *EC – Sardines*, at para. 244.
[29] Appellate Body Report on *EC – Sardines*, para. 247–248.
[30] Appellate Body Report on *EC – Sardines*, para. 250.
[31] Panel Report on *EC – Sardines*, para. 7.116 and footnotes 91–92 thereto.
[32] Panel Report on *EC – Sardines*, para. 7.116, and Appellate Body Report on *EC – Sardines*, para. 289.

(ii) "legitimate objectives pursued"

22. In *EC – Sardines*, the Appellate Body agreed with the Panel's interpretation of the meaning of the phrase "legitimate objectives pursued". The Panel stated that the "'legitimate objectives' referred to in Article 2.4 must be interpreted in the context of Article 2.2", which provides an illustrative, open list of objectives considered "legitimate".[33] Also, the Panel indicated that Article 2.4 of the *TBT Agreement* requires an examination and a determination whether the objectives of the measure at issue are "legitimate".[34] The Appellate Body further concurred with the panel in concluding that "the 'legitimate objectives' referred to in Article 2.4 must be interpreted in the context of Article 2.2"[35], which refers also to "legitimate objectives", and includes a description of what the nature of some such objectives can be:

> "Two implications flow from the Panel's interpretation. First, the term 'legitimate objectives' in Article 2.4, as the Panel concluded, must cover the objectives explicitly mentioned in Article 2.2, namely: 'national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.' Second, given the use of the term '*inter alia*' in Article 2.2, the objectives covered by the term 'legitimate objectives' in Article 2.4 extend beyond the list of the objectives specifically mentioned in Article 2.2. Furthermore, we share the view of the Panel that the second part of Article 2.4 implies that there must be an examination and a determination on the legitimacy of the objectives of the measure."[36]

3. Article 2.5

23. In *EC – Sardines*, the Panel, in a reasoning supported by the Appellate Body, referred to Article 2.5, as contextual support for its conclusion that Article 2.4 applies to existing technical regulations:

> "There is contextual support for the interpretation that Article 2.4 applies to technical regulations that are already in existence. The context provided by Article 2.5, which explicitly refers to Article 2.4, speaks of 'preparing, adopting or *applying*' a technical regulation and is not limited to, as the European Communities claims, to preparing and adopting. A technical regulation can only be applied if it is already in existence. The first sentence imposes an obligation on a Member 'preparing, adopting or applying' a technical regulation that may have a significant effect on trade of other Members to provide the justification for that technical regulation. The second sentence of Article 2.5 states that whenever a technical regulation is 'prepared, adopted or *applied*' for one of the legitimate objectives explicitly set out in Article 2.2 and is in accordance with relevant international standards, it is to be rebuttably presumed not to create an unnecessary obstacle to trade. The use of the term 'apply', in our view, confirms that the requirement contained in Article 2.4 is applicable to existing technical regulations."[37]

4. Article 2.6

24. In *EC – Sardines*, the Panel, in a reasoning confirmed by the Appellate Body, referred to Article 2.6 as providing contextual support for its conclusion that Article 2.4 applied to existing technical regulations:

> "Article 2.6 provides another contextual support. It states that Members are to participate in preparing international standards by the international standardizing bodies for products which they have either '*adopted*, or expect to adopt technical regulations.' Those Members that have in place a technical regulation for a certain product are expected to participate in the development of a relevant international standard. Article 2.6 would be redundant and it would be contrary to the principle of effectiveness, which is a corollary of the general rule of interpretation in the Vienna Convention, if a Member is to participate in the development of a relevant international standard and then claim that such standard need not be used as a basis for its technical regulation on the ground that it was already in existence before the standard was adopted. Such reasoning would allow Members to avoid using international standards as a basis for their technical regulations simply by enacting preemptive measures and thereby undermine the object and purpose of developing international standards."[38]

25. See also the Decision of the TBT Committee on principles for the development of international standards, guides and recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement.[39]

5. Article 2.9

26. The TBT Committee has adopted a number of recommendations and decisions concerning notification procedures for draft technical regulations and conformity assessment procedures, as described hereafter.[40]

(a) Notification format and guidelines

27. The procedures for notification under the Agreement have been kept under constant review by the Committee. In order to ensure a uniform and efficient operation of these procedures the Committee agreed on a format and guidelines for notifications.[41]

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[33] Panel Report on *EC – Sardines*, para. 7.118.
[34] Panel Report on *EC – Sardines*, para. 7.122.
[35] Panel Report on *EC – Sardines*, para. 7.118.
[36] Appellate Body Report on *EC – Sardines*, para. 286.
[37] Panel Report on *EC – Sardines*, para. 7.75. See also paras. 6–8 of this Chapter.
[38] Panel report on *EC – Sardines*, para. 7.76. See also paras. 6–8 of this Chapter.
[39] The text of the decision is contained in G/TBT/1/Rev.8, pp. 26–29.
[40] The text of these recommendations and decisions is contained in G/TBT/1/Rev.8, p. 11.
[41] The text of the relevant recommendations and decisions is contained in G/TBT/1/Rev.8, pp. 11–14.

(b) Decision relating to notifications – labelling requirements

28. With the purpose of clarifying the coverage of the Agreement with respect to labelling requirements, the TBT Committee took the following decision:

> "In conformity with Article 2.9 of the Agreement, Members are obliged to notify all mandatory labelling requirements that are not based substantially on a relevant international standard and that may have a significant effect on the trade of other Members. That obligation is not dependent upon the kind of information which is provided on the label, whether it is in the nature of a technical specification or not."[42]

(c) Timing of notifications

29. The TBT Committee issued the following recommendation with respect to the timing of notifications:

> "When implementing the provisions of Articles 2.9.2, 3.2 (in relation to Article 2.9.2), 5.6.2 and 7.2 (in relation to Article 5.6.2), a notification should be made when a draft with the complete text of a proposed technical regulation or procedures for assessment of conformity is available and when amendments can still be introduced and taken into account."[43]

(d) Application of Articles 2.9 and 5.6 (Preambular part)

30. With a view to ensuring a consistent approach to the selection of proposed technical regulations and procedures for assessment of conformity to be notified, the TBT Committee established the following criteria in order to define the term "significant effect on trade of other Members":

> "For the purposes of Articles 2.9 and 5.6, the concept of 'significant effect on trade of other Members' may refer to the effect on trade:
>
> (a) Of one technical regulation or procedure for assessment of conformity only, or of various technical regulations or procedures for assessment of conformity in combination;
>
> (b) in a specific product, group of products or products in general; and
>
> (c) between two or more Members.
>
> When assessing the significance of the effect on trade of technical regulations, the Member concerned should take into consideration such elements as the value or other importance of imports in respect of the importing and/or exporting Members concerned, whether from other Members individually or collectively, the potential growth of such imports, and difficulties for producers in other Members to comply with the proposed technical regulations. The concept of a significant effect on trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant."[44]

(e) Translation of documents relating to notifications and address of body supplying the documents

31. The TBT Committee also agreed on certain procedures designed to address the difficulties that can arise due to the fact that the documentation relevant to technical regulations, standards and procedures for assessment of conformity is not available in one of the WTO working languages and that a body other than the enquiry point may be responsible for such documentation.[45]

(f) Processing of requests for documentation

32. The TBT Committee addressed the problems of supplying and obtaining requested documentation on notified technical regulations and procedures for assessment of conformity and endorsed the electronic processing of such requests.[46]

(g) Length of time allowed for comments

33. The TBT Committee set the following time-limits for presentation of comments on notified technical regulations and procedures for assessment of conformity:

> "The normal time limit for comments on notifications should be 60 days. Any Member which is able to provide a time limit beyond 60 days, such as 90 days, is encouraged to do so and should indicate this in the notification."[47]

(h) Handling of comments on notifications

34. In order to improve the handling of comments on proposed technical regulations and procedures for assessment of conformity submitted under Articles 2.9.4, 2.10.3, 3.1 (in relation to 2.9.4 and 2.10.3), 5.6.4, 5.7.3 and 7.1 (in relation to 5.6.4 and 5.7.3) of the *TBT Agreement*, the TBT Committee agreed on the following procedures.

> "(a) Each Member should notify the WTO secretariat of the authority or agency (e.g. its enquiry point) which it has designated to be in charge for handling of comments received; and
>
> (b) a Member receiving comments through the designated body should without further request
>
> (i) acknowledge the receipt of such comments,
>
> (ii) explain within a reasonable time to any Member from which it has received comments,

[42] G/TBT/1/Rev.8, p. 18.
[43] G/TBT/1/Rev.8, p. 15.
[44] G/TBT/1/Rev.8, p. 15.
[45] G/TBT/1/Rev.8, p. 16.
[46] G/TBT/1/Rev.8, pp. 15–16.
[47] G/TBT/1/Rev.8, p. 17.

how it will proceed in order to take these comments into account and, where appropriate, provide additional relevant information on the proposed technical regulations or procedures for assessment of conformity concerned, and

(iii) provide to any Member from which it has received comments, a copy of the corresponding technical regulations or procedures for assessment of conformity as adopted or information that no corresponding technical regulations or procedures for assessment of conformity will be adopted for the time being."[48]

(i) Monthly listing of notifications issued

35. With a view to providing a brief indication of the notifications issued, the TBT Committee agreed that the Secretariat be requested to prepare a monthly table of notifications issued, indicating the notification numbers, notifying Members, Articles notified under, products covered, objectives and final dates for comments.[49]

(j) Enhancement of electronic transmission of information

36. In order to facilitate access to information by Members, as well as to strengthen the notification process, including the time needed for the publication and circulation of notification by the Secretariat, the TBT Committee agreed that electronic transmission of information was the preferred method of filing notifications.[50]

6. Article 2.12

37. At its meeting of 15 March 2002, the Committee took note of the Ministerial Decision (made at the Ministerial Conference of 14 November 2001) regarding the implementation of Article 2.12 of the Agreement:

"Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued."[51]

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3
Preparation, Adoption and Application of Technical Regulations by Local Government Bodies and Non-Governmental Bodies

With respect to their local government and non-governmental bodies within their territories:

3.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Article 2, with the exception of the obligation to notify as referred to in paragraphs 9.2 and 10.1 of Article 2.

3.2 Members shall ensure that the technical regulations of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 9.2 and 10.1 of Article 2, noting that notification shall not be required for technical regulations the technical content of which is substantially the same as that of previously notified technical regulations of central government bodies of the Member concerned.

3.3 Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 9 and 10 of Article 2, to take place through the central government.

3.4 Members shall not take measures which require or encourage local government bodies or non-governmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2.

3.5 Members are fully responsible under this Agreement for the observance of all provisions of Article 2. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

No jurisprudence or decision of a competent WTO body.

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4
Preparation, Adoption and Application of Standards

4.1 Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3[52] to this Agreement (referred to in this Agreement as the "Code of Good Practice"). They shall take such reasonable measures as may be available to them to ensure that local government and non-

[48] G/TBT/1/Rev.8, p. 17.
[49] G/TBT/1/Rev.8, pp. 17–18.
[50] G/TBT/1/Rev.8, p. 18.
[51] G/TBT/1/Rev.8, p. 30.
[52] In connection with the Code of Good Practice for the Preparation, Adoption and Application of Standards, the Marrakesh Ministerial Conference adopted two decisions on 15 December 1994. See Sections XVII and XXI.

governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.

4.2 Standardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

38. The TBT Committee adopted a decision in respect of the principles to be observed, when international standards, guidelines and recommendations (as mentioned under Articles 2, 5 and Annex 3 of the *TBT Agreement*) are developed, so as to take account of, *inter alia*, transparency, openness, impartiality and consensus, and to ensure that the concerns of developing countries are considered.[53]

39. The TBT Committee also decided, in order to keep abreast of the activities of regional standardizing bodies and systems for conformity assessment, that representatives of such bodies and systems may be invited to address the Committee on their procedures and how they relate to those embodied in the Agreement, on the basis of agreed lists of questions.[54]

40. See also the Section on Annex 3 (paragraph 67 below).

CONFORMITY WITH TECHNICAL REGULATIONS AND STANDARDS

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5
Procedures for Assessment of Conformity by Central Government Bodies

5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:

5.1.1 conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system;

5.1.2 conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, *inter alia*, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.

5.2 When implementing the provisions of paragraph 1, Members shall ensure that:

5.2.1 conformity assessment procedures are undertaken and completed as expeditiously as possible and in a no less favourable order for products originating in the territories of other Members than for like domestic products;

5.2.2 the standard processing period of each conformity assessment procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the assessment in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the conformity assessment if the applicant so requests; and that, upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

[53] See G/TBT/1/Rev.8, pp. 26–29.
[54] See G/TBT/1/Rev.8, p. 23.

5.2.3 information requirements are limited to what is necessary to assess conformity and determine fees;

5.2.4 the confidentiality of information about products originating in the territories of other Members arising from or supplied in connection with such conformity assessment procedures is respected in the same way as for domestic products and in such a manner that legitimate commercial interests are protected;

5.2.5 any fees imposed for assessing the conformity of products originating in the territories of other Members are equitable in relation to any fees chargeable for assessing the conformity of like products of national origin or originating in any other country, taking into account communication, transportation and other costs arising from differences between location of facilities of the applicant and the conformity assessment body;

5.2.6 the siting of facilities used in conformity assessment procedures and the selection of samples are not such as to cause unnecessary inconvenience to applicants or their agents;

5.2.7 whenever specifications of a product are changed subsequent to the determination of its conformity to the applicable technical regulations or standards, the conformity assessment procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the technical regulations or standards concerned;

5.2.8 a procedure exists to review complaints concerning the operation of a conformity assessment procedure and to take corrective action when a complaint is justified.

5.3 Nothing in paragraphs 1 and 2 shall prevent Members from carrying out reasonable spot checks within their territories.

5.4 In cases where a positive assurance is required that products conform with technical regulations or standards, and relevant guides or recommendations issued by international standardizing bodies exist or their completion is imminent, Members shall ensure that central government bodies use them, or the relevant parts of them, as a basis for their conformity assessment procedures, except where, as duly explained upon request, such guides or recommendations or relevant parts are inappropriate for the Members concerned, for, *inter alia*, such reasons as: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological or infrastructural problems.

5.5 With a view to harmonizing conformity assessment procedures on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of guides and recommendations for conformity assessment procedures.

5.6 Whenever a relevant guide or recommendation issued by an international standardizing body does not exist or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardizing bodies, and if the conformity assessment procedure may have a significant effect on trade of other Members, Members shall:

5.6.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular conformity assessment procedure;

5.6.2 notify other Members through the Secretariat of the products to be covered by the proposed conformity assessment procedure, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;

5.6.3 upon request, provide to other Members particulars or copies of the proposed procedure and, whenever possible, identify the parts which in substance deviate from relevant guides or recommendations issued by international standardizing bodies;

5.6.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

5.7 Subject to the provisions in the lead-in to paragraph 6, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 6 as it finds necessary, provided that the Member, upon adoption of the procedure, shall:

5.7.1 notify immediately other Members through the Secretariat of the particular procedure and the products covered, with a brief indication of the objective and the rationale of the procedure, including the nature of the urgent problems;

5.7.2 upon request, provide other Members with copies of the rules of the procedure;

5.7.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

5.8 Members shall ensure that all conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

5.9 Except in those urgent circumstances referred to in paragraph 7, Members shall allow a reasonable interval between the publication of requirements concerning conformity assessment procedures and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. General

(a) Technical Working Group

41. At its meeting of 16 and 22 October 1996, the TBT Committee agreed to establish a Technical Working Group to study certain ISO/IEC Guides on conformity assessment procedures and how they might contribute to furthering the objectives of Articles 5 and 6 of the *TBT Agreement*.[55]

2. Article 5.5 and 5.6

42. The TBT Committee adopted a decision in respect of the principles to be observed, when international standards, guidelines and recommendations (as mentioned under Articles 2, 5 and Annex 3 of the *TBT Agreement*) are developed, so as to ensure transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and to take account of the concerns of developing countries.[56]

3. Article 5.6

43. With reference to the notification of draft conformity assessment procedures, see the recommendations and decisions adopted by the TBT Committee, as described in paragraphs 26–36 above.[57] See in particular the recommendation concerning the application of Articles 2.9 and 5.6 (preambular part).[58]

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6

Recognition of Conformity Assessment by Central Government Bodies

With respect to their central government bodies:

6.1 Without prejudice to the provisions of paragraphs 3 and 4, Members shall ensure, whenever possible, that results of conformity assessment procedures in other Members are accepted, even when those procedures differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures. It is recognized that prior consultations may be necessary in order to arrive at a mutually satisfactory understanding regarding, in particular:

6.1.1 adequate and enduring technical competence of the relevant conformity assessment bodies in the exporting Member, so that confidence in the continued reliability of their conformity assessment results can exist; in this regard, verified compliance, for instance through accreditation, with relevant guides or recommendations issued by international standardizing bodies shall be taken into account as an indication of adequate technical competence;

6.1.2 limitation of the acceptance of conformity assessment results to those produced by designated bodies in the exporting Member.

6.2 Members shall ensure that their conformity assessment procedures permit, as far as practicable, the implementation of the provisions in paragraph 1.

6.3 Members are encouraged, at the request of other Members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures. Members may require that such agreements fulfil the criteria of paragraph 1 and give mutual satisfaction regarding their potential for facilitating trade in the products concerned.

6.4 Members are encouraged to permit participation of conformity assessment bodies located in the territories

[55] G/TBT/M/6, para. 8.
[56] See G/TBT/1/Rev.8, pp. 26–29.
[57] See G/TBT/1/Rev.8, pp. 11–18.
[58] See G/TBT/1/Rev.8, p. 15.

of other Members in their conformity assessment procedures under conditions no less favourable than those accorded to bodies located within their territory or the territory of any other country.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

No jurisprudence or decision of a competent WTO body.

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7
Procedures for Assessment of Conformity by Local Government Bodies

With respect to their local government bodies within their territories:

7.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Articles 5 and 6, with the exception of the obligation to notify as referred to in paragraphs 6.2 and 7.1 of Article 5.

7.2 Members shall ensure that the conformity assessment procedures of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 6.2 and 7.1 of Article 5, noting that notifications shall not be required for conformity assessment procedures the technical content of which is substantially the same as that of previously notified conformity assessment procedures of central government bodies of the Members concerned.

7.3 Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 6 and 7 of Article 5, to take place through the central government.

7.4 Members shall not take measures which require or encourage local government bodies within their territories to act in a manner inconsistent with the provisions of Articles 5 and 6.

7.5 Members are fully responsible under this Agreement for the observance of all provisions of Articles 5 and 6. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Articles 5 and 6 by other than central government bodies.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

No jurisprudence or decision of a competent WTO body.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8
Procedures for Assessment of Conformity by Non-Governmental Bodies

8.1 Members shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories which operate conformity assessment procedures comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with the provisions of Articles 5 and 6.

8.2 Members shall ensure that their central government bodies rely on conformity assessment procedures operated by non-governmental bodies only if these latter bodies comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

No jurisprudence or decision of a competent WTO body.

X. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9
International and Regional Systems

9.1 Where a positive assurance of conformity with a technical regulation or standard is required, Members shall, wherever practicable, formulate and adopt international systems for conformity assessment and become members thereof or participate therein.

9.2 Members shall take such reasonable measures as may be available to them to ensure that international and regional systems for conformity assessment in which relevant bodies within their territories are members or participants comply with the provisions of Articles 5 and 6. In addition, Members shall not take any measures which have the effect of, directly or indirectly, requiring or encouraging such systems to act in a manner inconsistent with any of the provisions of Articles 5 and 6.

9.3 Members shall ensure that their central government bodies rely on international or regional conformity assessment systems only to the extent that these systems comply with the provisions of Articles 5 and 6, as applicable.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

No jurisprudence or decision of a competent WTO body.

INFORMATION AND ASSISTANCE

XI. ARTICLE 10

A. TEXT OF ARTICLE 10

Article 10
Information About Technical Regulations, Standards and Conformity Assessment Procedures

10.1 Each Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents regarding:

10.1.1 any technical regulations adopted or proposed within its territory by central or local government bodies, by non-governmental bodies which have legal power to enforce a technical regulation, or by regional standardizing bodies of which such bodies are members or participants;

10.1.2 any standards adopted or proposed within its territory by central or local government bodies, or by regional standardizing bodies of which such bodies are members or participants;

10.1.3 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by central or local government bodies, or by non-governmental bodies which have legal power to enforce a technical regulation, or by regional bodies of which such bodies are members or participants;

10.1.4 the membership and participation of the Member, or of relevant central or local government bodies within its territory, in international and regional standardizing bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; it shall also be able to provide reasonable information on the provisions of such systems and arrangements;

10.1.5 the location of notices published pursuant to this Agreement, or the provision of information as to where such information can be obtained; and

10.1.6 the location of the enquiry points mentioned in paragraph 3.

10.2 If, however, for legal or administrative reasons more than one enquiry point is established by a Member, that Member shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these enquiry points. In addition, that Member shall ensure that any enquiries addressed to an incorrect enquiry point shall promptly be conveyed to the correct enquiry point.

10.3 Each Member shall take such reasonable measures as may be available to it to ensure that one or more enquiry points exist which are able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents or information as to where they can be obtained regarding:

10.3.1 any standards adopted or proposed within its territory by non-governmental standardizing bodies, or by regional standardizing bodies of which such bodies are members or participants; and

10.3.2 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by non-governmental bodies, or by regional bodies of which such bodies are members or participants;

10.3.3 the membership and participation of relevant non-governmental bodies within its territory in international and regional standardizing bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; they shall also be able to provide reasonable information on the provisions of such systems and arrangements.

10.4 Members shall take such reasonable measures as may be available to them to ensure that where copies of documents are requested by other Members or by interested parties in other Members, in accordance with the provisions of this Agreement, they are supplied at an equitable price (if any) which shall, apart from the real cost of delivery, be the same for the nationals[1] of the Member concerned or of any other Member.

(*footnote original*) [1] "Nationals" here shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

10.5 Developed country Members shall, if requested by other Members, provide, in English, French or Spanish, translations of the documents covered by a specific notification or, in case of voluminous documents, of summaries of such documents.

10.6 The Secretariat shall, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Members and interested international standardizing and conformity assessment bodies, and draw the attention of developing country Members to any notifications relating to products of particular interest to them.

10.7 Whenever a Member has reached an agreement with any other country or countries on issues related to technical regulations, standards or conformity assessment procedures which may have a significant effect on trade, at least one Member party to the agreement shall notify other Members through the Secretariat of the products to be covered by the agreement and include a brief description of the agreement. Members concerned are encouraged to enter, upon request, into consultations with other Members for the purposes of concluding similar agreements or of arranging for their participation in such agreements.

10.8 Nothing in this Agreement shall be construed as requiring:

10.8.1 the publication of texts other than in the language of the Member;

10.8.2 the provision of particulars or copies of drafts other than in the language of the Member except as stated in paragraph 5; or

10.8.3 Members to furnish any information, the disclosure of which they consider contrary to their essential security interests.

10.9 Notifications to the Secretariat shall be in English, French or Spanish.

10.10 Members shall designate a single central government authority that is responsible for the implementation on the national level of the provisions concerning notification procedures under this Agreement except those included in Annex 3.

10.11 If, however, for legal or administrative reasons the responsibility for notification procedures is divided among two or more central government authorities, the Member concerned shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these authorities.

B. INTERPRETATION AND APPLICATION OF ARTICLE 10

1. General

44. At its meeting of 21 April 1995, the TBT Committee decided on the modalities for regular meetings of persons responsible for information exchange.[59]

2. Article 10.1 and 10.3

(a) "enquiry points"

45. At its meeting of 14 July 1995, and with a view to encouraging the uniform application of Articles 10.1 and 10.3, the TBT Committee adopted the following recommendations:

"(a) (i) An enquiry should be considered 'reasonable' when it is limited to a specific product, or group of products, but not when it goes beyond that and refers to an entire business branch or field of regulations, or procedures for assessment of conformity; and

(ii) when an enquiry refers to a composite product, it is desirable that the parts or components, for which information is sought, are defined to the extent possible. When a request is made concerning the use of a product it is desirable that the use is related to a specific field.

(b) The Enquiry Point(s) of a Member should be prepared to answer enquiries regarding the membership and participation of that Member, or of relevant bodies within its territory, in international and regional standardizing bodies and conformity assessment systems as well as in bilateral arrangements, with respect to a specific product or group of products. They should likewise be prepared to provide reasonable information on the provisions of such systems and arrangement."[60]

46. At its meeting of 14 July 1995, with respect to the handling of requests received under Article 10.1 and 10.3, the TBT Committee adopted the recommendation that an enquiry point should, without further request, acknowledge the receipt of the enquiry.[61]

47. See also the recommendations of the TBT Committee concerning booklets on enquiry points and the List of Enquiry Points prepared by the Secretariat.[62]

3. Article 10.5

48. See the recommendation and decisions of the TBT Committee concerning translation of documents relating to notifications, referenced in paragraph 31 above.[63]

4. Article 10.7

49. The TBT Committee agreed on a notification format concerning agreements reached by a member

[59] The text of the decision is contained in G/TBT/1/Rev.8, p. 19.
[60] G/TBT/1/Rev.8, p. 21.
[61] The text of the decision is contained in G/TBT/1/Rev.8, p. 21.
[62] The text of the relevant decisions is contained in G/TBT/1/Rev.8, pp. 19–21.
[63] The text of the relevant recommendation and decisions is contained in G/TBT/1/Rev.8, p. 16.

with another country or countries on issues related to technical regulations, standards or conformity assessment procedures.[64]

XII. ARTICLE 11

A. TEXT OF ARTICLE 11

Article 11
Technical Assistance to Other Members

11.1 Members shall, if requested, advise other Members, especially the developing country Members, on the preparation of technical regulations.

11.2 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardizing bodies, and participation in the international standardizing bodies, and shall encourage their national standardizing bodies to do likewise.

11.3 Members shall, if requested, take such reasonable measures as may be available to them to arrange for the regulatory bodies within their territories to advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding:

11.3.1 the establishment of regulatory bodies, or bodies for the assessment of conformity with technical regulations; and

11.3.2 the methods by which their technical regulations can best be met.

11.4 Members shall, if requested, take such reasonable measures as may be available to them to arrange for advice to be given to other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of bodies for the assessment of conformity with standards adopted within the territory of the requesting Member.

11.5 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the steps that should be taken by their producers if they wish to have access to systems for conformity assessment operated by governmental or non-governmental bodies within the territory of the Member receiving the request.

11.6 Members which are members or participants of international or regional systems for conformity assessment shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of the institutions and legal framework which would enable them to fulfil the obligations of membership or participation in such systems.

11.7 Members shall, if so requested, encourage bodies within their territories which are members or participants of international or regional systems for conformity assessment to advise other Members, especially the developing country Members, and should consider requests for technical assistance from them regarding the establishment of the institutions which would enable the relevant bodies within their territories to fulfil the obligations of membership or participation.

11.8 In providing advice and technical assistance to other Members in terms of paragraphs 1 to 7, Members shall give priority to the needs of the least-developed country Members.

B. INTERPRETATION AND APPLICATION OF ARTICLE 11

50. In considering the ways in which the provisions of Article 11 could be put into practice, the TBT Committee laid down parameters for exchanging information on technical assistance.[65]

XIII. ARTICLE 12

A. TEXT OF ARTICLE 12

Article 12
Special and Differential Treatment of Developing Country Members

12.1 Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.

12.2 Members shall give particular attention to the provisions of this Agreement concerning developing country Members' rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement, both nationally and in the operation of this Agreement's institutional arrangements.

12.3 Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

12.4 Members recognize that, although international standards, guides or recommendations may exist, in

[64] G/TBT/1/Rev.8, p. 24.
[65] G/TBT/1/Rev.8, p. 22.

their particular technological and socio-economic conditions, developing country Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

12.5 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members.

12.6 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing country Members.

12.7 Members shall, in accordance with the provisions of Article 11, provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members. In determining the terms and conditions of the technical assistance, account shall be taken of the stage of development of the requesting Members and in particular of the least-developed country Members.

12.8 It is recognized that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures. It is further recognized that the special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement. Members, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement, the Committee on Technical Barriers to Trade provided for in Article 13 (referred to in this Agreement as the "Committee") is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed country Members.

12.9 During consultations, developed country Members shall bear in mind the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures, and in their desire to assist developing country Members with their efforts in this direction, developed country Members shall take account of the special needs of the former in regard to financing, trade and development.

12.10 The Committee shall examine periodically the special and differential treatment, as laid down in this Agreement, granted to developing country Members on national and international levels.

B. INTERPRETATION AND APPLICATION OF ARTICLE 12

No jurisprudence or decision of a competent WTO body.

INSTITUTIONS, CONSULTATION AND DISPUTE SETTLEMENT

XIV. ARTICLE 13

A. TEXT OF ARTICLE 13

Article 13

The Committee on Technical Barriers to Trade

13.1 A Committee on Technical Barriers to Trade is hereby established, and shall be composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet as necessary, but no less than once a year, for the purpose of affording Members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives, and shall carry out such responsibilities as assigned to it under this Agreement or by the Members.

13.2 The Committee shall establish working parties or other bodies as may be appropriate, which shall carry out such responsibilities as may be assigned to them by the Committee in accordance with the relevant provisions of this Agreement.

13.3 It is understood that unnecessary duplication should be avoided between the work under this Agreement and that of governments in other technical bodies. The Committee shall examine this problem with a view to minimizing such duplication.

B. INTERPRETATION AND APPLICATION OF ARTICLE 13

1. General

(a) Rules of procedure

51. At its meeting on 1 January 1996, the Council for Trade in Goods approved the Rules of Procedure adopted by the TBT Committee on 21 April 1995.[66]

(b) Observer status

52. Annexes 1 and 2 to the Rules of Procedure adopted by the TBT Committee contain Guidelines for Observer Status for Governments in the WTO (Annex 1) and for Intergovernmental Organizations in the WTO (Annex 2).[67]

XV. ARTICLE 14

A. TEXT OF ARTICLE 14

Article 14
Consultation and Dispute Settlement

14.1 Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall take place under the auspices of the Dispute Settlement Body and shall follow, *mutatis mutandis*, the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.

14.2 At the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts.

14.3 Technical expert groups shall be governed by the procedures of Annex 2.

14.4 The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected. In this respect, such results shall be equivalent to those as if the body in question were a Member.

B. INTERPRETATION AND APPLICATION OF ARTICLE 14

1. Invocation of the TBT Agreement in disputes

53. The following table lists the disputes in which Appellate Body and/or panel reports have been adopted where the provisions of the *TBT Agreement* were invoked:

	Case Name	Case Number	Invoked Articles
1	*US – Gasoline*	WT/DS2	Articles 2.1, 2.2
2	*Argentina – Textiles and Apparel*	WT/DS56	Articles 2.1, 2.2
3	*EC – Hormones (US)*	WT/DS26	Articles 2.1, 2.2
4	*EC – Hormones (Canada)*	WT/DS48	Articles 2.1, 2.2
5	*EC – Asbestos*	WT/DS135	Articles 2.1, 2.2, 2.4, 2.8
6	*EC – Sardines*	WT/DS231	Articles 2.1, 2.2, 2.4

2. Article 14.2

54. In *EC – Asbestos*, the Panel, having determined that the case raised scientific or technical issues, decided to consult experts on an individual basis, rather than in the form of a technical expert group, as foreseen in Article 14 and Annex 2 of the *TBT Agreement*. In response to an argument by the European Communities that expert consultations under the *TBT Agreement* should be conducted in the form of technical expert groups, the Panel observed:

> "[T]hat, if the measure at issue should be deemed to fall under the TBT Agreement, which the Communities contest, Article 14.2 of that Agreement would require the establishment of an expert review group for any scientific or technical matter, and the EC position that pursuant to Article 1:2 of the DSU, that provision would prevail over those of Article 13 to the DSU. Article 14:2 of the TBT Agreement is among the provisions mentioned in Appendix 2 to the DSU and which, under Article 1:2 of that Understanding, will prevail over the provisions of the Understanding to the extent that there is a difference between the two. The Panel notes, however, that it is only 'to the extent that there is a difference' between the rules and procedures of the Understanding and a special or additional rule or procedure in Appendix 2 to the DSU that the latter will prevail. Yet, as stated by the Appellate Body, it is only where the provisions of the DSU and the special or additional rules of Appendix 2 cannot be read as complementing each other that the special or additional provisions will prevail over those of the DSU, that is, in a situation where the two provisions would be mutually incompatible.[68] In the present case, Article 14:2 of the TBT Agreement provides that a panel 'may' establish a technical expert group. Like Article 13:2 of the DSU, this text envisages the

[66] G/C/M/7, para. 2.2. The text of the Rules of Procedures for the meetings of the TBT Committee is also contained in G/TBT/1/Rev.8, pp. 2–9.

[67] The text of the guidelines is contained in G/TBT/1/Rev.8, pp. 8 and 9. See also G/TBT/M/1, para. 22.

[68] (*footnote original*) Appellate Body Report on *Guatemala – Cement*, paras. 65–66.

possibility of establishing a technical expert group and lays down the procedures that would be applicable in the event. Nevertheless, it does not exclusively prescribe the establishment of a technical expert group, and this possibility, in our opinion, is not incompatible with the general authorization given under Article 13 of the DSU to consult with individual experts. The two provisions can be read as complementing each other.

The Panel believes that in this case the consultation of experts on an individual basis is the more appropriate form of consultation, inasmuch as it is the one that will better enable the panel usefully to gather opinions and information on the scientific or technical issues raised by this dispute. Considering in particular the range of areas of competence that might be required, it is appropriate in this case to gather information and different individual opinions rather than asking for a collective report on the various scientific or technical matters in question. In the light of the foregoing, the Panel wishes to underline that its decision to consult experts on an individual basis is without prejudice to the applicability of the TBT Agreement to the measure in question, on which the parties disagree."[69]

FINAL PROVISIONS

XVI. ARTICLE 15

A. TEXT OF ARTICLE 15

Article 15
Final Provisions

Reservations

15.1 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

Review

15.2 Each Member shall, promptly after the date on which the WTO Agreement enters into force for it, inform the Committee of measures in existence or taken to ensure the implementation and administration of this Agreement. Any changes of such measures thereafter shall also be notified to the Committee.

15.3 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof.

15.4 Not later than the end of the third year from the date of entry into force of the WTO Agreement and at the end of each three-year period thereafter, the Committee shall review the operation and implementation of this Agreement, including the provisions relating to transparency, with a view to recommending an adjustment of the rights and obligations of this Agreement where necessary to ensure mutual economic advantage and balance of rights and obligations, without prejudice to the provisions of Article 12. Having regard, *inter alia,* to the experience gained in the implementation of the Agreement, the Committee shall, where appropriate, submit proposals for amendments to the text of this Agreement to the Council for Trade in Goods.

B. INTERPRETATION AND APPLICATION OF ARTICLE 15

1. Article 15.2

55. The TBT Committee agreed on the following decision concerning the contents of written statements to be made by members in response to Article 15.2 of the *TBT Agreement*:

"1. The statement should cover the legislative, regulatory and administrative action taken as a result of the negotiation of the Agreement or currently in existence to ensure that the provisions of the Agreement are applied. If the Agreement itself has been incorporated into domestic law, the statement should indicate how this has been done. In other cases, the statement should describe the content of the relevant laws, regulations, administrative orders, etc. All necessary references should also be provided.

2. In addition, the statement should specify

(a) The names of the publications used to announce that work is proceeding on draft technical regulations or standards and procedures for assessment of conformity and those in which the texts of technical regulations and standards or procedures for assessment of conformity are published under Articles 2.9.1, 2.11; 3.1 (in relation to 2.9.1 and 2.11); 5.6.1, 5.8; 7.1, 8.1 and 9.2 (in relation to 5.6.1 and 5.8); and paragraphs J, L and O of Annex 3 of the Agreement;

(b) the expected length of time allowed for presentation of comments in writing on technical regulations, standards or procedures for assessment of conformity under Articles 2.9.4 and 2.10.3; 3.1 (in relation to 2.9.4 and 2.10.3); 5.6.4 and 5.7.3; 7.1, 8.1 and 9.2 (in relation to 5.6.4 and 5.7.3); and paragraph L of Annex 3 of the Agreement;

(c) the name and address of the enquiry point(s) foreseen in Articles 10.1 and 10.3 of the Agreement with an indication as to whether it is/they are fully operational; if for legal or administrative reasons more than one enquiry point is established, complete and unambiguous information on the scope of responsibilities of each of them;

(d) the name and address of any other agencies that have specific functions under the Agreement, including those foreseen in Articles 10.10 and 10.11 of the Agreement; and

[69] Panel Report on *EC – Asbestos*, paras. 5.18–5.19.

(e) measures and arrangements to ensure that national and sub-national authorities preparing new technical regulations or procedures for assessment of conformity, or substantial amendments to existing ones, provide early information on their proposals in order to enable the Member in question to fulfil its obligations on notifications under Articles 2.9, 2.10, 3.2, 5.6, 5.7 and 7.2 of the Agreement."[70]

2. Article 15.3

56. The Committee carried out, at its meeting of 23 March 2004, the Ninth Annual Review of the Implementation and Operation of the Agreement under Article 15.3[71] and the Ninth Annual Review of the Code of Good Practice for the Preparation, Adoption and Application of Standards based on the following background documents: a list of standardizing bodies that have accepted the Code in 2003[72], a list of standardizing bodies that have accepted the Code since 1 January 1995[73] and the ninth edition of the WTO TBT Standards Code Directory prepared by the ISO/IEC Information Centre.

3. Article 15.4

57. The Committee concluded the First,[74] Second[75] and Third[76] Triennial Reviews of the Operation and Implementation of the Agreement on Technical Barriers to Trade on 13 November 1997, 10 November 2000, and 7 November 2003, respectively.

XVII. ANNEX 1

A. TEXT OF ANNEX 1

ANNEX 1
TERMS AND THEIR DEFINITIONS FOR THE PURPOSE OF THIS AGREEMENT

The terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement.

For the purpose of this Agreement, however, the following definitions shall apply:

1. *Technical regulation*

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Explanatory note

The definition in ISO/IEC Guide 2 is not self-contained, but based on the so-called "building block" system.

2. *Standard*

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Explanatory note

The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.

3. *Conformity assessment procedures*

Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

Explanatory note

Conformity assessment procedures include, *inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.

4. *International body or system*

Body or system whose membership is open to the relevant bodies of at least all Members.

5. *Regional body or system*

Body or system whose membership is open to the relevant bodies of only some of the Members.

[70] G/TBT/1/Rev.8, p. 10.
[71] G/TBT/14.
[72] G/TBT/CS/1/Add.8.
[73] G/TBT/CS/2/Rev.10.
[74] First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/5.
[75] Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/9.
[76] Third Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/13.

6. *Central government body*

Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question.

Explanatory note:

In the case of the European Communities the provisions governing central government bodies apply. However, regional bodies or conformity assessment systems may be established within the European Communities, and in such cases would be subject to the provisions of this Agreement on regional bodies or conformity assessment systems.

7. *Local government body*

Government other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.

8. *Non-governmental body*

Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.

B. INTERPRETATION AND APPLICATION OF ANNEX 1

1. Technical regulation

58. In *EC – Asbestos*, the Appellate Body clarified the term "technical regulation" and held, *inter alia*, that "[a] 'technical regulation' must . . . regulate the 'characteristics' of products in a binding or compulsory fashion":

> "The heart of the definition of a 'technical regulation' is that a 'document' must 'lay down' – that is, set forth, stipulate or provide – 'product *characteristics*'. The word 'characteristic' has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the 'characteristics' of a product include, in our view, any objectively definable 'features', 'qualities', 'attributes', or other 'distinguishing mark' of a product. Such 'characteristics' might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a 'technical regulation' in Annex 1.1, the *TBT Agreement* itself gives certain examples of 'product characteristics' – 'terminology, symbols, packaging, marking or labelling requirements'. These examples indicate that 'product characteristics' include, not only features and qualities intrinsic to the product itself, but also related 'characteristics', such as the means of identification, the presentation and the appearance of a product. In addition, according to the definition in Annex 1.1 of the *TBT Agreement*, a 'technical regulation' may set forth the 'applicable administrative provisions' for products which have certain 'characteristics'. Further, we note that the definition of a 'technical regulation' provides that such a regulation 'may also include or deal *exclusively* with terminology, symbols, packaging, marking *or* labelling requirements'. (emphasis added) The use here of the word 'exclusively' and the disjunctive word 'or' indicates that a 'technical regulation' may be confined to laying down only one or a few 'product characteristics'. The definition . . . also states that '*compliance*' with the 'product characteristics' laid down in the 'document' must be '*mandatory*'. A 'technical regulation' must, in other words, regulate the 'characteristics' of products in a binding or compulsory fashion. It follows that, with respect to products, a 'technical regulation' has the effect of *prescribing* or *imposing* one or more 'characteristics' – 'features', 'qualities', 'attributes', or other 'distinguishing mark'.
>
> 'Product characteristics' may . . . be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products *must possess* certain 'characteristics', or the document may require, negatively, that products *must not possess* certain 'characteristics'. In both cases, the legal result is the same: the document 'lays down' certain binding 'characteristics' for products, in one case affirmatively, and in the other by negative implication."[77]

59. Regarding the products to which a technical regulation applies, the Appellate Body in *EC – Asbestos* further held that while a technical regulation must be applicable to an identifiable product or groups of products, this did not signify that the products in question must be actually named or identified in the regulation at issue:

> "A 'technical regulation' must, of course, be applicable to an *identifiable* product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. This consideration also underlies the formal obligation, in Article 2.9.2 of the *TBT Agreement*, for Members to notify other Members, through the WTO Secretariat, of 'the *products to be covered*' by a proposed 'technical regulation'. (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. However, in contrast to what the Panel suggested, this does not mean that a 'technical regulation' must apply to '*given*' products which are actually *named*, *identified* or *specified* in the regulation. (emphasis added) Although the *TBT Agreement* clearly applies to 'products' generally, nothing in the text of that Agreement suggests that those products need be named or otherwise *expressly* identified in a 'technical regulation'. Moreover, there may be perfectly sound administrative reasons for formulating a 'technical regulation' in a way that does *not* expressly identify products by name, but

[77] Appellate Body Report on *EC – Asbestos*, paras. 67–69.

simply makes them identifiable – for instance, through the 'characteristic' that is the subject of regulation."[78]

60. In *EC – Sardines*, the Appellate Body summarized its interpretation of the definition of a "technical regulation":

"We interpreted this definition in *EC – Asbestos*. In doing so, we set out *three criteria* that a document must meet to fall within the definition of 'technical regulation' in the *TBT Agreement*. *First*, the document must apply to an identifiable product or group of products. The *identifiable* product or group of products need not, however, be expressly *identified* in the document. *Second*, the document must lay down one or more characteristics of the product. These product characteristics may be intrinsic, or they may be related to the product. They may be prescribed or imposed in either a positive or a negative form. *Third*, compliance with the product characteristics must be mandatory. As we stressed in *EC – Asbestos*, these three criteria are derived from the wording of the definition in Annex 1.1. At the oral hearing, both participants confirmed that they agree with these criteria for determining whether a document is a 'technical regulation' under the *TBT Agreement*."[79]

61. In *EC – Asbestos*, the Appellate Body further elaborated on the first criterion – the requirement that the document apply to an identifiable product or group of products – confirming that "the product does not necessarily have to be mentioned explicitly in a document for that product to be an identifiable product. Identifiable does not mean expressly identified".[80] The Appellate Body noted:

"The European Communities argues that the Panel erred in failing to acknowledge that the EC Regulation uses the term 'preserved sardines' to mean – exclusively – preserved *Sardina pilchardus*. The European Communities is of the view that preserved *Sardina pilchardus* and preserved *Sardinops sagax* are not like products. The European Communities reasons that preserved *Sardinops sagax* can neither be an identified nor an identifiable product under the EC Regulation.

. . .

As we explained in *EC – Asbestos*, the requirement that a 'technical regulation' be applicable to *identifiable* products relates to aspects of compliance and enforcement, because it would be impossible to comply with or enforce a 'technical regulation' without knowing to what the regulation applied. As the Panel record shows, the EC Regulation has been enforced against preserved fish products imported into Germany containing *Sardinops sagax*. This confirms that the EC Regulation is applicable to preserved *Sardinops sagax*, and demonstrates that preserved *Sardinops sagax* is an *identifiable product* for purposes of the EC Regulation. Indeed, the European Communities admits that the EC Regulation is applicable to *Sardinops sagax*, when it states in its appellant's submission that '[t]he only legal consequence of the [EC] Regulation for preserved *Sardinops sagax* is that they may not be called "preserved sardines" '.

Therefore, we reject the contention of the European Communities that preserved *Sardinops sagax* is not an identifiable product under the EC Regulation."[81]

62. With regard to the second criterion – the requirement that the document must lay down one or more characteristic of the product – the Appellate Body rejected, in *EC – Sardines*, an argument by the European Communities that the measure at issue did not lay down product characteristics, but rather constituted a "naming rule". The Appellate Body found that "product characteristics include not only 'features and qualities intrinsic to the product', but also those that are related to it, such as 'means of identification'."[82] It agreed with the panel's ruling that the measure at issue did lay down product characteristics:

"As we stated earlier, the EC Regulation expressly identifies a product, namely 'preserved sardines'. Further, Article 2 of the EC Regulation provides that, to be marketed as 'preserved sardines', products must be prepared exclusively from fish of the species *Sardina pilchardus*. We are of the view that this requirement – to be prepared exclusively from fish of the species *Sardina pilchardus* – is a product characteristic 'intrinsic to' preserved sardines that is laid down by the EC Regulation. . . .

In any event, as we said in *EC – Asbestos*, a 'means of identification' *is* a product characteristic. A name clearly identifies a product; indeed, the European Communities concedes that a name is a 'means of identification'. . . . the European Communities itself underscored the important role that a 'name' plays as a 'means of identification' when it argued before the Panel that one of the objectives pursued by the European Communities through the EC Regulation is to provide precise information to avoid misleading the consumer . . . . "[83]

2. Standards

(a) Relationship between the definitions under the TBT Agreement and the definitions in the ISO/IEC Guide

63. In *EC – Sardines*, in the context of an analysis relating to the notion of "relevant international standard" under Article 2.4, the Appellate Body considered the relationship between the definitions under Annex 1 of the TBT Agreement and the ISO/IEC Guide:

[78] Appellate Body Report on *EC – Asbestos*, para. 70.
[79] Appellate Body Report on *EC – Sardines*, para. 176.
[80] Appellate Body Report on *EC – Sardines*, para. 180.
[81] Appellate Body Report on *EC – Sardines*, paras. 181–186.
[82] Appellate Body Report on *EC – Sardines*, para. 189.
[83] Appellate Body Report on *EC – Sardines*, paras. 190–191.

"[A]ccording to the chapeau [of Annex 1], the terms defined in Annex 1 apply for the purposes of the *TBT Agreement* only if their definitions *depart* from those in the ISO/IEC Guide 2:1991 (the 'ISO/IEC Guide'). This is underscored by the word 'however'. The definition of a standard in Annex 1 to the *TBT Agreement* departs from that provided in the ISO/IEC Guide precisely in respect of whether consensus is expressly required."[84]

(b) Consensus

64. With respect to whether consensus is required to meet the definition of "standard" under Annex 1.2, the Appellate Body observed in *EC – Sardines* that:

"The term 'standard' is defined in the ISO/IEC Guide as follows:

> Document, established by *consensus* and approved by a *recognized* body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context. (original emphasis)

Thus, the definition of a 'standard' in the ISO/IEC Guide expressly includes a consensus requirement. Therefore, the logical conclusion, in our view, is that the omission of a consensus requirement in the definition of a standard in Annex 1.2 of the TBT Agreement was a deliberate choice on the part of the drafters of the TBT Agreement, and that the last two phrases of the Explanatory note were included to give effect to this choice. Had the negotiators considered consensus to be necessary to satisfy the definition of 'standard', we believe they would have said so explicitly in the definition itself, as is the case in the ISO/IEC Guide. Indeed, there would, in our view, have been no point in the negotiators adding the last sentence of the Explanatory note."[85]

65. See also the section on the notion of "relevant international standards" under Article 2.4 (paragraphs 10–12 above).

XVIII. ANNEX 2

A. TEXT OF ANNEX 2

ANNEX 2
TECHNICAL EXPERT GROUPS

The following procedures shall apply to technical expert groups established in accordance with the provisions of Article 14.

1. Technical expert groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.

2. Participation in technical expert groups shall be restricted to persons of professional standing and experience in the field in question.

3. Citizens of parties to the dispute shall not serve on a technical expert group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on a technical expert group. Members of technical expert groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before a technical expert group.

4. Technical expert groups may consult and seek information and technical advice from any source they deem appropriate. Before a technical expert group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by a technical expert group for such information as the technical expert group considers necessary and appropriate.

5. The parties to a dispute shall have access to all relevant information provided to a technical expert group, unless it is of a confidential nature. Confidential information provided to the technical expert group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the technical expert group but release of such information by the technical expert group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.

6. The technical expert group shall submit a draft report to the Members concerned with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be circulated to the Members concerned when it is submitted to the panel.

B. INTERPRETATION AND APPLICATION OF ANNEX 2

66. On the issue of whether the establishment of a technical expert group is required under Article 14, see paragraph 54 above.

[84] Appellate Body Report on *EC – Sardines*, para. 224.
[85] Appellate Body Report on *EC – Sardines*, para. 225.

XIX. ANNEX 3

A. TEXT OF ANNEX 3

ANNEX 3
CODE OF GOOD PRACTICE FOR THE PREPARATION, ADOPTION AND APPLICATION OF STANDARDS

General Provisions

A. For the purposes of this Code the definitions in Annex 1 of this Agreement shall apply.

B. This Code is open to acceptance by any standardizing body within the territory of a Member of the WTO, whether a central government body, a local government body, or a non-governmental body; to any governmental regional standardizing body one or more members of which are Members of the WTO; and to any non-governmental regional standardizing body one or more members of which are situated within the territory of a Member of the WTO (referred to in this Code collectively as "standardizing bodies" and individually as "the standardizing body").

C. Standardizing bodies that have accepted or withdrawn from this Code shall notify this fact to the ISO/IEC Information Centre in Geneva. The notification shall include the name and address of the body concerned and the scope of its current and expected standardization activities. The notification may be sent either directly to the ISO/IEC Information Centre, or through the national member body of ISO/IEC or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

Substantive Provisions

D. In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country.

E. The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

F. Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.

G. With a view to harmonizing standards on as wide a basis as possible, the standardizing body shall, in an appropriate way, play a full part, within the limits of its resources, in the preparation by relevant international standardizing bodies of international standards regarding subject matter for which it either has adopted, or expects to adopt, standards. For standardizing bodies within the territory of a Member, participation in a particular international standardization activity shall, whenever possible, take place through one delegation representing all standardizing bodies in the territory that have adopted, or expect to adopt, standards for the subject matter to which the international standardization activity relates.

H. The standardizing body within the territory of a Member shall make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies. They shall also make every effort to achieve a national consensus on the standards they develop. Likewise the regional standardizing body shall make every effort to avoid duplication of, or overlap with, the work of relevant international standardizing bodies.

I. Wherever appropriate, the standardizing body shall specify standards based on product requirements in terms of performance rather than design or descriptive characteristics.

J. At least once every six months, the standardizing body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period. A standard is under preparation from the moment a decision has been taken to develop a standard until that standard has been adopted. The titles of specific draft standards shall, upon request, be provided in English, French or Spanish. A notice of the existence of the work programme shall be published in a national or, as the case may be, regional publication of standardization activities.

The work programme shall for each standard indicate, in accordance with any ISONET rules, the classification relevant to the subject matter, the stage attained in the standard's development, and the references of any international standards taken as a basis. No later than at the time of publication of its work programme, the standardizing body shall notify the existence thereof to the ISO/IEC Information Centre in Geneva.

The notification shall contain the name and address of the standardizing body, the name and issue of the publication in which the work programme is published, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

K. The national member of ISO/IEC shall make every effort to become a member of ISONET or to appoint another body to become a member as well as to acquire the most advanced membership type possible for the ISONET member. Other standardizing bodies shall make every effort to associate themselves with the ISONET member.

L. Before adopting a standard, the standardizing body shall allow a period of at least 60 days for the submission of comments on the draft standard by interested parties within the territory of a Member of the WTO. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise. No later than at the start of the comment period, the standardizing body shall publish a notice announcing the period for commenting in the publication referred to in paragraph J. Such notification shall include, as far as practicable, whether the draft standard deviates from relevant international standards.

M. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of a draft standard which it has submitted for comments. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

N. The standardizing body shall take into account, in the further processing of the standard, the comments received during the period for commenting. Comments received through standardizing bodies that have accepted this Code of Good Practice shall, if so requested, be replied to as promptly as possible. The reply shall include an explanation why a deviation from relevant international standards is necessary.

O. Once the standard has been adopted, it shall be promptly published.

P. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of its most recent work programme or of a standard which it produced. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

Q. The standardizing body shall afford sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this Code presented by standardizing bodies that have accepted this Code of Good Practice. It shall make an objective effort to solve any complaints.

B. INTERPRETATION AND APPLICATION OF ANNEX 3

1. Notification procedure under paragraph J

67. The TBT Committee adopted the following decision relating to the communication of the work programme of standardizing bodies via the Internet:

> "The communication of the work programmes of standardizing bodies via the Internet would be another possibility to fulfil paragraph J obligations on transparency. Hard copies of such work programmes would, nevertheless, always be made available on request in accordance with paragraph P of the Code of Code of Good Practice."[86]

XX. DECISION ON PROPOSED UNDERSTANDING ON WTO-ISO STANDARDS INFORMATION SYSTEM

A. TEXT OF THE DECISION

Decision on Proposed Understanding on WTO-ISO Standards Information System

Ministers,

Decide to recommend that the Secretariat of the World Trade Organization reach an understanding with the International Organization for Standardization ("ISO") to establish an information system under which:

1. ISONET members shall transmit to the ISO/IEC Information Centre in Geneva the notifications referred to in paragraphs C and J of the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to the Agreement on Technical Barriers to Trade, in the manner indicated there;

2. the following (alpha)numeric classification systems shall be used in the work programmes referred to in paragraph J:

   (a) *a standards classification system* which would allow standardizing bodies to give for each standard mentioned in the work programme an (alpha)numeric indication of the subject matter;

   (b) *a stage code system* which would allow standardizing bodies to give for each standard mentioned in the work programme an (alpha)numeric indication of the stage of development of the standard; for this purpose, at least five stages of development should be distinguished: (1) the stage at which the decision to develop a standard has been taken, but technical work has not yet begun; (2) the stage

[86] See G/TBT/1/Rev.8, p. 25.

at which technical work has begun, but the period for the submission of comments has not yet started; (3) the stage at which the period for the submission of comments has started, but has not yet been completed; (4) the stage at which the period for the submission of comments has been completed, but the standard has not yet been adopted; and (5) the stage at which the standard has been adopted;

(c) *an identification system* covering all international standards which would allow standardizing bodies to give for each standard mentioned in the work programme an (alpha)numeric indication of the international standard(s) used as a basis;

3. the ISO/IEC Information Centre shall promptly convey to the Secretariat copies of any notifications referred to in paragraph C of the Code of Good Practice;

4. the ISO/IEC Information Centre shall regularly publish the information received in the notifications made to it under paragraphs C and J of the Code of Good Practice; this publication, for which a reasonable fee may be charged, shall be available to ISONET members and through the Secretariat to the Members of the WTO.

B. INTERPRETATION AND APPLICATION OF THE DECISION

No jurisprudence or decision of a competent WTO body.

XXI. DECISION ON REVIEW OF THE ISO/IEC INFORMATION CENTRE PUBLICATION

A. TEXT OF THE DECISION

Decision on Review of the ISO/IEC Information Centre Publication

Ministers,

Decide that in conformity with paragraph 1 of Article 13 of the Agreement on Technical Barriers to Trade in Annex 1A of the Agreement Establishing the World Trade Organization, the Committee on Technical Barriers to Trade established thereunder shall, without prejudice to provisions on consultation and dispute settlement, at least once a year review the publication provided by the ISO/IEC Information Centre on information received according to the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 of the Agreement, for the purpose of affording Members opportunity of discussing any matters relating to the operation of that Code.

In order to facilitate this discussion, the Secretariat shall provide a list by Member of all standardizing bodies that have accepted the Code, as well as a list of those standardizing bodies that have accepted or withdrawn from the Code since the previous review.

The Secretariat shall also distribute promptly to the Members copies of the notifications it receives from the ISO/IEC Information Centre.

B. INTERPRETATION AND APPLICATION OF THE DECISION

No jurisprudence or decision of a competent WTO body.

XXII. RELATIONSHIP WITH OTHER WTO AGREEMENTS

A. GATT 1994

68. See the Interpretative Note to Annex 1A of the *WTO Agreement.*

B. SPS AGREEMENT

69. See Article 1.5 and paragraph 4 above.

Agreement on Trade-Related Investment Measures

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Considering that Ministers agreed in the Punta del Este Declaration that "Following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade";

Desiring to promote the expansion and progressive liberalisation of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, while ensuring free competition;

Taking into account the particular trade, development and financial needs of developing country Members, particularly those of the least-developed country Members;

Recognizing that certain investment measures can cause trade-restrictive and distorting effects;

Hereby *agree* as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

No jurisprudence or decision of a competent WTO body.

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1
Coverage

This Agreement applies to investment measures related to trade in goods only (referred to in this Agreement as "TRIMs").

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. "Investment measures"

1. In *Indonesia – Autos*, the Panel examined the consistency of an Indonesian subsidy programme with the *TRIMs Agreement*. Indonesia, arguing that the measures at issue were not trade-related investment measures, stated that while its subsidies may, at times, indirectly affect investment decisions of the recipient of the subsidy or other parties, these decisions are not the object, but rather the unintended result, of the subsidy. Also, Indonesia argued that the *TRIMs Agreement* is basically designed to govern and provide a level playing field for foreign investment, and that therefore measures relating to internal taxes or subsidies cannot be trade-related investment measures. The Panel rejected this view, stating that the term "investment measures" was not limited to measures applying specifically to *foreign* investment:

> "We note that the use of the broad term 'investment measures' indicates that the TRIMs Agreement is not limited to measures taken specifically in regard to *foreign* investment. . . . [N]othing in the TRIMs Agreement suggests that the nationality of the ownership of enterprises subject to a particular measure is an element in deciding whether that measure is covered by the Agreement. We therefore find without textual support in the TRIMs Agreement the argument that since the TRIMs Agreement is basically designed to govern and provide a level playing field for foreign investment, measures relating to internal taxes or subsidies cannot be construed to be a trade-related investment measure. We recall in this context that internal tax advantages or subsidies are only one of many types of advantages which may be tied to a local content requirement which is a principal focus of the TRIMs Agreement. The TRIMs Agreement is not concerned with subsidies and internal taxes as such but rather with local content requirements, compliance with which may be encouraged through providing any type of advantage. Nor, in any case, do we see why an internal measure would necessarily not govern the treatment of foreign investment."[1]

2. In examining whether the measures in question were "investment measures", the Panel on *Indonesia – Autos* reviewed the legislative provisions relating to these measures. The Panel concluded that the measures were "aimed at encouraging the development of a local manufacturing capability for finished motor vehicles and parts and components in Indonesia" and that "that there is nothing in the text of the *TRIMs Agreement* to suggest that a measure is not an investment measure simply on the grounds that a Member does not characterize the measure as such, or on the grounds that the measure is not explicitly adopted as an investment regulation":

> "On the basis of our reading of these measures applied by Indonesia under the 1993 and the 1996 car programmes, which have investment objectives and investment features and which refer to investment programmes, we find that these measures are aimed at encouraging the development of a local manufacturing capability for finished motor vehicles and parts and components in Indonesia. Inherent to this objective is that these measures necessarily have a significant impact on investment in these sectors. For this reason, we consider that these measures fall within any reasonable interpretation of the term 'investment measures'. We do not intend to provide an overall definition of what constitutes an investment measure. We emphasize that our characterization of the measures as 'investment measures' is based on an examination of the manner in which the measures at issue in this case relate to investment. There may be other measures which qualify as investment measures within the meaning of the TRIMs Agreement because they relate to investment in a different manner.
>
> With respect to the arguments of Indonesia that the measures at issue are not investment measures because the Indonesian Government does not regard the programmes as investment programmes and because the measures have not been adopted by the authorities responsible for investment policy, we believe that there is nothing in the text of the TRIMs Agreement to suggest that a measure is not an investment measure simply on the grounds that a Member does not characterize the measure as such, or on the grounds that the measure is not explicitly adopted as an investment regulation. In any event, we note that some of the regulations and decisions adopted pursuant to these car programmes were adopted by investment bodies."[2]

2. "related to trade"

3. In examining whether the measures at issue in the dispute before it were "trade-related", the Panel on *Indonesia – Autos* held that local content requirements were necessarily trade-related:

> "[I]f these measures are local content requirements, they would necessarily be 'trade-related' because such requirements, by definition, always favour the use of

[1] Panel Report on *Indonesia – Autos*, para. 14.73.
[2] Panel Report on *Indonesia – Autos*, paras. 14.80–14.81.

domestic products over imported products, and therefore affect trade.

An examination of whether these measures are covered by Item (1) of the Illustrative List of TRIMs annexed to the TRIMs Agreement, which refers amongst other situations to measures with local content requirements, will not only indicate whether they are trade-related but also whether they are inconsistent with Article III:4 and thus in violation of Article 2.1 of the TRIMs Agreement."[3]

3. Necessity of separate analysis on whether a measure is a trade-related investment measure

4. In *Indonesia – Autos*, the Panel noted that differing views had been expressed by the parties to that dispute on the question "whether any requirement by an enterprise to purchase or use a domestic product in order to obtain an advantage, by definition falls within the Illustrative List or whether the *TRIMs Agreement* requires a separate analysis of the nature of a measure as a trade-related investment measure before proceeding to an examination of whether the measure is covered by the Illustrative List."[4] The Panel considered that it was not necessary for it to decide this question, and noted in this regard:

"[I]f we were to consider that the measures in dispute in this case are in any event trade-related investment measures, it would not be necessary to decide this basic issue of interpretation. We note in this regard that the United States and the European Communities have also argued in the alternative that, even if it is necessary to show a relationship of a measure to investment, any such requirement would be satisfied in the case under consideration.

Therefore, we will first determine whether the Indonesian measures are TRIMs. To this end, we address initially the issue of whether the measures at issue are 'investment measures'. Next, we consider whether they are 'trade-related'. Finally, we shall examine whether any measure found to be a TRIM is inconsistent with the provisions of Article III and thus violates the TRIMs Agreement."[5]

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2
National Treatment and Quantitative Restrictions

1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.

2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex[6] to this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. Illustrative List

(a) Paragraph 1(a)

5. The Panel on *Indonesia – Autos* concluded from its analysis of the measures in question that "under these measures compliance with the provisions for the purchase and use of particular products of domestic origin is necessary to obtain the tax and customs duty benefits on these car programmes, as referred to in Item 1(a) of the Illustrative List of TRIMs."[7] The Panel then concluded that the tax and customs duty benefits were "advantages" within the meaning of the chapeau of paragraph 1 of the Illustrative List:

"In the context of the claims under Article III:4 of GATT, Indonesia has argued that the reduced customs duties are not internal regulations and as such cannot be covered by the wording of Article III:4. We do not consider that the matter before us in connection with Indonesia's obligations under the TRIMs Agreement is the customs duty relief as such but rather the internal regulations, i.e. the provisions on purchase and use of domestic products, compliance with which is necessary to obtain an advantage, which advantage here is the customs duty relief. The lower duty rates are clearly 'advantages' in the meaning of the chapeau of the Illustrative List to the TRIMs Agreement and as such, we find that the Indonesian measures fall within the scope of the Item 1 of the Illustrative List of TRIMs.

Indonesia also argues that the local content requirements of its car programmes do not constitute classic local content requirements within the meaning of the *FIRA* panel (which involved a binding contract between the investor and the Government of Canada) because they leave companies free to decide from which source to purchase parts and components. We note that the Indonesian producers or assemblers of motor vehicles (or motor vehicle parts) must satisfy the local content targets of the relevant measures in order to take advantage of the customs duty and tax benefits offered by the Government. The wording of the Illustrative List of the TRIMs Agreement makes it clear that a simple advantage conditional on the use of domestic goods is considered to

[3] Panel Report on *Indonesia – Autos*, paras. 14.82–14.83.
[4] Panel Report on *Indonesia – Autos*, para. 14.71.
[5] Panel Report on *Indonesia – Autos*, paras. 14.71–14.72.
[6] See Section XII.
[7] Panel Report on *Indonesia – Autos*, para. 14.88.

be a violation of Article 2 of the TRIMs Agreement even if the local content requirement is not binding as such. We note in addition that this argument has also been rejected in the Panel Report on *Parts and Components.*[8]

We thus find that the tax and tariff benefits contingent on meeting local requirements under these car programmes constitute 'advantages'."[9]

6. In *Canada – Wheat Exports and Grain Imports* the question arose, whether Section 87 of the Canada Grain Act was an investment measure inconsistent with Article 2.1 of the *TRIMs Agreement*. With respect to this issue, the Panel made reference to its previous findings[10] that the United States had not established that Section 87 is, as such, inconsistent with Article III:4 of the *GATT 1994*. Since a violation of Article III:4 of the *GATT 1994* was not established, the Panel concluded that no inconsistency with Article 2.1 of the *TRIMs Agreement* could be found.

"The United States has not established that Section 87 is inconsistent with Article III:4 of the GATT 1994. In view of these findings, it is clear that, even if Section 87 could be considered an investment measure related to trade in goods within the meaning of the *TRIMs Agreement*, the United States has not established that Section 87 is, as such, inconsistent with Article 2.1 of the *TRIMs Agreement*. Moreover, since the United States has not established that Section 87 of the *Canada Grain Act* legally precludes producers of foreign grain or foreign producers of grain from gaining access to producer railway cars, the United States has also failed to establish that Section 87 requires the use by an enterprise of products of domestic origin or from any domestic source within the meaning of paragraph 1(a) of the Annex to the *TRIMs Agreement*."[11]

2. Relationship with GATT 1994

7. With respect to the relationship between Article III.4 of the *GATT 1994* and Article 2 of the *TRIMs Agreement*, see paragraphs 25–36 below.

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3
Exceptions

All exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

8. In *Indonesia – Autos*, the Panel referred to Article 3 in discussing the relationship between the *TRIMs Agreement* and *GATT 1994*. See excerpts from the report of the Panel referenced in paragraphs 28–30 below.

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4
Developing Country Members

A developing country Member shall be free to deviate temporarily from the provisions of Article 2 to the extent and in such a manner as Article XVIII of GATT 1994, the Understanding on the Balance-of-Payments Provisions of GATT 1994, and the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205–209) permit the Member to deviate from the provisions of Articles III and XI of GATT 1994.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

No jurisprudence or decision of a competent WTO body.

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5
Notification and Transitional Arrangements

1. Members, within 90 days of the date of entry into force of the WTO Agreement, shall notify the Council for Trade in Goods of all TRIMs they are applying that are not in conformity with the provisions of this Agreement. Such TRIMs of general or specific application shall be notified, along with their principal features.[1]

(*footnote original*) [1] In the case of TRIMs applied under discretionary authority, each specific application shall be notified. Information that would prejudice the legitimate commercial interests of particular enterprises need not be disclosed.

2. Each Member shall eliminate all TRIMs which are notified under paragraph 1 within two years of the date of entry into force of the WTO Agreement in the case of a developed country Member, within five years in the case of a developing country Member, and within seven years in the case of a least-developed country Member.

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[8] (*footnote original*) In *Parts and Components*, the panel recognized that requirements that an enterprise voluntarily accepts to gain government-provided advantages are nonetheless "requirements" (italics in original): "5.21 The Panel noted that Article III:4 refers to 'all laws, regulations or requirements affecting (the) internal sale, offering for sale, purchase, transportation, distribution or use.' The Panel considered that the comprehensive coverage of '*all* laws, regulations or requirements *affecting*' the internal sale, etc. of imported products suggests that not only requirements which an enterprise is legally bound to carry out, but also those which an enterprise voluntarily accepts in order to obtain an advantage from the government constitute 'requirements' within the meaning of that provision . . . ." Panel Report on *EEC – Parts and Components*.

[9] Panel Report on *Indonesia – Autos*, paras. 14.88–14.91.

[10] Panel Report on *Canada – Wheat*, para. 6.375

[11] Panel Report on *Canada – Wheat*, para. 6.381.

3. On request, the Council for Trade in Goods may extend the transition period for the elimination of TRIMs notified under paragraph 1 for a developing country Member, including a least-developed country Member, which demonstrates particular difficulties in implementing the provisions of this Agreement. In considering such a request, the Council for Trade in Goods shall take into account the individual development, financial and trade needs of the Member in question.

4. During the transition period, a Member shall not modify the terms of any TRIM which it notifies under paragraph 1 from those prevailing at the date of entry into force of the WTO Agreement so as to increase the degree of inconsistency with the provisions of Article 2. TRIMs introduced less than 180 days before the date of entry into force of the WTO Agreement shall not benefit from the transitional arrangements provided in paragraph 2.

5. Notwithstanding the provisions of Article 2, a Member, in order not to disadvantage established enterprises which are subject to a TRIM notified under paragraph 1, may apply during the transition period the same TRIM to a new investment (*i*) where the products of such investment are like products to those of the established enterprises, and (*ii*) where necessary to avoid distorting the conditions of competition between the new investment and the established enterprises. Any TRIM so applied to a new investment shall be notified to the Council for Trade in Goods. The terms of such a TRIM shall be equivalent in their competitive effect to those applicable to the established enterprises, and it shall be terminated at the same time.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. Article 5.1

9. At its meeting of 20 February 1995, the Council for Trade in Goods adopted a standard format for notifications required under Article 5.1[12], which had been recommended by the Preparatory Committee for the World Trade Organization.[13]

10. With respect to Article 5.1 notifications, at its meeting on 3 April 1995, the General Council adopted the recommendation of the TRIMs Committee relating to notifications required under Article 5.1.[14]

2. Article 5. 3

11. At its meeting of 3 and 8 May 2000, the General Council agreed to "direct the Council for Trade in Goods to give positive consideration to individual requests presented in accordance with Article 5.3 by developing countries for extension of transition periods for implementation of the TRIMs Agreement."[15]

12. At its meeting of 31 July 2001, the Council for Trade in Goods adopted an extension of the transitional period for the elimination of TRIMs for seven developing countries at their request.[16] The extension lasted until the end of 2001. At its meeting of 5 November 2001, the Council for Trade in Goods adopted an additional extension of the transition period for six of these Members and for Thailand.[17] The length of the extension varied depending on the Member concerned.[18]

13. At its meeting of 20 December 2001 Colombia was granted by the General Council a waiver of its TRIMS obligations for certain bean products until 31 December 2003.[19]

14. On 22 December 2003, Pakistan made a request to the Council for Trade in Goods for a three-year extension of the transition period in which to eliminate its remaining TRIMs. As of December 2004, a decision on this request is still pending.[20]

3. Article 5.5

15. A standard format has been adopted for notifications made pursuant to this provision.[21] However, to date no such notifications have been made to the Council for Trade in Goods.

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6
Transparency

1. Members reaffirm, with respect to TRIMs, their commitment to obligations on transparency and notification in Article X of GATT 1994, in the undertaking on "Notification" contained in the Understanding Regarding Notification, Consultation, Dispute Settlement and

[12] G/C/M/1, Section 2(A).
[13] PC/IPL/8.
[14] WT/GC/M/3, Section 5. The text of the decision can be found in WT/L/64.
[15] WT/GC/M/55, Annex II, the third bullet point.
[16] These seven countries were: Argentina (G/L/460), Colombia (G/L/461),Malaysia (G/L/462), Mexico (G/L/463), Philippines (G/L/464), Romania (G/L/465), Pakistan (G/L/466).
[17] The first extension to Thailand was granted in a waiver, adopted by the General Council at its meeting of 31 July 2001 (WT/L/410). The waiver expired the 31 December 2002. The waiver stated that after this period, if another extension proved necessary, it would be granted by a decision of the Council of Trade in Goods. This new extension was adopted by the Council for Trade in Goods at its meeting of 5 November 2001 (G/L/504).
[18] Argentina – G/L/497 (31 December 2003),, Malaysia – G/L/499 (31 December 2003), Mexico – G/L/500 (31 December 2003), Pakistan – G/L/501 (31 December 2003), Philippines – G/L/502 (31 June 2003), Romania – G/L/503 (31 May 2003), Thailand – G/L/504 (31 December 2003).
[19] G/L/441. The waiver confirmed the decision to extend the transitional period for the elimination of TRIMs for Colombia that the Council of Trade in Goods had adopted at its meeting of 5 November 2001. G/L/498.
[20] G/C/W/501.
[21] G/TRIMS/3.

Surveillance adopted on 28 November 1979 and in the Ministerial Decision on Notification Procedures adopted on 15 April 1994.

2. Each Member shall notify the Secretariat of the publications in which TRIMs may be found, including those applied by regional and local governments and authorities within their territories.

3. Each Member shall accord sympathetic consideration to requests for information, and afford adequate opportunity for consultation, on any matter arising from this Agreement raised by another Member. In conformity with Article X of GATT 1994 no Member is required to disclose information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

1. Article 6.2

16. At its meetings of 30 September and 1 November 1996, the TRIMs Committee decided that Members would provide the Secretariat with the name(s) of publication(s) in which TRIMs may be found.[22]

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7
Committee on Trade-Related Investment Measures

1. A Committee on Trade-Related Investment Measures (referred to in this Agreement as the "Committee") is hereby established, and shall be open to all Members. The Committee shall elect its own Chairman and Vice-Chairman, and shall meet not less than once a year and otherwise at the request of any Member.

2. The Committee shall carry out responsibilities assigned to it by the Council for Trade in Goods and shall afford Members the opportunity to consult on any matters relating to the operation and implementation of this Agreement.

3. The Committee shall monitor the operation and implementation of this Agreement and shall report thereon annually to the Council for Trade in Goods.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. General

(a) Rules of procedure

17. At its meeting on 1 December 1995, the Council for Trade in Goods approved the rules of procedure for the TRIMs Committee.[23]

18. The TRIMs Committee reports to the Council for Trade in Goods on an annual basis.[24]

(b) Observership

19. With respect to the observership for the TRIMs Committee, see Chapter on *WTO Agreement*, Section XII.B.1(b) and Section XXVI.[25]

2. Article 7.2

20. At its meeting on 20 February 1995 the Council for Trade in Goods, in approving the standard format for notifications specified under Article 5.1 and 5.5 of the Agreement, agreed to a proposal made by the Chairman of the Committee to the effect that the TRIMs Committee would carry out the task assigned to the Council for Trade in Goods with respect to notifications of TRIMs.[26]

21. At its meeting of 7 May 2002, the Council for Trade in Goods adopted a decision in order to assign to the Committee on TRIMs the work for continued discussion on implementation issues, relating to special treatment for developing countries. The decision stated that:

> "Members agree in accordance with Article 7.2 of the TRIMs Agreement, the CTG will assign to the Committee on TRIMs the responsibility for conducting the work on the outstanding implementation issues contained in tirets 37–40 of the document JOB(01)152/Rev.1. The TRIMs committee shall report regularly on the progress of its work to the CTG, which will report to the Trade Negotiating Committee in accordance with paragraph 12 of the Doha Ministerial Declaration."[27]

22. In its report to the General Council, the TRIMs Committee noted that it had considered two proposals on special and differential treatment submitted by the African Group[28] with respect to Article 4 and Article 5.3 of the TRIMs Agreement.

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[22] G/TRIMS/M/5, Section B. The text of the decision can be found in G/TRIMS/5.
[23] G/C/M/7, Section 2.
[24] The reports are contained in documents G/L/37, 133, 193, 259, 319, 390, 589, 649, 705 and 705/Corr.1.
[25] On 17 March 1999, the TRIMs Committee granted regular observer status to those organizations which had observer status on an ad hoc basis, see G/TRIMS/M/6.
[26] G/C/M/1, para. 2.1.
[27] G/C/M/60, Section VI.
[28] TN/CTD/W/3/Rev.2.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8
Consultation and Dispute Settlement

The provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, shall apply to consultations and the settlement of disputes under this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

23. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the *TRIMs Agreement* were invoked:

Case Name	Case Number	Invoked Articles
1 *EC – Bananas III*	WT/DS27	Articles 2.1 and 5
2 *Indonesia – Autos*	WT/DS54, WT/DS55, WT/DS59, WT/DS64	Articles 2.1 and 5.4
3 *Canada – Autos*	WT/DS139, WT/DS142	Article 2
4 *India – Autos*	WT/DS146, WT/DS175	Articles 2.1 and 2.2
5 *Canada – Wheat Exports and Grain Imports*	WT/DS276	Article 2.1

X. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9
Review by the Council for Trade in Goods

Not later than five years after the date of entry into force of the WTO Agreement, the Council for Trade in Goods shall review the operation of this Agreement and, as appropriate, propose to the Ministerial Conference amendments to its text. In the course of this review, the Council for Trade in Goods shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

24. In accordance with Article 9, at its meeting of 15 October 1999, the Council for Trade in Goods launched the review of the operation of the *TRIMs Agreement*.[29] Upon request by Members, a study on the use and effects of TRIMs and other performance requirements was jointly prepared by the WTO and UNCTAD Secretariats, which served as input for discussions under the Article 9 review of the *TRIMs Agreement*.[30]

XI. RELATIONSHIP WITH OTHER WTO AGREEMENTS

A. GATT 1994

1. Whether conflict exists

25. The Panel on *EC – Bananas III*, the Panel examined the import licensing procedures of the European Communities under GATT 1994, the Licensing Agreement and the *TRIMs Agreement*. After determining that the Licensing Agreement applied to tariff quotas, the Panel addressed the question whether GATT 1994 as well as the Licensing Agreement and the *TRIMs Agreement* applied to the European Communities import licensing procedures. The Panel defined the term "conflict" between WTO agreements, as laid down in the General Interpretative Note to Annex 1A; it held that a conflict exists when two obligations are mutually exclusive and where a rule in one agreement prohibits what a rule in another agreement explicitly permits:

> "As a preliminary issue, it is necessary to define the notion of 'conflict' laid down in the General Interpretative Note. In light of the wording, the context, the object and the purpose of this Note, we consider that it is designed to deal with (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.[31]
>
> However, we are of the view that the concept of 'conflict' as embodied in the General Interpretative Note does not relate to situations where rules contained in one of the Agreements listed in Annex 1A provide for

[29] G/C/M/41, Section 7.
[30] G/C/W/307 and G/C/W/307/Add.1.
[31] (*footnote original*) For instance, Article XI:1 of GATT 1994 prohibits the imposition of quantitative restrictions, while Article XI:2 of GATT 1994 contains a rather limited catalogue of exceptions. Article 2 of the Agreement on Textiles and Clothing ("ATC") authorizes the imposition of quantitative restrictions in the textiles and clothing sector, subject to conditions specified in Article 2:1–21 of the ATC. In other words, Article XI:1 of GATT 1994 prohibits what Article 2 of the ATC permits in equally explicit terms. It is true that Members could theoretically comply with Article XI:1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector because Article 2 of the ATC authorizes rather than mandates the imposition of quantitative restrictions. However, such an interpretation would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994. Therefore, in the case described above, we consider that the General Interpretative Note stipulates that an obligation or authorization embodied in the ATC or any other of the agreements listed in Annex 1A prevails over the conflicting obligation provided for by GATT 1994.

different or complementary obligations in addition to those contained in GATT 1994. In such a case, the obligations arising from the former and GATT 1994 can both be complied with at the same time without the need to renounce explicit rights or authorizations. In this latter case, there is no reason to assume that a Member is not capable of, or not required to, meet the obligations of both GATT 1994 and the relevant Annex 1A Agreement."[32]

26. Based on its reading of the term "conflict" contained in the General Interpretative Note to Annex 1A, as referenced in paragraph 25 above, the Panel on *EC – Bananas III* went on to examine whether such conflict existed between the *Licensing Agreement* and the *TRIMs Agreement*, on the one hand, and provisions of the *GATT 1994*, on the other. The Panel concluded that this was not the case and that, consequently, "the provisions of GATT 1994, the Licensing Agreement and Article 2 of the TRIMS Agreement all apply to the EC's import licensing procedures for bananas":

"Proceeding on this basis, we have to ascertain whether the provisions of the Licensing Agreement and the TRIMs Agreement, to the extent they are within the coverage of the terms of reference of this Panel, contain any conflicting obligations which are contrary to those stipulated by Articles I, III, X, or XIII of GATT 1994, in the sense that Members could not comply with the obligations resulting from both Agreements at the same time or that WTO Members are authorized to act in a manner that would be inconsistent with the requirements of GATT rules. Wherever the answer to this question is affirmative, the obligation or authorization contained in the Licensing or TRIMs Agreement would, in accordance with the General Interpretative Note, prevail over the provisions of the relevant article of GATT 1994. Where the answer is negative, both provisions would apply equally.

Based on our detailed examination of the provisions of the Licensing Agreement, Article 2 of the TRIMs Agreement as well as GATT 1994, we find that no conflicting, i.e. mutually exclusive, obligations arise from the provisions of the three Agreements that the parties to the dispute have put before us. Indeed, we note that the first substantive provision of the Licensing Agreement, Article 1.2, requires Members to conform to GATT rules applicable to import licensing.

In the light of the foregoing discussion, we find that the provisions of GATT 1994, the Licensing Agreement and Article 2 of the TRIMS Agreement all apply to the EC's import licensing procedures for bananas."[33]

2. Relationship between Article III:4 of the GATT 1994 and Article 2 of the TRIMs Agreement

27. The Panel on *EC – Bananas III* found that the allocation of import licences to a particular category of operators was inconsistent with Article III:4 of *GATT 1994*.[34] With respect to the claim that this measure was also inconsistent with Article 2 of the *TRIMs Agreement*, the Panel, further to noting that the *TRIMs Agreement* essentially interprets and clarifies the provisions of Article III where trade-related investment measures are concerned, decided to resort to judicial economy:

"[W]e first examine the relationship of the TRIMs Agreement to the provisions of GATT. We note that with the exception of its transition provisions[35] the TRIMs Agreement essentially interprets and clarifies the provisions of Article III (and also Article XI) where trade-related investment measures are concerned. Thus the TRIMs Agreement does not add to or subtract from those GATT obligations, although it clarifies that Article III:4 may cover investment-related matters.

We emphasize that in view of the importance of the TRIMs Agreement in the framework of the agreements covered by the WTO, we have examined the claims and legal arguments advanced by the parties under the TRIMs Agreement carefully. However, for the reasons stated in the previous paragraph, we do not consider it necessary to make a specific ruling under the TRIMs Agreement with respect to the eligibility criteria for the different categories of operators and the allocation of certain percentages of import licences based on operator categories. On the one hand, a finding that the measure in question would not be considered a trade-related investment measure for the purposes of the TRIMs Agreement would not affect our findings in respect of Article III:4 since the scope of that provision is not limited to TRIMs and, on the other hand, steps taken to bring EC licensing procedures into conformity with Article III:4 would also eliminate the alleged non-conformity with obligations under the TRIMs Agreement."[36]

28. In *Indonesia – Autos*, the European Communities and the United States claimed that the Indonesian 1993 car programme, by providing for tax benefits for finished cars incorporating a certain percentage value of domestic parts and components, and for customs duty benefits for imported parts and components used in cars incorporating a certain percentage value of domestic products, violated the provisions of Article 2 of the *TRIMs Agreement*, and Article III:4 of the *GATT 1994*. Japan, the European Communities and the United States also claimed that the Indonesian 1996 car programme, by providing for local content requirements

[32] Panel Report on *EC – Bananas III*, paras. 7.159–7.160.
[33] Panel Report on *EC – Bananas III*, paras. 7.161–7.163.
[34] Panel Report on *EC – Bananas III*, para. 7.182.
[35] (*footnote original*) We have already dismissed the Complainants' claim under the transition provisions of Article 5 of the TRIMs Agreement because Article 5 was not listed in the request for the establishment of the Panel as required by Article 6.2 of the DSU.
[36] Panel Report on *EC – Bananas III*, paras. 7.185–7.186.

linked to tax benefits for National Cars (which by definition incorporated a certain percentage value of domestic products), and to customs duty benefits for imported parts and components used in National Cars, violated the provisions of Article 2 of the *TRIMs Agreement* and Article III:4 of the *GATT 1994*. In response to these claims, the Panel analysed the relationship between the *TRIMs Agreement* and Article III of *GATT 1994*, holding that "on its face the TRIMs Agreement is a fully fledged agreement in the WTO system":

> "Since the complainants have raised claims that the local content requirements of the car programmes violate both the provisions of Article III:4 of GATT and Article 2 of the TRIMs Agreement, we must consider which claims to examine first. In deciding which claims to examine first, we must, initially, address the relationship between Article III of GATT and the TRIMs Agreement.
>
> In this regard, we note first that on its face the TRIMs Agreement is a fully fledged agreement in the WTO system. The TRIMs Agreement is not an 'Understanding to GATT 1994', unlike the six Understandings which form part of the GATT 1994. The TRIMs Agreement and Article III:4 prohibit local content requirements that are TRIMs and therefore can be said to cover the same subject matter. But when the TRIMs Agreement refers to 'the provisions of Article III', it refers to the substantive aspects of Article III; that is to say, conceptually, it is the ten paragraphs of Article III that are referred to in Article 2.1 of the TRIMs Agreement, and not the application of Article III in the WTO context as such. Thus if Article III is not applicable for any reason not related to the disciplines of Article III itself, the provisions of Article III remain applicable for the purpose of the TRIMs Agreement. This view is reinforced by the fact that Article 3 of the TRIMs Agreement contains a distinct and explicit reference to the general exceptions to GATT. If the purpose of the TRIMs Agreement were to refer to Article III as applied in the light of other (non Article III) GATT rules, there would be no need to refer to such general exceptions.[37]"[38]

29. The Panel on *Indonesia – Autos* found confirmation for its finding that the *TRIMs Agreement* was "a fully fledged agreement in the WTO system" in the fact that the *TRIMs Agreement* had introduced "special transitional provisions including notification requirements". Subsequently, referring to the Appellate Body Report in *EC – Bananas III*, the Panel then held that it would begin its analysis with the *TRIMs Agreement*, because "the TRIMs Agreement is more specific than Article III:4 as far as the claims under consideration are concerned":

> "Moreover, it has to be recognized that the TRIMs Agreement, in addition to interpreting and clarifying the provisions of Article III where trade-related investment measures are concerned, has introduced special transitional provisions including notification requirements.[39] This reinforces the conclusion that the TRIMs Agreement has an autonomous legal existence, independent from that of Article III. Consequently, since the TRIMs Agreement and Article III remain two legally distinct and independent sets of provisions of the WTO Agreement, we find that even if either of the two sets of provisions were not applicable the other one would remain applicable. And to the extent that complainants have raised separate and distinct claims under Article III:4 of GATT and the TRIMs Agreement, each claim must be addressed separately.
>
> As to which claims, those under Article III:4 of GATT or Article 2 of the TRIMs Agreement, to examine first, we consider that we should first examine the claims under the TRIMs Agreement since the TRIMs Agreement is more specific than Article III:4 as far as the claims under consideration are concerned. A similar issue was presented in *Bananas III*, where the Appellate Body discussed the relationship between Article X of GATT and Article 1.3 of the Licensing Agreement and concluded that the Licensing Agreement being more specific it should have been applied first.[40] This is also in line with the approach of the panel and the Appellate Body in the *Hormones* dispute, where the measure at issue was examined first under the SPS Agreement since the measure was alleged to be an SPS measure."[41]

30. The Panel on *Indonesia – Autos* found that the tax and tariff benefits contingent on meeting local requirements under the Indonesian car programmes constituted "advantages" within the meaning of the chapeau of paragraph 1 of the Illustrative List of TRIMs, and as a result were inconsistent with Article 2.1 of the *TRIMs Agreement*.[42] The Panel then decided that it was unnec-

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[37] (*footnote original*) We note that a similar drafting technique was used with the TRIPS Agreement which cross-refers to provisions of other international treaties.

[38] Panel Report on *Indonesia – Autos*, paras. 14.60–14.61.

[39] (*footnote original*) We note that Indonesia has put emphasis on a particular statement of the *Bananas III* panel concerning the relationship between Article III of GATT and the TRIMs Agreement. We consider that that statement has to be understood in the particular context of that dispute between two developed countries (no transition period was therefore applicable) where the panel had already reached a conclusion that the measure at issue violated Article III:4 of GATT. Therefore there was no need to further discuss the TRIMs Agreement since any action to remedy the inconsistency found under Article III:4 of GATT would necessarily remedy inconsistencies under the TRIMs Agreement. In the present case, we have to address the legal relationship between these two agreements.

[40] (*footnote original*) The Appellate Body in *EC – Bananas III* stated in paragraph 204: "Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994."

[41] Panel Report on *Indonesia – Autos*, paras. 14.62–14.63.

[42] Panel Report on *Indonesia – Autos*, paras. 14.91–14.92.

essary to consider claims raised with respect to these measures under Article III:4 of *GATT 1994*:

> "The complainants have claimed that the local content requirements under examination, and which we find are inconsistent with the TRIMs Agreement, also violate the provisions of Article III:4 of GATT. Under the principle of judicial economy,[43] a panel only has to address the claims that must be addressed to resolve a dispute or which may help a losing party in bringing its measures into conformity with the WTO Agreement. The local content requirement aspects of the measures at issue have been addressed pursuant to the claims of the complainants under the TRIMs Agreement. We consider therefore that action to remedy the inconsistencies that we have found with Indonesia's obligations under the TRIMs Agreement would necessarily remedy any inconsistency that we might find with the provisions of Article III:4 of GATT. We recall our conclusion that non applicability of Article III would not affect as such the application of the TRIMs Agreement. We consider therefore that we do not have to address the claims under Article III:4, nor any claim of conflict between Article III:4 of GATT and the provisions of the SCM Agreement."[44]

31. In *Canada – Autos*, the complainants raised claims pertaining to conditions concerning the level of Canadian value added and the maintenance of a certain ratio between the net sales value of vehicles produced in Canada and the net sales value of vehicles sold for consumption in Canada. These claims were based upon both Article III:4 of the *GATT 1994* and the *TRIMs Agreement*. The Panel, in noting that claims were raised under both Article III:4 of *GATT 1994* and the *TRIMs Agreement*, decided to examine first the claims raised under Article III:4 of *GATT 1994*. The Panel first took note of the findings of the previous two panels on the issue of the relationship between Article III:4 of the *GATT 1994* and the *TRIMs Agreement*:

> "We note that, in two recent dispute settlement proceedings, consideration has been given to the issue of the sequence of the examination of claims raised with respect to the same measure under Article III:4 of the GATT and the TRIMs Agreement.
>
> In *EC – Bananas III* (ECU), claims were raised under Article III:4 of the GATT and Article 2.1 of the TRIMs Agreement regarding aspects of the European Communities import licensing procedures for bananas. The panel in that dispute decided to treat the claims under Article 2.1 of the TRIMs Agreement together with its consideration of the claims under Article III:4 of the GATT. The panel found that the allocation to certain operators of a percentage of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates was inconsistent with the requirements of Article III:4 of the GATT. In light of that finding, the panel did not consider it necessary to make a specific ruling on whether this aspect of these import licensing procedures was also inconsistent with Article 2.1 of the TRIMs Agreement.
>
> In *Indonesia – Autos*, claims under Article III:4 of the GATT and Article 2.1 of the TRIMs Agreement were raised with respect to certain local content measures applied by Indonesia regarding automobiles. The panel in that dispute decided that it should first examine the claims under the TRIMs Agreement on the grounds that 'the TRIMs Agreement is more specific than Article III:4 as far as the claims under consideration are concerned'. After finding that the measures at issue were inconsistent with Article 2.1 of the TRIMs Agreement, the panel determined that it was not necessary to make a finding on the question of whether these measures were inconsistent with Article III:4 of the GATT."[45]

32. After reviewing previous panel findings on the relationship between Article III:4 of the *GATT 1994* and the *TRIMs Agreement*, the Panel on *Canada – Autos* held that it was not "persuaded that the TRIMs Agreement can be properly characterized as being more specific than Article III:4 in respect of the claims raised by the complainants in the present case".

> "In the present dispute, the parties have not explicitly addressed this question of which of the claims raised under Article III:4 of the GATT and Article 2.1 of the TRIMs Agreement should be examined first. Implicit in the order in which they have presented their claims is the view that these claims should be addressed first under Article III:4 of the GATT. While we are aware of the statement made by the Appellate Body in *EC – Bananas III*, and referred to by the panel in *Indonesia – Autos,* that a claim should be examined first under the agreement which is the most specific with respect to that claim, we are not persuaded that the TRIMs Agreement can be properly characterized as being more specific than Article III:4 in respect of the claims raised by the complainants in the present case. Thus, we note that there is disagreement between the parties not only on whether the measures at issue can be considered to be 'trade-related investment measures' but also on whether the Canadian value added requirements and ratio requirements are explicitly covered by the Illustrative List annexed to the TRIMs Agreement. It would thus appear that, assuming that the measures at issue are 'trade-related investment measures', their consistency with Article III:4 of the GATT may not be able to be determined simply on the basis of the text of the Illustrative List but may require an analysis based on the wording of Article III:4. Consequently, we doubt that examining the claims first under the TRIMs Agreement will enable us to resolve the dispute before us in a more efficient manner than examining these claims under Article III:4.

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[43] (*footnote original*) As defined by the Appellate Body in *US – Wool Shirts and Blouses*, pp. 17–20.

[44] Panel Report on *Indonesia – Autos*, para. 14.93.

[45] Panel Report on *Canada – Autos*, paras. 10.60–10.62.

In light of the foregoing considerations, we decide that, consistent with the approach of the panel in *EC – Bananas III*, we will examine the claims in question first under Article III:4 of the GATT."[46]

33. After finding that certain requirements concerning domestic value added were inconsistent with Article III:4 of the *GATT 1994*,[47] the Panel on *Canada – Autos* addressed the issue of why it considered that it was not necessary to address claims that had been raised with respect to these requirements under the *TRIMs Agreement*. The Panel stated:

"In light of the finding in the preceding paragraph, we do not consider it necessary to make a specific ruling on whether the CVA requirements provided for in the MVTO 1998 and the SROs are inconsistent with Article 2.1 of the TRIMs Agreement. We believe that the Panel's reasoning in *EC – Bananas III* as to why it did not make a finding under the TRIMs Agreement after it had found that certain aspects of the EC licensing procedures were inconsistent with Article III:4 of the GATT also applies to the present case. Thus, on the one hand, a finding in the present case that the CVA requirements are not trade-related investment measures for the purposes of the TRIMs Agreement would not affect our finding in respect of the inconsistency of these requirements with Article III:4 of the GATT since the scope of that provision is not limited to trade-related investment measures. On the other hand, steps taken by Canada to bring these measures into conformity with Article III:4 would also eliminate the alleged inconsistency with obligations under the TRIMs Agreement."[48]

34. The Panel on *Canada – Autos* rejected a claim that the application of certain requirements regarding the ratio of sales of vehicles produced by a manufacturer in Canada to the net sales value of vehicles of the same class sold for consumption in Canada by the manufacturer was in violation of Article III:4 of the *GATT 1994*. In view of that finding, the Panel considered that it also had to dismiss the claim raised under Article 2.1 of the *TRIMs Agreement* with respect to this measure. The Panel noted:

"In light of the foregoing considerations, we find that the European Communities has failed to demonstrate that, by applying ratio requirements under the MVTO 1998 and the SROs as one of the conditions determining the eligibility of duty-free importation of motor vehicles, Canada is according to motor vehicles imported duty free less favourable treatment with respect to their internal sale than to like domestic motor vehicles. The claim of the European Communities regarding the inconsistency of the ratio requirements with Article III:4 must therefore be rejected. Because of this finding with respect to the claim of the European Communities regarding the consistency of the ratio requirements with Article III:4 of the GATT, we must also reject the claim of the European Communities that these requirements are inconsistent with Article 2.1 of the TRIMs Agreement. We note in this regard that the European Communities claims that these ratio requirements are trade-related investment measures which are inconsistent with Article 2.1 of the TRIMs Agreement because they violate Article III:4 of the GATT."[49]

35. In *India – Autos*, the United States and the European Communities alleged violations of Articles III:4 and XI:1 of the *GATT 1994* and Article 2 of the *TRIMs Agreement* in relation to certain Indian measures affecting trade and investment in the automotive industry, that India maintained on balance-of-payment grounds. The Panel, in noting that the measures at issue could violate both the *GATT 1994* and the *TRIMs Agreement*, decided to first examine *GATT 1994* provisions. The Panel, commenced its analysis of the relationship between the *GATT 1994* and the *TRIMs Agreement* in the light of the Panel Report on *Canada – Autos*[50] and held that it was "not convinced that, as a general matter, the TRIMS Agreement could inherently be characterised as more specific than the relevant GATT provisions":

"As a general matter, even if there was some guiding principle to the effect that a specific covered Agreement might appropriately be examined before a general one where both may apply to the same measure, it might be difficult to characterize the TRIMs Agreement as necessarily more 'specific' than the relevant GATT provisions. Although the TRIMS Agreement 'has an autonomous legal existence', independent from the relevant GATT provisions, as noted by the *Indonesia – Autos* panel, the substance of its obligations refers directly to Articles III and XI of the GATT, and clarifies their meaning, *inter alia*, through an Illustrative list. On one view, it simply provides additional guidance as to the identification of certain measures considered to be inconsistent with Articles III:4 and XI:1 of the GATT 1994. On the other hand, the TRIMs Agreement also introduces rights and obligations that are specific to it, through its notification mechanism and related provisions. An interpretative question also arises in relation to the TRIMs Agreement as to whether a complainant must separately prove that the measure in issue is a 'trade-related investment measure'. For either of these reasons, the TRIMs Agreement might be arguably more specific in that it provides additional rules concerning the specific measures it covers. The Panel is therefore not convinced that, as a general matter, the TRIMs Agreement could inherently be characterized as more specific than the relevant GATT provisions."[51]

[46] Panel Report on *Canada – Autos*, paras. 10.63–10.64.
[47] Panel Report on *Canada – Autos*, paras. 10.90 and 10.130.
[48] Panel Report on *Canada – Autos*, para. 10.91. See also para. 10.131.
[49] Panel Report on *Canada – Autos*, para. 10.150.
[50] See para. 32 of this Chapter.
[51] Panel Report on *India – Autos*, para. 7.157.

36. After noticing that this case was not one of those in which the order of examination of claims could have any practical significance, the Panel in *India – Autos* took into consideration the order given by the complainants in their replies to specific questions from the Panel on the proper order of the examination of their claims and the impact that the order selected could have on the potential application of the principle of judicial economy in the case. As a result, the Panel decided first to examine the *GATT 1994* provisions.[52] After finding that both the indigenization and the neutralization conditions were inconsistent with Articles III:4 and XI:1 of the *GATT 1994*, the Panel in *India – Autos* applied the principle of judicial economy and did not separately consider whether such conditions also violated the provisions of the *TRIMs Agreement*.[53]

B. SCM AGREEMENT

37. In *Indonesia – Autos*, claims regarding various Indonesian measures adopted pursuant to the Indonesian National Car programmes were raised under the *GATT 1994*, the *SCM Agreement* and the *TRIMs Agreement*. In considering an argument advanced by Indonesia that that the measures in dispute were covered only by the *SCM Agreement*, the Panel discussed *inter alia* whether a measure can be covered at the same time by the provisions of the *TRIMs Agreement* and those of the *SCM Agreement*. The Panel began by considering whether there was a conflict between the *SCM Agreement* and the *TRIMs Agreement*. The Panel first noted that the *General Interpretative Note to Annex 1A* did not apply to the relationship between these two agreements and that this relationship would have to be considered "in the light of the general international law presumption against conflicts":

> "In considering this issue ... we need to examine whether there is a general conflict between the SCM Agreement and the TRIMs Agreement. We note first that the interpretative note to Annex IA of the WTO Agreement is not applicable to the relationship between the SCM Agreement and the TRIMs Agreement. The issue of whether there might be a general conflict between the SCM Agreement and the TRIMs Agreement would therefore need to be examined in the light of the general international law presumption against conflicts and the fact that under public international law a conflict exists in the narrow situation of mutually exclusive obligations for provisions that cover the same type of subject matter."[54]

38. The Panel on *Indonesia – Autos* then went on to hold that "the SCM Agreement and the TRIMs Agreement are concerned with different types of obligations and cover different subject matters":

> "In this context the fact that the drafters included an express provision governing conflicts between GATT and the other Annex 1A Agreements, but did not include any such provision regarding the relationship between the other Annex 1A Agreements, at a minimum reinforces the presumption in public international law against conflicts. With respect to the nature of obligations, we consider that, with regard to local content requirements, the SCM Agreement and the TRIMs Agreement are concerned with different types of obligations and cover different subject matters. In the case of the SCM Agreement, what is prohibited is the grant of a subsidy contingent on use of domestic goods, not the requirement to use domestic goods as such. In the case of the TRIMs Agreement, what is prohibited are TRIMs in the form of local content requirements, not the grant of an advantage, such as a subsidy.
>
> A finding of inconsistency with Article 3.1(b) of the SCM Agreement can be remedied by removal of the subsidy, even if the local content requirement remains applicable. By contrast, a finding of inconsistency with the TRIMs Agreement can be remedied by a removal of the TRIM that is a local content requirement even if the subsidy continues to be granted. Conversely, for instance, if a Member were to apply a TRIM (in the form of local content requirement), as a condition for the receipt of a subsidy, the measure would continue to be a violation of the TRIMs Agreement if the subsidy element were replaced with some other form of incentive. By contrast, if the local content requirements were dropped, the subsidy would continue to be subject to the SCM Agreement, although the nature of the relevant discipline under the SCM Agreement might be affected. Clearly, the two agreements prohibit different measures. We note also that under the TRIMs Agreement, the advantage made conditional on meeting a local content requirement may include a wide variety of incentives and advantages, other than subsidies. There is no provision contained in the SCM Agreement that obliges a Member to violate the TRIMs Agreement, or vice versa.
>
> We consider that the SCM and TRIMs Agreements cannot be in conflict, as they cover different subject matters and do not impose mutually exclusive obligations. The TRIMs Agreement and the SCM Agreement may have overlapping coverage in that they may both apply to a single legislative act, but they have different focus, and they impose different types of obligations."[55]

39. The Panel on *Indonesia – Autos* found support for its finding referenced in paragraphs 37 and 38 above in the Appellate Body Reports in *Canada – Periodicals* and *EC – Bananas III*:

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[52] Panel Report *India – Autos*, paras. 7.158–7.162.
[53] Panel Report *India – Autos*, paras. 7.323–7.324.
[54] Panel Report on *Indonesia – Autos*, para. 14.49.
[55] Panel Report on *Indonesia – Autos*, paras. 14.50–14.52.

"In support of this finding, we agree with the principles developed in the *Periodicals*[56] and *Bananas III*[57] cases concerning the relationship between two WTO agreements at the same level within the structure of WTO agreements. It was made clear that, while the same measure could be scrutinized both under GATT and under GATS, the specific aspects of that measure to be examined under each agreement would be different. In the present case, there are in fact two different, albeit linked, aspects of the car programmes for which the complainants have raised claims. Some claims relate to the existence of local content requirements, alleged to be in violation of the TRIMs Agreement, and the other claims relate to the existence of subsidies, alleged to cause serious prejudice within the meaning of the SCM Agreement.

[W]e do not consider that the application of the TRIMs Agreement to this dispute would reduce the SCM Agreement, and Article 27.3 thereof, to 'inutility'. On the contrary, with Article 27.3 of the SCM Agreement, those subsidy measures of developing countries that are contingent on compliance with TRIMs (in the form of local content requirement) and that are permitted during the transition period provided under Article 5 of the TRIMs Agreement, are not prohibited by Article 3.1(b) of the SCM Agreement, for the transition period specified in Article 27.3 of the SCM Agreement.

We find that there is no general conflict between the SCM Agreement and the TRIMs Agreement. Therefore, to the extent that the Indonesian car programmes are TRIMs and subsidies, both the TRIMs Agreement and the SCM Agreement are applicable to this dispute."[58]

XII. ANNEX I

A. TEXT OF ANNEX I

ILLUSTRATIVE LIST

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

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or

(b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.

2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:

(a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;

(b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or

(c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

B. INTERPRETATION AND APPLICATION OF ANNEX I

40. With respect to references to the Illustrative List contained in Annex I, see paragraphs 5 and 30 above.

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[56] (*footnote original*) In *Canada – Periodicals*, the Appellate Body stated at page 19: "The entry into force of the GATS, as Annex 1B of the WTO Agreement, does not diminish the scope of application of the GATT 1994".

[57] (*footnote original*) In *EC – Bananas III*, the Appellate Body stated in paragraph 221: "The second issue is whether the GATS and the GATT are mutually exclusive agreements. (. . .) Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods. certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. (. . .) [W]hile the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different."

[58] Panel Report on *Indonesia – Autos*, paras. 14.49–14.55.

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PART I

I. ARTICLE 1

A. TEXT OF ARTICLE 1

Members hereby *agree* as follows:

Article 1[1]
Principles

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated[1] and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

(*footnote original*) [1] The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. General

(a) "anti-dumping measure"

1. The Appellate Body in *US – 1916 Act* rejected the argument that, based on the history of Article 1, "the phrase 'anti-dumping measure' refers *only* to definitive anti-dumping duties, price undertakings and provisional measures."[2] The Appellate Body stated that "the ordinary meaning of the phrase 'anti-dumping measure' seems to encompass all measures taken against dumping. We do not see in the words 'an anti-dumping measure' any explicit limitation to particular types of measures."[3]

(b) "initiated and conducted in accordance with the provisions of this Agreement"

2. Regarding a claim raised under Article 1, the Panel on *US – 1916 Act (EC)* noted that "if we find a violation of other provisions of the *Anti-Dumping Agreement*, it will be demonstrated that the anti-dumping investigation ... is not 'initiated and conducted in accordance with the provisions of this Agreement' and a breach of Article 1 will be established."[4]

3. The Panel on *EC – Tube or Pipe Fittings* rejected the assertion that in case of a devaluation in the fourth quarter of the period of investigation, Article 1 of the *Anti-Dumping Agreement* and Article VI of the *GATT*

[1] In Marrakesh, the Ministers adopted the Decision on Anti-Circumvention, see Section XXIV.
[2] Appellate Body Report on *US – 1916 Act*, para. 119.
[3] Appellate Body Report on *US – 1916 Act*, para. 119.
[4] Panel Report on *US – 1916 Act (EC)*, para. 6.208.

1994 require the investigating authority to base its determination only on the period following the devaluation to examine whether there was present dumping causing injury. The Panel stated that "Article 1 of the *Anti-Dumping Agreement* does not require an investigating authority to re-assess its own determination made on the basis of an examination of data pertaining to the IP prior to the imposition of an anti-dumping measure in the light of an event that occurred during the IP".[5]

(c) Relationship with other Articles

4. In *EC – Bed Linen*, the Panel touched on the relationship between Articles 1 and 15 in interpreting Article 15. See paragraph 585 below.

5. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with Articles 3, 5, 6, 7, 12, and paragraph 2 of Annex I of the *Anti-Dumping Agreement*. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, including Article 1, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement. There would be no basis to Mexico's claims under Articles 1, 9 and 18 of the AD Agreement, and Article VI of GATT 1994, if Guatemala were not found to have violated other provisions of the AD Agreement."[6] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.

6. In *US – Stainless Steel*, addressing Korea's claim that "*because* certain provisions of the *AD Agreement* have been violated, Article VI of the GATT 1994 and Article 1 of the *AD Agreement* are consequently violated"[7], the Panel also stated: "[b]ecause of their dependent nature, we can perceive of no useful purpose that would be served by ruling on these claims. Accordingly, we do not consider it necessary to address them."[8]

7. The relationship between Article 1 and other provisions of the *Anti-Dumping Agreement* was discussed in *Guatemala – Cement II* and *US – Stainless Steel*. See paragraphs 5–6 above.

II. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2
Determination of Dumping

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[2], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

(*footnote original*) [2] Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities[3] determine that such sales are made within an extended period of time[4] in substantial quantities[5] and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

(*footnote original*) [3] When in this Agreement the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate senior level.
(*footnote original*) [4] The extended period of time should normally be one year but shall in no case be less than six months.
(*footnote original*) [5] Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales

[5] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.107.
[6] Panel Report on *Guatemala – Cement II*, para. 8.296.
[7] Panel Report on *US – Stainless Steel*, para. 6.138.
[8] Panel Report on *US – Stainless Steel*, para. 6.138.

below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[6]

(*footnote original*) [6] The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[7] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

(*footnote original*) [7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate

of exchange on the date of sale[8], provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

(*footnote original*) [8] Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

2.5 In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

2.7 This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. General

(a) Period of data collection

(i) Recommendation by the Committee on Anti-Dumping Practices

8. At its meeting of 4–5 May 2000, regarding appropriate periods of data collection, the Committee on Anti-Dumping Practices recommended with respect to original investigations to determine the existence of dumping and consequent injury:

"1. As a general rule:

(a) the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months, ending as close to the date of initiation as is practicable;

(b) the period of data collection for investigating sales below cost, and the period of data collection for dumping investigations, normally should coincide in a particular investigation;

(c) the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation;

(d) In all cases the investigating authorities should set and make known in advance to interested parties the periods of time covered by the data collection, and may also set dates certain for completing collection and/or submission of data. If such dates are set, they should be made known to interested parties.

2. In establishing the specific periods of data collection in a particular investigation, investigating authorities may, if possible, consider practices of firms from which data will be sought concerning financial reporting and the effect this may have on the availability of accounting data. Other factors that may be considered include the characteristics of the product in question, including seasonality and cyclicality, and the existence of special order or customized sales.

3. In order to increase transparency of proceedings, investigating authorities should include in public notices or in the separate reports provided pursuant to Article 12.2 of the Agreement, an explanation of the reason for the selection of a particular period for data collection if it differs from that provided for in: paragraph 1 of this recommendation, national legislation, regulation, or established national guidelines."[9]

[9] G/ADP/M/16, Section I, in particular, para. 84. The text of the recommendation can be found in G/ADP/6, para. 3.

(ii) The role of the investigation period

9. The Appellate Body on *EC – Tube or Pipe Fittings* rejected an argument made by Brazil that the investigating authority was obliged to base its export price determination on data relating to only that part of the period of investigation that followed an important devaluation of the Brazilian currency. According to the Appellate Body "certain anomalous results would flow from Brazil's assertion that when a major change, such as in this case a steep and lasting devaluation, occurs at a late stage of the POI, the dumping determination should be confined to and based on the data following that major change. If such a change were to take place at the very end of the POI, Brazil's approach would imply that the determination would have to be based on the data of a very short period."[10] The Appellate Body reached the following conclusion with regard to the role of the period of investigation:

> "Permitting such discretionary selection of data from a period of time within the POI would defeat the objectives underlying investigating authorities' reliance on a POI for the purposes of a dumping determination. As the Panel correctly noted, the POI 'form[s] the basis for an objective and unbiased determination by the investigating authority.' Like the Panel and the parties to this dispute, we understand a POI to provide data collected over a sustained period of time, which period can allow the investigating authority to make a dumping determination that is less likely to be subject to market fluctuations or other vagaries that may distort a proper evaluation. We agree with the Panel that the standardized reliance on a POI, although not fixed in duration by the *Anti-Dumping Agreement*, assures the investigating authority and exporters of 'a consistent and reasonable methodology for determining present dumping', which anti-dumping duties are intended to offset. In contrast to this consistency and reliability, Brazil's approach would introduce a significant level of subjectivity on the part of the investigating authority to determine when data from a subset of the POI may be a reliable indicator of an exporter's future pricing behaviour. As the European Communities points out, the 'broad judgmental role' accorded investigating authorities by Brazil's approach is not consistent with the detailed nature of the rules and obligations of the *Anti-Dumping Agreement* governing various aspects of the dumping determination."[11]

10. The Appellate Body in *EC – Tube or Pipe Fittings* further considered that "the *Anti-Dumping Agreement* takes into account the possibility of such major changes occurring at a late stage of the POI, or even after the POI, not by allowing investigating authorities to pick and choose a subset of data or sub-periods of a POI according to their subjective considerations, but by review mechanisms."[12]

(b) Relationship with other paragraphs of Article 2

11. In *US – Stainless Steel*, the Panel found the United States treatment of unpaid export sales as direct selling costs to be inconsistent with Article 2.4. In the context of this finding, the Panel explained the relationship between Articles 2.1, 2.3 and 2.4, as follows:

> "In our view, both Article 2.3 and Article 2.4 play an important role in respect of the construction of export prices. When determining whether dumping exists, Article 2.1 usually requires a comparison of the *export price* with the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. Article 2.3, however, authorizes a Member to *construct* the export price where, *inter alia*, the actual export price is unreliable because of association between the exporter and the importer. As discussed in section VI.C.2.(b)(i), it was pursuant to this authorization that the DOC disregarded the export price charged by POSCO to its affiliated importer POSAM in these investigations and instead constructed the export price.
>
> Further, Article 2.3 specifies that the export price may be constructed *on the basis of* the price at which the imported products are first resold to an independent buyer. It is clear from this language that, while the price charged to the first independent buyer is a starting-point for the construction of an export price, it is not *itself* the constructed export price. Nor does Article 2.3 itself contain any guidance regarding the methodology to be employed in order to construct the export price. Rather, the only rules governing the methodology for construction of an export price are set forth in Article 2.4 of the *AD Agreement*, which provides that, '[i]n the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.' Although the United States repeatedly refers to these allowances as 'Article 2.3 adjustments', the provision governing these allowances is found in Article 2.4 and it is therefore evident to us that a claim regarding the appropriateness of allowances made to construct an export price may be made pursuant to that Article.[13]"[14]

[10] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 78
[11] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 80.
[12] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 81.
[13] (*footnote original*) The United States' perception seems to be based on the assumption that there is a watertight separation between the provision relating to construction of the export price (Article 2.3) and that relating to comparison between export price/constructed export price and normal value (Article 2.4). It is evident from the face of the text, however, that the rules regarding allowances related to construction of the export price are found in the paragraph relating to comparison.
[14] Panel Report on *US – Stainless Steel*, paras. 6.90–6.91.

2. Article 2.1

(a) Conditions on sales transactions for the calculation of normal value

12. In *US – Hot-Rolled Steel*, the Appellate Body considered that "[t]he text of Article 2.1 expressly imposes four conditions on sales transactions in order that they may be used to calculate normal value: first, the sale must be 'in the ordinary course of trade'; second, it must be of the 'like product'; third, the product must be 'destined for consumption in the exporting country'; and, fourth, the price must be 'comparable'".[15]

(i) Use of downstream sales

13. In *US – Hot-Rolled Steel*, the United States authorities, in calculating the normal value, discarded certain sales by exporters to their affiliates because these sales were not "in the ordinary course of trade". The authorities replaced the discarded sales with downstream sales of the product, transacted between the affiliate and the first independent buyer, which had been made "in the ordinary course of trade". Japan objected to the use of these sales in calculating normal value, under Article 2.1, because, according to it, it is implicit in that Article that the exporter must be the seller in order that a sales transaction may properly be used to calculate normal value and this was not the case here. The Appellate Body, reversing the Panel's finding, considered that Article 2.1 is silent in that respect and that, provided all four explicit conditions (see paragraph 12 above) in Article 2.1 are satisfied, the identity of the "seller of the 'like product' is not a ground for precluding the use of a downstream sales transaction when calculating normal value". However, the Appellate Body stressed that the identity of the seller is not irrelevant when calculating normal value since it may affect comparability, although that aspect is taken care by Article 2.4:

> "The text of Article 2.1 is, however, silent as to *who* the parties to relevant sales transactions should be. Thus, Article 2.1 does not expressly mandate that the sale be made by the exporter for whom a margin of dumping is being calculated. Nor does Article 2.1 expressly preclude that relevant sales transactions might be made downstream, between affiliates of the exporter and independent buyers. In our view, provided that all of the explicit conditions in Article 2.1 of the *Anti-Dumping Agreement* are satisfied, the *identity* of the seller of the 'like product' is not a ground for precluding the use of a downstream sales transaction when calculating normal value. In short, we see no reason to read into Article 2.1 an additional condition that is not expressed.
>
> We do not mean to suggest that the identity of the seller is irrelevant in calculating normal value under Article 2.1 of the *Anti-Dumping Agreement*. However, to ensure that prices are 'comparable', the *Anti-Dumping Agreement* provides a mechanism, in Article 2.4, which allows investigating authorities to take full account of the fact, as appropriate, that a relevant sale was not made by the exporter or producer itself, but was made by another party . . .
>
> . . .
>
> . . . the use of downstream sales prices may necessitate the provision of appropriate 'allowances', under Article 2.4, which take into account any differences demonstrated to affect price comparability. We will explore this issue further below."[16]

(b) Sales "in the ordinary course of trade"

(i) Definition of sales "in the ordinary course of trade"

14. In *US – Hot-Rolled Steel*, the Appellate Body confirmed that the *Anti-Dumping Agreement* does not define the term "in the ordinary course of trade".[17] In this dispute, Japan, the complainant, had agreed with the definition of this term given by the United States authorities, namely: "[g]enerally, sales are in the ordinary course of trade if made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product."[18] The Appellate Body considered that for the purpose of the appeal, it was content with that definition.[19]

15. The Appellate Body in *US – Hot-Rolled Steel*, when looking into the meaning of "sales in the ordinary course of trade" under Article 2.1 of the *Anti-Dumping Agreement*, noted that Article 2.2.1 does provide for a method to determine whether "sales below cost" are "in the ordinary course of trade". However, the Appellate Body considered that the said provision does not purport to exhaust the range of methods for determining whether sales are "in the ordinary course of trade" and it does not cover the more specific issue of sales between affiliated parties:

> "We note that Article 2.2.1 of the *Anti-Dumping Agreement* itself provides for a method for determining whether *sales below cost* are 'in the ordinary course of trade'. However, that provision does not purport to exhaust the range of methods for determining whether sales are 'in the ordinary course of trade', nor even the

[15] Appellate Body Report on *US – Hot-Rolled Steel*, para. 165.
[16] Appellate Body Report on *US – Hot-Rolled Steel*, paras. 166, 167 and 169. The Appellate Body could not, however, continue the analysis of whether the United States authorities had made any specific allowances in this case so as to make a fair comparison under Article 2.4 because it found that there was not an adequate factual record for it to complete the analysis. Para. 180.
[17] Appellate Body Report on *US – Hot-Rolled Steel*, para. 139.
[18] Appellate Body Report on *US – Hot-Rolled Steel*, para. 139.
[19] Appellate Body Report on *US – Hot-Rolled Steel*, para. 139.

range of possible methods for determining whether low-priced sales are 'in the ordinary course of trade'. Article 2.2.1 sets forth a method for determining whether sales between *any* two parties are 'in the ordinary course of trade'; it does *not* address the more specific issue of transactions between affiliated parties. In transactions between such parties, the affiliation itself may signal that *sales above cost*, but below the usual market price, might not be in the ordinary course of trade. Such transactions may, therefore, be the subject of special scrutiny by the investigating authorities."[20]

(ii) Investigating authorities' discretion under Article 2.1

16. The Appellate Body in *US – Hot-Rolled Steel* noted that the investigating authorities' discretion under Article 2.1 to determine how to avoid distortions in the normal value should be exercised in a even-handed way that is fair to all parties:

"Although we believe that the *Anti-Dumping Agreement* affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not 'in the ordinary course of trade', that discretion is not without limits. In particular, the discretion must be exercised in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation. If a Member elects to adopt general rules to prevent distortion of normal value through sales between affiliates, those rules must reflect, even-handedly, the fact that both high and low-priced sales between affiliates might not be 'in the ordinary course of trade'."[21]

(iii) Sales not in the ordinary course of trade

Purpose of excluding sales not in the ordinary course of trade

17. In *US – Hot-Rolled Steel*, the Appellate Body explained that the exclusion of sales not in the ordinary course of trade from the calculation of the normal value is mandated by Article 2.1 in order to ensure that the normal value is indeed "normal":

"Article 2.1 requires investigating authorities to exclude sales not made 'in the ordinary course of trade', from the calculation of normal value, precisely to ensure that normal value is, indeed, the 'normal' price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with 'normal' commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating 'normal' value."[22]

Prices above or below the ordinary course of trade price

18. In *US – Hot-Rolled Steel*, Japan had challenged the so-called "arm's length" test which allowed the United States authorities to automatically disregard the sales of a given exporter to individual affiliated parties as not being in the ordinary course of trade when the weighted average selling price to that affiliated party is below 99.5 percent of the weighted average price of sales to all non-affiliated parties. Japan claimed that the application of this test was inconsistent with Article 2.1 of the *Anti-Dumping Agreement* because, first, the test excluded only low-priced affiliated sales, thereby inflating normal value, and, second, the test operated on the basis of an arbitrary threshold that did not take account of usual variation of prices in the marketplace. The Panel found that the application of the 99.5 percent test "does not rest on a permissible interpretation of the term 'sales in the ordinary course of trade'."[23] The Appellate Body upheld the Panel's finding, although it followed a different reasoning.[24]

19. The Appellate Body in *US – Hot-Rolled Steel* considered that determining "whether a sales price is higher or lower than the 'ordinary course' price is not simply a question of comparing prices" and that the other terms

[20] Appellate Body Report on *US – Hot-Rolled Steel*, para. 147.
[21] Appellate Body Report on *US – Hot-Rolled Steel*, para. 148
[22] Appellate Body Report on *US – Hot-Rolled Steel*, para. 140. The Appellate Body also gives some examples of what it could be considered as sales not in the ordinary course of trade: "We can envisage many reasons for which transactions might not be 'in the ordinary course of trade'. For instance, where the parties to a transaction have common ownership, although they are legally distinct persons, usual commercial principles might not be respected between them. Instead of a sale between these parties being a transfer of goods between two enterprises which are economically *independent*, transacted at market prices, the sale effectively involves a transfer of goods within a *single* economic enterprise. In that situation, there is reason to suppose that the sales price *might* be fixed according to criteria which are not those of the marketplace. The sales transaction might be used as a vehicle for transferring resources within the single economic enterprise. Thus, the sales price may be *lower* than the 'ordinary course' price, if the purpose is to shift resources to the buyer, who then receives goods worth more than the actual sales price. Or, conversely, the sales price may be *higher* than the 'ordinary course' price, if the purpose is to shift resources to the seller, who receives higher revenues for the sale than would be the case in the marketplace. There are many reasons relating to corporate law and strategy, and to fiscal law, which may lead to resources being allocated, in these ways, within a single economic enterprise." Para. 141.
[23] Panel Report on *US – Hot-Rolled Steel*, para. 7.112.
[24] Appellate Body Report on *US – Hot-Rolled Steel*, para. 158. The Appellate Body also looked at another method used by the authorities, although not used in this case, which regards *high*-priced sales between affiliates. This so-called "aberrationally high" test excludes *high*-priced sales between affiliates from the calculation of normal value only if they were "*aberrationally*" or "*artificially*" high. The Appellate Body conclude that "[i]n our view, there is a lack of *even-handedness* in the two tests applied by the United States, in this case, to establish whether sales made to affiliates were 'in the ordinary course of trade'. The combined application of these two rules operated systematically to raise normal value, through the automatic exclusion of marginally low-priced sales, coupled with the automatic inclusion of all high-priced sales, except those proved, upon request, to be aberrationally high priced. The application of the two tests, thereby, disadvantaged exporters." Para. 154. As regards the Appellate Body's conclusions as to the investigating authorities' duty to exercise their discretion in an even-handed way, see para. 16 of this Chapter.

and conditions of the transaction must be taken into account:

> "We note that determining whether a sales price is higher or lower than the 'ordinary course' price is not simply a question of comparing prices. Price is merely one of the terms and conditions of a transaction. To determine whether the price is high or low, the price must be assessed in light of the other terms and conditions of the transaction. Thus, the volume of the sales transaction will affect whether a price is high or low. Or, the seller may undertake additional liability or responsibilities in some transactions, for instance for transport or insurance. These, and a number of other factors, may be expected to affect an assessment of the price."[25]

20. The Appellate Body in *US – Hot-Rolled Steel* further considered that nothing excludes that, even in the absence of any common ownership, "a sales transaction *might* not be 'in the ordinary course of trade', either because the sales price is higher than the 'ordinary course' price, or because it is lower than that price":

> "Clearly, the lower the degree of common ownership, implying common control, between the parties to a sales transaction, the less likely it is that the transaction will not be 'in the ordinary course of trade'. However, even where the parties to a sales transaction are entirely independent, a transaction might not be 'in the ordinary course of trade'.[26] In this appeal, we do not need to define all the circumstances in which transactions might not be 'in the ordinary course of trade'. It suffices to recognize that, *as between affiliates*, a sales transaction *might* not be 'in the ordinary course of trade', either because the sales price is higher than the 'ordinary course' price, or because it is lower than that price."[27]

Scope of the investigating authorities' duties under Article 2.1

21. The Appellate Body in *US – Hot-Rolled Steel* described the duties of the investigating authorities under Article 2.1 as follows:

> "In our view, the duties of investigating authorities, under Article 2.1 of the *Anti-Dumping Agreement*, are precisely the *same*, whether the sales price is higher or lower than the 'ordinary course' price, and irrespective of the reason why the transaction is not 'in the ordinary course of trade'. Investigating authorities must exclude, from the calculation of normal value, *all* sales which are not made 'in the ordinary course of trade'. To include such sales in the calculation, whether the price is high or low, would distort what is defined as '*normal* value'.
>
> In view of the many different types of transaction not 'in the ordinary course of trade' – some including affiliated parties, others not; some including high prices, others low prices; some including prices below cost, others not – investigating authorities need not, under the *Anti-Dumping Agreement*, scrutinize, according to *identical* rules, *each and every* category of sale that is potentially not 'in the ordinary course of trade'."[28]

Sales between affiliated companies

22. In *US – Hot-Rolled Steel*, the Appellate Body upheld the Panel's findings (albeit for different reasons) that the application by the United States authorities of its 99.5 per cent test to determine whether the sales between affiliated companies were in the ordinary course of trade did not rest upon a permissible interpretation of Article 2.1. See paragraphs 18–20 above.

23. In *US – Hot-Rolled Steel*, the United States authorities, in calculating the normal value, discarded certain sales by exporters to their affiliates because these sales were not "in the ordinary course of trade". The authorities had replaced the discarded sales with downstream sales of the product, transacted between the affiliate and the first independent buyer, which had been made "in the ordinary course of trade". See paragraph 13 above.

(c) Request for information

24. In *Guatemala – Cement II*, the Panel rejected Mexico's argument that the request for cost data was not justified under Articles 2.1 and 2.2 because the application did not contain any allegation that Mexican producers were selling below cost, and stated that "[n]othing in those provisions prevents an investigating authority from requesting cost information, even if the applicant does not allege sales below cost."[29]

(d) Relationship with other paragraphs of Article 2

(i) Article 2.2.1

25. See paragraph 15 above.

(ii) Article 2.4

26. See paragraph 13 above.

3. Article 2.2

(a) Request for cost information

27. With respect to the request for cost information by investigating authorities, see paragraph 24 above.

(b) Article 2.2.1

28. In *US – Hot-Rolled Steel*, the Appellate Body, when looking into the meaning of "sales in the ordinary

[25] Appellate Body Report on *US – Hot-Rolled Steel*, para. 142.
[26] (*footnote original*) One example of such a transaction is a liquidation sale by an enterprise to an independent buyer, which may not reflect "normal" commercial principles.
[27] Appellate Body Report on *US – Hot-Rolled Steel*, para. 143.
[28] Appellate Body Report on *US – Hot-Rolled Steel*, paras. 145–146.
[29] Panel Report on *Guatemala – Cement II*, para. 8.183.

course of trade" under Article 2.1, noted that Article 2.2.1 of the *Anti-Dumping Agreement* "itself provides for a method for determining whether *sales below cost* are 'in the ordinary course of trade'. However, that provision does not purport to exhaust the range of methods for determining whether sales are 'in the ordinary course of trade', nor even the range of possible methods for determining whether low-priced sales are 'in the ordinary course of trade'." See paragraph 15 above.

(i) Article 2.2.1.1

Cost data requirements or elements

29. The Panel on *US – DRAMS* addressed Korea's claim that the United States' authority had acted inconsistently with the first sentence of Article 2.2.1.1 by disregarding cost data which met with the two requirements set forth in the proviso of that Article, namely, "in accordance with generally accepted accounting principles" and "reasonably reflect costs". The Panel considered that the first sentence is only applicable to "records kept by the exporter or producer under investigation", and thus refused to apply this Article to cost data prepared by an outside consultant on behalf of the producer.[30]

30. In *Egypt – Steel Rebar*, the Panel noted that both Articles 2.2.1.1 and 2.2.2 "emphasize two elements, first, that cost of production is to be calculated based on the actual books and records maintained by the company in question so long as these are in keeping with generally accepted accounting principles but that second, the costs to be included are those that reasonably reflect the costs *associated with* the production and sale of the product under consideration".[31]

Positive obligations on investigating authorities

31. The Panel on *US – Lumber V* considered that Article 2.2.1.1 contained only a limited obligation to base the cost on the records of the exporter or producer under investigation under certain circumstances. The Panel was of the view that Article 2.2.1.1 does not require that costs be calculated in accordance with Generally Accepted Accounting Principles (GAAP) nor that they reasonably reflect the costs associated with the production and sale of the product under consideration:

> "In our view, Article 2.2.1.1 imposes certain positive obligations on investigating authorities, including the obligation to calculate costs on the basis of records kept by the exporter or producer under investigation and to consider all available evidence on the proper allocation of costs. Neither of these obligations is absolute, however, as in both cases the obligations apply only if ('*provided*') certain conditions are met. The role of these conditions is therefore *not* to impose positive obligations on Members, but to set forth the circumstances under which certain positive obligations do or do not apply. Thus, Article 2.2.1.1 does not in our view require that costs be calculated in accordance with GAAP nor that they reasonably reflect the costs associated with the production and sale of the product under consideration. Rather, it simply requires that costs be calculated on the basis of the exporter or producer's records, *in so far as* those records are in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration. Similarly, Article 2.2.1.1 does *not* require that all allocations made by an investigating authority have been historically utilised by the exporter or producer; rather it simply provides that investigating authorities must consider all available evidence on the proper allocation of costs, including that made available by respondents, *insofar as* such allocations have been historically utilised by the exporter or producer. Bearing this in mind, we shall examine Canada's arguments relating to Article 2.2.1.1."[32]

Consider all available evidence on the proper allocation of costs

32. The Appellate Body on *US – Lumber V* considered that the requirement to consider all available evidence on the proper allocation of costs may in certain circumstances require the authorities to compare advantages and disadvantages of alternative cost allocation methodologies:

> "In our view, the parameters of the obligation to 'consider all available evidence' will vary case-by-case. It may well be that, in the light of the facts of a particular case, the requirement to 'consider all available evidence' may be satisfied by the investigating authority without comparing allocation methodologies or aspects thereof. However, in other instances – such as where there is compelling evidence available to the investigating authority that more than one allocation methodology potentially may be appropriate to ensure that there is a proper allocation of costs – the investigating authority may be required to 'reflect on' and 'weigh the merits of' evidence that relates to such alternative allocation methodologies, in order to satisfy the requirement to 'consider all available evidence'. Thus, although the second sentence of Article 2.2.1.1 does not, as a general rule, require investigating authorities to compare allocation methodologies to assess their respective advantages and disadvantages in each and every case, there may be particular instances in which the investigating authority may be required to compare them in order to satisfy the explicit requirement of the second sentence of Article 2.2.1.1 to 'consider all available evidence on the proper allocation of costs'."[33]

[30] Panel Report on *US – DRAMS*, para. 6.66.
[31] Panel Report on *Egypt – Steel Rebar*, para. 7.393.
[32] Panel Report on *US – Lumber V*, para. 7.237.
[33] Appellate Body Report on *US – Lumber V*, para. 138.

Burden of proof

33. Referring to *EC – Hormones*[34], the Panel on *US – DRAMS* noted that the burden of establishing a prima facie case of inconsistency with Article 2.2.1.1 was on the complaining party.[35]

(c) Article 2.2.2

(i) Amounts based on actual data pertaining to production and sales of the like product

34. The Panel on *US – Lumber V* was of the view that amounts for general and administrative expenses *pertain to* the production and sale of the like product unless it can be demonstrated that the product under investigation did not benefit from a particular General and Administrative costs (G&A) cost item[36]:

> "We next examine the term 'pertain to' within the meaning of the chapeau of Article 2.2.2. 'Pertain' is defined as '**1 a** relate or have reference to'.[37] In our view, a meaningful interpretation of the term 'pertain[ing] to' must take into account the nature of those costs because, as Canada acknowledges, they 'are not directly attributable to the product under investigation or [to] any particular product'. Thus, it would appear to us that, unless a particular G&A cost can be tied to a particular product manufactured by a company, G&A costs – because normally they cannot be attributed to any particular product but are costs incurred by the company in the production and sale of goods – pertain or relate to all of those goods. Canada's argument that G&A costs 'benefit all products that a company (or division within a company) may produce rather than specific products' supports our view. If G&A costs benefit the production and sale of all goods that a company may produce, they must certainly relate or pertain to those goods, including in part to the product under investigation."[38]

(ii) Use of low volume sales Selling, General and Administrative costs (SG&A) and profits data in constructing normal value

35. In its report on *EC – Tube or Pipe Fittings*, the Appellate Body was asked to examine whether an investigating authority must exclude data from low-volume sales when determining the amounts for SG&A and profits under the chapeau of Article 2.2.2, having disregarded such low-volume sales for normal value determination under Article 2.2. The Appellate Body reasoned as follows:

> "Examining the text of the chapeau of Article 2.2.2, we observe that this provision imposes a general obligation ('shall') on an investigating authority to use 'actual data pertaining to production and sales in the ordinary course of trade' when determining amounts for SG&A and profits. Only '[w]hen such amounts cannot be determined on this basis' may an investigating authority proceed to employ one of the other three methods provided in sub-paragraphs (i)–(iii). In our view, the language of the chapeau indicates that an investigating authority, when determining SG&A and profits under Article 2.2.2, must first attempt to make such a determination using the 'actual data pertaining to production and sales in the ordinary course of trade'. If actual SG&A and profit data for sales in the ordinary course of trade do exist for the exporter and the like product under investigation, an investigating authority is obliged to use that data for purposes of constructing normal value; it may not calculate constructed normal value using SG&A and profit data by reference to different data or by using an alternative method.
>
> As the Panel correctly observed, it is meaningful for the interpretation of Article 2.2.2 that Article 2.2 specifically identifies low-volume sales *in addition to* sales outside the ordinary course of trade. In contrast to Article 2.2, the chapeau of Article 2.2.2 explicitly excludes only sales outside the ordinary course of trade. The absence of any qualifying language related to low volumes in Article 2.2.2 implies that an exception for low-volume sales should not be read into Article 2.2.2."[39]

36. The Appellate Body in *EC – Tube or Pipe Fittings* conluded that it is "significant that Article 2.2.2 specifies the data to be used by an investigating authority when constructing normal value. The text of that provision excludes actual data outside the ordinary course of trade, but does not exclude data from low-volume sales. The negotiators' express reference to sales outside the ordinary course of trade *and* to low-volume sales in Article 2.2, and the omission of a reference to low-volume sales in the chapeau of Article 2.2.2, confirms our view that low-volume sales are not excluded from the chapeau of Article 2.2.2 for the calculation of SG&A profits."[40] Thus, the Appellate Body found that in cases where low-volume sales are in the ordinary course of trade, an investigating authority does not act inconsistently with the chapeau of Article 2.2.2 by including actual data from those sales to derive SG&A and profits for the construction of normal value.

(iii) Priority of options

37. In response to the argument that the order of methodological options for calculating reasonable amount for profit set out in Article 2.2.2 reflects a pref-

[34] Appellate Body Report on *EC – Hormones*, para. 98.
[35] Panel Report on *US – DRAMS*, paras. 6.68–6.69.
[36] Panel Report on *US – Lumber V*, para. 7.267.
[37] (*footnote original*) *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 1021.
[38] Panel Report on *US – Lumber V*, para. 7.265.
[39] Appellate Body Report on *EC – Tube or Pipe Fittings*, paras. 97–98.
[40] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 101.

erence for one option over another, the Panel on *EC – Bed Linen*, in a finding subsequently not addressed by the Appellate Body, concluded that "the order in which the three options are set out in Article 2.2.2(i)–(iii) is without any hierarchical significance and that Members have complete discretion as to which of the three methodologies they use in their investigations."[41] The Panel set out the following reasoning:

> "Looking first at the text of Article 2.2.2, we see nothing that would indicate that there is a hierarchy among the methodological options listed in subparagraphs (i) to (iii). Of course, they are listed in a sequence, but this is an inherent characteristic of any list, and does not in and of itself entail any preference of one option over others. Moreover, we note that where the drafters intended an order of preference, the text clearly specifies it. . . . Had the drafters wished to indicate a hierarchy among the three options, surely they would have done so in a manner that made that hierarchy explicit. Certainly, we would have expected something more than simply a numbered listing. Thus, in context, it seems clear to us that the mere order in which the options appear in Article 2.2.2 has no preferential significance.
>
> . . . Paragraphs (i)–(iii) provide three alternative methods for calculating the profit amount, which, in our view, are intended to constitute close approximations of the general rule set out in the chapeau of Article 2.2.2. These approximations differ from the chapeau rule in that they relax, respectively, the reference to the like product, the reference to the exporter concerned, or both references, spelled out in that rule . . .
>
> In our view, there is no basis on which to judge which of these three options is 'better'. Certainly, there were differing views during the negotiations as to how this issue was to be resolved, and there is no specific language in the Agreement to suggest that the drafters considered one option preferable to the others. Given, as explained above, that each of the three options is in some sense 'imperfect' in comparison with the chapeau methodology, there is, in our opinion, no meaningful way to judge which option is less imperfect – or of greater authority – than another and, thus, no obvious basis for a hierarchy. And it is, in our view, for the drafters of an Agreement to set out a hierarchy or order of preference among admittedly imperfect approximations of a preferred result, and not for a panel to impose such a choice where it is not apparent from the text."[42]

(iv) Relationship with Article 2.2.2

38. See paragraph 30 above.

(v) Article 2.2.2(i) – "same general category of products"

39. In *Thailand – H-Beams*, in a finding not reviewed by the Appellate Body, the Panel rejected Poland's argument that the Thai authority had, for the purpose of calculating profit in constructed normal value, adopted too narrow a definition of the term "same general category of products". The Panel stated:

> "[W]e note that the text of Article 2.2.2 (i) simply refers without elaboration to 'the same general category of products' produced by the producer or exporter under investigation. Thus, the text of this subparagraph provides no precise guidance as to the required breadth or narrowness of the product category, and therefore provides no support for Poland's argument that a broader rather than a narrower definition is *required*."[43]

40. The Panel on *Thailand – H-Beams* went on to explain the contextual bases for its interpretation of Article 2.2.2(i) quoted in paragraph 39 above. The Panel first opined that the context of Article 2.2.2 (i) supports a narrow rather than a broad interpretation of the term "same general category of products":

> "We do find a certain amount of guidance in other provisions of Article 2.2.2, in particular its chapeau and its overall structure, however. In particular, we note that, in general, Article 2.2 and Article 2.2.2 concern the establishment of an appropriate proxy for the price 'of the like product in the ordinary course of trade in the domestic market of the exporting country' when that price cannot be used. As such, as the drafting of the provisions makes clear, the preferred methodology which is set forth in the chapeau is to use *actual* data of the exporter or producer under investigation for the *like product*. Where this is not possible, subparagraphs (i) and (ii) respectively provide for the database to be broadened, either as to the product (i.e., the same general category of products produced by the producer or exporter in question) or as to the producer (i.e., other producers or exporters subject to investigation in respect of the like product), but not both. Again this confirms that the intention of these provisions is to obtain results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country.
>
> This context indicates to us that the use under subparagraph (i) of a *narrower* rather than a *broader* 'same general category of products' certainly is permitted. Indeed, the narrower the category, the fewer products other than the like product will be included in the category, and this would seem to be fully consistent with the goal of obtaining results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country."[44]

[41] Panel Report on *EC – Bed Linen*, para. 6.62.
[42] Panel Report on *EC – Bed Linen*, paras. 6.59–6.61.
[43] Panel Report on *Thailand – H-Beams*, para. 7.111.
[44] Panel Report on *Thailand – H-Beams*, paras. 7.112–7.113.

41. The Panel on *Thailand – H-Beams* found additional contextual support in Article 3.6 for its finding that the term "same general category of products" under Article 2.2.2(i) permits a narrower rather than a broader approach:

> "Additional contextual support can be found in Article 3.6 (a provision related to data concerning injury), which provides that when available data on 'criteria such as the production process, producers' sales and profits' do not permit the separate identification of production of the like product, 'the effects of the dumped imports shall be assessed by the examination of the production of the *narrowest* group or range of products, which includes the like product, for which the necessary information can be provided' (emphasis supplied). Although this provision concerns information relevant to injury rather than dumping, and although we do not mean to suggest that use of the narrowest possible category including the like product is *required* under Article 2.2.2(i), in our view Article 3.6 provides contextual support for the conclusion that use of a narrow rather than a broader category is permitted.
>
> We note Poland's argument that a broader category is more likely than a narrower one to yield 'representative' results (by which we presume Poland to mean representative of the price of the like product in the ordinary course of trade in the domestic market of the exporting country), but we believe that as a matter of logic the opposite more often is likely to be true. The broader the category, the more products other than the like product will be included, and thus in our view the more potential there will be for the constructed normal value to be unrepresentative of the price of the like product. We therefore disagree with Poland that Article 2.2.2(i) requires the use of broader rather than narrower categories, and believe to the contrary that the use even of the narrowest general category that includes the like product is permitted."[45]

(vi) Article 2.2.2(ii) – "weighted average" and data from "other exporters or producers"

42. In *EC – Bed Linen*, the Appellate Body reversed the Panel's finding under Article 2.2.2(ii) that the existence of data for more than one other exporter or producer is not a necessary prerequisite for application of the approach using "weighted average" in calculating the amount for administrative, selling and general costs ("SG&A") to determine the constructed normal value of subject products. The Appellate Body stated:

> "In our view, the phrase 'weighted average' in Article 2.2.2(ii) precludes, in this particular provision, understanding the phrase 'other exporters or producers' in the plural as including the singular case. To us, the use of the phrase 'weighted average' in Article 2.2.2(ii) makes it impossible to read 'other exporters or producers' as 'one exporter or producer'. First of all, and obviously, an 'average' of amounts for SG&A and profits *cannot* be calculated on the basis of data on SG&A and profits relating to only *one* exporter or producer. Moreover, the textual directive to 'weight' the average further supports this view because the 'average' which results from combining the data from different exporters or producers must reflect the relative importance of these different exporters or producers in the overall mean. In short, it is simply not possible to calculate the 'weighted average' relating to only one exporter or producer. Indeed, we note that, at the oral hearing in this appeal, the European Communities conceded that the phrase 'weighted average' envisages a situation where there is more than one exporter or producer.
>
> The requirement to calculate a 'weighted average' in Article 2.2.2(ii) is, in our view, the key to interpreting that provision. It is indispensable to the calculation method set forth in this provision, and, thus, it is indispensable to the entire provision – which deals only with the mechanics of that calculation. We disagree with the Panel that 'the concept of weighted averaging is relevant only *when there is information from more than one other producer or exporter* available to be considered.' (emphasis in the original) We see no justification, textual or otherwise, for concluding that amounts for SG&A and profits are to be determined on the basis of the weighted average *some* of the time but not *all* of the time. In so interpreting Article 2.2.2(ii), the Panel, in effect, reads the requirement of calculating a 'weighted average' out of the text in some circumstances. In those circumstances, this would substantially empty the phrase 'weighted average' of meaning.[46]
>
> In our view, then, the use of the phrase 'weighted average', combined with the use of the words 'amounts' and 'exporters or producers' in the plural in the text of Article 2.2.2(ii), clearly anticipates the use of data from *more than one* exporter or producer. We conclude that the method for calculating amounts for SG&A and profits set out in this provision can only be used if data relating to more than one other exporter or producer is available."[47]

(vii) Article 2.2.2(ii) – production and sales amounts "incurred and realized"

43. In *EC – Bed Linen*, the Appellate Body reversed the Panel's conclusion that "an interpretation of Article

[45] Panel Report on *Thailand – H-Beams*, paras. 7.114–7.115.

[46] (*footnote original*) We note that in a case where there is data relating to only one other exporter or producer, a Member may have recourse to the calculation method set forth in Article 2.2.2(iii), provided, of course, that the specific requirements for the use of this calculation method are met. We recall that Article 2.2.2(iii) states that amounts for SG&A and profits may be calculated on the basis of : "any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin."

[47] Appellate Body Report on *EC – Bed Linen*, paras. 74–75.

2.2.2(ii) under which sales not in the ordinary course of trade are excluded from the determination of the profit amount to be used in the calculation of a constructed normal value is permissible".[48] The Appellate Body emphasized that Article 2.2.2(ii) refers to "actual amounts incurred and realized by other exporters and producers" and concluded that, in the light of this wording, in the calculation of weighted average all of the actual amounts have to be included, regardless of whether the underlying sales were made in the ordinary course of trade or not:

> "Here, we note especially that Article 2.2.2(ii) refers to 'the weighted average of *the actual amounts incurred and realized* by other exporters or producers'. (emphasis added) In referring to 'the actual amounts incurred and realized', this provision does not make any exceptions or qualifications. In our view, the ordinary meaning of the phrase '*actual* amounts incurred and realized' includes the *SG&A actually incurred*, and the *profits or losses actually realized*[49] by other exporters or producers in respect of production and sales of the like product in the domestic market of the country of origin. There is no basis in Article 2.2.2(ii) for excluding *some* amounts that were actually incurred or realized from the 'actual amounts incurred or realized'. It follows that, in the calculation of the 'weighted average', *all* of 'the actual amounts incurred and realized' by other exporters or producers must be included, *regardless* of whether those amounts are incurred and realized on production and sales made in the ordinary course of trade or not. Thus, in our view, a Member is not allowed to exclude those sales that are not made in the ordinary course of trade from the calculation of the 'weighted average' under Article 2.2.2(ii)."[50]

44. The Appellate Body in *EC – Bed Linen* also discussed the first sentence of the chapeau of Article 2.2.2 as part of the context supporting its interpretation of Article 2.2.2(ii) quoted in paragraph 43 above. The Appellate Body stated:

> "In contrast to Article 2.2.2(ii), the first sentence of the chapeau of Article 2.2.2 refers to 'actual data pertaining to production and sales *in the ordinary course of trade*'. (emphasis added) Thus, the drafters of the *Anti-Dumping Agreement* have made clear that sales *not* in the *ordinary course of trade* are to be *excluded* when calculating amounts for SG&A and profits using the method set out in the chapeau of Article 2.2.2.
>
> The exclusion in the chapeau leads us to believe that, where there is no such explicit exclusion elsewhere in the same Article of the *Anti-Dumping Agreement*, no exclusion should be implied. And there is no such explicit exclusion in Article 2.2.2(ii). Article 2.2.2(ii) provides for an *alternative* calculation method that can be employed precisely when the method contemplated by the chapeau cannot be used. Article 2.2.2(ii) contains its own specific requirements. On their face, these requirements do not call for the exclusion of sales not made in the ordinary course of trade. Reading into the text of Article 2.2.2(ii) a requirement provided for *in the chapeau* of Article 2.2.2 is not justified either by the text or by the context of Article 2.2.2(ii)."[51]

(viii) Article 2.2.2(ii) – should "weighted" average be based on the value or the volume of sales?

45. The Panel on *EC – Bed Linen (Article 21.5 – India)* rejected India's claim that the weighting of averages under Article 2.2.2 (ii) was to be perfomed on the basis of sales volume rather than value data. According to the Panel,

> "It is clear from the text of Article 2.2.2(ii) that the amounts for SG&A and for profits to be used in constructing normal value must be weighted averages. However, nothing in the text specifies the factor to be used in calculating those weighted averages. There is clearly no specific direction requiring that the averages be weighted on the basis of volume, rather than value. Article 2.2.2(ii) is simply silent on this issue.Article 2.2.2 (ii) does not specify the factor, volume or value, to be used in calculating weighted averages."[52]

46. The Panel on *EC – Bed Linen (Article 21.5 – India)* further explained that, in its view, "either volume or value may be relevant in the context of Article 2.2.2(ii), and both are 'neutral' in the sense that the weighted average will reflect the relative importance of the companies with respect to that factor".[53] According to the Panel, "the fact that the choice of the factor used in calculating the weighted average will affect the outcome is simply irrelevant to the question whether Article 2.2.2(ii) requires the use of one volume rather than value as the weighting factor."[54]

(ix) No separate "reasonability" test

47. The Panel on *EC – Bed Linen*, in a finding subsequently not addressed by the Appellate Body, rejected the argument by India that "the results of a proper calculation under Article 2.2.2(ii) are subject to a separate test of 'reasonability' before they may be used in constructing a normal value for other producers"[55]. The Panel was unable to find a basis for such a separate reasonability test in the wording of Article 2.2.2:

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[48] (*footnote original*) Panel Report on *EC – Bed Linen*, para. 6.87.
[49] (*footnote original*) It is worthwhile noting that "realized" is a word used with respect to both gains (profits) and losses. See *Black's Law Dictionary* (West Group, 1999), p. 1271, which speaks of both "realized gain" and "realized loss".
[50] Appellate Body Report on *EC – Bed Linen*, para. 80.
[51] Appellate Body Report on *EC – Bed Linen*, paras. 82–83. Following the excerpted paragraphs, the Appellate Body cited its Report on *India – Patents*, para. 45.
[52] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.81.
[53] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.84.
[54] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.84.
[55] Panel Report on *EC – Bed Linen*, para. 6.94.

"The text . . . indicates that the methodologies set out in Article 2.2.2 are outlined 'for the purpose' of calculating a *reasonable* profit amount pursuant to Article 2.2. There is no specific language establishing a separate reasonability test, or indicating how such a test should be conducted. In these circumstances, we consider that there is no textual basis for such a requirement. Thus, the ordinary meaning of the text indicates that if one of the methods of Article 2.2.2 is properly applied, the results are by definition 'reasonable' as required by Article 2.2.

Further, we note that Article 2.2.2(iii) provides for the use of 'any *other* reasonable method', without specifying such method, subject to a cap, defined as 'the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin'. To us, the inclusion of a cap where the methodology is not defined indicates that where the methodology is defined, in subparagraphs (i) and (ii), the application of those methodologies yields reasonable results. If those methodologies did not yield reasonable results, presumably the drafters would have included some explicit constraint on the results, as they did for subparagraph (iii).

Thus, we conclude that the text indicates that, if a Member bases its calculations on either the chapeau or paragraphs (i) or (ii), there is no need to separately consider the reasonability of the profit rate against some benchmark. In particular, there is no need to consider the limitation set out in paragraph (iii). That limitation is triggered only when a Member does not apply one of the methods set out in the chapeau or paragraphs (i) and (ii) of Article 2.2.2. Indeed, it is arguably precisely because no specific method is outlined in paragraph (iii) that the limitation on the profit rate exists in that provision."[56]

48. Similarly to the Panel on *EC – Bed Linen*, the Panel on *Thailand – H-Beams* also considered that no separate "reasonability" test is required under Article 2.2.2, and rejected Poland's argument that the results of applying any of the specified methodologies are at best rebuttably presumed to be reasonable. The Panel stated:

"We find no trace in the texts of the relevant provisions of such a rebuttable presumption, however. To the contrary, the ordinary meaning of the text seems rather to indicate that, if one of the methodologies is applied, the result is by definition reasonable. First, as noted, the phrase 'for the purpose of paragraph 2' is without qualification in the text. In our view, this phrase is straightforward and means that Article 2.2.2 gives the specific instructions as to how to fulfil the basic but unelaborated requirement in Article 2.2 to use no more than a 'reasonable' amount for profit.

Second, we note that the chapeau of Article 2.2.2 provides that where the methodology in the chapeau 'cannot' be used, one of the methodologies in subparagraphs (i), (ii) or (iii) 'may' be used. Poland argues that the word 'may' only provides for the possibility of using such methodologies and implies that any results derived thereby would be subject to a reasonability test arising under Article 2.2. We disagree, as in our view the word 'may' constitutes authorization to use the methodologies in the subparagraphs where the methodology in the chapeau, which is the preferred methodology, 'cannot' be used. We note that the text of Article 2.2.2 establishes no hierarchy among the subparagraphs and that there is no disagreement between the parties concerning this issue."[57]

49. The Panel on *Thailand – H-Beams*, similarly to the Panel on *EC – Bed Linen*, went on to find that the existence of a "cap" under subparagraph (iii) of Article 2.2.2. with respect to "any other reasonable method" implied that the methodologies under subparagraphs (i) and (ii) *ipso facto* yielded "reasonable" results, such that no separate constraint existed in respect of these paragraphs.[58] The Panel, in a finding subsequently not reviewed by the Appellate Body, then also noted the requirement to use "actual data" under the Article 2.2.2 chapeau and subparagraphs (i) and (ii):

"We note also the requirement in the chapeau of Article 2.2.2 as well as in subparagraphs (i) and (ii) that *actual data* be used. In our view, the notion of a separate reasonability test is both illogical and superfluous where the Agreement requires the use of specific types of actual data. That is, where actual data are used and the other requirements of the relevant provision(s) are fulfilled (e.g., that the 'same general category of products' is defined in a permissible way where 2.2.2(i) is applied), a *correct* or *accurate* result is obtained, and the requirement to use actual data *is itself* the mechanism that ensures reasonability in the sense of Article 2.2 of that (correct) result. By contrast, under subparagraph (iii) where no specific methodology or data source is required, and the use of 'any other reasonable method' is permitted, the provision itself contains what is in effect a separate reasonability test, namely the cap on the profit amount based on the actual experience of other exporters or producers. Thus, in our view, Article 2.2.2's requirement that actual data be used (and its establishment of a cap where this is not the case) are intended precisely to avoid the outcome that Poland seeks, namely subjective judgements by national authorities as to the 'reasonability' of given amounts used in constructed value calculations."[59]

(d) Relationship with other paragraphs of Article 2

50. In *Egypt – Steel Rebar*, the Panel indicated that, in its view, what might be necessary to take into account by

[56] Panel Report on *EC – Bed Linen*, paras. 6.96–6.98.
[57] Panel Report on *Thailand – H-Beams*, paras. 7.122–7.123.
[58] Panel Report on *Thailand – H-Beams*, para. 7.124.
[59] Panel Report on *Thailand – H-Beams*, paras. 7.122–7.125.

way of due allowance in a particular investigation in order to comply with the obligation to ensure a fair comparison under Article 2.4 could not be limited by the simplistic characterisation of a normal value as being one arrived at by way of a construction under Article 2.2:

> "[W]e do not think that the construction of a normal value under Article 2.2 precludes consideration of the making of various adjustments as between that normal value and the export price with which it is to be compared. A constructed normal value is, in effect, a notional price, 'built up' by adding costs of production, administrative, selling and other costs, and a profit. In any given case, such a built-up price might or might not reflect credit costs. Thus, what might be necessary to take into account by way of due allowance in a particular investigation in order to comply with the obligation to ensure a fair comparison under Article 2.4 cannot be limited by the simplistic characterisation of a normal value as being one arrived at by way of a construction under Article 2.2."[60]

51. The Panel on *EC – Tube or Pipe Fittings* found that the definition of "like product" in Article 2.6 governs how an investigating authority identifies the scope of the "like product" for the purposes of the investigation and of the Agreement. The Panel considered that, since the chapeau of Article 2.2.2 requires the use of actual data from all relevant sales of the like product, "actual data from relevant transactions relating to sales of the 'like product' – as a whole – may be taken into account to construct normal value. There is no provision to the effect that constructed normal value is to be based only on a limited subset of data relating to sales of certain selective product types falling within the definition of like product, but excluding data relating to sales of other such types."[61]

4. Article 2.3

52. In *US – Stainless Steel*, the Panel explained the status of paragraph 3 in Article 2. See paragraph 11 above.

5. Article 2.4

(a) First sentence

(i) Fair comparison of export price and normal value

53. In *Egypt – Steel Rebar*, the Panel considered that "Article 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value".[62] The Panel indicated that the ordinary meaning of this provision confirms that it has to do with the nature of the comparison of export price and normal value. In the Panel's view, "the immediate context of this provision, namely Articles 2.4.1 and 2.4.2 confirms that Article 2.4 and in particular its burden of proof requirement, applies to . . . the calculation of the dumping margin". The Panel thus found that this provision did not apply to the investigating authority's establishment of normal value as such:

> "Article 2.4, on its face, refers to the *comparison* of export price and normal value, i.e., the calculation of the dumping margin, and in particular, requires that such a comparison shall be 'fair'. A straightforward consideration of the ordinary meaning of this provision confirms that it has to do not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions)[63], but with the nature of the comparison of export price and normal value. First, the emphasis in the first sentence is on the *fairness* of the *comparison*. The next sentence, which starts with the words '[t]his comparison', clearly refers back to the 'fair comparison' that is the subject of the first sentence. The second sentence elaborates on considerations pertaining to the 'comparison', namely level of trade and timing of sales on both the normal value and export price sides of the dumping margin equation. The third sentence has to do with allowances for 'differences which affect *price comparability*', and provides an illustrative list of possible such differences. The next two sentences have to do with ensuring 'price comparability' in the particular case where a constructed export price has been used. The final sentence, where the reference to burden of proof at issue appears, also has to do with 'ensur[ing] a fair comparison'. In particular, the sentence provides that when collecting from the parties the particular information necessary to ensure a fair comparison, the authorities shall not impose an unreasonable burden of proof on the parties.
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> The immediate context of this provision, namely Articles 2.4.1 and 2.4.2 confirms that Article 2.4 and in particular its burden of proof requirement, applies to the comparison of export price and normal value, that is, the calculation of the dumping margin. Article 2.4.1 contains the relevant provisions for the situation where 'the *comparison* under paragraph 4 requires a conversion of currencies' (emphasis added). Article 2.4.2 specifically refers to Article 2.4 as 'the provisions governing fair comparison', and then goes on to establish certain rules for the method by which that comparison is made (i.e., the calculation of dumping margins on a weighted-average to weighted-average or other basis)."[64]

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[60] Panel Report on *Egypt – Steel Rebar*, para. 7.388.
[61] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.150.
[62] Panel Report on *Egypt – Steel Rebar*, para. 7.335.
[63] (*footnote original*) In this regard, we note that earlier provisions in Article 2, namely Article 2.2 including all of its sub-paragraphs, and Article 2.3, have to do exclusively and in some detail with the establishment of normal value and export price, and in addition that Article 2.1 has to do in part with the establishment of the export price.
[64] Panel Report on *Egypt – Steel Rebar*, paras. 7.333–7.334.

(ii) Relationship with other sentences

54. In *US – Stainless Steel*, having found a violation of the third and fourth sentence of Article 2.4 in respect of certain allowances, the Panel considered that it was "not . . . necessary to examine Korea's claims that the United States' treatment of bad debt breached a more general 'fair comparison' requirement under Article 2.4 of the *AD Agreement*."[65]

(b) Second sentence

(i) "sales made at as nearly as possible the same time"

55. The Panel on *US – Stainless Steel* rejected the United States argument that the "same time" requirement of Article 2.4 implies a preference for shorter rather than longer averaging periods when calculating the dumping margin pursuant to the weighted average/weighted average method in Article 2.4.2, first sentence. See paragraph 86 below.

(c) Third sentence: "Due allowance"

(i) "in each case, on its merits"

56. In *Argentina – Ceramic Tiles*, the Panel analysed the meaning of the requirement to make "due allowance in each case, on its merits" for differences in physical characteristics affecting price comparability. The Panel concluded that this requirement "means at a minimum that the authority has to evaluate identified differences in physical characteristics" and not only the most important ones:

> "Article 2.4 places the obligation on the investigating authority to make due allowance, in each case on its merits, for differences which affect price comparability, including differences in physical characteristics. The last sentence of Article 2.4 provides that the authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison. We believe that the requirement to make due allowance for such differences, in each case on its merits, means at a minimum that the authority has to evaluate identified differences in physical characteristics to see whether an adjustment is required to maintain price comparability and to ensure a fair comparison between normal value and export price under Article 2.4 of the AD Agreement, and to adjust where necessary.
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> . . .
>
> . . . We do not agree with Argentina's view that Article 2.4, through the qualifying language that due allowance shall be made 'in each case' 'on its merits', permits an investigating authority to adjust only for the most important of the physical differences that affect price comparability, even if making the remaining adjustments would have been, as the parties agree, complex. The DCD chose not to conduct a model-by-model comparison and it was then left to find other means to account for the remaining physical differences affecting price comparability. It did not do so."[66]

57. In *Egypt – Steel Rebar*, the Panel read Article 2.4 as explicitly requiring a fact-based, case-by-case analysis of differences that affect price comparability:

> "[W]e read Article 2.4 as explicitly requiring a fact-based, case-by-case analysis of differences that affect price comparability. In this regard, we take note in particular of the requirement in Article 2.4 that '[d]ue allowance shall be made *in each case, on its merits*, for differences which affect price comparability' (emphasis added). We note as well that in addition to an illustrative list of possible such differences, Article 2.4 also requires allowances for 'any other differences which are also *demonstrated* to affect price comparability' (emphasis added). Finally, we note the affirmative information-gathering burden on the investigating authority in this context, that it 'shall indicate to the parties in question *what information is necessary* to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties' (emphasis added). In short, where it is demonstrated by one or another party in a particular case, or by the data itself that a given difference affects price comparability, an adjustment must be made. In identifying to the parties the data that it considers would be necessary to make such a demonstration, the investigating authority is not to impose an unreasonable burden of proof on the parties. Thus, the process of determining what kind or types of adjustments need to be made to one or both sides of the dumping margin equation to ensure a fair comparison, is something of a dialogue between interested parties and the investigating authority, and must be done on a case-by-case basis, grounded in factual evidence."[67]

58. The Panel on *EC – Tube or Pipe Fittings* considered that Article 2.4 did not set forth any particular methodology for calculating adjustments and that a Panel could therefore only examine whether the investigating authority acted in an unbiased and even-handed manner when calculating the adjustments made:

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[65] Panel Report on *US – Stainless Steel*, para. 6.104.

[66] Panel Report on *Argentina – Ceramic Tiles*, paras. 6.113 and 6.116. A similar view was expressed by the Panel on *EC – Tube or Pipe Fittings* which considered that "the requirement to make due allowance for such differences, in each case on its merits, means that the authority must at least evaluate identified differences in taxation with a view to determining whether or not an adjustment is required to ensure a fair comparison between normal value and export price under Article 2.4 of the *Anti-Dumping Agreement*, and then to make an adjustment where it determines this to be necessary on the basis of this evaluation". Panel Report on *EC – Tube or Pipe Fittings*, para. 7.157. See also Panel Report on *US – Lumber V*, paras. 7.165–7.167.

[67] Panel Report on *Egypt – Steel Rebar*, para. 7.352.

"An investigating authority must act in an unbiased, even-handed manner and must not exercise its discretion in an arbitrary manner. This obligation also applies where an investigating authority confronts practical difficulties and time constraints. We do not find, in Article 2.4, or in any other relevant provision in the Agreement, any specific rules governing the methodology to be applied by an investigating authority in calculating adjustments. In the absence of any precise textual guidance in the Agreement concerning how adjustments are to be calculated, and in the absence of any textual prohibition on the use of any particular methodology adopted by an investigating authority with a view to ensuring a fair comparison, we consider that an unbiased and objective authority could have applied this methodology applied by the European Communities and calculated this adjustment on the basis of the actual data in the record of this investigation. Moreover, Tupy had an opportunity to substantiate its claimed adjustment."[68]

(ii) "differences which affect price comparability"

59. In *US – Hot-Rolled Steel*, the Appellate Body ruled that the investigating authorities cannot exclude any differences affecting price comparability from being the object of an allowance:

"Article 2.4 of the *Anti-Dumping Agreement* provides that, where there are 'differences' between export price and normal value, which affect the 'comparability' of these prices, '[d]ue allowance shall be made' for those differences. The text of that provision gives certain examples of factors which may affect the comparability of prices: 'differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences'. However, Article 2.4 expressly requires that 'allowances' be made for '*any other differences* which are also demonstrated to affect price comparability.' (emphasis added) There are, therefore, no differences 'affect[ing] price comparability' which are precluded, as such, from being the object of an 'allowance'."[69]

60. The Panel on *US – Lumber V* considered that there is no requirement to adjust for any and all differences but rather only those differences demonstrated to have affected the price comparability:

"We consider that Article 2.4 does *not* require that an adjustment be made automatically in all cases where a difference is found to exist, but only where – based on the merits of the case – that difference is demonstrated to affect price comparability. An interpretation that an adjustment would have to be made automatically where a difference in physical characteristics is found to exist would render the term 'which affect price comparability' nugatory. Further, such an interpretation would make little sense in practice, as not all differences in physical characteristics necessarily affect price comparability "[70]

61. Reflecting further on the meaning of the term *comparability* in Article 2.4, the Panel on *US – Lumber V* concluded that an investigating authority must, based on the facts before it, on a case-by-case basis decide whether a certain factor is demonstrated to affect price comparability:

"The identified differences concerning the products sold in the two markets must affect the *comparability* of normal value and export price for the obligation to make due allowance to apply. Article 2.4 does not define what *comparability* means, but includes a non-exhaustive list of factors which may affect price comparability. Comparability is a term which, in our view, cannot be defined in the abstract. Rather, an investigating authority must, based on the facts before it, on a case-by-case basis decide whether a certain factor is demonstrated to affect price comparability. We can imagine of situations where although differences exist, they do not affect price comparability. For instance, this could occur where in the exporting country all cars sold are painted in red, while cars exported are all black. The difference is obvious; in fact, it is one of those differences listed in Article 2.4 itself – a difference in physical characteristics. However, there might be no variable cost difference among the two cars because the cost of the paint – whether red or black – might be the same. If instead of differences in cost, we were looking at market value differences, we might reach the same conclusion if, either the seller or the purchaser, would be willing to sell or purchase at the same price, regardless whether the car is red or black."[71]

(iii) Differences in "terms and conditions of sale"

62. In *US – Stainless Steel*, the Panel examined Korea's argument that in violation of the third sentence of Article 2.4, which permits an adjustment "for differences affecting price comparability, including differences in conditions and terms of sales . . .", the United States treated export sales which had not been paid because the customer had gone bankrupt later, as "direct selling expenses", and allocated these direct selling expenses over all United States' sales. The Panel rejected the United States' argument that bad debts are expenses directly related to the payment terms of the contract, and stated:

"We do not consider that the phrase 'differences in conditions and terms of sale', interpreted in accordance with customary rules of interpretation of public international law, can be understood to encompass differences arising from the unforeseen bankruptcy of a customer and consequent failure to pay for certain sales. In this respect, we note that Article 2.4 refers to the 'terms and conditions

[68] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.178.
[69] Appellate Body Report on *US – Hot-Rolled Steel*, para. 177.
[70] Panel Report on *US – Lumber V*, para. 7.165
[71] Panel Report on *US – Lumber V*, para. 7.357.

of sale'. Although of course both words – 'term' and 'condition' – have many meanings, both are commonly used in relation to contracts and agreements. Thus, 'term' is defined, *inter alia*, to mean 'conditions with regard to payment for goods or services', while 'condition' is defined, *inter alia*, as 'a provision in a will, contract, etc., on which the force or effect of the document depends'. Thus, we consider that, read as a whole, the phrase 'conditions and terms of sale' refers to the bundle of rights and obligations created by the sales agreement, and 'differences in conditions and terms of sale' refers to differences in that bundle of contractual rights and obligations. Thus, to the extent that there are, for example, differences in payment terms in the two markets, a difference in the conditions and terms of sale exists. The failure of a customer to pay is not a condition or term of sale in this sense, however. Rather, non-payment involves a situation where the purchaser has violated the 'conditions and terms of sale' by breaching its obligation to pay for the merchandise in question."[72]

63. The Panel on *US – Stainless Steel* specifically responded to the United States' argument that unpaid export sales were to be treated as "direct selling expenses" in distinguishing between "differences in conditions and terms of sale" and the "mode or state of being" of such sales:

"We perceive no textual basis for the United States' effort to characterize all differences in costs associated with the terms of the contract and expenses directly related to the sale as 'differences in terms and conditions of sale'. The United States contends that 'conditions' of sale can be read in this context to mean the 'mode or state of being' of sales, such that 'differences in conditions and terms of sale' include the 'mode or circumstances' under which sales are made. Assuming this interpretation to be a permissible one, it might allow for adjustments for 'differences in conditions and terms of sale' in cases where the contractual provisions governing sales in the two markets were identical but the seller was aware from circumstances existing at the time of sale that those provisions would likely entail different costs.[73] Thus to take an example often cited by the United States in this dispute, a seller might extend identical warranties in different markets or to different customers, knowing in advance that the costs related to those warranties in one market would likely be higher than in the other. Similarly, a seller might extend sales on the same credit terms in two different markets or to two different customers in the awareness that the risk of default – and thus the likely costs associated with the extension of credit – would be higher in one case than in the other. However, we fail to see how the fact that a customer who has purchased on credit subsequently went bankrupt and failed to pay for his purchases could be deemed a 'circumstance under which sales are made', at least in a case such as this one where the seller had no knowledge of the precarious financial situation of the purchaser.

We consider that an examination of the context in which the phrase 'differences in conditions and terms of sale' is used supports our understanding of the ordinary meaning of this phrase. We recall that Article 2.4 identifies 'differences in conditions and terms of sale' as one of several 'differences which affect price comparability'. Thus, the notion of price comparability informs our interpretation of 'differences in conditions and terms of sale'. In our view, the requirement to make due allowance for differences that affect price comparability is intended to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing. A difference that could not reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the product in different markets or to different customers is not a difference that affects the comparability of *prices* within the meaning of Article 2.4. This reinforces our view that the phrase 'differences in conditions and terms of sale' cannot permissibly be interpreted to encompass an unanticipated failure of a customer to pay for certain sales."[74]

64. Further, the Panel on *US – Stainless Steel* rejected the United States' argument that its methodology for the treatment of bad debt was simply a practical way to address differing levels of risks between markets in cases where sales are made on credit. The Panel opined that differences in risk of non-payment might be a difference relevant for the purposes of Article 2.4 and that actual bad debt could be evidence for establishing such different levels of risk of non-payment. However, it found that the United States' methodology did not base its determination on these factors:

"[W]e agree with the United States that a difference in risk of non-payment between markets that was known at the time of sale might represent a difference for which due allowance could properly be made under Article 2.4. Nor do we preclude that actual bad debt experience during the period of investigation might be evidence relevant to establishing the existence of such a difference.[75] The United States did not however treat actual experience with respect to levels of unpaid sales as *evidence* of different levels of risk in the two markets in these investigations. Rather, it stated that it was the DOC's practice to treat bad debt as a direct selling expense when the expense was incurred in respect of the subject merchandise. Thus, even assuming that the US methodology was somehow intended to address differences in *risk* of non-payment, we do not accept the proposition that the exis-

[72] Panel Report on *US – Stainless Steel*, para. 6.75.
[73] (*footnote original*) We note however that such a situation might more properly be considered to be an "other difference . . . affecting price comparability".
[74] Panel Report on *US – Stainless Steel*, paras. 6.76–6.77.
[75] (*footnote original*) Although in our view the existence of different levels of non-payment during prior periods would appear to be much more relevant.

tence of a higher level of non-payment in one market than in another during the period of investigation may be *deemed* to demonstrate the existence of such differences in risk and thus represent a permissible adjustment for 'differences in conditions and terms of sale'.[76]"[77]

(d) Fourth sentence

(i) Legal effect

65. In *US – Stainless Steel*, the United States argued that the fourth sentence of Article 2.4 is not mandatory since it provides that allowances for costs and profits "should" be made in constructing an export price. The Panel agreed that the *Anti-Dumping Agreement* permits, but does not require such allowances, but opined that a Member may not make allowances other than those authorized by Article 2.4:

> "The term 'should' in its ordinary meaning generally is non-mandatory, i.e., its use in this sentence indicates that a Member is not *required* to make allowance for costs and profits when constructing an export price.[78] We believe that, because the failure to make allowance for costs and profits could only result in a higher export price – and thus a lower dumping margin – the *AD Agreement* merely permits, but does not require, that such allowances be made.[79]
>
> . . . In our view, that the *AD Agreement* does not require such allowances does not mean that a Member is free to make any allowances it desires, including allowances not specified in this provision. To the contrary, we view this sentence as providing an *authorization* to make certain specific allowances. We therefore consider that allowances not within the scope of that authorization cannot be made.[80] If a Member were free to make any additional allowances it desired, there would be no effective disciplines on the methodology for construction of an export price and the provision in question would in our view be reduced to inutility.[81] Thus, we conclude that it would be inconsistent with Article 2.4 of the *AD Agreement* to make allowances in the construction of the export price that are not within the scope of the authorization found in that Article.
>
> Our conclusion that Article 2.4 contains binding obligations regarding the scope of the permissible allowances that can be made in constructing an export price does not mean that we equate allowances for differences which affect price comparability with allowances relating to the construction of the export price. Rather, the third sentence of Article 2.4 requires due allowance to be made for differences affecting price comparability, while the fourth sentence provides that in the cases referred to in paragraph 3 – i.e., when constructing an export price – allowance for certain costs and profits should *also* be made. Finally, the fifth sentence of Article 2.4 makes clear that allowances relating to the construction of the export price could in fact *reduce* price comparability, such that one of several compensating steps should be taken. For all these reasons, it is clear to us that allowances in respect of construction of the export price are separate and distinct from allowances for differences which affect price comparability and are governed by different substantive rules."[82]

(ii) "costs . . . incurred between importation and resale"

66. In *US – Stainless Steel*, the Panel agreed with Korea's argument that it was inconsistent with Article 2.4 to treat export sales unpaid as a result of the bankruptcy of a customer as direct selling costs, because the related costs were not "incurred between importation and resale" mentioned in the fourth sentence of Article 2.4. The Panel established the "foreseeability" of costs as the decisive factor:

> "[W]e note that Article 2.4 uses the word 'between'. That term is defined to mean, *inter alia*, '[i]n the interval separating two points of time, events, etc.'. Thus, the phrase costs 'incurred between importation and resale' in its ordinary meaning is most naturally read to refer to costs that were incurred between the date of importation and the date of resale. Under this reading, it might be difficult to conclude that a cost incurred after the date

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[76] (*footnote original*) The United States contends that, "during the period of investigation, POSCO actually recognized greater bad debt expenses, as a proportion of sales, in the US market than in the Korean market. This evidence would indicate that POSCO should be charging higher prices in the US market than in the Korean market." In the absence of any evidence in the record that the level of non-payment in the US market was foreseeable or that the historical risk of non-payment was higher in the US than the Korean market, the conclusion that POSCO *should* have been charging higher prices in the US than in the Korean market seems unwarranted.

[77] Panel Report on *US – Stainless Steel*, para. 6.78.

[78] (*footnote original*) *But see* Appellate Body Report on *US – FSC*, fn. 124.

[79] (*footnote original*) It can be assumed that a Member will use this authorization where appropriate without being legally constrained to do so. By contrast, the *AD Agreement* provides that due allowance "shall" be made for differences affecting price comparability. Mandatory language is used here because the failure to make such allowances could generate or inflate dumping margins to the detriment of the interests of other Members.

[80] (*footnote original*) That the use of the non-mandatory phrase "should" does not support the conclusion advanced by the United States can be confirmed by replacing "should" with another non-mandatory term, "may". That a Member "may" make certain allowances would indicate that the Member was authorized but not required to make those allowances. It does not follow, however, that the Member was free also to make any other allowances not within the scope of the authorization. *Cf.* Appellate Body Report on *US – 1916 Act*, paras. 112–117 (that Article VI:2 of GATT 1994 makes imposition of anti-dumping duties permissive does not mean that a Member may impose measures other than anti-dumping duties to counteract dumping).

[81] (*footnote original*) As the Appellate Boy stated in *United States – Standards for Reformulated and Conventional Gasoline*, "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to inutility." Appellate Body Report on *US – Gasoline*, p. 23.

[82] Panel Report on *US – Stainless Steel*, paras. 6.93–6.95.

of resale was a cost incurred 'between importation and resale'.

We are cognizant, however, that dictionary definitions can only take the interpreter so far, and that in interpreting a provision of a treaty we must take into account both context and object and purpose.[83] As discussed above, it is clear that the purpose of allowances to construct an export price is not to insure price comparability *per se*. Rather, an export price is constructed, and the appropriate allowances made, because it appears to the investigating authorities that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or third party. By working backwards from the price at which the imported products are first resold to an independent buyer, it is possible to remove the unreliability. Thus, we agree with the United States that the purpose of these allowances is to construct a reliable export price to use in lieu of the actual export price or, as expressed by the EC as third party, to arrive at the price that would have been paid by the related importer had the sale been made on a commercial basis.

Read in light of this object and purpose, we recognize that costs related to the resale transaction but not incurred in a temporal sense between the date of importation and resale could as a general matter be considered to be 'incurred between importation and resale' and thus deducted in order to construct an export price. Nor do we preclude that an amount to cover the risk of non-payment might be considered to be such a cost. We do not believe, however, that this interpretation of costs 'incurred between importation and resale' can be stretched to include costs that not only were not incurred in an accounting sense until after the date of resale but which were entirely unforeseen at that time. In this regard, we observe that, while we agree with the United States that as a general principle a related importer may be expected to establish price based on costs plus profit, a price certainly cannot be expected to reflect an amount for costs that were entirely unforeseen at the time the price was set. To deduct costs which not only were incurred after the date of resale but which were entirely unforeseen at that time would not result in a 'reliable' export price in the sense of the price that would have been paid by the related exporter had the sale been made on a commercial basis."[84]

(e) Fifth sentence

67. In *US – Hot-Rolled Steel*, the Appellate Body considered that "the obligation to ensure a 'fair comparison'" under Article 2.4 "lies on the *investigating authorities*, and not the exporters. It is those authorities which, as part of their investigation, are charged with comparing normal value and export price and determining whether there is dumping of imports."[85]

(f) Article 2.4.1

(i) Scope of Article 2.4.1

68. In *US – Stainless Steel*, the complainant, Korea, argued that Article 2.4.1 is the only provision of the *Anti-Dumping Agreement* that addresses exchange rates and the permissible modification to the dumping calculation methodology to account for exchange rate fluctuations, and thus, that the use of multiple averaging periods to account for the depreciation of the Korean won during the period of investigation was inconsistent with Article 2.4.1. The Panel responded as follows:

> "In our view, Article 2.4.1 relates to the selection of exchange rates to be used where currency conversions are required. It establishes a general rule – conversion should be made using the rate of exchange on the date of sale – and an exception to this general rule for sales on forward markets. It also establishes special rules in the case of fluctuations and sustained movements in exchange rates. We note Korea's view that the requirements of the second sentence of Article 2.4.1 prescribe specific results, rather than describing a method for selecting exchange rates. It appears to us, however, that, read in context, these special rules also relate to the selection of exchange rates, and not to the construction of averages. Rather, the permissibility of the use of multiple averaging is an issue addressed by Article 2.4.2.
>
> Even if Article 2.4.1 were not restricted to the issue of the selection of exchange rates, we find nothing in that Article that would prohibit a Member from addressing, through multiple averaging, a situation arising from a currency depreciation. Korea contends, and the United States does not dispute, that the provision of Article 2.4.1 requiring Members to allow exporters sixty days to adjust their export prices to sustained movements in exchange rates applies only in the case of currency appreciation, and not in the case of currency depreciation. Assuming that the parties are correct in this regard, the requirement that a Member take certain actions in the case of currency appreciation does not in our view mean that Members are prohibited from taking any action to address a situation arising from a currency depreciation.[86]"[87]

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[83] (*footnote original*) As the Appellate Body has noted, "dictionary meanings leave many interpretive questions open." Appellate Body Report on *Canada – Aircraft*, para. 153.

[84] Panel Report on *US – Stainless Steel*, paras. 6.98–6.100.

[85] Appellate Body Report on *US – Hot-Rolled Steel*, para. 178.

[86] (*footnote original*) The provision relied upon by Korea is the language in Article 2.4.1 stating that, "in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation". Korea is in effect asking us to read this provision to further say that "in an investigation the authorities shall take no actions to address currency depreciations". We can perceive no textual basis to imply such an additional rule into Article 2.4.1.

[87] Panel Report on *US – Stainless Steel*, paras. 6.129–6.130.

(ii) "required"

69. In *US – Stainless Steel*, the complainant, Korea, argued that while Article 2.4.1 permits currency conversions only when such conversions are "required", i.e., when there is no other reasonable alternative, the United States' authority had performed an unnecessary "double conversion" of Korean local sales by converting the dollar amounts appearing in their invoices into won at one exchange rate and converting them back into dollars at a different exchange rate, in order to compare the prices of the local sales with those of exports to the United States. The Panel found that the conversions were not required because the prices being compared were in the same currency (dollars), and thus concluded that the currency conversions were inconsistent with Article 2.4.1:

> "While Article 2.4.1 does not spell out the precise circumstances under which currency conversions are to be avoided, we consider that it does establish a general – and in our view, self-evident – principle that currency conversions are permitted only where they are required in order to effect a comparison between the export price and the normal value. We note that a contrary interpretation would call into doubt the utility of the introductory clause of Article 2.4.1. If the drafters had not intended to establish a rule that currency conversions be performed only when required, they could easily have drafted Article 2.4.1 to provide that 'Currency conversions should be made using the rate of exchange on the date of sale . . . .' Further, such an interpretation could result in the unusual situation where currency conversions that were required in order to perform a comparison under Article 2.4 would be subject to the rules set forth in Article 2.4.1, but unnecessary currency conversions could be performed without regard to the rules of Article 2.4.1.
>
> We need not here arrive at any general understanding as to when currency conversions are or are not required within the meaning of Article 2.4.1, nor do we express any view regarding Korea's 'reasonable alternative' test. . . ."[88]

70. In *US – Stainless Steel*, one of the issues in the context of Article 2.4.1 was whether the Korean local sales had been made for United States dollars or Korean won. The Panel stated that "if the amount of won actually paid was based on the dollar amount identified in the invoice at the market rate of exchange on the date of *payment* (which, because the local sales in question were letter of credit sales, came some months after the date of invoice), then the controlling amount would be the dollar amount appearing in the invoice."[89]

(iii) Relationship with Article 2.4

71. In *US – Stainless Steel*, the complainant, Korea, argued that certain factual determinations of the United States' authority on currency conversion were inconsistent with Article 2.4 as well as Article 2.4.1. The Panel held that the United States' determination which it found consistent with Article 2.4.1 was also consistent with Article 2.4[90], but that with respect to the other determination, which it found in violation of Article 2.4.1, "we do not consider it necessary to examine Korea's claim that those double conversions breached a more general 'fair comparison' requirement under Article 2.4 of the AD Agreement."[91]

72. In *EC – Tube or Pipe Fittings*, the Panel found that Article 2.4.1 "refers to currency conversion in connection with the prices of export sales, rather than to any conversion that may occur in the calculation of specific adjustments to either the normal value or the export price".[92] It thus concluded that "the obligations concerning currency conversions in Article 2.4.1 do not apply to *all* conversions made in order to calculate adjustments under Article 2.4.1 – we can conceive of certain situations in which differences affecting price comparability that might lead to an adjustment under Article 2.4 might not correspond precisely with the date of the export sale (e.g. credit and warranty expenses), and where conversion of all currency data as at the date of export sale might therefore distort a fair comparison."[93]

(g) Article 2.4.2

(i) "margins"

73. In *EC – Bed Linen*, the Panel interpreted the word "margins" in Article 2.4.2 as meaning the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product. The Appellate Body agreed with this interpretation.[94]

74. In *EC – Bed Linen*, the Appellate Body stated with reference to the text of Article 2.4.2, that "[f]rom the wording of this provision, it is clear to us that the *Anti-Dumping Agreement* concerns the dumping of a *product*, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*."[95]

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[88] Panel Report on *US – Stainless Steel*, paras. 6.11–6.12.
[89] Panel Report on *US – Stainless Steel*, para. 6.25. However, pursuant to Article 17.6(i), the Panel did not find one factual determination of the US authority on this issue in violation of Article 2.4.1. See para. 636 of this Chapter.
[90] Panel Report on *US – Stainless Steel*, para. 6.44.
[91] Panel Report on *US – Stainless Steel*, para. 6.45.
[92] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.198.
[93] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.199.
[94] Panel Report on *EC – Bed Linen*, para. 6.118. Appellate Body Report on *EC – Bed Linen*, para. 53. This interpretation was also confirmed by the Appellate Body in *US – Hot-Rolled Steel*, para. 118.
[95] (*footnote original*) Appellate Body Report on *EC – Bed Linen*, para. 51.

75. In *US – Lumber V*, the Appellate Body further clarified its position that "'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product".[96] On this basis, the Appellate Body rejected the argument that zeroing would be allowed as long as all comparable transactions had been taken into consideration at the model or type level:

> "It is clear that an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation. In our view, the results of the multiple comparisons at the sub-group level are, however, not 'margins of dumping' within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating *all* these 'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole.
>
> We fail to see how an investigating authority could properly establish margins of dumping for the product under investigation as a whole without aggregating *all* of the 'results' of the multiple comparisons for *all* product types. There is no textual basis under Article 2.4.2 that would justify taking into account the 'results' of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other 'results'. If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2. Thus we disagree with the United States that Article 2.4.2 does not apply to the aggregation of the results of multiple comparisons."[97]

(ii) Weighted average normal value / weighted average export price

76. In *EC – Bed Linen* the Appellate Body examined the first method under Article 2.4.2 for establishing the existence of margins of dumping, i.e. the comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions. The Appellate Body found the European Communities' practice of "zeroing"[98] inconsistent with this method because by, *inter alia*, zeroing the negative dumping margins, the European Communities had not taken fully into account the entirety of the prices of some export transactions:

> "[W]e recall that Article 2.4.2, first sentence, provides that 'the existence of margins of dumping' for the product under investigation shall normally be established according to one of two methods. At issue in this case is the first method set out in that provision, under which 'the existence of margins of dumping' must be established:
>
> '. . . on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions . . .'
>
> Under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of *all* comparable export transactions. Here, we emphasize that Article 2.4.2 speaks of 'all' comparable export transactions. As explained above, when 'zeroing', the European Communities counted as zero the 'dumping margins' for those models where the 'dumping margin' was 'negative'. As the Panel correctly noted, for those models, the European Communities counted 'the weighted average export price to be equal to the weighted average normal value . . . despite the fact that it was, in reality, higher than the weighted average normal value.'[99] By 'zeroing' the 'negative dumping margins', the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where 'negative dumping margins' were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did *not* establish 'the existence of margins of dumping' for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions – that is, for *all* transactions involving *all* models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does *not*

[96] Appellate Body Report, *US – Lumber V*, para. 96

[97] Appellate Body Report, *US – Lumber V*, paras. 97 – 98.

[98] The European Communities practice of "zeroing" was summarized in the Panel Report on *EC – Bed Linen* as follows: first, the European Communities identified with respect to the product under investigation – cotton-type bed linen – a certain number of different "models" or "types" of that product. Next, the European Communities calculated, for each of these models, a *weighted average* normal value and a *weighted average* export price. Then, the European Communities compared the weighted average normal value with the weighted average export price for each model. For some models, normal value was *higher* than export price; by subtracting export price from normal value for these models, the European Communities established a "*positive* dumping margin" for each model. For other models, normal value was *lower* than export price; by subtracting export price from normal value for these other models, the European Communities established a "*negative* dumping margin" for each model. For these latter models, in other words, dumping had not occurred, as the *export price exceeded the normal value.* The European Communities then calculated the overall dumping margin by averaging the individually calculated results for the different models, but counting "negative dumping margins" as zero in the process. The Panel found that this practice was inconsistent with Article 2.4.2. Panel Report on *EC – Bed Linen*, para. 7.1(g).

[99] (*footnote original*) Panel Report on *EC – Bed Linen*, para. 6.115.

take fully into account the prices of *all* comparable export transactions – such as the practice of 'zeroing' at issue in this dispute – is *not* a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2."[100]

77. In *US – Lumber V*, the Appellate Body confirmed its view that an authority is not allowed to practice zeroing when using the weighted-average to weighted-average comparison methodology for calculating the margin of dumping:

"Zeroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price.[101] Zeroing thus inflates the margin of dumping for the product as a whole."[102]

"comparable export transactions"

78. In *EC – Bed Linen*, the Appellate Body specifically addressed the term "comparable" used in Article 2.4.2, which the European Communities referred to as a basis for its appeal. More specifically, the European Communities claimed that Article 2.4.2 requires a comparison with a "weighted average of prices of all *comparable* export transactions" which, in the view of the European Communities, was not the same as requiring a comparison with a weighted average of *all* export transactions:

"In our view, the word 'comparable' in Article 2.4.2 does not affect, or diminish in any way, the obligation of investigating authorities to establish the existence of margins of dumping on the basis of 'a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions'. (emphasis added)

The ordinary meaning of the word 'comparable' is 'able to be compared'. 'Comparable export transactions' within the meaning of Article 2.4.2 are, therefore, export transactions that are able to be compared. . . .

. . .

. . . All types or models falling within the scope of a 'like' product must necessarily be 'comparable', and export transactions involving those types or models must therefore be considered 'comparable export transactions' within the meaning of Article 2.4.2."[103]

79. In support of its proposition that the term "comparable" in Article 2.4.2 did not detract from the obligation of investigating authorities to consider *all* relevant transactions, the Appellate Body in *EC – Bed Linen* referred to Article 2.4 as part of the context of Article 2.4.2:

"Article 2.4 sets forth a general obligation to make a 'fair comparison' between export price and normal value. This is a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4]'. Moreover, Article 2.4 sets forth specific obligations to make comparisons at the same level of trade and at, as nearly as possible, the same time. Article 2.4 also requires that 'due allowance' be made for differences affecting 'price comparability'. We note, in particular, that Article 2.4 requires investigating authorities to make due allowance for 'differences in . . . physical characteristics'.

We note that, while the word 'comparable' in Article 2.4.2 relates to the comparability of export transactions, Article 2.4 deals more broadly with a 'fair comparison' between export price and normal value and 'price comparability'. Nevertheless, and with this qualification in mind, we see Article 2.4 as useful context sustaining the conclusions we draw from our analysis of the word 'comparable' in Article 2.4.2. In our view, the word 'comparable' in Article 2.4.2 relates back to both the general and the specific obligations of the investigating authorities when comparing the export price with the normal value. The European Communities argues on the basis of the 'due allowance' required by Article 2.4 for 'differences in physical characteristics' that distinctions can be made among different types or models of cotton-type bed linen when determining 'comparability'. But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another."[104]

Non-comparable types

80. In *EC – Bed Linen*, the Panel found that the European Communities "zeroing" practice was inconsistent with Article 2.4.2.[105] The European Communities appealed this finding on the ground that the word "comparable" in Article 2.4.2 indicates that, where the product under investigation consists of various "non-comparable" types or models, the investigating authorities should first calculate "margins of dumping" for each of the "non-comparable" types or models, and, then, at a subsequent stage, combine those "margins" in order to calculate an overall margin of dumping for the product under investigation. The Appellate Body disagreed with the European Communities:

[100] Appellate Body Report on *EC – Bed Linen*, paras. 54–55.
[101] (*footnote original*) We note that the Panel reached the same conclusion in para. 7.216 of its Report.
[102] Appellate Body Report on *US – Lumber V*, para. 101.
[103] Appellate Body Report on *EC – Bed Linen*, paras. 56–58.
[104] Appellate Body Report on *EC – Bed Linen*, paras. 59–60.
[105] Panel Report on *EC – Bed Linen*, para. 7.1(g). For the description of the zeroing practice, see footnote 98.

"We see nothing in Article 2.4.2 or in any other provision of the *Anti-Dumping Agreement* that provides for the establishment of 'the existence of margins of dumping' for *types or models* of the product under investigation; to the contrary, all references to the establishment of 'the existence of margins of dumping' are references to the *product* that is subject of the investigation. Likewise, we see nothing in Article 2.4.2 to support the notion that, in an anti-dumping investigation, two different stages are envisaged or distinguished in any way by this provision of the *Anti-Dumping Agreement*, nor to justify the distinctions the European Communities contends can be made among *types or models* of the same product on the basis of these 'two stages'. Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole. We are unable to agree with the European Communities that Article 2.4.2 provides no guidance as to how to calculate an *overall* margin of dumping for the product under investigation."[106]

81. In *US – Lumber V*, the Appellate Body clearly stated that multiple averaging, using models or types, is as such permitted under Article 2.4.2 to establish the existence of margins of dumping for the product under investigation:

"We agree with the participants in this dispute that multiple averaging is permitted under Article 2.4.2 to establish the existence of margins of dumping for the product under investigation. We disagree with those who suggest that the Appellate Body Report in *EC – Bed Linen* is premised on an assumption that multiple averaging is prohibited. The issue of multiple averaging was not before the Appellate Body in *EC – Bed Linen* and the reasoning of the Appellate Body in that case should therefore not be read as prohibiting that practice. This is not to say that *EC – Bed Linen* is not relevant in this appeal. Indeed, there are a number of relevant findings to which we refer to below. However, the Appellate Body did not rule on multiple averaging in that case and therefore it is incorrect to argue, as the United States does, that '[t]he agreement of both parties to this dispute and a unanimous Panel that Article 2.4.2 permits multiple comparisons is a fundamental departure from the premise' of the Appellate Body Report in *EC – Bed Linen*."[107]

Sampling of domestic transactions

82. The Panel on *Argentina – Poultry Anti-Dumping Duties* addressed the issue of whether or not a Member must include all domestic sales transactions when establishing "a weighted average normal value" for the purpose of Article 2.4.2:

"In examining what is meant by 'a weighted average normal value', we attach particular importance to the meaning of the term 'normal value'. We note that Article 2.1 of the *AD Agreement* refers to normal value as 'the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country'. Article 2.1 therefore defines normal value in terms of domestic sales transactions in the exporting Member (although Article 2.2 provides that alternative methods to establish normal value may be used in certain circumstances).[108] Article 2.1 does not specify, however, whether or not all domestic sales transactions need be included. This issue is addressed by Article 2.2.1, which sets out the conditions to be met before domestic sales may be treated as not in 'the ordinary course of trade', and therefore excluded for the purpose of establishing normal value in accordance with Article 2.1. Article 2.2.1 states that domestic sales 'may be disregarded in determining normal value only if' the relevant conditions are met. We understand these provisions to mean that there are only specific circumstances in which domestic sales transactions may be excluded from normal value. We consider that these provisions constitute relevant context for interpreting the phrase 'a weighted average normal value', since they indicate that 'a weighted average normal value' is a weighted average of all domestic sales other than those which may be disregarded pursuant to Article 2.2.1 of the *AD Agreement*."[109]

83. The Panel on *Argentina – Poultry Anti-Dumping Duties* thus came to the conclusion that "the strict rules in Article 2 regarding the determination of normal value require that, in the usual case, normal value should be established by reference to all domestic sales of the like product in the ordinary course of trade".[110]

Multiple averages

84. In *US – Stainless Steel*, the Panel examined Korea's argument that Article 2.4.2 prohibits the following method used by the United States authorities: (i) dividing a period of investigation into two sub-periods corresponding to the pre- and post-devaluation periods; (ii) calculating a weighted average margin of dumping for each sub-period; and (iii) combining these weighted averages of margin of dumping, however, treating sub-periods where the average export price was higher than the average normal value as sub-periods of zero dumping. In this regard, the Panel rejected Korea's claim that Article 2.4.2 prohibits the use of multiple averaging *per se*:

"Article 2.4.2 provides that the existence of dumping shall normally be established 'on the basis of a compar-

[106] Appellate Body Report on *EC – Bed Linen*, para. 53.
[107] Appellate Body Report on *US – Lumber V*, para. 81.
[108] (*footnote original*) These methods are not relevant in the present proceedings, since the DCD established normal value on the basis of domestic sales transactions.
[109] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para.7.272.
[110] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para.7.274.

ison of a weighted average normal value with a weighted average of all *comparable* export transactions' (emphasis added). The inclusion of the word 'comparable' is in our view highly significant, as in its ordinary meaning it indicates that a weighted average normal value is not to be compared to a weighted average export price that includes non-comparable export transactions.[111] It flows from this conclusion that a Member is not required to compare a single weighted average normal value to a single weighted average export price in cases where certain export transactions are not comparable to transactions that represent the basis for the calculation of the normal value.

We recall Korea's view that the reference in the singular to 'a weighted average normal value' means that the use of multiple averages is prohibited. In our view, however, the reference in the singular to 'a weighted average normal value' means simply that there must be a single weighted average normal value and export price in respect of comparable transactions. It does not mean that a Member is required to compare a single weighted average normal value to a single weighted average export price in cases where some of the export transactions are not comparable to the transactions that represent the basis for the normal value.

An examination of the context of the provision in question and of its object and purpose in our view provide further support for the above conclusion. The chapeau of Article 2.4 states that '[a] fair comparison shall be made between the export price and the normal value.' Whatever the relationship of the fair comparison language of the chapeau to the specific requirements of Article 2.4 – an issue of dispute between the parties – it is evident to us that the provisions of Article 2.4.2 must be read against the background of this basic principle. In fact, the provisions of Article 2.4.2 itself are 'subject to the provisions governing fair comparison in paragraph 4.' An interpretation of Article 2.4.2 that required a Member to compare transactions that were not comparable would run counter to this basic principle.

Accordingly, we conclude – and by the later phases of this dispute the parties agreed – that Article 2.4.2 does not preclude the use of multiple averages *per se*. Rather, Article 2.4.2 requires a Member to compare a single weighted average normal value to a single weighted average export price in respect of all *comparable* transactions. A Member may however use multiple averages in cases where it has determined that non-comparable transactions are involved."[112]

85. Despite rejecting Korea's argument in *US – Stainless Steel*, that Article 2.4.2 precludes the use of multiple averages *per se* (see paragraph 84 above), the Panel found a violation of Article 2.4.2 by the United States investigating authorities. The Panel examined whether the existence of significant differences in normal value over the course of an investigation is, in and of itself, a sufficient basis to conclude – as the United States authorities had done – that export and home market transactions at different points in the period of investigation are not "comparable":

> "In examining this question, we first note that the term 'comparable' has been defined to mean 'able to be compared (with)'. This definition however does not cast great light on the meaning of the term as used in Article 2 of the *AD Agreement*. Thus, we consider it useful to turn to the context in which this term appears. In this respect, we agree with the parties that the meaning of the term 'comparable' as used in Article 2.4.2 can best be established by an examination of other provisions of Article 2 of the *AD Agreement* that address the issue of comparability. We further note that the chapeau to Article 2.4 provides that the comparison between the export price and the normal value shall be made 'in respect of sales made at as nearly as possible the same time'. Thus, we consider it clear that the timing of sales may have implications in respect of the comparability of export and home market transactions.[113]
>
> This does not mean, however, that where an average to average comparison methodology is used, individual home market and export sales that are not made at the same time necessarily are not comparable and thus cannot be included in the weighted averages. To the contrary, it is in the very nature of an average to average comparison that, for example, transactions made at the beginning of the averaging period in the export market will be made at a different moment in time than sales in the home market made at the end of averaging period. If the drafters had considered that this situation would necessarily give rise to a problem of comparability, surely they would not have explicitly authorized the use of averaging in Article 2.4.2. Thus we consider that, in the context of weighted average to weighted average comparisons, the requirement that a comparison be made between sales made at as nearly as possible the same

[111] (*footnote original*) We note that insertion of the word "comparable" into Article 2.4.2 represented the only modification to that Article between the date of the Draft Final Act and the text as adopted. *See Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA, 20 December 1991. This suggests that its inclusion was not merely incidental but reflected careful consideration by the drafters.

[112] Panel Report on *US – Stainless Steel*, paras. 6.111–6.114.

[113] (*footnote original*) As an additional contextual argument, Korea argues that devaluation cannot be considered to affect comparability because there is no provision in the *AD Agreement* specifying that sales made at one exchange rate cannot be compared with sales at another exchange rate. Rather, the only provision of the *AD Agreement* that addresses exchange rates is Article 2.4.1, which the United States concedes does not establish a limit on what sales may be considered comparable. We do not however place any weight on Korea's argument in this respect. In our view – and absent the unusual situation of multiple exchange rates – there will at any given moment in time be only one exchange rate. Thus, any problem of comparability does not relate to exchange rates *per se*, but rather to differences in timing of sales. Thus it is on this issue that we focus.

time requires *as a general matter* that the periods on the basis of which the weighted average normal value and the weighted average export price are calculated must be the same."[114]

Length of averaging periods

86. The Panel on *US – Stainless Steel* rejected the United States' argument that the "same time" requirement of Article 2.4 implies a preference for shorter rather than longer averaging periods, and stated:

". . . If the requirement to compare sales at 'as nearly as possible the same time' means that sales within an averaging period covering a [period of investigation ('POI')] are not comparable, then a Member presumably would be *obligated* to break a POI into as many sub-periods as possible. Yet to interpret the word 'comparable', when combined with the requirement that sales be compared 'at as nearly as possible the same time', to obligate Members to perform numerous average to average comparisons based on the shortest possible time periods would in effect read the Article 2.4.2 authorization to perform average to average comparisons out of the *AD Agreement,* leaving Members with only the second option, the comparison of normal values and export prices on a transaction-by-transaction basis.[115]"[116]

87. Having found that Members are not obliged to divide a period of investigation into as many sub-periods as possible, the Panel on *US – Stainless Steel* nevertheless placed the following caveat:

"We do not preclude that there may be factual circumstances where the use of multiple averaging periods could be appropriate in order to insure that comparability is not affected by differences in the timing of sales within the averaging periods in the home and export markets. We note that, where changes in normal value, export price or constructed export price during the course of the POI are combined with differences in the relative weights by volume within the POI of sales in the home market as compared to the export market, the use of weighted averages for the entire POI could indicate the existence of a margin of dumping that did not reflect the situation at any given moment within the POI.[117] In this situation a Member might in our view be justified in concluding that differences in timing of sales in the home and export markets give rise to a problem of comparability that could be addressed through multiple averaging periods.[118] We recall however that this situation only arises where two elements – a change in prices *and* differences in the relative weights by volume within the POI of sales in the home market as compared to the export market – exist. Thus, while a change in normal value, export price or constructed export price may be a *necessary* condition for the conclusion that the passage of time affects comparability in the case of an average-to-average comparison, the existence of such a change is not in itself a *sufficient* condition to conclude that the export transactions are not comparable to the normal value."[119]

(iii) Weighted average / individual transactions

Targeted dumping

88. The Appellate Body in *EC – Bed Linen* rejected the European Communities appeal that the Panel's interpretation would not allow Members to counter dumping "targeted" to certain types of the product under investigation. With respect to the notion of "targeted" dumping, the Appellate Body referred to Article 2.4.2, second sentence, and stated:

"This provision allows Members, in structuring their anti-dumping investigations, to address three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods. However, neither Article 2.4.2, second sentence, nor any other provision of the *Anti-Dumping Agreement* refers to dumping 'targeted' to certain 'models' or 'types' of the same product under investigation. It seems to us that, had the drafters of the *Anti-Dumping Agreement* intended to authorize Members to respond to such kind of 'targeted' dumping, they would have done so explicitly in Article 2.4.2, second sentence. The European Communities has not demonstrated that any provision of the Agreement implies that

[114] Panel Report on *US – Stainless Steel*, paras. 6.120–6.121.

[115] (*footnote original*) The United States' argument seems to be posited on its view that the best comparison for measuring dumping is a transaction-to-transaction comparison, and that average-to-average comparisons are a second-best approach allowed because of practical problems with the transaction-to-transaction methodology. *See* US answer to question 2 from the Panel posed at the second meeting of the Panel with the parties. We perceive no valid textual basis for such a conclusion, however. To the contrary, the *AD Agreement* sets forth two options for a comparison methodology – average-to-average and transaction-to transaction – and expresses no preference between them.

[116] Panel Report on *US – Stainless Steel*, para. 6.122.

[117] (*footnote original*) A particularly dramatic example of this situation would arise where, during a substantial portion of the POI, there were *no* sales in one of the two markets.

[118] (*footnote original*) The combination of these two factors could even result in a situation where, although at any given moment in time throughout the POI, the exporter was charging an identical price (after all appropriate allowances had been made), a margin of dumping could nevertheless be found to exist. For example, imagine that there were two home market sales (HM-1 and HM-2) and two export sales (EX-1 and EX-2) during the POI. HM-1 and EX-1 occurred on day 1 and were both at a price of $10. HM-2 and EX-2 occurred on day 90 and were both at a price of $15. Thus, neither of the individual export transactions was dumped when compared to the simultaneous home market transactions. If all these sales were in the same volumes, then a weighted average to weighted average would also show no dumping. Assume however that HM-1 and EX-2 involved a volume of ten units, while HM-2 and EX-1 involved a volume of twenty units. In this case, the weighted average normal value would be (10 units × $10/unit) + (20 units × $15/unit) = $400/30 units = $13.33/unit. The weighted average export price would be (20 units × $10/unit) + (10 units × $15/unit) = $350/30 units = $11.27/unit. Thus, the weighted average margin of dumping would be 18 per cent.

[119] Panel Report on *US – Stainless Steel*, para. 6.123.

targeted dumping may be examined in relation to specific types or models of the product under investigation. Furthermore, we are bound to add that, if the European Communities wanted to address, in particular, dumping of certain types or models of bed linen, it could have defined, or redefined, the *product* under investigation in a narrower way.[120]"[121]

(h) Relationship between subparagraphs of Article 2.4

89. With respect to the relationship between Article 2.4 and Article 2.4.1, see paragraph 71 above.

90. With respect to the relationship between Article 2.4 and Article 2.4.2, see paragraph 86 above.

(i) Relationship with other paragraphs of Article 2

91. With respect to the relationship between Article 2.4 and Article 2.2, see paragraph 50 above.

6. Article 2.6

92. The Panel on *US – Lumber V* considered that the "like product" to the product under consideration has to be determined on the basis of Article 2.6, but that this provision does not provide any guidance on the way in which the "product under investigation" is to be determined:

> "Article 2.6 therefore defines the basis on which the product to be compared to the 'product under consideration' is to be determined, that is, a product which is either identical to the product under consideration, or in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration. As the definition of 'like product' implies a comparison with another product, it seems clear to us that the starting point can only be the 'other product', being the allegedly dumped product. Therefore, once the product under consideration is defined, the 'like product' to the product under consideration has to be determined on the basis of Article 2.6. However, in our analysis of the *AD Agreement*, we could not find any guidance on the way in which the 'product under consideration' should be determined."[122]

7. Relationship with other Articles

93. With respect to the relationship between Article 2 and Articles 6.1, 6.2 and 6.9, see paragraph 441 below.

94. With respect to the relationship between Article 6.8 and Articles 2.2 and 2.4, the Panel on *US – Steel Plate*, having found a violation of Article 6.8, considered it unnecessary to determine, in addition, whether the circumstances of that violation also constituted a violation of Article 2.4 (and Article 9.3, and Articles VI:1 and 2 of GATT 1994). In the Panel's view, findings on these claims would serve no useful purpose, as they would neither assist the Member found to be in violation of its obligations to implement the ruling of the Panel, nor would they add to the overall understanding of the obligations found to have been violated. The Panel also declined to rule on India's claim under Article 2.2.[123]

95. With respect to the relationship between Article 2.4 and Article 6.10, see paragraph 443 below.

96. With respect to the relationship between Articles 2.4.1 and 12, see paragraph 564 below.

8. Relationship with other WTO Agreements

(a) Article VI of the GATT 1994

97. The Panel on *US – 1916 Act (EC)* found that where the complainant had not established a prima facie case of violation of Article 2.1 and 2.2, "[t]he fact that we found a violation of Article VI:1 of the *GATT 1994* is not as such sufficient to conclude that Articles 2.1 and 2.2 of the Anti-Dumping Agreement have been breached, in the absence of more specific arguments and evidence."[124]

98. The Appellate Body on *EC – Tube or Pipe Fittings* considered that the "precise rules relating to the determination as to whether there is dumping and, if dumping exists, how the dumping margin is to be calculated, are set out, not in Article VI:2 of the GATT 1994, but rather in Article 2 of the *Anti-Dumping Agreement*, which is the agreement on the implementation of Article VI of the GATT 1994." The Appellate Body in this case rejected the argument that the opening sentence of Article VI:2 of *GATT 1994*, "in order to offset or prevent dumping" imposed an obligation on an investigating authority to select a particular comparison methodology under Article 2.4.2 of the *Anti-Dumping Agreement*:

> "In our view, therefore, Article 2 is a more appropriate source than the opening phrase '[i]n order to offset or prevent dumping' of Article VI:2, for ascertaining specifically

[120] (*footnote original*) The European Communities also argues in its appellant's submission, paras. 42–45, that the Panel's interpretation of Article 2.4.2 would disadvantage those importing Members which collect anti-dumping duties on a "prospective" basis when compared to those importing Members which collect anti-dumping duties on a "retrospective" basis. We note, though, that Article 2.4.2 is not concerned with the collection of anti-dumping duties, but rather with the determination of "the existence of margins of dumping". Rules relating to the "prospective" and "retrospective" collection of anti-dumping duties are set forth in Article 9 of the *Anti-Dumping Agreement*. The European Communities has not shown how and to what extent these rules on the "prospective" and "retrospective" collection of anti-dumping duties bear on the issue of the establishment of "the existence of dumping margins" under Article 2.4.2.

[121] Appellate Body Report on *EC – Bed Linen*, para. 62.

[122] Panel Report on *US – Lumber V*, para. 7.153.

[123] Panel Report on *US – Steel Plate*, para. 7.103.

[124] Panel Report on *US – 1916 Act (EC)*, para. 6.209.

what is required for the proper determination of dumping by an investigating authority. We are unable to see an obligation flowing from the opening phrase of Article VI:2 of the GATT 1994 to Article 2 of the *Anti-Dumping Agreement* that the determination of dumping must be based on the standard of a 'reasonable assumption for the future', or that this, in turn, would require that a particular methodology be chosen under Article 2.4.2."[125]

(b) Article X of the GATT 1994

99. The Panel on *US – Stainless Steel* touched on the relationship between Article X:3(a) of the *GATT 1994* and Article 2.4.1 of the *Anti-Dumping Agreement*. See the Chapter on the *GATT 1994*, Section XI.B.D.2.

III. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3
Determination of Injury[9]

(*footnote original*) [9] Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.3 Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

3.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.[10] In making a determination regarding the exis-

[125] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 76.

tence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

(*footnote original*) [10] One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

(ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

3.8 With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. General

(a) Relationship with other paragraphs of Article 3

100. In *Thailand – H-Beams*, the Appellate Body explained the relationship between the paragraphs of Article 3:

> "Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs. These obligations concern the determination of the volume of dumped imports, and their effect on prices (Article 3.2), investigations of imports from more than one country (Article 3.3), the impact of dumped imports on the domestic industry (Article 3.4), causality between dumped imports and injury (Article 3.5), the assessment of the domestic production of the like product (Article 3.6), and the determination of the threat of material injury (Articles 3.7 and 3.8). The focus of Article 3 is thus on *substantive* obligations that a Member must fulfill in making an injury determination."[126]

101. In *Egypt – Steel Rebar*, the Panel confirmed the role of Article 3.1 and explained the relationship between paragraph 5 and paragraphs 2 and 4:

> ". . . It is clear that Article 3.1 provides overarching general guidance as to the nature of the injury investigation and analysis that must be conducted by an investigating authority. Article 3.5 makes clear, through its cross-references, that Articles 3.2 and 3.4 are the provisions containing the specific guidance of the AD Agreement on the examination of the volume and price effects of the dumped imports, and of the consequent impact of the imports on the domestic industry, respectively . . ."[127]

(b) Period of data collection

(i) Jurisprudence

102. In *Egypt – Steel Rebar*, Turkey claimed that because the period of investigation for dumping ended on 31 December 1998, and most of the injury found by the investigating authorities occurred in the first quarter of 1999, the investigating authorities had failed to demonstrate that dumping and injury occurred at the same point in time and that there was a link between the imports that were specifically found to be dumped and the injury found, violating Articles 3.5 and 3.1.[128] The Panel disagreed:

> ". . . neither of the articles cited in this claim [Articles 3.1 and 3.5], nor any other provision of the AD Agreement, contains any specific rule as to the time periods to be covered by the injury or dumping investigations, or any overlap of those time periods.[129]
>
> In fact, the only provisions that provide guidance as to how the price effects and effects on the domestic industry of the dumped imports are to be gauged are (as cross-referenced in Article 3.5), Articles 3.2 (volume and price effects of dumped imports), and Article 3.4 (impact of the dumped imports on the domestic industry). Neither of these provisions specifies particular time periods for these analyses . . ."[130]

103. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered that "there is a *prima facie* case that an investigating authority fails to conduct an 'objective' examination if it examines different injury factors using different periods. Such a *prima facie* case may be

[126] Appellate Body Report on *Thailand – H-Beams*, para. 106.
[127] Panel Report on *Egypt – Steel Rebar*, para. 7.102.
[128] Panel Report on *Egypt – Steel Rebar*, para. 7.127.
[129] (*footnote original*) See *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*, G/ADP/6, adopted 5 May 2000 by the Committee on Anti-Dumping Practices.
[130] Panel Report on *Egypt – Steel Rebar*, paras. 7.130–7.131.

rebutted if the investigating authority demonstrates that the use of different periods is justifiable on the basis of objective grounds (because, for example, data for more recent periods was not available for certain injury factors)."[131]

104. The Panel on *Argentina – Poultry Anti-Dumping Duties* rejected the argument that the periods of review used for the separate dumping and injury determination must end at the same time, and considered that "there is nothing in the *AD Agreement* to suggest that the periods of review for dumping and injury must necessarily end at the same point in time. Indeed, since there may be a time-lag between the entry of dumped imports and the injury caused by them, it may not be appropriate to use identical periods of review for the dumping and injury analyses in all cases."[132]

(ii) Recommendation by the Committee on Anti-Dumping Practices

105. With respect to the recommendation by the Committee on Anti-Dumping Practices on the period of data collection, see paragraph 8 above.

2. Footnote 9

106. Referring to footnote 9 to Article 3 and to Article 4.1, the Panel on *Mexico – Corn Syrup* stated: "These two provisions inescapably require the conclusion that the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1".[133]

3. Article 3.1

(a) Significance of paragraph 1 within the context of Article 3

107. In *Thailand – H-Beams*, the Appellate Body explained the legal status of paragraph 1 in the provisions of Article 3. See paragraph 100 above.[134] See also paragraph 101 above.

108. The Panel on *US – Softwood Lumber VI* considered that in the absence of independent argument supporting overarching claims under Article 3.1, the resolution of these claims is substantively dependent on the resolution of the specific claims under the other paragraphs of Article 3:

> "Thus, in the absence of any additional arguments supporting the allegations of violation of Articles 3.1 and 15.1, if we find that the facts give rise to a conclusion of no violation under one of Canada's specific claims, we will also consider that those facts give rise to the same conclusion, no violation, with respect to the overarching claims under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. With respect to any aspect of the determination that is found to be inconsistent with any other provision of Articles 3 and 15 of the Agreements asserted by Canada, we can see no reason to conclude, in addition, that it also violates Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. In the absence of additional arguments in support of these claims, to say that a violation of a specific provision of the Agreements also violates the overarching obligations in Articles 3.1 and 15.1 does not clarify the obligation set out in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement. Nor would it provide any guidance in the context of implementation of any recommendation of the DSB. Therefore, we will make no findings with respect to these claims."[135]

(b) Investigating authorities' obligation under Article 3.1

109. In *US – Hot-Rolled Steel*, the Appellate Body ruled that "the thrust of the investigating authorities' obligation, in Article 3.1, lies in the requirement that they base their determination on 'positive evidence' and conduct an 'objective examination'".[136]

(i) "positive evidence"

Meaning of positive evidence

110. In *US – Hot-Rolled Steel*, the Appellate Body ruled that "the term 'positive evidence' relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination." It further explained that "[t]he word 'positive' means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible."[137]

Scope of positive evidence

111. In *Thailand – H-Beams*, the Appellate Body reversed the Panel's finding that an injury determination must be based only upon evidence disclosed to, or discernible by, the parties to the investigation, and concluded that "Article 3.1 ... permits an investigating authority making an injury determination to base its

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[131] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.283.
[132] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.287.
[133] Panel Report on *Mexico – Corn Syrup*, para. 7.147.
[134] See also Appellate Body Report on *US – Hot-Rolled Steel*, para. 192.
[135] Panel Report on *US – Softwood Lumber VI*, para. 7.26.
[136] Appellate Body Report on *US – Hot-Rolled Steel*, para. 192.
[137] Appellate Body Report on *US – Hot-Rolled Steel*, para. 192. In *Egypt – Steel Rebar*, Turkey had argued that for a price undercutting analysis to be based on positive evidence as required by Article 3.1, an investigating authority must justify its choice of the basis for the price comparison it makes. The Panel considered that it did not need to opine on the exact nature of the "positive evidence" requirement of Article 3.2 (see para. 134 of this Chapter) and dismissed Turkey's claim. The Panel found that Turkey had not established that an objective and unbiased investigating authority could not have found price undercutting on the basis of the evidence of record. Panel Report on *Egypt – Steel Rebar*, paras. 7.70 and 7.75.

determination on *all* relevant reasoning and facts before it."[138] The Appellate Body explained:

> "Even if we accept that the ordinary meaning of these terms is reflected in the dictionary definitions cited by the Panel, in our view, the ordinary meaning of these terms does not suggest that an investigating authority is required to base an injury determination only upon evidence disclosed to, or discernible by, the parties to the investigation. An anti-dumping investigation involves the commercial behaviour of firms, and, under the provisions of the *Anti-Dumping Agreement*, involves the collection and assessment of *both* confidential and non-confidential information. An injury determination conducted pursuant to the provisions of Article 3 of the *Anti-Dumping Agreement* must be based on the totality of that evidence. We see nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information."[139]

112. In *Thailand – H-Beams*, the Appellate Body provided the following contextual support for its finding that a determination of injury pursuant to Article 3.1 need not be based exclusively on evidence which has been disclosed to the parties to the investigation:

> "Contextual support for this interpretation of Article 3.1 can be found in Article 3.7, which states that a threat of material injury must be 'based on facts and not merely on allegation, conjecture or remote possibility'. This choice of words shows that, as in Article 3.1, which overarches and informs it, it is the *nature* of the evidence that is being addressed in Article 3.7. A similar requirement for an investigating authority can be found in Article 5.2, which requires that an application for initiation of an anti-dumping investigation may not be based on '[s]imple assertion, unsubstantiated by relevant evidence'. Article 5.3 requires an investigating authority to 'examine the accuracy and adequacy' of the evidence provided in such an application.
>
> Further contextual support for this reading of Article 3.1 is provided by other provisions of the *Anti-Dumping Agreement*. Article 6 (entitled 'Evidence') establishes a framework of procedural and due process obligations which, amongst other matters, requires investigating authorities to disclose certain evidence, during the investigation, to the interested parties. Article 6.2 requires that parties to an investigation 'shall have a full opportunity for the defence of their interests'. Article 6.9 requires that, before a final determination is made, authorities shall 'inform all interested parties of the essential facts under consideration which form the basis for the decision'. There is no justification for reading these obligations, which appear in Article 6, into the substantive provisions of Article 3.1. We do *not*, however, imply that the injury determination by the Thai authorities in this case necessarily met the requirements of Article 6. As the Panel found that Poland's claim under Article 6 did not meet the requirements of Article 6.2 of the DSU, the issue was not considered by the Panel.
>
> Article 12 (entitled 'Public Notice and Explanation of Determinations') also provides contextual support for our interpretation of the meaning of 'positive evidence' and 'objective examination' in Article 3.1. In a similar manner to Article 6, Article 12 establishes a framework of procedural and due process obligations concerning, notably, the contents of a final determination. Article 12.2.2 requires, in particular, that a final determination contain 'all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures', and 'the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers'. Article 12, like Article 6, sets forth important procedural and due process obligations. However, as in the case of Article 6, there is no justification for reading these obligations into the substantive provisions of Article 3.1. We do *not*, however, imply that the injury determination of the Thai authorities in this case necessarily met the requirements of Article 12. This issue was not considered by the Panel, since Poland did not make a claim under this provision."[140]

113. Further, in *Thailand – H-Beams*, the Appellate Body rejected the Panel's reasoning that in reviewing the determination of injury by the investigating authority under Article 3, the Panel "is required, under Article 17.6(i), in assessing whether the *establishment of facts* is proper, to ascertain whether the 'factual basis' of the determination is 'discernible' from the documents that were available to the interested parties and/or their legal counsel in the course of the investigation and at the time of the final determination; and, in assessing whether the *evaluation of the facts* is unbiased and objective, to examine the 'analysis and reasoning' in only those documents 'to ascertain the connection between the disclosed factual basis and the findings.'"[141] The Panel had linked the obligation of national authorities under Article 3.1 to base the determination of injury on positive evidence, i.e. excluding confidential information not disclosed to the parties to the investigation, to the Panel's obligation under Articles 17.5 and 17.6, stating that "we as a panel should base our review on the reasoning and analysis reflected in the final determination and in communications and disclosures to which the Polish firms had access in the course of the investigation or at the time of the final determination". The Appellate Body had already found that under Article 3.1, contrary to the Panel's finding, the investigating authority was

[138] Appellate Body Report on *Thailand – H-Beams*, para. 111.
[139] Appellate Body Report on *Thailand – H-Beams*, para. 107. With respect to the treatment of confidential information in the context of Panel and Appellate Body proceedings, see Chapter on *DSU*, Section XVIII.B(d).
[140] Appellate Body Report on *Thailand – H-Beams*, paras. 108–110.
[141] Appellate Body Report on *Thailand – H-Beams*, para. 119.

not precluded from basing its determination of injury on information not disclosed to the parties to the investigation. The Appellate Body then also disagreed with the link, established by the Panel, between Article 3.1 on the one hand and Articles 17.5 and 17.6 on the other:

> "[W]hile the obligations in Article 3.1 apply to *all* injury determinations undertaken by Members, those in Articles 17.5 and 17.6 apply only when an injury determination is examined by a WTO panel. The obligations in Articles 17.5 and 17.6 are distinct from those in Article 3.1."[142]

114. In *Thailand – H-Beams*, the Appellate Body then also reversed the Panel's findings that the Panel was precluded from examining facts not disclosed to interested parties in the national investigation:

> "Articles 17.5 and 17.6(i) require a panel to examine the facts made available to the investigating authority of the importing Member. These provisions do not prevent a panel from examining facts that were not disclosed to, or discernible by, the interested parties at the time of the final determination."[143]

(ii) "Objective examination"

Concept of objective examination

115. In *US – Hot-Rolled Steel*, the Appellate Body analysed the concept of "objective assessment" as compared to "positive evidence", indicating that the latter is concerned with the investigating process itself as opposed to the facts justifying the injury determination:

> "The term 'objective examination' aims at a different aspect of the investigating authorities' determination. While the term 'positive evidence' focuses on the facts underpinning and justifying the injury determination, the term 'objective examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word 'objective', which qualifies the word 'examination', indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness.[144] In short, an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objective examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.[145]"[146]

Extent of the objective examination

116. In *US – Hot-Rolled Steel*, Japan had challenged Section 771(7)(C)(iv) of the United States Tariff Act of 1930, as amended, (the so-called "captive production provision") which provided that, in certain statutorily defined circumstances, the investigating authorities when conducting an injury determination "shall focus primarily" on a particular segment of the "domestic industry", when "determining market share and the factors affecting financial performance". The Appellate Body examined whether the investigating authorities could make a sectoral examination of the domestic industry when conducting an injury determination under Article 3.1. As indicated in paragraph 144 below the Appellate Body concluded by reference to Article 3.4 that it may be highly pertinent to examine the domestic industry by part, sector or segment provided that such an examination be conducted in an "objective" manner as mandated by Article 3.1. The Appellate Body interprets the obligation to make an "objective" assessment in this regard as meaning that "where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole" or, "in the alternative," provide "a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts. . .". It therefore found that an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of "objectiv[ity]" in Article 3.1 of the *Anti-Dumping Agreement:*

> ". . . it may be highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment. However, as with all other aspects of the evaluation of the domestic industry, Article 3.1 of the *Anti-Dumping Agreement* requires that such a sectoral examination be conducted in an 'objective' manner. In our view, this requirement means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should

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[142] Appellate Body Report on *Thailand – H-Beams*, para. 114.
[143] Appellate Body Report on *Thailand – H-Beams*, para. 118.
[144] (*footnote original*) This provision is yet another expression of the general principle of good faith in the *Anti-Dumping Agreement*. See, *supra*, para. 101.
[145] (*footnote original*) In this respect, we recall that panels are under a similar duty, under Article 11 of the DSU, to make an "objective assessment of the matter . . . including an objective assessment of the facts". In our Report in *EC Measures Concerning Meat and Meat Products (Hormones)*, we indicated that the obligation to make an "objective assessment" includes an obligation to act in "good faith", respecting "fundamental fairness". (Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 133)
[146] Appellate Body Report on *US – Hot-Rolled Steel*, para. 193.

provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry. Different parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry. We note that the reverse may also be true – to examine only the parts of an industry which are performing well may lead to overlooking the significance of deteriorating performance in other parts of the industry.

Moreover, by examining only one part of an industry, the investigating authorities may fail properly to appreciate the economic relationship between that part of the industry and the other parts of the industry, or between one or more of those parts and the whole industry. For instance, we can envisage that an industry, with two parts, may be overall in mild recession, where one part is performing very poorly and the other part is performing very well. It may be that the relationship between the two parts is such that the healthier part will lead the other part, and the industry as a whole, out of recession. Alternatively, the healthy part may follow the other part, and the industry as a whole, into recession.

Accordingly, an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of 'objectiv[ity]' in Article 3.1 of the *Anti-Dumping Agreement*."[147]

Relationship with Article 3.4

117. In *US – Hot-Rolled Steel*, the Appellate Body explained that "an important aspect of the 'objective examination' required by Article 3.1 is further elaborated in Article 3.4 as an obligation to 'examin[e] the impact of the dumped imports on the domestic industry' through 'an evaluation of all relevant economic factors and indices having a bearing on the state of the industry'." See also paragraphs 116 above and 144 below.

118. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered that "to the extent that a Member failed to conduct a proper 'examination of the impact of dumped imports' for the purpose of Article 3.4, that Member also failed to conduct an 'objective examination of … the consequent impact of the[] imports' within the meaning of Article 3.1(b)."[148]

(c) An objective examination based on positive evidence of "dumped imports"

119. The Panel on *EC – Bed Linen*, in a finding subsequently not reviewed by the Appellate Body, rejected the argument advanced by India that the term "dumped imports" must be understood to refer only to imports which are the subject of transactions in which the export price was below normal value. Rather, the Panel endorsed the argument by the European Communities that once a determination has been made that a product in question from particular producers is being dumped, this conclusion will then apply to *all* imports of that product from that source:

"[W]e consider that dumping is a determination made with reference to a *product* from a particular producer/exporter, and not with reference to individual transactions. That is, the determination of dumping is made on the basis of consideration of transactions involving a particular product from particular producers/exporters. If the result of that consideration is a conclusion that the product in question from particular producers/exporters is dumped, we are of the view that the conclusion applies to all imports of that product from such source(s), at least over the period for which dumping was considered. Thus, we consider that the investigating authority is entitled to consider all such imports in its analysis of 'dumped imports' under Articles 3.1, 3.4, and 3.5 of the AD Agreement."[149]

120. The Panel on *EC – Bed Linen* also indicated some practical reasons for why the phrase "dumped imports" could not refer only to those imports attributable to transactions in which export price was below normal value:

"Our conclusion that investigating authorities may treat all imports from producers/exporters for which an affirmative determination of dumping is made as 'dumped imports' for purposes of injury analysis under Article 3 is bolstered by our view that the interpretation proposed by India, which entails the conclusion that the phrase 'dumped imports' refers *only* to those imports attributable to *transactions* in which export price is below normal value, would lead to an unworkable result in certain cases. One of the objects and purposes of the AD Agreement is to establish the conditions under which Members may impose anti-dumping duties in cases of

[147] Appellate Body Report on *US – Hot-Rolled Steel*, paras. 204–206.
[148] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.325.
[149] Panel Report on *EC – Bed Linen*, para. 6.136. The Panel on *Argentina – Poultry Anti-Dumping Duties* also considered that "the term 'dumped imports' refers to all imports attributable to producers or exporters for which a margin of dumping greater than *de minimis* has been calculated. The term 'dumped imports' excludes imports from producers / exporters found in the course of the investigation not to have dumped." Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.303.

injurious dumping. An interpretation which would, in many cases, make it impossible to assess one of the necessary elements, injury, is not consistent with that object and purpose.

An assessment of the volume, price effects, and consequent impact, only of imports attributable to transactions for which a positive margin was calculated would be, in many cases, impossible, or at least impracticable. Attempting to segregate individual transactions as to whether they were 'dumped' or not, even assuming it could be done, would leave investigating authorities in a quandary in cases in which the dumping investigation is undertaken for a sample of companies or products. Such sampling is specifically provided for in the AD Agreement, yet it would not be possible, in such cases, accurately to determine the volume of imports attributable to 'dumped' transactions. Similarly, if dumping is determined on the basis of a comparison of weighted average normal value to weighted average export price, there would be no comparisons concerning individual transactions which could serve as the basis for segregating imports in 'dumped' and 'not-dumped' categories."[150]

121. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body reversed the finding by the Panel that in case of an investigation based on a sample, an investigating authority is entitled to consider the total volume of imports from non-examined producers and exporters as being dumped for the purposes of an Article 3 injury analysis, as long as a dumping margin had been established for any of the examined producers or exporters.[151] Contrary to the Panel, the Appellate Body considered that Article 9.4 does not provide justification for considering *all* imports from *non*-examined producers as *dumped* for purposes of Article 3. According to the Appellate Body:

"Article 9.4 provides no guidance for determining the volume of dumped imports from producers that *were not* individually examined on the basis of 'positive evidence' and an 'objective examination' under Article 3. The exception in Article 9.4, which authorizes the imposition of anti-dumping *duties* on imports from producers for which *no* individual dumping margin has been calculated, *cannot be assumed* to extend to Article 3, and, in particular, in this dispute, to paragraphs 1 and 2 of Article 3. For the same reasons, we do not see why the volume of imports that has been found to be dumped by non-examined producers, for purposes of determining *injury* under paragraphs 1 and 2 of Article 3, must be *congruent* with the volume of imports from those non-examined producers that is subject to the *imposition of anti-dumping duties* under Article 9.4, as contended by the European Communities and the Panel."[152]

122. In the view of the Appellate Body on *EC – Bed Linen (Article 21.5 – India)*, while paragraphs 1 and 2 of Article 3 do not set forth a specific methodology for examining the volume of dumped imports in case the investigating authority carries out its investigation on the basis of a sample, they do "require investigating authorities to make a determination of injury on the basis of 'positive evidence' and to ensure that the injury determination results from an 'objective examination' of the volume of dumped imports, the effects of the dumped imports on prices, and, ultimately, the state of the domestic industry. Thus, whatever methodology investigating authorities choose for determining the volume of dumped imports, if that methodology fails to ensure that a determination of injury is made on the basis of 'positive evidence' and involves an 'objective examination' of *dumped* imports – rather than imports that are found *not* to be dumped – it is not consistent with paragraphs 1 and 2 of Article 3."[153]

123. The Appellate Body on *EC – Bed Linen (Article 21.5 – India)* thus came to the conclusion that the European Communities' approach whereby it had considered all imports from non-examined exporters or producers as dumped because a number of exporters included in the sample were found to have been dumping was inconsistent with the obligation to conduct an "objective examination":

"The examination was not 'objective' because its result is predetermined by the methodology itself. Under the approach used by the European Communities, whenever the investigating authorities decide to *limit* the examination to some, but not all, producers – as they are entitled to do under Article 6.10 – *all* imports from *all non*-examined producers will *necessarily always be included* in the volume of dumped imports under Article 3, as long as any of the producers examined individually were found to be dumping. This is so because Article 9.4 permits the imposition of the 'all others' duty rate on imports from *non*-examined producers, *regardless* of which alternative in the second sentence of Article 6.10 is applied. In other words, under the European Communities' approach, imports attributable to *non*-examined producers are simply *presumed*, in all circumstances, to

[150] Panel Report on *EC – Bed Linen*, paras. 6.139–140.

[151] The Panel had considered highly relevant that "Article 9.4 allows anti-dumping duties to be **collected** on imports from producers for which an individual determination of dumping, based on the calculation of a dumping margin under Article 2, was not made. It also establishes an upper limit for any such duties. In our view, the fact that an anti-dumping duty may properly be collected on imports from producers for which an individual calculation of dumping was not made, necessarily entails that such producers are properly considered to be dumping. Consequently, we consider inescapable the conclusion that the imports from those producers are properly considered as 'dumped imports' for the purposes of Articles 3.1 and 3.2." Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.137.

[152] Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 126.

[153] Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 113.

> be *dumped*, for purposes of Article 3, solely because they are subject to the imposition of anti-dumping duties under Article 9.4. This approach makes it 'more likely [that the investigating authorities] will determine that the domestic industry is injured', and, therefore, it cannot be 'objective'. Moreover, such an approach tends to favour methodologies where *small numbers* of producers are examined individually. This is because the *smaller* the number of individually-examined producers, the *larger* the amount of imports attributable to *non*-examined producers, and, therefore, the larger the amount of imports *presumed* to be *dumped*. Given that the *Anti-Dumping Agreement* generally requires examination of *all* producers, and only exceptionally permits examination of only *some* of them, it seems to us that the interpretation proposed by the European Communities cannot have been intended by the drafters of the Agreement.
>
> For these reasons, we conclude that the European Communities' determination that *all* imports attributable to *non*-examined producers were dumped – even though the evidence from *examined* producers showed that producers accounting for 53 percent of imports attributed to examined producers were *not* dumping – did not lead to a result that was *unbiased*, *even-handed*, and *fair*. Therefore, the European Communities did not satisfy the requirements of paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports on the basis of an examination that is '*objective*'."[154]

(d) "the effect of dumped imports"

124. In *Guatemala – Cement II*, Mexico claimed that Guatemala's investigating authority had violated Articles 3.1 and 3.2 by not considering at all, in its investigation, certain other cement imports. The Panel understood the Mexican claim to be that the Guatemalan authorities considered the type of cement under the not scrutinized imports as being "unlike" the cement under the imports subject to investigation, an assessment which Mexico considered erroneous. Mexico further claimed that the erroneous exclusion of certain imports from the investigation resulted in the following consequences: (i) the resulting volume of total imports of the product under investigation was lower; (ii) the share of allegedly dumped imports in total imports of the product under investigation was artificially inflated; (iii) the consideration of a faulty and incomplete figure for total imports of the product under investigation yielded a distorted figure for apparent domestic consumption; and (iv) because of this incorrect figure for apparent domestic consumption, the relationship between the increase in dumped imports and consumption was ultimately incorrect.[155] The Panel considered that consequences (i) through (iv), if proven, would constitute a violation of Articles 3.1 and 3.2, in that an exclusion of the imports at issue from the figures for domestic consumption of the like product affected the comparison that was made with the figures for volume of dumped imports for purposes of determining that there had been a significant increase in dumped imports relative to domestic consumption in the importing Member.[156] After reviewing the evidence submitted by Mexico and inconsistencies in Guatemala's replies in this regard, the Panel ultimately found that Mexico had established a prima facie case of inconsistency with respect to Articles 3.1 and 3.2.[157]

(e) Relationship with other paragraphs of Article 3

125. In *Thailand – H-Beams*, the Appellate Body referred to Article 3.7 as well as Articles 5.2, 5.3, 6 and 12 in interpreting Article 3.1. See paragraph 112 above.

4. Article 3.2

(a) Choice of analytical methodology

(i) General

126. With respect to Article 3.2, the Panel on *Thailand – H-Beams* stated that "it is for the investigating authorities in the first instance to determine the analytical methodologies that will be applied in the course of an investigation, as Article 3 contains no requirements concerning the methodology to be used."[158]

127. In *Egypt – Steel Rebar*, the Panel did not find on the plain text of Article 3.2 any requirement that the price undercutting analysis must be conducted at any particular level of trade. See paragraph 134 below.

(ii) Frequency of analysis

128. The Panel on *Thailand – H-Beams* considered that a quarterly analysis of the trend in import volume is not required under Article 3.2, and went on to state that "[g]iven that on an annual basis over a multi-year period, imports from Poland increased in every period examined, we do not believe that quarter-to-quarter fluctuation in import volumes during one of the twelve-month periods examined invalidates the Thai authorities' finding that the import volume of the subject imports 'increased continuously'."[159]

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[154] Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, paras. 132–133.
[155] Panel Report on *Guatemala – Cement II*, paras. 8.268–8.272. The Panel also found a violation of Article 3.5 with respect to the failure by Guatemala's authority to take into account certain non-dumped imports. See paras. 124 and 131 of this Chapter.
[156] Panel Report on *Guatemala – Cement II*, para. 8.269.
[157] Panel Report on *Guatemala – Cement II*, para. 8.272.
[158] Panel Report on *Thailand – H-Beams*, para. 7.159.
[159] Panel Report on *Thailand – H-Beams*, para. 7.168.

(iii) Length of period of investigation

129. In *Guatemala – Cement II*, the Panel did not agree with Mexico's argument that Guatemala's authority had acted inconsistently with Article 3.2 by examining import data only for the one-year period of investigation. The Panel explained:

> "A recent recommendation of the Committee on Anti-Dumping Practices calls on Members to use a data collection period of at least three years. This recommendation reflects the common practice of Members.[160] That said, there is no provision in the Agreement which specifies the precise duration of the period of data collection. Thus, it cannot be said *a priori* that the use of a one-year period of data collection would not be consistent with the requirement of Article 3.2 to consider whether there has been a significant increase in the volume of dumped imports in the circumstances of a particular case. In this case, Guatemala argues that the reason for the short period of data collection was that exports by Cruz Azul did not become significant until 1995. The record of the investigation supports this conclusion."[161]

With respect to the recommendation by the Committee on Anti-Dumping Practices on this topic, see paragraph 8 above.

(b) "a significant increase in dumped imports"

130. In *Thailand – H-Beams*, the Panel considered that Article 3.2 does not require that the term "significant" be used to characterize a subject increase in imports in the determination of an investigating authority. The Panel explained:

> "We note that the text of Article 3.2 requires that the investigating authorities 'consider whether there has been a significant increase in dumped imports'. The *Concise Oxford Dictionary* defines 'consider' as, *inter alia*: 'contemplate mentally, especially in order to reach a conclusion'; 'give attention to'; and 'reckon with; take into account'. We therefore do not read the textual term 'consider' in Article 3.2 to require an explicit 'finding' or 'determination' by the investigating authorities as to whether the increase in dumped imports is 'significant'. While it would certainly be preferable for a Member explicitly to characterize whether any increase in imports as 'significant', and to give a reasoned explanation of that characterization, we believe that the word 'significant' does not necessarily need to appear in the text of the relevant document in order for the requirements of this provision to be fulfilled. Nevertheless, we consider that it must be apparent in the relevant documents in the record that the investigating authorities have given attention to and taken into account whether there has been a significant increase in dumped imports, in absolute or relative terms."[162]

131. In *Guatemala – Cement II*, the Panel agreed with Mexico that Guatemala's authority had acted inconsistently with Articles 3.1 and 3.2 by not taking into account imports other than those from the supplier under investigation. See paragraph 124 above.[163]

(c) "the effect of the dumped imports on prices"

132. In *Guatemala – Cement II*, disagreeing with Mexico's claim that in violation of Article 3.2, Guatemala's authority did not properly examined the effect of dumped imports on the price of domestic sales, the Panel stated that "[b]ased on the evidence of declining prices and inability to achieve established price levels, coinciding with imports at lower prices we find that an objective and unbiased investigating authority could have properly concluded that the dumped imports were having a negative effect on the prices of the domestic industry."[164]

133. In *Guatemala – Cement II*, the Panel also rejected Mexico's argument that Guatemala's authority conducted the examination of the price effect of dumped imports at the regional level only and not also at the national level and therefore acted inconsistently with Article 3.2. Rather, the Panel found that Guatemala had not limited its analysis to a particular region. The Panel also added that there was only one cement producer in Guatemala, and thus, even if the negative effect of the dumped imports on the prices of the domestic like product was only evidenced in one particular region (where that producer was located), this could still be viewed as causing injury to that producer.[165]

(d) "price undercutting"

134. In *Egypt – Steel Rebar*, Turkey had argued that, to satisfy the requirements of Article 3.2, a price undercutting analysis must be made on a delivered-to-the-customer basis, as, in its view, it is only at that level that

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[160] (*footnote original*) The recommendation provides that:

> "(c) the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation; (Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, adopted by the ADP Committee on 5 May 2000, G/ADP/6)."

We note that this recommendation is a relevant, but non-binding, indication of the understanding of Members as to appropriate implementation practice regarding the period of data collection for an anti-dumping investigation.

[161] Panel Report on *Guatemala – Cement II*, para. 8.266.

[162] Panel Report on *Thailand – H-Beams*, para. 7.161.

[163] The Panel also found a violation of Article 3.5 with respect to the failure by Guatemala's authority to take into account certain non-dumped imports. See paras. 124 and 131 of this Chapter.

[164] Panel Report on *Guatemala – Cement II*, para. 8.276.

[165] Panel Report on *Guatemala – Cement II*, para. 8.277.

any such undercutting can influence customers' purchasing decisions. The Panel did not find on the basis of the plain text of Article 3.2 any requirement that the price undercutting analysis must be conducted in any particular way, that is, at any particular level of trade.[166]

135. The Panel on *EC – Tube or Pipe Fittings* similarly stated that "unlike Article 2 (in particular Article 2.4.2) of the *Anti-Dumping Agreement*, which contains specific requirements relating to the calculation of the dumping margin, Article 3.2 requires the investigating authorities to consider whether price undercutting is 'significant' but does not set out any specific requirement relating to the calculation of a margin of undercutting, or provide a particular methodology to be followed in this consideration"[167] The Panel reasoned as follows:

> "The text of Article 3.2 refers to domestic 'prices' (in the plural rather than singular). This textual element supports our view that there is no requirement under Article 3.2 to establish one single margin of undercutting on the basis of an examination of every transaction involving the product concerned and the like product. In addition, the text of Article 3.2 refers to the 'dumped imports', that is, the imports of the product concerned from an exporting producer that has been determined to be dumping. Thus, investigating authorities may treat any imports from producers/exporters for which an affirmative determination of dumping is made as 'dumped imports' for purposes of injury analysis under Article 3. There is, however, no requirement to take each and every transaction involving the 'dumped imports' into account, nor that the 'dumped imports' examined under Article 3.2 are limited to those precise transactions subject to the dumping determination. This view is supported by the absence of a specific provision concerning time periods in the Agreement; an importing Member may investigate price effects of imports in an injury investigation period which may be different than the IP for dumping. These considerations do not, of course, diminish the obligation of an investigating authority to conduct an unbiased and even-handed price undercutting analysis.
>
> We take note of the shared view of the parties that 'the Panel should accord a considerable discretion to the investigating authorities to choose a methodology which produces a meaningful result while avoiding unfairness'. One purpose of a price undercutting analysis is to assist an investigating authority in determining whether dumped imports have, through the effects of dumping, caused material injury to a domestic industry. In this part of an anti-dumping investigation, an investigating authority is trying to discern whether the prices of dumped imports have had an impact on the domestic industry. The interaction of two variables would essentially determine the extent of impact of price undercutting on the domestic industry: the quantity of sales at undercutting prices; and the margin of undercutting of such sales. Sales at undercutting prices could have an impact on the domestic industry (for example, in terms of lost sales) irrespective of whether other sales might be made at prices above those charged by the domestic industry. The fact that certain sales may have occurred at 'non-underselling prices' does not eradicate the effects in the importing market of sales that *were* made at underselling prices. Thus, a requirement that an investigating authority must base its price undercutting analysis on a methodology that offset undercutting prices with 'overcutting' prices would have the result of requiring the investigating authority to conclude that no price undercutting existed when, in fact, there might be a considerable number of sales at undercutting prices which might have had an adverse effect on the domestic industry."[168]

(e) Relationship with other paragraphs of Article 3

136. With respect to the relationship of paragraph 2 with paragraphs 1, 3, 4 and 5 of Article 3, see paragraphs 100–101 above.

5. Article 3.3

(a) Relationship with other paragraphs of Article 3

137. With respect to the relationship of paragraph 3 with paragraphs 1, 2, 4 and 5 of Article 3, see paragraph 100 above.

138. In its report on *EC – Tube or Pipe Fittings*, the Appellate Body stated that in case of a cumulated injury analysis, there is no indication in the text of Article 3.2 that the analyses of volume and prices must be performed on a country-by-country basis where an investigation involves imports from several countries.[169] The Appellate Body thus confirmed the Panel's position in this case that it is possible for the analyses of volume and prices envisaged under Article 3.2 to be done on a cumulative basis, as opposed to an individual country basis, when dumped imports originate from more than one country.[170]

(b) Conditions for cumulation – general

139. The Panel on *EC – Tube or Pipe Fittings* came to the conclusion, on the basis of the text in Article 3.3, and citing contextual support in Articles 3.4 and 3.5, that the conditions identified in Article 3.3 are the *sole* conditions that must be satisfied by an investigating authority in order to undertake a cumulative assessment of the

[166] Panel Report on *Egypt – Steel Rebar*, paras. 7.70 and 7.73.
[167] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.281.
[168] Panel Report on *EC – Tube or Pipe Fittings*, paras. 7.276–7.277.
[169] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 111.
[170] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.231.

effects of dumped imports.[171] In particular, the Panel rejected Brazil's allegation that an investigating authority must first consider whether country-specific import volumes have significantly increased before cumulating them.[172] The Appellate Body agreed with the Panel and reached the following conclusion:

> "The text of Article 3.3 expressly identifies three conditions that must be satisfied before an investigating authority is permitted under the *Anti-Dumping Agreement* to assess cumulatively the effects of imports from several countries. These conditions are:
>
> (a) the dumping margin from each individual country must be more than *de minimis*;
>
> (b) the volume of imports from each individual country must not be negligible; and
>
> (c) cumulation must be appropriate in the light of the conditions of competition
>
> (i) between the imported products; and
>
> (ii) between the imported products and the like domestic product.
>
> By the terms of Article 3.3, it is 'only if' the above conditions are established that an investigating authority 'may' make a cumulative assessment of the effects of dumped imports from several countries.
>
> We find no basis in the text of Article 3.3 for Brazil's assertion that a country-specific analysis of the potential negative effects of volumes and prices of dumped imports is a pre-condition for a cumulative assessment of the effects of all dumped imports. Article 3.3 sets out expressly the conditions that must be fulfilled before the investigating authorities may cumulatively assess the effects of dumped imports from more than one country. There is no reference to the country-by-country volume and price analyses that Brazil contends are pre-conditions to cumulation. In fact, Article 3.3 expressly requires an investigating authority to examine country-specific volumes, not in the manner suggested by Brazil, but for purposes of determining whether the 'volume of imports from each country is not negligible'."[173]

140. In support of its finding, the Appellate Body in *EC – Tube or Pipe Fittings* further elaborated on the rationale behind the practice of cumulation:

> "The apparent rationale behind the practice of cumulation confirms our interpretation that both volume and prices qualify as 'effects' that may be cumulatively assessed under Article 3.3. A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the 'dumped imports' as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. If, for example, the dumped imports from some countries are low in volume or are declining, an exclusively country-specific analysis may not identify the causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry. The outcome may then be that, because imports from such countries could not *individually* be identified as causing injury, the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury. In our view, therefore, by expressly providing for cumulation in Article 3.3 of the *Anti-Dumping Agreement*, the negotiators appear to have recognized that a domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports. Consistent with the rationale behind cumulation, we consider that changes in import volumes from individual countries, and the effect of those country-specific volumes on prices in the importing country's market, are of little significance in determining whether injury is being caused to the domestic industry by the dumped imports as a whole.[174]"[175]

(c) Conditions for cumulation – appropriate in light of the "conditions of competition"

141. The Panel on *EC – Tube or Pipe Fittings* examined the nature and scope of the requirement in Article 3.3(b) that a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product. It considered that, "[I]n light of the general wording of the provision and the nature of the term 'appropriate', an investigating authority enjoys a certain degree of discretion in making that determination on the basis of the record before it. However, it is clear to us that cumulation must be suitable or fitting in the particular circumstances of a given case in light of the particular conditions of competition extant in the marketplace."[176]

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[171] Panel Report on *EC – Tube or Pipe Fittings*, paras. 7.234–7.235.

[172] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.234.

[173] Appellate Body Report on *EC – Tube or Pipe Fittings*, paras. 109–110.

[174] (*footnote original*) We do not suggest that trends in country-specific volumes are always irrelevant for an investigating authority's consideration. For example, such trends may be relevant in the context of an investigating authority's evaluation of the conditions of competition between imported products, and between imported products and the domestic like product, as provided for in Article 3.3(b). Brazil raised the relationship between import volumes and conditions of competition as the basis for a claim under that provision before the Panel. (Panel Report, para. 7.252) The Panel found that the divergences in volume trends between Brazilian imports and those of other countries did not compel a finding by the European Commission that the effects of Brazilian imports could not be appropriately assessed on a cumulated basis with the effects of imports from other countries. (*Ibid.*, paras. 7.253–7.256) Brazil has not appealed the Panel's finding in this respect.

[175] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 116.

[176] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.241.

142. The Panel on *EC – Tube or Pipe Fittings* understood the phrase "conditions of competition" to refer to the dynamic relationship between products in the marketplace and added that this phrase is not accompanied by any sort fo qualifier such as "identical" or "similar". It concluded that Article 3.3 contains no express indicators by which to assess the "conditions of competition", much less any fixed rules dictating precisely the relative percentages or levels of such indicators that must be present:

> "While we note that a broadly parallel evolution and a broadly similar volume and price trend might well indicate that imports may appropriately be cumulated, we find no basis in the text of the Agreement for Brazil's assertion that 'only a comparable evolution and a similarity of the significantly increased import volumes and/or the significant price effects . . . would indicate that these imports might have a joint impact on the situation of the domestic industry and may be assessed cumulatively'. Moreover, the provision contains no express indicators by which to assess the 'conditions of competition', much less any fixed rules dictating precisely and exhaustively the relative percentages or levels of such indicators that must be present. Unlike the lists of factors that guide an authority's examination under, for example, Articles 3.2, 3.4 and 3.5, Article 3.3 does not provide even an indicative list of factors that might be relevant in the assessment called for under that provision, in particular, the assessment of 'conditions of competition'.[177] We note that Article 3.2 explicitly concentrates on volume and price trends, and that Article 3.3 is neither specific nor limited in this way. Thus, while price and volume considerations may well be relevant in this context, we find no explicit reference thereto in Article 3.3(b)."[178]

6. Article 3.4

(a) "dumped imports"

143. In *EC – Bed Linen*, the Panel rejected the argument that "dumped imports" must be understood to refer only to imports which are the subject of transactions in which the export price was below normal value. See paragraph 119 above.

(b) "domestic industry"

(i) Sectoral analysis

144. The Appellate Body in *US – Hot-Rolled Steel* ruled that investigating authorities can undertake "an evaluation of particular parts, sectors or segments within a domestic industry", provided they respect the fundamental obligation in Article 3.1 to conduct an "objective assessment"[179]:

> ". . . it seems to us perfectly compatible with Article 3.4 for investigating authorities to undertake, or for a Member to require its investigating authorities to undertake, an evaluation of particular parts, sectors or segments within a domestic industry.[180] Such a sectoral analysis may be highly pertinent, from an economic perspective, in assessing the state of an industry as a whole.
>
> However, the investigating authorities' evaluation of the relevant factors must respect the fundamental obligation, in Article 3.1, of those authorities to conduct an 'objective examination'. If an examination is to be 'objective', the identification, investigation and evaluation of the relevant factors must be even-handed. Thus, investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.
>
> Instead, Articles 3.1 and 3.4 indicate that the investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to *each* potentially relevant factor and the weight to be attached to it. In every investigation, this determination turns on the 'bearing' that the relevant factors have 'on the state of the [domestic] industry'."[181]

(ii) Domestic producers outside the "sample"

145. In *EC – Bed Linen*, the Panel examined whether, further to having defined the Community industry as a group of 35 producers and resorted to a sample of those producers, the European Communities was precluded from considering information relating to producers not within that sample, or not within the Community industry.[182] The Panel, in a finding subsequently not addressed by the Appellate Body, resolved the issue whether "consideration of evidence for domestic producers outside the selected sample *but within the domestic industry* constitutes, *ipso facto*, a violation of Article 3.4"[183], as follows:

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[177] (*footnote original*) In this regard, we take note of Exhibits EC-8 through 11 containing submissions made by certain Members as part of discussions in the Ad Hoc Group on Implementation within the ADP Committee, which we observe reflect somewhat divergent practices of Members. These discussions show, at a minimum, that price and volume are not accepted by all Members as appropriate indicators of the "conditions of competition" (as they arguably reflect the outcome of competition and not whether competition is occurring). It appears, therefore, that Members themselves have not yet arrived at a common understanding of the content of these terms. Indeed, we note that this is a topic which has been proposed for negotiations and it is not our task to presuppose the outcome of those negotiations.

[178] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.242.

[179] As regards the meaning of the term "objective examination" under Article 3.1, see paras. 115–116.

[180] (*footnote original*) We note that the panel in *Mexico – High Fructose Corn Syrup*, *supra*, footnote 30, para. 7.154, took a similar view.

[181] Appellate Body Report on *US – Hot-Rolled Steel*, paras. 195–197.

[182] The Panel also indicated that "[they] express no opinion as to the correctness *vel non* of the European Communities' interpretation of Article 4 of the AD Agreement or its application in this case". Panel Report on *EC – Bed Linen*, para. 6.175.

[183] Panel Report on *EC – Bed Linen*, para. 6.180.

"[I]t is clear from the language of the AD Agreement, in particular Articles 3.1, 3.4, and 3.5, that the determination of injury has to be reached for the *domestic industry* that is the subject of the investigation. . . . In our view, it would be anomalous to conclude that, because the [investigating Member] chose to consider a sample of the domestic industry, it was required to close its eyes to and ignore other information available to it concerning the domestic industry it had defined. Such a conclusion would be inconsistent with the fundamental underlying principle that anti-dumping investigations should be fair and that investigating authorities should base their conclusions on an objective evaluation of the evidence. It is not possible to have an objective evaluation of the evidence if some of the evidence is required to be ignored, even though it relates precisely to the issues to be resolved. Thus, we consider that the [investigating authority] did not act inconsistently with Articles 3.1, 3.4, and 3.5 of the AD Agreement by taking into account in its analysis information regarding the . . . industry as a whole, including information pertaining to companies that were not included in the sample."[184]

(iii) Companies outside the domestic industry

146. Regarding the issue of information concerning Article 3.4 factors for companies outside the domestic industry, the Panel on *EC – Bed Linen* held that information about companies which are not part of the domestic industry "provides no basis for conclusions about the impact of dumped imports on the domestic industry":

"In our view, information concerning companies that are not within the domestic industry is irrelevant to the evaluation of the 'relevant economic factors and indices having a bearing on the state of the industry' required under Article 3.4. This is true even though those companies may presently produce, or may have in the past produced, the like product . . . . Information concerning the Article 3.4 factors for companies outside the domestic industry provides no basis for conclusions about the impact of dumped imports on the domestic industry itself."[185]

147. The Panel on *EC – Tube or Pipe Fittings* held that if like product-specific information was not available, investigating authorities could use other broader data:

"[W]hile data and information pertaining specifically to the 'like product' is to be used to the extent possible, the Agreement also envisages resort to a broader spectrum of data where separate identification of like product specific data is not possible. It is therefore permissible for an investigating authority to assess the effects of the dumped imports by the examination of the production of a broader range of products, which includes the like product, for which the necessary information can be provided if like-product-specific information is not available."[186]

(c) "all relevant economic factors and indices having a bearing on the state of the industry"

(i) Mandatory or illustrative nature of the list of factors

148. The Panel on *EC – Bed Linen*, in a finding not addressed by the Appellate Body[187], considered whether the list of factors in Article 3.4 is illustrative or mandatory. Further to concluding that the list is mandatory, the Panel addressed the issue of whether only the four groups of "factors" represented by the subgroups separated by semicolons in Article 3.4 must be evaluated, or whether each individual factor listed must be considered:

"The use of the phrase 'shall include' in Article 3.4 strongly suggests to us that the evaluation of the listed factors in that provision is properly interpreted as mandatory in all cases. That is, in our view, the ordinary meaning of the provision is that the examination of the impact of dumped imports must include an evaluation of all the listed factors in Article 3.4.

. . .

With regard to the use of the word 'including', we consider that this simply emphasises that there may be other 'relevant factors and indices having a bearing on the state of the industry' among 'all' such factors that must be evaluated. We recall that, in the Tokyo Round AD Code, the same list of factors was preceded by the

[184] Panel Report on *EC – Bed Linen*, para. 6.181.
[185] Panel Report on *EC – Bed Linen*, para. 6.182.
[186] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.327.
[187] However, the Appellate Body in *US – Wheat Gluten* had held that all the factors in the list of economic factors to be considered as having a bearing on the state of the domestic industry under Article 4.2(a) of the Safeguards Agreement must be considered:

"The use of the word 'all' in the phrase 'all relevant factors' in Article 4.2(a) indicates that the effects of *any* factor may be relevant to the competent authorities' determination, irrespective of whether the particular factor relates to imports specifically or to the domestic industry more generally. This conclusion is borne out by the list of factors which Article 4.2(a) stipulates are, 'in particular', relevant to the determination. This list includes factors that relate *both* to imports specifically *and* to the overall situation of the domestic industry more generally. The language of the provision does not distinguish between, or attach special importance or preference to, any of the listed factors. In our view, therefore, Article 4.2(a) of the *Agreement on Safeguards* suggests that all these factors are to be *included* in the determination and that the contribution of each relevant factor is to be counted in the determination of serious injury according to its 'bearing' or effect on the situation of the domestic industry. Thus, we consider that Article 4.2(a) does not support the Panel's conclusion that some of the 'relevant factors' – those related exclusively to increased imports – should be counted towards an affirmative determination of serious injury, while others – those not related to increased imports – should be excluded from that determination."

Appellate Body Report on *US – Wheat Gluten*, para. 72. See also Chapter on the *Agreement on Safeguards*, Section V.B.4(a)(ii).

> phrase 'such as', which was changed to the word 'including' that now appears in Article 3.4 of the AD Agreement. . . . We thus read the phrase 'shall include an evaluation of all relevant factors and indices having a bearing on the state of the industry, including . . .' as introducing a mandatory list of relevant factors which must be evaluated in every case. The change in the wording that was introduced in the Uruguay Round in our view supports an interpretation of the current text of Article 3.4 as setting forth a list that is mandatory, and not merely indicative or illustrative.
>
> . . . [I]n our view, neither the presence of semicolons separating certain groups of factors in the text of Article 3.4, nor the presence of the word 'or' within the first and fourth of these groups, serves to render the mandatory list in Article 3.4 a list of only four 'factors'. We further note that the two 'ors' appear within – rather than between – the groups of factors separated by semicolons. Thus, we consider that the use of the term 'or' here does not detract from the mandatory nature of the textual requirement that 'all relevant economic factors' shall be evaluated. With respect to the second 'or,' it appears in the phrase 'ability to raise capital or investments', which clearly indicates that the factor that an investigating authority must examine is the 'ability to raise capital' or the 'ability to raise investments', or both.
>
> . . .
>
> Based on the foregoing, we conclude that *each* of the fifteen factors listed in Article 3.4 of the AD Agreement must be evaluated by the investigating authorities in each case in examining the impact of the dumped imports on the domestic industry concerned."[188]

149. The Panel on *Mexico – Corn Syrup* confirmed the mandatory nature of the list of factors in Article 3.4. The Panel indicated that, in its view, the language of Article 3.4 makes it clear that the listed factors in Article 3.4 must be considered in all cases "even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority.[189]"[190]

150. The Panel on *Thailand – H-Beams*, in a finding subsequently explicitly endorsed by the Appellate Body[191], also confirmed that Article 3.4 requires the examination of *all* the listed factors:

> "We note Thailand's argument that the list of factors in Article 3.4 is illustrative only, and that no change in meaning was intended in the change in drafting from the 'such as' that appeared in the corresponding provision in the Tokyo Round Antidumping Code to the 'including' that now appears in Article 3.4 of the AD Agreement.[192] The term 'such as' is defined as '[o]f the kind, degree, category being or about to be specified' . . . 'for example'. By contrast, the verb 'include' is defined to mean 'enclose'; 'contain as part of a whole or as a subordinate element; contain by implication, involve'; or 'place in a class or category; treat or regard as part of a whole'. We thus read the Article 3.4 phrase 'shall include an evaluation of all relevant factors and indices having a bearing on the state of the industry, including . . .' as introducing a mandatory list of relevant factors which must be evaluated in every case. We are of the view that the change that occurred in the wording of the relevant provision during the Uruguay Round (from 'such as' to 'including') was made for a reason and that it supports an interpretation of the current text of Article 3.4 as setting forth a list that is not merely indicative or illustrative, but, rather, mandatory.[193]"[194]

151. Also, in support of its proposition referenced in paragraph 150 above, in *Thailand – H-Beams*, the Panel examined the presence of the word "or" in Article 3.4, but concluded that the use of this word did not serve to detract from the mandatory nature of the list of factors under this provision:

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[188] Panel Report on *EC – Bed Linen*, paras. 6.154–6.159. *See* also Panel Report on *Mexico – Corn Syrup*, para. 7.128; Panel Report on *Egypt – Steel Rebar*, para. 7.36. With respect to a very similar issue concerning the term "all relevant factors" under Article 4.2(a) of the Safeguards Agreement, see the Chapter on the *Agreement on Safeguards*, Section IV.B.4(a).

[189] (*footnote original*) In this regard, we note the text of Article 12.2.2, which provides:

> "A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . .".

[190] Panel Report on *Mexico – Corn Syrup*, para. 7.128.

[191] Appellate Body Report on *Thailand – H-Beams*, paras. 121–128.

[192] (*footnote original*) As a third party, the European Communities was also of the view that the list in Article 3.4 was illustrative despite the change in language from "such as" in the relevant Tokyo Round Code provision to "including" in current Article 3.4. See EC third party submission, Annex 3–1, para. 41 and EC Response to Panel Question 13, Annex 3–7. Japan submitted that the change in terminology indicated that each factor listed in Article 3.4 must be evaluated. See Response of Japan to Panel Question 13, Annex 3–8. The United States was of the view that the change in terminology "clarified the need for the authority to evaluate each and every listed factor that is relevant to the state of the industry". See US Response to Panel Question 13, Annex 3–9.

[193] (*footnote original*) Article 3.2 DSU directs panels to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law", which are set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. See e.g. Appellate Body Report on *Japan – Alcoholic Beverages II*, pp.10–12. Here, we look to negotiating history pursuant to Article 32 of the *Vienna Convention* in order to confirm the meaning resulting from the application of the general rule of interpretation in Article 31 of the *Vienna Convention*.

[194] Panel Report on *Thailand – H-Beams*, para. 7.225. Also see Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.314.

"We are of the view that the language in Article 3.4 makes it clear that all of the listed factors in Article 3.4 must be considered in all cases. The provision is specific and mandatory in this regard. We do not consider that the presence of semi-colons separating certain groups of factors in the text of Article 3.4, nor the presence of the word 'or' within the first and fourth of these groups serve to render the mandatory list in Article 3.4 a list of only four 'factors'. We note that the two 'ors' appear within – rather than between – the groups of factors separated by semi-colons. The first 'or' in Article 3.4 appears at the end of a group of factors that may indicate declines in the domestic industry (i.e. 'actual and potential decline in sales, profits, output, market share, productivity, return on investments, *or* utilization of capacity' (emphasis added)). In our view, the use of the word 'or' here is textually linked to the phrase 'actual and potential decline', and may indicate that such 'declines' need not occur in respect of each and every one of the factors listed in this group in order to support a finding of injury. Thus, we do not consider that the use of the term 'or' here detracts from the textual requirement that 'all relevant economic factors' be evaluated. Moreover, we note that this first group of factors in Article 3.4 contains factors that all relate to, and are indicative of, the state of the industry.[195]

With respect to the second 'or,' we note that it appears in the phrase 'ability to raise capital or investments'. In our view, this 'or' indicates that the factor that an investigating authority must examine is 'ability to raise capital' or 'ability to raise investments', or both."[196]

152. In *Guatemala – Cement II*, the Panel found that in violation of Article 3.4, Guatemala's authority had not considered certain factors among those enumerated in that Article. In doing so, the Panel agreed with the finding of the Panel on *Mexico – Corn Syrup* referenced in paragraph 149 above. In further support of its finding, the Panel also noted a finding of the Panel on *Korea – Dairy* with respect to Article 4.2 of the Agreement on Safeguards, "which is very similar to Article 3.4 of the AD Agreement."[197]

153. The Panel on *EC – Bed Linen (Article 21.5 – India)* underlined that "there is no requirement in Article 3.4 that each and every injury factor, individually, must be indicative of injury".[198] The Panel concluded that:

"[. . . .] an analysis of injury does not rest on the evaluation of the Article 3.4 factors individually, or in isolation. Nor is it necessary that all factors show negative trends or declines. Rather, the analysis and conclusions must consider each factor, determine the relevance of each factor, or lack thereof, to the analysis, and consider the relevant factors together, in the context of the particular industry at issue, to make a reasoned conclusion as to the state of the domestic industry."[199]

(ii) Other factors not listed in Article 3.4

154. The Panel on *Mexico – Corn Syrup* indicated that, in a particular case, the examination of relevant economic factors other than those listed in Article 3.4 could be required:

"In our view, this language [of Article 3.4] makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of injury case, for instance, the AD Agreement itself establishes that consideration of the Article 3.7 factors is also required . . ."[200]

155. In *US – Hot-Rolled Steel*, the Appellate Body ruled that the obligation of evaluation that Article 3.4 imposes on investigating authorities is not confined to the listed factors, but extends to "all relevant economic factors":

"Article 3.4 lists certain factors which are deemed to be relevant in every investigation and which must always be evaluated by the investigating authorities.[201] However, the obligation of evaluation imposed on investigating authorities, by Article 3.4, is not confined to the listed factors, but extends to 'all relevant economic factors'. We see nothing in the *Anti-Dumping Agreement* which prevents a Member from requiring that its investigating authorities examine, in every investigation, the potential relevance of a particular 'other factor', not listed in Article 3.4, as part of its overall 'examination' of the state of the domestic industry."[202]

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[195] (*footnote original*) We note that Article 4.2(a) of the Agreement on Safeguards, which contains a requirement that the investigating authorities "shall evaluate all relevant factors . . . having a bearing on the situation of that industry, in particular, . . . changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment" has been interpreted to require an evaluation of each of these listed factors having a bearing on the state of the industry. See Appellate Body Report on *Argentina – Footwear (EC)*, para. 136 and Panel Report on *Argentina – Footwear (EC)*, para. 8.123. While the standard for injury in safeguards cases ("serious injury") is different from that applied to injury determinations in the anti-dumping context ("material injury"), the same type of analysis is provided for in the respective covered agreements, i.e. evaluation or examination of a listed series of factors in order to determine whether the requisite injury exists.

[196] Panel Report on *Thailand – H-Beams*, paras. 7.229–7.230.

[197] Panel Report on *Guatemala – Cement II*, fn. 884, where the Panel refers to Panel Report on *Korea – Dairy*, para. 7.55. With respect to the term "all relevant factors" under Article 4.2(a) of the *Safeguards Agreement*, see Chapter on the *Agreement on Safeguards*, Section V.B.4(a).

[198] Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.163.

[199] Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.213.

[200] Panel Report on *Mexico – Corn Syrup*, para. 7.128. See also Panel Report on *Thailand – H-Beams*, para. 7.225.

[201] (*footnote original*) Appellate Body Report, *Thailand – Steel*, *supra*, footnote 36, para. 128.

[202] (*footnote original*) Appellate Body Report on *US – Hot-Rolled Steel*, para. 195.

(iii) "having a bearing on"

156. In *Egypt – Steel Rebar*, the Panel rejected Turkey's argument that Article 3.4 required a full causation analysis, including a non-attribution analysis, which, according to the Panel, stemmed from Turkey's reading of the words "having a bearing on" as having to do exclusively with causation:

> "Turkey's argument that Article 3.4 requires a full 'non-attribution' analysis appears to stem from its reading of the term 'having a bearing on' as having to do exclusively with causation, (i.e., as meaning factors *having an effect on* the state of the industry). There is another meaning of this term which we find more pertinent in the overall context of Article 3.4, however. In particular, the term 'having a bearing on' can mean *relevant to* or *having to do with* the state of the industry[203], and this meaning is consistent with the fact that many of the factors listed in Article 3.4 are descriptors or indicators *of* the state of the industry, rather than being factors *having an effect* thereon. For example, sales levels, profits, output, etc. are not in themselves *causes* of an industry's condition. They are, rather, among the factual indicators by which that condition can be judged and assessed as injured or not. Put another way, taken as a whole, these factors are more in the nature of *effects* than *causes*.
>
> This reading of 'having a bearing on' finds contextual support in the wording of the last group of factors in Article 3.4, namely 'actual and potential negative *effects on* cash flow, inventories, . . .' (emphasis added). Further contextual support is found in the cross-reference to Article 3.4 contained in the first sentence of Article 3.5: '. . . the *effects* of dumping as set forth in paragraph [] 4 [of Article 3]'.(emphasis added)
>
> We note in addition that if Turkey were correct that the full causation analysis, including non-attribution, were required by Article 3.4, this would effectively render redundant Article 3.5, which explicitly addresses causation, including non-attribution. Such an outcome would not be in keeping with the relevant principles of international treaty law interpretation, or with consistent practice in WTO dispute settlement.[204]"[205]

(d) Evaluation of relevant factors

(i) Concept of evaluation

157. In *Thailand – H-Beams*, the Panel opined that each of the factors listed in Article 3.4 must be evaluated, not merely as to whether it is "relevant" or "irrelevant", but on the basis of a "thorough evaluation" of the state of the industry at issue. While the Appellate Body in *Thailand – H-Beams* explicitly endorsed the Panel's finding that consideration of all factors listed under Article 3.4 is mandatory, it did not address this particular finding:

> ". . . Article 3.4 requires the authorities properly to establish whether a factual basis exists to support a well-reasoned and meaningful analysis of the state of the industry and a finding of injury. This analysis does not derive from a mere characterization of the degree of 'relevance or irrelevance' of each and every individual factor, but rather must be based on a thorough evaluation of the state of the industry and, in light of the last sentence of Article 3.4[206], must contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."[207]

158. In *Egypt – Steel Rebar*, the Panel faced the question of whether the mere presentation of tables of data, without more, constitutes an "evaluation" in the sense of Article 3.4. Egypt had gathered data on all of the listed factors but could not adduce sufficient evidence of its authorities' evaluation of all those factors. The Panel considered that "the 'evaluation' to which Article 3.4 refers is the process of analysis and interpretation of the facts established in relation to each listed factor". Since, in spite of having gathered data on all of the factors listed in Article 3.4, the Egyptian investigating authority failed to evaluate a number of listed factors, the Panel found that Egypt acted inconsistently with Article 3.4:[208]

> "We first consider the ordinary meaning of the word 'evaluation'. The Oxford English Dictionary defines 'evaluation' as follows:
>
> '(1) The action of appraising or valuing (goods, etc.); a calculation or statement of value. (2) The action of evaluating or determining the value of (a mathematical expression, a physical quantity, etc.), or of estimating the force of (probabilities, *evidence*).'[209](emphasis added)
>
> The Merriam-Webster's Collegiate Dictionary defines 'evaluation' as follows:
>
> '(1) To determine or fix the value of. (2) To determine the significance, worth, or condition of *usually by careful appraisal or study.*'[210] (emphasis added)

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[203] For example, *Webster's New World Dictionary*, 2nd College Edition, 1986, at p.123, includes as a definition of "bearing": "relevant meaning, appreciation, relation [the evidence had no bearing on the case]".

[204] (*footnote original*) Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline ("US – Gasoline")*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I,3. On page 23 of the Appellate Body Report it is stated: ". . . One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."

[205] Panel Report on *Egypt – Steel Rebar*, paras. 7.62–7.64.

[206] (*footnote original*) This sentence reads: "This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

[207] Panel Report on *Thailand – H-Beams*, para. 7.236.

[208] Panel Report on *Egypt – Steel Rebar*, para. 7.51.

[209] (*footnote original*) Oxford English Dictionary Online: http://dictionary.oed.com.

[210] (*footnote original*) Merriam-Webster's Collegiate Dictionary online: http://www.m-w.com.

> The Merriam-Webster's Thesaurus lists as synonyms for 'evaluation' the following:
>
> '(1) appraisal, appraisement, assessment, estimation, valuation (with related words: interpreting; judging, rating); (2) appraisal, appraisement, assessment, estimate, judgement, stock (with related words: appreciation; interpretation; decision).'[211]
>
> We find significant that all of these definitions and synonyms connote, particularly in the context of 'evaluation' of evidence, the act of analysis, judgement, or assessment. That is, the first definition recited above refers to 'estimating the force of' evidence, evoking a process of weighing evidence and reaching conclusions thereon. The second definition recited above – to determine the significance, worth, or condition of, usually by careful appraisal or study – confirms this meaning. Thus, for an investigating authority to 'evaluate' evidence concerning a given factor in the sense of Article 3.4, it must not only gather data, but it must analyze and interpret those data.
>
> We nevertheless do recognize that, in addition to the dictionary meanings of 'evaluation' that we have cited, the definitions set forth above also refer to a purely quantitative process (i.e., calculating, stating, determining or fixing the value of something). If this were the definition applicable to the word 'evaluation' as used in Article 3.4, arguably mere compilation of data on the listed factors, without any narrative explanation or analysis, might suffice to satisfy the requirements of Article 3.4. We find, however, contextual support in Article 17.6(i) of the AD Agreement for our reading that 'evaluation' is something different from, and more than, simple compilation of tables of data. We recognize that Article 17.6(i) does not apply directly to investigating authorities, and that instead, it is part of the standard of review to be applied by panels in reviewing determinations of investigating authorities. However, Article 17.6(i) identifies as the object of a panel's review two basic components of a determination: first, the investigating authority's 'establishment of the facts', and second, the investigating authority's 'evaluation of those facts'. Thus, Article 17.6(i)'s characterization of the essential components of a determination juxtaposes 'establishment of the facts' with the 'evaluation of those facts'. That panels are instructed to determine whether an investigating authority's 'establishment of the facts' was proper connotes an assessment by the panel of the means by which the data before the investigating authority were gathered and compiled. By contrast, the fact that panels are instructed to determine whether an investigating authority's 'evaluation of those facts' was objective and unbiased, provides further support for our view that the 'evaluation' to which Article 3.4 refers is the process of analysis and interpretation of the facts established in relation to each listed factor."[212]

159. A similar view was expressed by the Panel on *EC – Tube or Pipe Fittings*. The Panel considered that "an evaluation of a factor, in our view, is not limited to a mere characterisation of its relevance or irrelevance. Rather, we believe that an 'evaluation' also implies the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined".[213] According to the Panel, "a meaningful investigation must also take into account the actual intervening trends in each of the injury factors and indices – rather than just a comparison of 'end-points'. There must a streamlined, genuine and undistorted picture drawn from the facts before the investigating authority. Only on the basis of such a thorough and dynamic evaluation of data capturing the current state of the industry in the determination would a reviewing panel be able to assess whether the conclusions drawn from the examination are those of an unbiased and objective authority".[214]

(ii) Evaluation of all listed factors

Evaluation of all listed factors must be apparent in the authorities' conclusions

160. The Panel on *EC – Bed Linen*, in a finding not specifically addressed by the Appellate Body, stated that the evaluation of all the factors by the investigating authorities must be apparent in the final determination:

> "[W]hile the authorities may determine that some factors are not relevant or do not weigh significantly in the decision, the authorities may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors. . . . [W]e are of the view that every factor in Article 3.4 must be considered, and that the nature of this consideration, including whether the investigating authority considered the factor relevant in its analysis of the impact of dumped imports on the domestic industry, must be apparent in the final determination."[215]

161. Similarly, the Panel on *Guatemala – Cement II* stated that "the consideration of the factors in Article 3.4 must be apparent in the determination so the Panel may assess whether the authority acted in accordance with Article 3.4 at the time of the investigation."[216]

162. On the other hand, in its Report on *EC – Tube or Pipe Fittings*, the Appellate Body stated that Article 3.4

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[211] (*footnote original*) Merriam-Webster's Thesaurus online: http://www.m-w.com.

[212] Panel Report on *Egypt – Steel Rebar*, paras. 7.42–7.45. For a similar view see Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.162; Panel Report on *EC – Tube or Pipe Fittings*, para. 7.314.

[213] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.314.

[214] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.316.

[215] Panel Report on *EC – Bed Linen*, para. 6.162.

[216] Panel Report on *Guatemala – Cement II*, para. 8.283.

"requires an investigating authority to evaluate all relevant economic factors in its examination of the impact of the dumped imports. By its terms, it does not address the manner in which the results of this evaluation are to be set out, nor the type of evidence that may be produced before a panel for the purpose of demonstrating that this evaluation was indeed conducted"[217]. In other words, the Appellate Body considered that the text of Article 3.4 "does not address the *manner* in which the results of the investigating authority's analysis of each injury factor are to be set out in the published documents"[218]. This led the Appellate Body to reject Brazil's claims that the absence of an explicit evaluation in the published record of the investigation of one of the factors of Article 3.4 – i.e. the factor "growth" – was inconsistent with Article 3.4:

> "Accordingly, because Articles 3.1 and 3.4 do not regulate the *manner* in which the results of the analysis of each injury factor are to be set out in the published documents, we share the Panel's conclusion that it is not required that in every anti-dumping investigation a separate record be made of the evaluation of each of the injury factors listed in Article 3.4. Whether a panel conducting an assessment of an anti-dumping measure is able to find in the record sufficient and credible evidence to satisfy itself that a factor has been evaluated, even though a separate record of the evaluation of that factor has not been made, will depend on the particular facts of each case. Having said this, we believe that, under the particular facts of this case, it was reasonable for the Panel to have concluded that the European Commission addressed and evaluated the factor 'growth'.
>
> Having regard to the nature of the factor 'growth', we believe that an evaluation of that factor necessarily entails an analysis of certain other factors listed in Article 3.4. Consequently, the evaluation of those factors could cover also the evaluation of the factor 'growth'."[219]

163. The Panel on *EC – Bed Linen (Article 21.5 – India)* addressed the question of the adequacy of the evaluation in the case of a redetermination by the investigating authority in order to implement a recommendation by the DSB to bring the measure into conformity. In doing so, the Panel made the following finding:

> "With respect to the adequacy of the evaluation of the elements as an overall matter, we look to the explanation of the EC regarding its conclusions, based on the combination of elements discussed in the original determination and redetermination. While this is perhaps less straightforward than we might wish, it is clear to us that merely because the redetermination confirms or adopts certain findings made in the original determination does not **demonstrate** a failure to carry out an overall evaluation of the information in making the injury redetermination."[220]

Checklist approach

164. In *EC – Bed Linen*, the European Community objected to what it termed the "checklist" approach to the list of factors under Article 3.4 and argued that the relevance of some factors may be apparent early in the investigation. The Panel, in a finding not reviewed by the Appellate Body, concluded that "as long as the lack of relevance or materiality of the factors not central to the decision is at least implicitly apparent from the final determination, the Agreement's requirements are satisfied. While a checklist would perhaps increase an authority's and a panel's confidence that all factors were considered, we believe that it is not a required approach to decision-making under Article 3.4."[221]

165. In *US – Hot-Rolled Steel*, the issue was whether the US investigating authority had violated Article 3.4 by failing to explicitly discuss, in its determination, certain factors for each year of the period of investigation. In that case, according to the Panel, the authority had discussed each of the factors for the final two years of the three-year period of investigation, and only some of them for the first year of that period. The Panel found that the determination explained the particular relevance of the second and third years of the period, and that the authority's failure to explicitly address each factor in its discussion of the first year of the period did not constitute a violation of Article 3.4.[222] The Panel thus found that each of the listed Article 3.4 factors was explicitly discussed in the authority's determination, and given the explanations provided in that determination for the particular emphasis on a part of the period of investigation, the evaluation of the facts was deemed adequate by the panel.[223]

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[217] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 131.
[218] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 157.
[219] Appellate Body Report on *EC – Tube or Pipe Fittings*, paras. 161–162.
[220] Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.173.
[221] Panel Report on *EC – Bed Linen*, para. 6.163. *See also* Panel Report on *Thailand – H-Beams*, para. 7.236 where the Panel concluded: "We are of the view that the 'evaluation of all relevant factors' required under Article 3.4 must be read in conjunction with the overarching requirements imposed by Article 3.1 of 'positive evidence' and 'objective examination' in determining the existence of injury. Therefore, in determining that Article 3.4 contains a mandatory list of fifteen factors to be looked at, we do not mean to establish a mere 'checklist approach' that would consist of a mechanical exercise of merely ensuring that each listed factor is in some way referred to by the investigating authority. It may well be in the circumstances of a particular case that certain factors enumerated in Article 3.4 are not relevant, that their relative importance or weight can vary significantly from case to case, or that some other non-listed factors could be deemed relevant . . ."
[222] Panel Report on *US – Hot-Rolled Steel*, paras.7.235–7.236.
[223] *See also* Panel Report on *Egypt – Steel Rebar*, para. 7.47.

Relevance of written record of authorities' evaluation

166. In *Egypt – Steel Rebar*, Egypt had gathered data on all of the listed factors but could not adduce sufficient evidence of its authorities' evaluation of all those factors on its written analysis. See paragraph 158 above. The Panel stressed the importance of the written record in the context of an anti-dumping investigation for burden of proof purposes.

> "Here we must emphasize that in the context of an anti-dumping investigation, which is by definition subject to multilateral rules and multilateral review, a Member is placed in a difficult position in rebutting a *prima facie* case that an evaluation has *not* taken place if it is unable to direct the attention of a panel to some contemporaneous written record of that process. If there is no such written record – whether in the disclosure documents, in the published determination, or in other internal documents – of how certain factors have been interpreted or appreciated by an investigating authority during the course of the investigation, there is no basis on which a Member can rebut a *prima facie* case that its 'evaluation' under Article 3.4 was inadequate or did not take place at all. In particular, without a written record of the analytical process undertaken by the investigating authority, a panel would be forced to embark on a *post hoc* speculation about the thought process by which an investigating authority arrived at its ultimate conclusions as to the impact of the dumped imports on the domestic industry. A speculative exercise by a panel is something that the special standard of review in Article 17.6 is intended to prevent. Thus, while Egypt attempts to derive support from the panel report in the *US – Hot-Rolled Steel* dispute for its position that Article 3.4 does not require an explicit written analysis of all of the factors listed therein[224], to us, the findings in that dispute confirms our interpretation, in that what was at issue, was the substantive adequacy of the authority's written analysis of *each* of those factors."[225]

167. In *Egypt – Steel Rebar*, the Panel rejected the argument of one of the parties whereby the requirement of a written analysis of the Article 3.4 factors would be exclusively governed by Article 12 of the *Anti-Dumping Agreement*:

> "Nor do we consider, as suggested by Egypt [footnote omitted], that the requirement of a written analysis of the Article 3.4 factors is exclusively governed by Article 12 of the AD Agreement (public notice and explanation of determinations). While Article 12 contains a requirement to *publish*, and to make available to the interested parties in the investigation, some form of a report on the investigating authority's determination, this is, as the Appellate Body has noted, a procedural requirement having to do with due process[226], rather than with the relevant substantive analytical requirements (which in the context of this claim are found in Article 3.4)."[227]

Evaluation of specific listed factors

"profits"

168. In *Egypt – Steel Rebar*, Turkey claimed that Egypt had violated Article 3.4 because its investigating authorities had not examined all factors affecting profits. The Panel disagreed:

> "We recall that Turkey's claim is that Egypt violated Article 3.4 because the IA did not examine *all factors affecting profits*, and did not examine *all factors affecting domestic prices*. The above text indicates to us, however, a different requirement on an investigating authority. In particular, the text is straightforward in that the requirement is to examine all relevant factors and indices *having a bearing on the state of the industry*. The text then lists a variety of such factors and indices that are presumptively relevant to the investigation and must be examined, one of which is

[224] (*footnote original*) Written Response, dated 13 March 2002, of Egypt to Question 9 to Egypt and Question 3 to Both Parties of the *Written Questions of the Panel*, of 27 February 2002 – Annex 8–2. Egypt contends in its response that "[t]he *Confidential Injury Analysis* therefore constitutes an evaluation of the factors that it covers in the sense of Article 3.4" and that this approach is consistent with the findings of the panel in *US – Hot-Rolled Steel*. However, the facts in the *US – Hot-Rolled Steel* dispute differ significantly from those in this dispute. In this dispute the allegation is that the IA did not properly evaluated all of the factors listed in Article 3.4 of the AD Agreement, whereas in the *US – Hot-Rolled Steel* case, all Article 3.4 factors were evaluated, but Japan claimed that the discussion did not sufficiently evaluate certain factors by failing to discuss date for all three years which comprised the period of investigation for the determination of injury – paras. 7.231–7.236 of the Panel Report, *ibid.*

[225] Panel Report on *Egypt – Steel Rebar*, para. 7.49.

[226] (*footnote original*) In the Appellate Body Report in *Thailand – H-Beams*, para.110, the Appellate Body stated that ". . . Article 12 establishes a framework of procedural and due process obligations concerning, notably, the contents of a *final determination*". We note that what is at issue before us is not the adequacy of the *final determination* or any other published document, as such, but rather, the adequacy of the *substance* of the analysis performed by the Egyptian investigating authority, in whatever document such analysis might be found. Moreover, the basic issue before the Appellate Body in *Thailand – H-Beams* was very different from that before us. In that appeal, the issue raised was whether the panel was limited by the language of Articles 3.1 and 17.6 to reviewing the Thai investigating authority's injury determination exclusively on the basis of facts and analysis discernible in documents that had been published or otherwise made available to the respondents in the investigation or their counsel, or whether in addition, the panel could and should take into account internal analysis memoranda and similar documents prepared by and for the exclusive use of the authority during the investigation, the contents of which were not discernible in any documents available to the respondents. Thus, the issue there was essentially about how a panel should address confidential information, an issue not before us in this dispute. Thus, while Egypt cites *Thailand – H-Beams* as support for its position in the present dispute, in our view that dispute pertains to a different issue entirely. To the extent that it may touch upon issues before us, it does not detract in any way from our interpretation of the substantive requirements of Article 3.4 – paras.98 *et al* of the Appellate Body Report.

[227] Panel Report on *Egypt – Steel Rebar*, para. 7.50.

'profits'. The text does not say, as argued by Turkey, 'all factors affecting profits'. To us, this text means that in its evaluation of the state of the industry, an investigating authority must include an analysis of the domestic industry's profits. Turkey has raised no claim that the IA failed to conduct such an analysis in the rebar investigation."[228]

"factors affecting domestic prices"

169. In *Egypt – Steel Rebar*, Turkey claimed that Egypt had violated Article 3.4 because its investigating authorities had not examined all factors affecting prices. The Panel disagreed:

"We recall that Turkey's claim is that Egypt violated Article 3.4 because the IA did not examine . . . *all factors affecting domestic prices*.

. . . Here again, we note that contrary to Turkey's argument, the text does not read 'all factors affecting domestic prices'. Rather, what is required is that there be *an* evaluation of factors affecting domestic prices. This requirement is clearly linked to the requirements of Articles 3.1 and 3.2 for an 'objective examination' of 'the effect of dumped imports on prices in the domestic market for like products'. . .

In our view, this means that in its evaluation of the state of the industry, an investigating authority must in every case include a price analysis of the type required by Articles 3.1 and 3.2. Turkey has raised no claim that the IA failed to conduct such an analysis in the rebar investigation. In addition, in our view, an investigating authority must consider generally the question of 'factors affecting domestic prices'. . ."[229]

170. The Panel on *EC – Tube or Pipe Fittings* stated that it saw "no basis in the text of the Agreement for Brazil's argument that would require an analysis of factors affecting domestic prices beyond an Article 3.2 price analysis, and observe that certain of the factors potentially affecting price may be more in the way of causal factors to be analysed under Article 3.5, rather than under 3.4."[230]

"growth"

171. In *Egypt – Steel Rebar*, the Panel considered that Article 3.4 threshold as regards addressing the factor "growth" had been satisfied by Egypt since its authorities had addressed sales volume and market share in their final determinations.[231]

(e) Relationship with other paragraphs of Article 3

172. With respect to the relationship of paragraph 4 with paragraphs 1, 2, 3 and 5 of Article 3, see paragraphs 100–101 above.

173. With respect to the relationship between Article 3.4 and Article 3.7, see paragraphs 195–196 below.

7. Article 3.5

(a) Article 3.5 requirements for investigating authorities

174. In *US – Hot-Rolled Steel*, the Appellate Body laid down the requirements that Article 3.5 imposes on the investigating authorities when performing a causation analysis as follows:

"This provision requires investigating authorities, as part of their causation analysis, first, to examine *all* 'known factors', 'other than dumped imports', which are causing injury to the domestic industry 'at the same time' as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not '*attributed* to the dumped imports.' (emphasis added)"[232]

(b) Scope of the non-attribution language in Article 3.5

175. The Appellate Body in *US – Hot-Rolled Steel* delimitated the situations where the non-attribution language of Article 3.5 plays a role. In this regard, the Appellate Body specified that this language applies "solely [to] situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*".[233]

(c) "dumped imports"

176. In *EC – Bed Linen*, the Panel rejected the argument that "dumped imports" must be understood to refer only to imports which are the subject of transactions in which the export price was below normal value. See paragraph 119 above.

(d) "any known factors other than dumped imports"

(i) Concept of known factors

177. On the issue of what are "known factors" other than the dumped imports, the Panel on *Thailand – H-Beams*, in a finding not reviewed by the Appellate Body, found that other "known factors" would include factors "clearly raised before the investigating authorities by interested parties in the course of an AD investigation" and that investigating authorities are not required to seek out such factors on their own initiative:

"We consider that other 'known' factors would include those causal factors that are clearly raised before the

[228] Panel Report on *Egypt – Steel Rebar*, para. 7.60.
[229] Panel Report on *Egypt – Steel Rebar*, paras. 7.60–7.61.
[230] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.335.
[231] Panel Report on *Egypt – Steel Rebar*, para. 7.37.
[232] Appellate Body Report on *US – Hot-Rolled Steel*, para. 222.
[233] Appellate Body Report on *US – Hot-Rolled Steel*, para. 223.

> investigating authorities by interested parties in the course of an AD investigation. We are of the view that there is no express requirement in Article 3.5 AD that investigating authorities seek out and examine in each case *on their own initiative* the effects of *all* possible factors other than imports that may be causing injury to the domestic industry under investigation.[234] . . . We note that there may be cases where, at the time of the investigation, a certain factor may be 'known' to the investigating authorities without being known to the interested parties. In such a case, an issue might arise as to whether the authorities would be compelled to examine such a known factor that is affecting the state of the domestic industry. However, it has not been argued that such factors are present in this case."[235]

178. The Appellate Body on *EC – Tube or Pipe Fittings* disagreed with the Panel's understanding of the term "known" in Article 3.5. The Panel had considered that the alleged causal factor *was* "known" to the European Commission in the context of its dumping and injury analyses, but that the factor was nevertheless not "known" in the context of its causality analysis.[236] The Appellate Body disagreed with this approach and considered that "a factor is either 'known' to the investigating authority, or it is not 'known'; it cannot be 'known' in one stage of the investigation and unknown in a subsequent stage."[237]

179. In *Guatemala – Cement II*, the Panel agreed with Mexico's claim that Guatemala's authority failed to take into account certain undumped imports, and accordingly, failed to assess other factors which were injuring the domestic industry at the same time, in violation of Article 3.5.[238]

(ii) Illustrative list of known factors

180. In *Thailand – H-Beams*, in a finding not reviewed by the Appellate Body, the Panel further stated that "[t]he text of Article 3.5 indicates that the list of other possible causal factors enumerated in that provision is illustrative."[239]

(e) Non-attribution methodology

181. In *US – Hot-Rolled Steel*, the Appellate Body considered that the Panel had erred in its interpretation of the non-attribution language by finding that this language does not require the investigating authorities to separate and distinguish the injurious effects of the other known causal factors from the injurious effects of the dumped imports. The Panel had followed the interpretive approach set forth by the GATT Panel in *US – Norwegian Salmon AD* which the Appellate Body thus also presumably considered erroneous. The Appellate Body ruled that "in order to comply with the non-attribution language in that provision, investigating authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors. This requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports":[240]

> "The non-attribution language in Article 3.5 of the *Anti-Dumping Agreement* applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*. In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not 'attributed' to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.
>
> We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injuri-

[234] (*footnote original*) The panel in *US – Norwegian Salmon AD*, para. 550 stated: "there is no express requirement that investigating authorities examine in each case on their own initiative the effects of all other possible factors other than imports under investigation." That panel was examining Article 3.4 of the Tokyo Round Anti-Dumping Code, which contained different language than Article 3.5 of the WTO AD Agreement.

[235] Panel Report on *Thailand – H-Beams*, para. 7.273. The "clearly raised" standard in the context of national investigations has been rejected by the Appellate Body under the *Safeguards Agreement* which contains different language. See Chapter on the *Agreement on Safeguards*, Section IV.B.2(a).

[236] The Panel on *EC – Tube or Pipe Fittings* found:

> In light of these findings, these factors, although "known" to them in the context of the dumping and injury analysis, would not be a "known" causal factor, that is, a factor that the European Communities was aware would possibly be causing injury to the domestic industry.

Panel Report on *EC – Tube or Pipe Fittings*, para. 7.362.

[237] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 178.

[238] Panel Report on *Guatemala – Cement II*, paras. 8.268–8.272. The Panel also found a violation of Articles 3.1 and 3.2 with respect to the failure by Guatemala's authority to take into account certain undumped imports. See paras. 124 and 131 of this Chapter.

[239] Panel Report on *Thailand – H-Beams*, para. 7.274. See also Panel Report on *Egypt – Steel Rebar*, para. 7.115.

[240] Appellate Body Report on *US – Hot-Rolled Steel*, para. 226.

> ous effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the *Anti-Dumping Agreement*. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made."[241]

182. The Appellate Body in *US – Hot-Rolled Steel* acknowledged the practical difficulty of separating and distinguishing the injurious effects of different causal factors but indicated that "although this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors."[242]

183. The Appellate Body in *US – Hot-Rolled Steel* supported its interpretation of the non-attribution language of Article 3.5 by referring to its decisions in two safeguards Reports, *US – Wheat Gluten* and *US – Lamb* where it interpreted the non-attribution language in Article 4.2(b) of the Agreement on Safeguards in a similar manner.[243]

184. The Appellate Body on *EC – Tube or Pipe Fittings* addressed the question whether the non-attribution language of Article 3.5 requires an investigating authority, in conducting its causality analysis, to examine the effects of the other causal factors collectively after having examined them individually. The Appellate Body first reiterated its basic view that non-attribution requires separation and distinguishing of the effects of other causal factors from those of the dumped imports so that injuries caused by the dumped imports and those caused by other factors are not "lumped together" and made "indistinguishable". It further stated that "provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury."[244] On this basis, the Appellate Body did not find that "an examination of *collective* effects is necessarily required by the non-attribution language of the *Anti-Dumping Agreement*. In particular, we are of the view that Article 3.5 does not compel, *in every case*, an assessment of the *collective* effects of other causal factors, because such an assessment is not always necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors."[245] At the same time, the Appellate Body recognized that "there may be cases where, because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports".[246]

(f) Relationship with other paragraphs of Article 3

185. With respect to the relationship of paragraph 5 with paragraphs 1, 2, 3 and 4 of Article 3, see paragraphs 100–101 above.

8. Article 3.6

(a) Domestic industry production

186. The Panel on *Mexico – Corn Syrup* addressed the issue of allowing the determination of injury on the basis of the portion of the domestic industry's production sold in one sector of the domestic market, as follows:

> "Article 3.6 does not, on its face, allow the determination of injury or threat of injury on the basis of the portion of the domestic industry's production sold in one sector of the domestic market, rather than on the basis of the industry as a whole. Indeed, Article 3.6 relates to a situation different from that at issue here. Article 3.6 provides for the situation where information concerning the production of the like product, such as producers' profits and sales, cannot be separately identified. In such cases, Article 3.6 allows the authority to consider information concerning production of a *broader* product group than the like product produced by the domestic industry, which includes the like product, in evaluating the effect of imports. Nothing in Article 3.6 allows the investigating authority to consider information concerning production of a product sub-group that is *narrower* than the like product produced by the domestic

[241] Appellate Body Report on *US – Hot-Rolled Steel*, paras. 223–224.
[242] Appellate Body Report on *US – Hot-Rolled Steel*, para. 228.
[243] According to the Appellate Body, "[a]lthough the text of the *Agreement on Safeguards* on causation is by no means identical to that of the *Anti-Dumping Agreement*, there are considerable similarities between the two Agreements as regards the non-attribution language. Under both Article 3.5 of the *Anti-Dumping Agreement* and Article 4.2(b) of the *Agreement on Safeguards*, any injury caused to the domestic industry, at the same time, by factors other than imports, must not be attributed to imports. Moreover, under both Agreements, the domestic authorities seek to ensure that a determination made concerning the injurious effects of imports relates, in fact, to those imports and not to other factors. In these circumstances, we agree with the Panel that adopted panel and Appellate Body Reports relating to the non-attribution language in the *Agreement on Safeguards* can provide guidance in interpreting the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement*." Appellate Body Report on *US – Hot-Rolled Steel*, para. 230.
[244] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 189.
[245] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 191.
[246] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 192.

> industry. In particular, nothing in Article 3.6 allows the investigating authority to limit its examination of injury to an analysis of the portion of domestic production of the like product sold in the particular market sector where competition with the dumped imports is most direct."[247]

187. In *US – Hot-Rolled Steel*, the Appellate Body examined whether the investigating authorities could make a sectoral examination of the domestic industry. See paragraphs 116 and 144 above.

9. Article 3.7: threat of material injury

(a) "change in circumstances"

188. In *Egypt – Steel Rebar*, the Panel considered that the text of Article 3.7 makes explicit that the central question in a threat of injury investigation is whether there will be a "change in circumstances" that would cause the dumping to begin to injure the domestic industry:

> "[T]he text of this provision makes explicit that in a threat of injury investigation, the central question is whether there will be a 'change in circumstances' that would cause the dumping to begin to injure the domestic industry. Solely as a matter of logic, it would seem necessary, in order to assess the likelihood that a particular change in circumstances would cause an industry to begin experiencing present material injury, to know about the condition of the domestic industry at the outset. For example, if an industry is increasing its production, sales, employment, etc., and is earning a record level of profits, even if dumped imports are increasing rapidly, presumably it would be more difficult for an investigating authority to conclude that it is threatened with imminent injury than if its production, sales, employment, profits and other indicators are low and/or declining."[248]

189. The Panel on *US – Softwood Lumber VI* after first noting that the text of Article 3.7 concerning "change of circumstances" is "not a model of clarity"[249], went on to find that Articles 3.7 and 15.7 required that some change in circumstances must be both foreseen and imminent and that this change of circumstances would lead to a situation in which injury would occur:

> "[T]he relevant 'change in circumstances' referred to in Articles 3.7 and 15.7 is one element to be considered in making a determination of threat of material injury. However, we can find no support for the conclusion that such a change in circumstances must be identified as a single or specific event. Rather, in our view, the change in circumstances that would give rise to a situation in which injury would occur encompasses a single event, or a series of events, or developments in the situation of the industry, and/or concerning the dumped or subsidized imports, which lead to the conclusion that injury which has not yet occurred can be predicted to occur imminently."[250]

(b) Requirement to "consider" factors of Article 3.7

190. The Panel on *US – Softwood Lumber VI* was of the view that while investigating authorities are not required to make an explicit determination with respect to factors considered under Articles 3.7 and 15.7, they must however do more than simply recite the facts in the abstract:

> "[I]n order to conclude that the investigating authorities have 'considered' the factors set out in Articles 3.7 and 15.7, it must be apparent from the determination before us that the investigating authorities have given attention to and taken into account those factors. That consideration must go beyond a mere recitation of the facts in question, and put them into context. However, the investigating authorities are not required by Articles 3.7 and 15.7 to make an explicit 'finding' or 'determination' with respect to the factors considered."[251]

191. Moreover, according to the Panel on *US – Softwood Lumber VI*, due to the use of the word "should" in Article 3.7, consideration of each of the factors listed in Articles 3.7 and 15.7 is not mandatory:

> "Whether a violation existed would depend on the particular facts of the case, in light of the totality of the factors considered and the explanations given. In this case, it is clear from the face of the determination that the USITC in fact addressed the facts concerning each of the factors set out in Articles 3.7 and 15.7 of the Agreements. Indeed, Canada does not argue that any relevant factor was ignored by the USITC, or not addressed in the determination. Thus, we cannot conclude that the USITC failed to consider the factors set forth in Articles 3.7 and 15.7, in the sense of not taking them into account at all."[252]

192. The Panel on *US – Softwood Lumber VI* hastened to add that the fact that the Article 3.7 factors were "considered" does not answer the question "whether the USITC's overall determination of a threat of material injury is consistent with the requirement of Articles 3.7 that the totality of the factors considered lead to the conclusion that further dumped and subsidized exports are imminent and that, unless protective action was taken, material injury would occur".[253]

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[247] Panel Report on *Mexico – Corn Syrup*, para. 7.157. With respect to the issue of a market segment analysis under the *Safeguards Agreement*, see Chapter on the *Agreement on Safeguards*, Section V.B.4(a)(ix).
[248] Panel Report on *Egypt – Steel Rebar*, para. 7.91.
[249] Panel Report on United States – Softwood Lumber VI, para. 7.53
[250] Panel Report on *US – Softwood Lumber VI*, para. 7.57.
[251] Panel Report on *US – Softwood Lumber VI*, para. 7.67.
[252] Panel Report on *US – Softwood Lumber VI*, para. 7.68.
[253] Panel Report on *US – Softwood Lumber VI*, para. 7.69.

(c) Article 3.7(i): "likelihood of substantially increased importation"

193. The Panel on *Mexico – Corn Syrup* found that the investigating authority had failed to adequately address the likelihood of substantially increased imports by failing to properly evaluate the facts concerning, and to provide a reasoned explanation of its conclusions regarding the potential effects of the alleged restraint agreement. The Panel considered as follows:[254]

> "In our view, the question for purposes of an anti-dumping investigation is not whether an alleged restraint agreement in violation of Mexican law existed, an issue which might well be beyond the jurisdiction of an anti-dumping authority to resolve, but whether there was evidence of and arguments concerning the effect of the alleged restraint agreement[255], which, if it existed, would be relevant to the analysis of the likelihood of increased dumped imports in the near future. If the latter is the case, in our view, the investigating authority is obliged to consider the effects of such an alleged agreement, assuming it exists."[256]

(d) Analysis of the "consequent impact" of dumped imports on the domestic industry

194. The Panel on *Mexico – Corn Syrup* considered the requirements imposed upon investigating authorities in a determination of a "threat of injury" under Article 3.7. One of the issues which arose in this context was whether a specific analysis of the consequent impact of the dumped imports on the domestic industry is required in a threat of injury determination. Referring to Article 3.7, the Panel stated that "[t]his language, in our view, recognizes that factors other than those set out in Article 3.7 itself will necessarily be relevant to the determination."[257] The Panel concluded that "an analysis of the consequent impact of imports is required in a threat of material injury determination":

> "[I]t is clear that in making a determination regarding the threat of material injury, the investigating authority must conclude that '*material injury would occur*' (emphasis added) in the absence of an anti-dumping duty or price undertaking. A determination that material injury would occur cannot, in our view, be made solely on the basis of consideration of the Article 3.7 factors. Rather, it must include consideration of the likely impact of further dumped imports on the domestic industry.
>
> While an examination of the Article 3.7 factors is required in a threat of injury case, that analysis alone is not a sufficient basis for a determination of threat of injury, because the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry. The Article 3.7 factors relate specifically to the questions of the likelihood of increased imports (based on the rate of increase of imports, the capacity of exporters to increase exports, and the availability of other export markets), the effects of imports on future prices and likely future demand for imports, and inventories. They are not, in themselves, relevant to a decision concerning what the 'consequent impact' of continued dumped imports on the domestic industry is likely to be. However, it is precisely this latter question – whether the 'consequent impact' of continued dumped imports is likely to be material injury to the domestic industry – which must be answered in a threat of material injury analysis. Thus, we conclude that an analysis of the consequent impact of imports is required in a threat of material injury determination."[258]

195. Having established that an analysis of the impact of imports on the domestic industry is required also in the context of the determination of a "threat of injury", the Panel on *Mexico – Corn Syrup* held that this analysis is to be performed pursuant to Article 3.4, since "[n]othing in the text or context of Article 3.4 limits consideration of the Article 3.4 factors to cases involving material injury":

> "Turning to the question of the nature of the analysis required, we note that Article 3.4 of the AD Agreement sets forth factors to be evaluated in the examination of the impact of dumped imports on the domestic industry. Nothing in the text or context of Article 3.4 limits consideration of the Article 3.4 factors to cases involving material injury. To the contrary, as noted above, Article 3.1 requires that a determination of 'injury', which includes threat of material injury, involve an examination of the impact of imports, while Article 3.4 sets forth

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[254] Panel Report on *Mexico – Corn Syrup*, paras. 7.173–7.178. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Panel considered the factual determination of likelihood of substantially increased imports made by the Mexican investigating authority in their redetermination. The Panel indicated that "in assessing the redetermination, we must judge whether, in light of the explanations given in the redetermination, an unbiased and objective investigating authority could reach the conclusions reached by [the investigating authority] on the evidence before it. As stated by the Panel on the original dispute, the relevant question is 'whether [the investigating authority]'s analysis provides a reasoned explanation for its conclusion that, assuming [a restraint] agreement existed, there was nonetheless a likelihood of substantially increased importation'." The Panel further indicated that "the reasoned explanation required to satisfy us under the standard of review must respect [the] elements of Article 3.7 as well". The Panel, in a finding upheld by the Appellate Body (Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 135.(b)), determined that the investigating authority's conclusion that there was a significant likelihood of increased importation in the redetermnination was not consistent with Article 3.7(i) of the *Anti-Dumping Agreement*. Paras. 6.14–6.23.

[255] (*footnote original*) We note in this regard that Article 12.2.2 of the AD Agreement requires that the notice of final determination contain "the reasons for the acceptance of relevant arguments or claims made by the exporters and importers". It is clear that the arguments concerning the alleged restraint agreement were relevant.

[256] Panel Report on *Mexico – Corn Syrup*, para. 7.174.

[257] Panel Report on *Mexico – Corn Syrup*, para. 7.124.

[258] Panel Report on *Mexico – Corn Syrup*, paras. 7.125–7.126.

factors relevant to that examination. Article 3.7 requires that the investigating authorities determine whether, in the absence of protective action, material injury would occur. In our view, consideration of the Article 3.4 factors in examining the consequent impact of imports is required in a case involving threat of injury in order to make a determination consistent with the requirements of Articles 3.1 and 3.7."[259]

196. The Panel on *Mexico – Corn Syrup* concluded that consideration of the factors in Article 3.4 "is necessary in order to establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective actions, as required by Article 3.7."[260] It further indicated that "[t]he text of the AD Agreement requires consideration of the Article 3.4 factors in a threat determination. Article 3.7 sets out additional factors that must be considered in a threat case, but does not eliminate the obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4".[261]

197. The Panel on *US – Softwood Lumber VI* agreed with the views expressed by the Panel on *Mexico – Corn Syrup* (see paragraph 196 above), while emphasizing at the same time that there is no requirement under Article 3.7 to conduct a second Article 3.4 analysis:

"It seems clear to us that, as the Panel found in *Mexico – Corn Syrup*, there must, in every case in which threat of material injury is found, be an evaluation of the condition of the industry in light of the Article 3.4/15.4 factors to establish the background against which the impact of future dumped/subsidized imports must be assessed, in addition to an assessment of specific threat factors. However, once such an analysis has been carried out, we do not read the relevant provisions of the Agreements to require an assessment of the likely impact of future imports by reference to a consideration of projections regarding each of the Article 3.4/15.4 factors. There is certainly nothing in the text of either Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, or Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement, setting out an obligation to conduct a second analysis of the injury factors in cases involving threat of material injury. Of course, such an assessment could be undertaken, to the extent available information permitted, and might be useful. However, in many instances, it seems likely that the necessary information would not be available, for instance projected productivity, return on investment, projected cash flow, etc. Even if projections are made on the basis of the information gathered in the investigation, this might result in a degree of speculation in the decision–making process, which is not consistent with the requirements of the Agreements."[262]

198. The Panel on *US – Softwood Lumber VI* came to a similar conclusion with respect to the absence of a requirement for a second Article 3.2 analysis:

"With respect to the factors set out in Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, we see even less basis for concluding that they must be directly considered in a 'predictive' context in making a threat of material injury determination. These provisions require the investigating authorities to consider events in the past, during the period investigated, in making a determination regarding present material injury. Thus, the text directs the investigating authorities to consider whether there 'has been' a significant increase in imports, whether there 'has been' significant price undercutting, or whether the effect of imports is otherwise to depress prices or prevent price increases which otherwise 'would have' occurred. As with the consideration of the Article 3.4/15.4 factors, the consideration of the Article 3.2/15.2 factors forms part of the background against which the investigating authorities can evaluate the effects of future dumped and/or subsidized imports.[263]"[264]

(e) Distinction between the roles of the investigating authorities and the Panel

199. In *Mexico – Corn Syrup (Article 21.5 – US)*, Mexico had requested the Appellate Body to reverse the finding of the Panel regarding the likelihood of increased imports on the grounds that the Panel had wrongly interpreted Article 3.7 of the *Anti-Dumping Agreement* and incorrectly applied the standard of review prescribed by Articles 17.5 and 17.6 of that Agreement. The Appellate Body drew the line between the roles of the investigating authorities and the panel in respect to Article 3.7 of the *Anti-Dumping Agreement* as follows:

"In previous anti-dumping cases, we have emphasized the importance of distinguishing between the different roles of panels and investigating authorities.[265] We note, in this regard, that Article 3.7 of the *Anti-Dumping Agreement* sets forth a number of requirements that

[259] Panel Report on *Mexico – Corn Syrup*, para. 7.127. In this regard, see also paras. 149 and 154 of this Chapter. See also Panel Report on *Egypt – Steel Rebar*, paras. 7.93–7.94.
[260] Panel Report on *Mexico – Corn Syrup*, para. 7.132.
[261] Panel Report on *Mexico – Corn Syrup*, para. 7.137.
[262] Panel Report on *US – Softwood Lumber VI*, para. 7.105.
[263] (*footnote original*) Of course, the proper establishment of a background under Articles 3.2 and 3.4 and 15.2 and 15.4 of the AD and SCM Agreements does not determine whether the evaluation of the effects of future imports is consistent with the requirements governing determinations of threat of material injury set out in Articles 3.7 and 15.7 of the AD and SCM Agreements.
[264] Panel Report on *US – Softwood Lumber VI*, para. 7.111.
[265] (*footnote original*) Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*United States – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, para. 55.

must be respected in order to reach a valid determination of a threat of material injury. The third sentence of Article 3.7 explicitly recognizes that it is the *investigating authorities* who make a determination of threat of material injury, and that such determination – by the investigating authorities – 'must be based on facts and not merely on allegation, conjecture or remote possibility'. Consequently, Article 3.7 is not addressed to panels, but to the national investigating authorities which determine the existence of a threat of material injury.

The *Anti-Dumping Agreement* imposes a specific standard of review on *panels*. With respect to facts, Articles 17.5 and 17.6(i) of the *Anti-Dumping Agreement*, together with Article 11 of the DSU[266], set out the standard to be applied by panels when assessing whether a Member's investigating authorities have 'established' and 'evaluated' the facts consistently with that Member's obligations under the covered agreements.[267] These provisions do not authorize panels to engage in a new and independent fact-finding exercise. Rather, in assessing the measure, panels must consider, in the light of the claims and arguments of the parties, whether, *inter alia,* the 'establishment' of the facts by the investigating authorities was 'proper', in accordance with the obligations imposed on such investigating authorities under the *Anti-Dumping Agreement*.[268]

In our view, the 'establishment' of facts by investigating authorities includes both affirmative findings of events that took place during the period of investigation as well as assumptions relating to such events made by those authorities in the course of their analyses. In determining the existence of a *threat* of material injury, the investigating authorities will necessarily have to make assumptions relating to the 'occurrence of future events' since such *future* events 'can never be definitively proven by facts'.[269] Notwithstanding this intrinsic uncertainty, a 'proper establishment' of facts in a determination of threat of material injury must be based on events that, although they have not yet occurred, must be 'clearly foreseen and imminent', in accordance with Article 3.7 of the *Anti-Dumping Agreement*.[270]"[271]

(f) Relationship with other paragraphs of Article 3

200. In *Thailand – H-Beams*, the Appellate Body referred to Article 3.7 in interpreting Article 3.1. See paragraph 112 above.

201. With respect to the relationship between paragraphs 4 and 7 of Article 3, see paragraphs 195–196 above.

10. Article 3.8

202. The Panel on *US – Softwood Lumber VI* examined the meaning of the requirement under Article 3.8 to consider and decide the application of anti-dumping measures in a threat of injury case with "special care":

> "The adjective 'special' is defined as, *inter alia*, 'Exceptional in quality or degree; unusual; out of the ordinary'.[272] The noun 'care' is defined, *inter alia*, as 'Serious attention, heed; caution, pains, regard'.[273] Thus, it seems clear to us that a degree of attention over and above that required of investigating authorities in all anti-dumping and countervailing duty injury cases is required in the context of cases involving threat of material injury."[274]

203. The Panel on *US – Softwood Lumber VI*, further considered that, in spite of the fact that Article 3.8 provides that the application of a measure has to be considered with special care, the "special care" obligation of Article 3.8 applies "during the process of investigation and determination of threat of material injury, that is, in the establishment of whether the prerequisites for application of a measure exist, and not merely afterward when final decisions whether to apply a measure are taken".[275] Faced with the question of what is entailed by this obligation to act with an enhanced degree of attention, so as to demonstrate compliance with the "special care" obligation, the Panel made the following finding:

> "The Agreements require, as noted above, an objective evaluation based on positive evidence in making **any** injury determination, including one based on threat of material injury. Canada has not asserted any specific legal requirements with respect to special care – it has made no arguments as to what it considers might constitute the special care required by the Agreements in threat cases. It is not clear to us what the parameters of such 'special care' in the context of an objective evaluation based on positive evidence would be. In these

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[266] (*footnote original*) Article 11 of the DSU provides in relevant part that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".

[267] (*footnote original*) Appellate Body Report, *United States – Hot-Rolled Steel*, supra, footnote 59, paras. 50–62.

[268] (*footnote original*) Ibid., para. 56.

[269] (*footnote original*) Appellate Body Report, *United States – Lamb Safeguard*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para 136.

[270] (*footnote original*) As we noted in United States – Hot-Rolled Steel:

> Article 17.6(i) . . . defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement* in the course of their "establishment" and "evaluation" of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities*' establishment and evaluation of the facts under other provisions of the *Anti-Dumping Agreement.* (original emphasis)

Appellate Body Report, *supra*, footnote 265, para. 56.

[271] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 83–85.

[272] The New Shorter Oxford English Dictionary (Clarendon Press 1993).

[273] *Ibid.*

[274] Panel Report on *US – Softwood Lumber VI*, para. 7.33.

[275] Panel Report on *US – Softwood Lumber VI*, para. 7.33.

> circumstances, we consider it appropriate to consider alleged violations of Articles 3.8 and 15.8 only after consideration of the alleged violations of specific provisions. While we do not consider that a violation of the special care obligation could not be demonstrated in the absence of a violation of the more specific provision of the Agreements governing injury determinations, we believe such a demonstration would require additional or independent arguments concerning the asserted violation of the special care requirement beyond the arguments in support of the specific violations."[276]

11. Relationship with other Articles

(a) Article 1

204. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 3. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, among them Article 1, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[277] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

(b) Article 4

205. In *Mexico – Corn Syrup*, the Panel discussed the relationship between footnote 9 to Article 3 and Article 4.1. See paragraph 106 above.

(c) Article 5

206. In *Thailand – H-Beams*, the Appellate Body referred to Articles 5.2 and 5.3, as well as to Articles 3.7, 6 and 12 in interpreting Article 3.1. See paragraph 112 above.

207. The Panel on *Mexico – Corn Syrup* touched on the relationship between Articles 3.2 and 5.2. See paragraph 238 below.

208. The Panel on *Mexico – Corn Syrup* also discussed the relationship between Articles 3.4 and 5.2. See paragraph 238 below.

209. In *Guatemala – Cement II*, the relationship between Article 3.7 and Articles 5.2 and 5.3 was discussed. See paragraphs 253–255 below.

(d) Article 6

210. In *Thailand – H-Beams*, the Appellate Body referred to Article 6 as well as Articles 3.7, 5.2, 5.3 and 12 in interpreting Article 3.1. See paragraph 112 above.

(e) Article 9

211. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 3. The Panel then asserted that Mexico's claims under other articles of the *Anti-Dumping Agreement*, among them Article 9, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[278] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

(f) Article 11

212. The Panel on *US – DRAMS* discussed the relationship between Articles 3.5 and 11.2. See paragraph 506 below.

213. Further in *US – DRAMS*, the Panel discussed the relationship between footnote 9 to Article 3 and Article 11.2. See paragraph 506 below.

(g) Article 12

214. In *Thailand – H-Beams*, the Appellate Body referred to Article 12 as well as Articles 3.7, 5.2, 5.3 and 6 in interpreting Article 3.1. See paragraph 112 above.

215. The Panels on *EC – Bed Linen* and *Egypt – Steel Rebar* touched on the relationship between Articles 3.4 and 12.2. See paragraphs 566 below and 167 above respectively.

(h) Article 17

216. The Appellate Body in *Thailand – H-Beams* compared the obligation set forth in Article 3.1 with those in Articles 17.5 and 17.6. See paragraph 113 above.

217. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body drew a line between the roles of investigating authorities and the panels as regards Article 3.7 threat of injury analysis. In doing so, the Appellate Body referred to Articles 17.5 and 17.6(i). See paragraph 199 above.

(i) Article 18

218. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 3. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, among them Article 18, were

[276] Panel Report on *US – Softwood Lumber VI*, para. 7.34.
[277] Panel Report on *Guatemala – Cement II*, para. 8.296.
[278] Panel Report on *Guatemala – Cement II*, para. 8.296.

"dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[279] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

12. Relationship with other WTO Agreements

(a) Article VI of the GATT 1994

219. The Panel on *US – 1916 Act (EC)* explained its exercise of judicial economy with respect to Article 3 as follows:

> "Since we found above that the 1916 Act violated Article VI:1 by not providing for an injury test compatible with the terms of that Article and since Article 3 simply addresses in more detail the requirement of 'material injury' contained in Article VI:1, we do not find it necessary to make specific findings under Article 3 and therefore exercise judicial economy, as we are entitled to do under GATT panel practice and WTO panel and Appellate Body practice."[280]

220. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 3. The Panel then determined that Mexico's claims under other articles of the *Anti-Dumping Agreement* and under Article VI of the *GATT 1994* were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[281] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

(b) Agreement on Safeguards

221. The Appellate Body in *US – Hot-Rolled Steel* supported its interpretation of the non-attribution language of Article 3.5 by referring to its decisions in two safeguards Reports, *US – Wheat Gluten* and *US – Lamb* where it interpreted the non-attribution language in Article 4.2(b) of the Agreement on Safeguards in a similar manner. See also the Panel Report in *Guatemala – Cement II*, paragraph 152 above.

IV. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4
Definition of Domestic Industry

4.1 For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

(i) when producers are related[11] to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;

(*footnote original*) [11] For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if *(a)* one of them directly or indirectly controls the other; or *(b)* both of them are directly or indirectly controlled by a third person; or *(c)* together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

(ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied[12] only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and *(b)* such duties cannot be levied only on products of specific producers which supply the area in question.

[279] Panel Report on *Guatemala – Cement II*, para. 8.296.
[280] Panel Report on *US – 1916 Act (EC)* para. 6.211; Panel Report on *US – 1916 Act (Japan)*, para. 6.254.
[281] Panel Report on *Guatemala – Cement II*, para. 8.296.

(*footnote original*) [12] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

4.3 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1.

4.4 The provisions of paragraph 6 of Article 3 shall be applicable to this Article.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

1. Article 4.1

(a) "domestic industry"

222. Referring to Article 4.1 and footnote 9 to Article 3, the Panel on *Mexico – Corn Syrup* stated: "These two provisions inescapably require the conclusion that the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1".[282]

223. As regards domestic industry production, see paragraphs 186–187 above.

(b) "domestic producers"

224. Referring to provisions which use the plural form, but are applicable in the singular case, the Panel on *EC – Bed Linen*, in a finding not reviewed by the Appellate Body, stated that "Article 4.1 of the AD Agreement defines the domestic industry in terms of 'domestic producers' in the plural. Yet we consider it indisputable that a single domestic producer may constitute the domestic industry under the AD Agreement, and that the provisions concerning domestic industry under Article 4 continue to apply in such a factual situation."[283]

225. The Panel on *EC – Bed Linen* examined whether, further to having defined the Community industry as a group of 35 producers and resorted to a sample of those producers, the European Communities was precluded from considering information relating to producers not within that sample, or not within the Community industry. See paragraphs 145–147 above.

(c) "a major proportion of the total domestic production"

226. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered whether or not the phrase "a major proportion" implies that the "domestic industry" refers to domestic producers whose collective output constitutes the majority, that is, more than 50 per cent, of domestic total production. The Panel considered different dictionary definitions and noted that the the word "major" is also defined as "important, serious, or significant".[284] The Panel therefore found that "an interpretation that defines the domestic industry in terms of domestic producers of an important, serious or significant proportion of total domestic production is permissible.[285]"[286]

2. Relationship with other Articles

227. In *Mexico – Corn Syrup*, the Panel referred to footnote 9 to Article 3 in interpreting Article 4.1. See paragraph 222 above.

228. The Panel on *Argentina – Poultry Anti-Dumping Duties* rejected the argument that Article 4.1 does not contain an obligation, but is merely a definition which, as such, cannot be violated. The Panel considered that:

> "Article 4.1 provides that the term 'domestic industry' 'shall' be interpreted in a specific manner. In our view, this imposes an express obligation on Members to interpret the term 'domestic industry' in that specified manner. Thus, if a Member were to interpret the term differently in the context of an anti-dumping investigation, that Member would violate the obligation set forth in Article 4.1."[287]

V. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5
Initiation and Subsequent Investigation

5.1 Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

5.2 An application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and *(c)* a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The applica-

[282] Panel Report on *Mexico – Corn Syrup*, para. 7.147. The Panel on *EC – Bed Linen* indicated that "[they] express no opinion as to the correctness *vel non* of the European Communities' interpretation of Article 4 of the AD Agreement or its application in this case". Panel Report on *EC – Bed Linen*, para. 6.175.

[283] Panel Report on *EC – Bed Linen*, para. 6.72.

[284] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.341.

[285] (*footnote original*) We recall that, in accordance with Article 17.6(ii) of the *AD Agreement*, if an interpretation is "permissible", then we are compelled to accept it.

[286] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.341.

[287] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.338.

tion shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[13] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[14] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

(*footnote original*) [13] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

(*footnote original*) [14] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.

5.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

5.7 The evidence of both dumping and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation, and *(b)* thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

5.9 An anti-dumping proceeding shall not hinder the procedures of customs clearance.

5.10 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. General

(a) The Doha mandate

229. Paragraph 7.1 of the Doha Ministerial Decision of 14 November 2001 on Implementation-Related Issues and Concerns provides that the Ministerial Conference "agrees that investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed."[288]

2. Article 5.2

(a) General

230. In *Guatemala – Cement II*, in examining Mexico's claim that Guatemala's authority, in violation of Article 5.2, had initiated the anti-dumping investigation without sufficient evidence of dumping having been including in the application, the Panel interpreted Article 5.2 with reference to Article 2, which outlines the elements that describe the existence of dumping. The Panel stated that "evidence on the ... elements necessary for the imposition of an anti-dumping measure may be inferred into Article 5.3 by way of Article 5.2."[289] See paragraph 248 below.

231. On the issue of what evidence was necessary to justify the initiation of an investigation under Article 5, the Panel on *Guatemala – Cement I* had reached the same conclusion as the Panel on *Guatemala – Cement II*.[290] However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach any conclusion on the Panel's discussion of Article 5.[291] The Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.[292]

232. In *Guatemala – Cement II*, the Panel further agreed that "statements of conclusion unsubstantiated by facts do not constitute evidence of the type required by Article 5.2."[293]

233. The Panel on *US – Lumber V* considered that an application need only include such reasonably available information on the relevant matters as the applicant deems necessary to substantiate its allegations of dumping, injury and causality, and not *all* information available to the applicant:

> "We note that the words 'such information as is reasonably available to the applicant', indicate that, if information on certain of the matters listed in sub-paragraphs (i) to (iv) is not reasonably available to the applicant in any given case, then the applicant is not obligated to include it in the application. It seems to us that the 'reasonably available' language was intended to avoid putting an undue burden on the applicant to submit information which is not reasonably available to it. It is not, in our view, intended to require an applicant to submit *all* information that is reasonably available to it. Looking at the purpose of the application, we are of the view that an application need only include such reasonably available information on the relevant matters as the applicant deems necessary to substantiate its allegations of dumping, injury and causality. As the purpose of the application is to provide an evidentiary basis for the initiation of the investigative process, it would seem to us unnecessary to require an applicant to submit *all* information reasonably available to it to substantiate its allegations.[294] This is particularly true where such information might be redundant or less reliable than, information contained in the application."[295]

(b) "evidence of ... dumping"

234. In *Guatemala – Cement II*, the Panel addressed the issue of whether the elements of "dumping" require sufficient evidence under Article 5.3, and based its analysis upon its reading of the term "dumping", under Article 5.2, as a reference to dumping as within the meaning of Article 2. See paragraphs 248–249 below.

235. On this issue, the Panel on *Guatemala – Cement I* also reached the same conclusion[296], but the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach any conclusion on the Panel's discussion of Article 2.4.[297] The Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.[298]

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[288] WT/MIN(01)/17.
[289] Panel Report on *Guatemala – Cement II*, para. 8.35.
[290] Panel Report on *Guatemala – Cement I*, paras. 7.49–7.53.
[291] Appellate Body Report on *Guatemala – Cement I*, para. 89.
[292] WT/DSB/M/51, section 9(a).
[293] Panel Report on *Guatemala – Cement II*, para. 8.53.
[294] (*footnote original*) If the requirement were to be that all information reasonably available to the applicant must be submitted in the application, it could lead to absurd results in that the applicant might be required to submit a large volume of information for purposes of the initiation of the investigation.
[295] Panel Report on *US – Lumber V*, para. 7.54.
[296] See para. 249 of this Chapter.
[297] Appellate Body Report on *Guatemala – Cement I*, para. 89.
[298] WT/DSB/M/51, section 9(a).

(c) "evidence of . . . injury"

236. The Panel on *Guatemala – Cement I*, in response to Mexico's claim of violation of Articles 5.2 and 5.3, addressed the issue of the evidence of injury in an application necessary under Article 5.2.[299] However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach any conclusion on the Panel's discussion of Article 5.[300] The Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.[301]

237. The Panel on *Guatemala – Cement II* also addressed the issue of the evidence of threat of injury necessary in an application under Article 5.2, and the closely related issue of the amount of evidence necessary under Article 5.3 to justify the initiation of an investigation. See paragraphs 253–254 below.

(d) "evidence of . . . causal link" – subparagraph (iv)

238. In considering what information regarding the existence of a causal link must be provided in an application pursuant to Article 5.2, the Panel on *Mexico – Corn Syrup* found that "the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination of injury":

> "[T]he inclusion in Article 5.2(iv) of the word 'relevant' and the phrase 'such as' in the reference to the factors and indices in Articles 3.2 and 3.4 in our view makes it clear that an application is *not* required to contain information on *all* the factors and indices set forth in Articles 3.2 and 3.4. Rather, Article 5.2(iv) requires that the application contain information on factors and indices relating to the impact of imports on the domestic industry, and refers to Articles 3.2 and 3.4 as illustrative of factors which may be relevant. Which factors and indices are relevant to demonstrate the consequent impact of imports on the domestic industry will vary depending on the nature of the allegations made by the industry, and the nature of the industry itself. If the industry provides information reasonably available to it concerning factors which are relevant to the allegation of injury (or threat of injury) it makes in the application, and the information concerning those factors demonstrates, that is, 'shows evidence of', the consequent impact of dumped imports on the domestic industry, we believe that Article 5.2(iv) is satisfied.
>
> Obviously, the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination of injury. Moreover, the applicant need only provide such information as is 'reasonably available' to it with respect to the relevant factors. Since information regarding the factors and indices set out in Article 3.4 concerns the state of the domestic industry and its operations, such information would generally be available to applicants. Nevertheless, we note that an application which is consistent with the requirements of Article 5.2 will not necessarily contain sufficient evidence to justify initiation under Article 5.3."[302]

239. In *Mexico – Corn Syrup*, the Panel distinguished, for the purposes of Article 5.2, between information and analysis:

> "Article 5.2 does not require an application to contain analysis, but rather to contain information, in the sense of evidence, in support of allegations. While we recognize that some analysis linking the information and the allegations would be helpful in assessing the merits of an application, we cannot read the text of Article 5.2 as requiring such an analysis in the application itself.[303]"[304]

240. In *Thailand – H-Beams*, the Panel agreed with the view of the Panel on *Mexico – Corn Syrup* referenced in paragraph 239 above.[305] Further, the Panel rejected Poland's argument that paragraph (iv) of Article 5.2 implies that some sort of analysis of data is required in the application, and stated that "we do not read this provision as imposing any additional *requirement* that the application contain analysis of the data submitted in support of the application."[306] The Appellate Body did not review these findings of the Panel.

(e) "simple assertion, unsubstantiated by relevant evidence"

241. In *Thailand – H-Beams*, the Panel stated that "raw numerical data would constitute 'relevant evidence' rather than merely a 'simple assertion' within the meaning of this provision."[307]

(f) Relationship with other paragraphs of Article 5

242. The Panel on *Guatemala – Cement II* discussed the relationship between Articles 5.2 and 5.3 in order to clarify the requirements under both Articles 5.2 and 5.3. See paragraph 248 below.

243. Also, in *Guatemala – Cement II*, the Panel stated that "[i]n light of our finding that the Ministry's

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[299] Panel Report on *Guatemala – Cement I*, paras. 7.75–7.77.
[300] Appellate Body Report on *Guatemala – Cement I*, para. 89.
[301] WT/DSB/M/51, section 9(a).
[302] Panel Report on *Mexico – Corn Syrup*, paras. 7.73–7.74.
[303] (*footnote original*) Of course, the investigating authority must examine the accuracy and adequacy of the information in the application to determine whether there is sufficient evidence to justify initiation, pursuant to Article 5.3, a question which is addressed further below. However, this obligation falls on the investigating authority, and does not imply a requirement for analysis resting on the applicant.
[304] Panel Report on *Mexico – Corn Syrup*, para. 7.76.
[305] Panel Report on *Thailand – H-Beams*, paras. 7.75–7.76.
[306] Panel Report on *Thailand – H-Beams*, para. 7.77.
[307] Panel Report on *Thailand – H-Beams*, para. 7.77.

determination that it had sufficient evidence to justify the initiation of an investigation was inconsistent with Article 5.3, we do not consider it necessary to rule on Mexico's Article 5.2 claims regarding the sufficiency of Cementos Progreso's application."[308]

3. Article 5.3

(a) "sufficient evidence to justify the initiation of an investigation"

(i) Distinction from the requirements under Article 5.2

244. In *Guatemala – Cement II*, in examining the claim that Guatemala's investigating authority based its initiation decision on insufficient evidence in violation of Article 5.3, the Panel stated:

> "Article 5.2 requires that the application contain sufficient evidence on dumping, injury and causation, while Article 5.3 requires the investigating authority to satisfy itself as to the accuracy and adequacy of the evidence to determine that it is sufficient to justify initiation."[309]

245. On the relationship between Articles 5.2 and 5.3, the Panel on *Guatemala – Cement I* commented to the same effect that the fact than an application satisfied the requirements of Article 5.2 did not demonstrate that there was "sufficient evidence" to justify initiation under Article 5.3.[310] However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach any conclusion on the Panel's discussion of Article 5.[311] The Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.[312]

246. The Panel on *Guatemala – Cement II* held that the appropriate legal standard under Article 5.3 was not the adequacy and accuracy *per se* of the evidence in the application, but the sufficiency of the evidence:

> "[I]n accordance with our standard of review, we must determine whether an objective and unbiased investigating authority, looking at the facts before it, could properly have determined that there was sufficient evidence to justify the initiation of an anti-dumping investigation. Article 5.3 requires the authority to examine, in making this determination, the accuracy and adequacy of the evidence in the application. Clearly, the accuracy and adequacy of the evidence is relevant to the investigating authorities' determination whether there is sufficient evidence to justify the initiation of an investigation. It is however the sufficiency of the evidence, and not its adequacy and accuracy *per se*, which represents the legal standard to be applied in the case of a determination whether to initiate an investigation."[313]

247. In *Guatemala – Cement II*, on the basis of the distinction between Articles 5.2 and 5.3 described in the excerpt in paragraph 248 below, the Panel stated that "[o]ne of the consequences of this difference in obligations is that investigating authorities need not content themselves with the information provided in the application but may gather information on their own in order to meet the standard of sufficient evidence for initiation in Article 5.3."[314] In support of this proposition, the Panel cited the panel's finding on *Guatemala – Cement I*.[315]

(ii) Sufficient evidence for "dumping"

248. In *Guatemala – Cement II*, in examining the issue of whether Articles 2.1 and 2.4 are applicable to the decision to initiate an investigation, i.e. which specific elements of dumping need to be supported by sufficient evidence under Article 5.3, the Panel first held that what constitutes necessary evidence for the purposes of Article 5.3 can be inferred from Article 5.2. The Panel then found that "in order to determine that there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of this practice as outlined in Article 2":

> "[W]e first observe that, although there is no express reference to evidence of dumping in Article 5.3, evidence on the three elements necessary for the imposition of an anti-dumping measure may be inferred into Article 5.3 by way of Article 5.2. In other words, Article 5.2 requires that the application contain sufficient evidence on dumping, injury and causation, while Article 5.3 requires the investigating authority to satisfy itself as to the accuracy and adequacy of the evidence to determine that it is sufficient to justify initiation. Thus, reading Article 5.3 in the context of Article 5.2, the evidence mentioned in Article 5.3 must be evidence of dumping, injury and causation. We further observe that the only clarification of the term 'dumping' in the AD Agreement is that contained in Article 2. In consequence, in order to determine that there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of this practice as outlined in Article 2. This analysis is done not with a view to making a determination that Article 2 has been violated through the initiation of an investigation, but rather to provide guidance in our review of the Ministry's determination that there was sufficient evidence of dumping to warrant an investigation. We do not of course mean to suggest that an

[308] Panel Report on *Guatemala – Cement II*, para. 8.59.
[309] Panel Report on *Guatemala – Cement II*, para. 8.35. Also see Panel Report on *US – Lumber V*, paras. 7.83–7.84.
[310] Panel Report on *Guatemala – Cement I*, paras. 7.49–7.53.
[311] Appellate Body Report on *Guatemala – Cement I*, para. 89.
[312] WT/DSB/M/51, section 9(a).
[313] Panel Report on *Guatemala – Cement II*, para. 8.31. Also see Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.60.
[314] Panel Report on *Guatemala – Cement II*, para. 8.62.
[315] Panel Report on *Guatemala – Cement I*, para. 7.53.

> investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the quantity and quality that would be necessary to support a preliminary or final determination. An anti-dumping investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward. However, the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 to justify initiation of an investigation.
>
> We note that Article 2.1 states that a product is to be considered as dumped 'if the export price . . . is less than the *comparable* price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.' (emphasis added). Other provisions of Article 2 that further elaborate on this basic definition include Article 2.4, which sets forth certain principles regarding the comparability of export prices and normal value. In particular, Article 2.4 specifies that comparisons between the export price and the normal value shall be made at the same level of trade, and that due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in level of trade and quantity. Consistent with our discussion above, we consider that, although these provisions of Article 2 do not 'apply' as such to initiation determinations, they are certainly relevant to an investigating authorities' consideration as to whether sufficient evidence of dumping exists to justify the initiation of an investigation.[316]"[317]

249. The Panel on *Guatemala – Cement I* reached the same conclusion as the Panel on *Guatemala – Cement II* on the issue of which specific elements of dumping need to be supported by sufficient evidence under Article 5.3 (see paragraph 248 above)[318], but the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach any conclusion on the Panel's discussion of Article 2.4.[319] The Panel Report on *Guatemala – Cement I* was accordingly adopted as reversed by the Appellate Body.[320]

250. The Panel on *Argentina – Poultry Anti-Dumping Duties* rejected Brazil's claim that an investigation cannot be initiated based on an application including only normal value data related to sales in one city and expressed the view that "it is sufficient for an investigating authority to base its decision to initiate on evidence concerning domestic sales in a major market of the exporting country subject to the investigation, without necessarily having data for sales throughout that country".[321]

251. The Panel on *Argentina – Poultry Anti-Dumping Duties* also examined the compatibility with Article 5.3, read in light of Article 2.4.2, of an inititation based on a weighted average export price that was calculated using only those transactions with a price lower than the normal value. As the weighted average export price was therefore not based on the totality of comparable export transactions, the Panel considered that "the use of such a practice would not allow an objective and impartial investigating authority to properly conclude that there was sufficient evidence of dumping to justify the initiation of an investigation".[322] The Panel thus also rejected the argument that, in order to initiate, an investigating authority need only satisfy itself that there has been some dumping, in the sense that certain transactions were dumped:

> "We recall that, 'in order to determine whether or not there is sufficient evidence of dumping for the purpose of initiation, an investigating authority cannot entirely disregard the elements that configure the existence of [dumping] outlined in Article 2'.[323] A determination of dumping should be made in respect of the product as a whole, for a given period, and not for individual transactions concerning that product. An investigating authority therefore cannot disregard export transactions at the time of initiation simply because they are equal to or greater than normal value. Disregarding such transactions does not provide a proper basis for determining whether or not there is sufficient evidence of dumping to justify initiation."[324]

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316 (*footnote original*) We understand Guatemala to agree to our approach concerning the relationship between Article 2 and Article 5.3. At para. 136 of its first written submission, Guatemala asserted that it is "not suggesting that Articles 2 and 3 are totally irrelevant during the initiation phase. Articles 2 and 3 contain definitions which give meaning to the expressions 'dumping', 'injury' and 'causal link' used in Article 5.2. When the authorities examine the accuracy and adequacy of the evidence submitted in the application, those definitions help to establish whether there is 'sufficient evidence' in the meaning of Article 5.3 to justify the initiation of the investigation."

317 Panel Report on *Guatemala – Cement II*, paras. 8.35–8.36. The Panel on *Argentina – Poultry Anti-Dumping Duties* fully agreed with this view expressed by the Panel on *Guatemala – Cement II* while adding that it did not mean to suggest that "an investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the *quantity* and *quality* that would be necessary to support a preliminary or final determination. However, the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 to justify initiation of an investigation." Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.62.

318 Panel Report on *Guatemala – Cement I*, paras. 7.64–7.66.

319 Appellate Body Report on *Guatemala – Cement I*, para. 89.

320 WT/DSB/M/51, section 9(a).

321 Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.67.

322 Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.78.

323 (*footnote original*) Panel Report, *Guatemala – Cement II*, para. 8.35.

324 Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.80.

252. On the question of whether a comparison between normal value for one day and and export price for a period of several months constitutes a proper basis for determining whether there is sufficient evidence of dumping to justify the inititiation of the investigation, the Panel on *Argentina – Poultry Anti-Dumping Duties* recalled that Article 2.4 requires that a fair comparison be made between the export price and the normal value in respect of sales "made at as nearly as possible the same time". It concluded that "there should be a substantial degree of overlap in the periods considered in order for the comparison of =normal value and export price to be fair within the meaning of Article 2.4".[325] For a product in respect of which there are many transactions taking place on a daily basis, it was "not persuaded that domestic sales data for one day provides sufficient overlap with export price data for several months for the purpose of Article 5.3."[326]

(iii) Sufficient evidence for "injury"

253. In *Guatemala – Cement II*, the Panel examined Mexico's argument that the Guatemalan authority did not have sufficient evidence of threat of material injury to justify the initiation of an investigation. In rebuttal, Guatemala argued that Article 3.7 does not apply to the determination of the investigating authorities on this issue, because Article 5.2(iv), which requires that an application contain certain information, does not refer to Article 3.7, but only to Articles 3.2 and 3.4. The Panel responded:

> "[W]hen considering whether there is sufficient evidence of threat of injury to justify the initiation of an investigation, an investigating authority cannot totally disregard the elements that configure the existence of threat of injury outlined in Article 3. We do not mean to suggest that an investigating authority must have before it at the time it initiates an investigation evidence of threat of material injury within the meaning of Article 3 of the quantity and quality that would be necessary to support a preliminary or final determination of threat of injury. However, the investigating authority must have before it evidence of threat of material injury, as defined in Article 3, sufficient to justify the initiation of an investigation."[327]

254. However, with respect to Article 3.7, the Panel added a caveat to its finding quoted under paragraph 253 above, in stating that the investigating authority need not have before it information on all Article 3.7 factors where there is an allegation of threat of injury:

> "Article 3.7 provides specific guidance on the factors to be considered by an investigating authority when making a determination of threat of injury. Although we do not necessarily believe that an investigating authority must have before it information on all Article 3.7 factors in a case where initiation of an investigation is requested on the basis of an alleged threat of injury, a consideration of those factors is certainly pertinent to an evaluation of whether there was sufficient evidence of threat of material injury to justify the initiation of an investigation."[328]

255. On the issue of which specific elements of dumping need to be supported by sufficient evidence under Article 5.3, the Panel on *Guatemala – Cement I* reached the same conclusion as the Panel on *Guatemala – Cement II* (see paragraphs 253–254 above).[329] However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach any conclusion on the Panel's discussion of Article 5[330], and accordingly, the Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.[331]

(iv) Standard of review – relationship with Article 17.6

256. In determining what constitutes "sufficient evidence to justify the initiation of an investigation" under Article 5.3, the Panel on *Guatemala – Cement I* applied the standard of review set out in Article 17.6(i)[332], referring, in so doing, to the GATT Panel Report on *US – Softwood Lumber II*.[333] The Panel also agreed with the view expressed by the Panel on *US – Softwood Lumber II* that "the quantum and quality of the evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after the investigation".[334] However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach a conclusion on the interpretation of Article 17.6 by the Panel[335], and accordingly, the Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.[336]

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[325] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.84. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered that Article 5.3, read in light of Article 2.4, cannot be interpreted to require that data on normal value and export price cover *identical* periods of time. Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.84.

[326] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.85.

[327] Panel Report on *Guatemala – Cement II*, para. 8.45.

[328] Panel Report on *Guatemala – Cement II*, para. 8.52.

[329] Panel Report on *Guatemala – Cement I*, paras. 7.75–7.77.

[330] Appellate Body Report on *Guatemala – Cement I*, para. 89.

[331] WT/DSB/M/51, section 9(a).

[332] Panel Report on *Guatemala – Cement I*, para. 7.57. See paras. 629–641 of this Chapter.

[333] (*footnote original*) Panel Report on US – Softwood Lumber II, para. 331.

[334] Panel Report on *Guatemala – Cement I*, para. 7.57.

[335] Appellate Body Report on *Guatemala – Cement I*, para. 89.

[336] WT/DSB/M/51, section 9(a).

257. Referring to the approach of the Panel on *Guatemala – Cement I*[337], which took into account the reasoning of the GATT Panel on *US – Softwood Lumber II*, the Panel on *Mexico – Corn Syrup* stated that "[o]ur approach in this dispute will similarly be to examine whether the evidence before [the investigating authority] at the time it initiated the investigation was such that an unbiased and objective investigating authority evaluating that evidence, could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify initiation."[338]

258. In *Guatemala – Cement II*, the Panel found that "[i]t is clear on the face of these documents that the invoices reflecting prices in Mexico are for sales occurring at the very end of the commercialisation chain and the import certificates reflect prices at the point of importation which is the beginning of the commercialisation chain for Mexican cement in Guatemala".[339] The Panel subsequently found, applying the standard of review set forth in Article 17.6(i):

> "[T]he fact that the sales in the Mexican and Guatemalan markets were at different levels of trade was apparent from the application itself, and an unbiased and objective investigating authority should have recognized this fact without the need for it to be pointed out. Nor do we consider that an investigating authority can completely ignore obvious differences that could affect the comparability of the prices cited in an application on the ground that the foreign exporter has not demonstrated that they have affected price comparability. Moreover, at the point where the investigating authority is considering whether there is sufficient evidence to initiate an investigation, potentially affected exporters have not even been notified of the existence of an application, much less been provided a copy thereof. Thus, the logical implication of Guatemala's argument is that an investigating authority need never take into account issues of price comparability when considering whether there is sufficient evidence of dumping to initiate an investigation. We cannot agree with such an interpretation of the AD Agreement, particularly in light of the criteria set out in para. 8.36 above.
>
> After a thorough review of all the actions by the Ministry leading up to the initiation of the investigation, we find that no attempt was made to take into account glaring differences in the levels of trade and sales quantities and their possible effects on price comparability. Under these circumstances, an unbiased and objective investigating authority could not in our view have concluded that there was sufficient evidence of dumping to justify the initiation of an anti-dumping investigation."[340]

259. Having found that the Guatemalan investigating authority should have considered the issue of price comparability when considering whether there was sufficient evidence of dumping to initiate an investigation, the Panel emphasized that it did not expect:

> "[I]nvestigating authorities at the initiation phase to ferret out all possible differences that might affect the comparability of prices in an application and perform or request complex adjustments to them. We do however expect that, when from the face of an application it is obvious that there are substantial questions of comparability between the export and home market prices being compared, the investigating authority will at least acknowledge that differences in the prices generate questions with regards to their comparability, and either give some consideration as to the impact of those differences on the sufficiency of the evidence of dumping or seek such further information as might be necessary to do so."[341]

(b) "shall examine the accuracy and adequacy of the evidence provided in the application"

260. The Panel on *Guatemala – Cement I* considered whether there had been sufficient evidence to justify an anti-dumping investigation under Article 5.3.[342] However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach a conclusion on the discussion of Article 5.3 by the Panel[343], and accordingly, the Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.[344]

261. In determining what the parameters are of the requirement to "examine" the accuracy and adequacy of the evidence, and on what basis an assessment can be made regarding whether the necessary examination was carried out, the Panel on *EC – Bed Linen*, in a finding subsequently not reviewed by the Appellate Body, stated:

> "The only basis, in our view, on which a panel can determine whether a Member's investigating authority has examined the accuracy and adequacy of the information in the application is by reference to the determination that examination is in aid of – the determination whether there is sufficient evidence to justify initiation. That is, if the investigating authority properly determined that

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[337] The Panel on *Mexico – Corn Syrup* cited Panel Report on *Guatemala – Cement I*, paras. 7.54–7.55. The Panel stated:

> "We recognize that, because the Appellate Body reversed the *Guatemala-Cement* Panel's conclusion on the issue of whether the dispute was properly before it, that Panel's conclusions in this regard have no legal status. However, the Panel's report sets out a standard that we consider instructive in this case."

Panel Report on *Mexico – Corn Syrup*, para. 7.94.

[338] Panel Report on *Mexico – Corn Syrup*, para. 7.95.

[339] Panel Report on *Guatemala – Cement II*, para. 8.37.

[340] Panel Report on *Guatemala – Cement II*, paras. 8.38–8.39.

[341] Panel Report on *Guatemala – Cement II*, para. 8.40.

[342] Panel Report on *Guatemala – Cement I*, para. 7.71.

[343] Appellate Body Report on *Guatemala – Cement I*, para. 89.

[344] WT/DSB/M/51, section 9(a).

> there was sufficient evidence to justify initiation, that determination can only have been made based on an examination of the accuracy and adequacy of the information in the application, and consideration of additional evidence (if any) before it."[345]

262. Regarding a determination under Article 5.3, the Panel on *Mexico – Corn Syrup* stated that "Article 5.3 does not impose an obligation on the investigating authority to set out its resolution of *all* underlying issues considered".[346] Applied to the facts of the dispute, the Panel concluded that "Article 5.3 does not establish a requirement for the investigating authority to state specifically the resolution of questions concerning the exclusion of certain producers involved in defining the relevant domestic industry in the course of examining the accuracy and adequacy of the evidence to determine whether there was sufficient evidence to justify initiation."[347]

263. In *Guatemala – Cement II*, the Panel agreed that "statements of conclusion unsubstantiated by facts do not constitute evidence of the type . . . which allows an objective examination of its adequacy and accuracy by an investigating authority as provided in Article 5.3."[348]

(c) Relationship with other paragraphs of Article 5

264. The Panel on *Guatemala – Cement II* discussed the relationship between Articles 5.2 and 5.3. See paragraphs 248–249 above.

265. The Panel on *Guatemala – Cement II* rejected Mexico's argument that a violation of Article 5.3 due to the initiation of an investigation in the absence of sufficient evidence necessarily constitutes a violation of Article 5.7. See paragraph 281 below.

266. The Panel on *Mexico – Corn Syrup* touched on the relationship between Articles 5.3 and 5.8. See paragraph 283 below.

4. Article 5.4

(a) General

267. The Appellate Body on *US – Offset Act (Byrd Amendment)* considered that Article 5.4 requires "no more than a formal examination of whether a sufficient number of domestic producers have expressed support for an application".[349] The Appellate Body went on to note that Article 5.4 contains no requirement for investigating authorities to examine the motives of producers that elect to support (or to oppose) an application.[350] The Appellate Body recalled that "there may be a number of reasons why a domestic producer could choose to support an investigation."[351] The Appellate Body strongly disagreed with the approach taken by the Panel in relation to the concept of support[352] and reached the following conclusion:

> "A textual examination of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* reveals that those provisions contain no requirement that an investigating authority examine the motives of domestic producers that elect to support an investigation. Nor do they contain any explicit requirement that support be based on certain motives, rather than on others. The use of the terms 'expressing support' and 'expressly supporting' clarify that Articles 5.4 and 11.4 require only that authorities 'determine' that support has been 'expressed' by a sufficient number of domestic producers. Thus, in our view, an 'examination' of the 'degree' of support, and not the 'nature' of support is required. In other words, it is the 'quantity', rather than the 'quality', of support that is the issue."[353]

(b) Relationship with Article 11.4 of the SCM Agreement

268. In *US – Offset Act (Byrd Amendment)*, the Appellate Body further to noting that both Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* are "identical" provisions, analysed them jointly. See paragraph 267 above.

5. Article 5.5

(a) "before proceeding to initiate"

269. In *Guatemala – Cement II*, Mexico claimed that in violation of Article 5.5, Guatemala did not notify the Government of Mexico before proceeding to initiate the investigation. Guatemala argued that that the effective date of initiation of the investigation was not 11 January 1996, the date alleged by Mexico, and maintained that according to its own Constitution and legislation, the investigating authority could not have initiated the investigation until the Government of Mexico had been officially notified. Referring to footnote 1 of the *Anti-Dumping Agreement*, the Panel first determined at what

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[345] Panel Report on *EC – Bed Linen*, para. 6.199.
[346] Panel Report on *Mexico – Corn Syrup*, para. 7.102.
[347] Panel Report on *Mexico – Corn Syrup*, para. 7.105.
[348] Panel Report on *Guatemala – Cement II*, para. 8.53.
[349] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 286.
[350] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 291.
[351] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 290.
[352] The Panel on *US – Offset Act (Byrd Amendment)* was of the view that the Offset Act defeated the object and purpose of Article 5.4 as it considered that Article 5.4 was "introduced precisely to ensure that support was not just assumed to exist but actually existed, and that the support expressed by domestic producers was evidence of the industry-wide concern of injury being caused by dumped or subsidized imports." Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.65.
[353] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 283.

specific point in time the Guatemalan investigation had been initiated within the meaning of the *Anti-Dumping Agreement*:

> "[T]he date of initiation is the date of the procedural action by which Guatemala formally commenced the investigation. We are of the view that in the case before us the action by which the investigation was formally commenced is the date of publication of the notice of initiation which occurred on 11 January 1996."[354]

270. The Panel on *Guatemala – Cement I*, like the Panel on *Guatemala – Cement II*, also reached the conclusion that the date of initiation for purposes of Article 5.5 is the date of action by which the Guatemalan authorities formally commenced the investigation.[355] The Appellate Body, however, found that the dispute was not properly before the Panel and therefore did not reach a conclusion on the discussion of Article 5.5 by the Panel,[356] and accordingly, the Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.[357]

271. The Panel on *Guatemala – Cement II* further rejected Guatemala's argument that "[it] could not have initiated the investigation until after it had notified Mexico"[358], because its own Constitution and laws mandated it to do so:

> "In acceding to the WTO, Guatemala undertook to be bound by the rules contained in the AD Agreement, and our mandate is to review Guatemala's compliance with those rules. The fact that the Constitution of Guatemala mandates that the investigating authorities proceed in a way which is consistent with its international obligations, does not validate the actions actually carried out by those authorities if those actions violate Guatemala's commitments under the WTO. Whether Mexico chose not to pursue its rights under Guatemalan law is of no concern to us, as this would not affect its rights under the WTO Agreements. . . ."[359]

272. In *Guatemala – Cement II*, the Panel also stated, with respect to Guatemala's assertion that "in some cases Mexico has failed to notify the government of the investigated exporters in a timely fashion under Article 5.5"[360], that "[w]e are of the view that Mexico's actions regarding notifications is of no relevance to issues before us in this case, which requires us to review the actions of the Guatemalan authorities.[361]"[362]

(b) "notify the government"

(i) General

273. At its meeting of 29 October 1998, the Committee on Anti-Dumping Practices adopted a recommendation on the timing of notifications required under Article 5.5.[363]

(ii) "Oral" notification

274. In *Thailand – H-Beams*, the Panel, in a finding not reviewed by the Appellate Body, considered that a notification required under Article 5.5 can be made orally. The Panel stated:

> "Article 5.5 AD does not specify the form that the notification must take. The *Concise Oxford Dictionary* defines the term 'notify' as: 'inform or give notice to (a person)'; 'make known, announce or report (a thing)'. We consider that the form of the notification under Article 5.5 must be sufficient for the importing Member to 'inform' or 'make known' to the exporting Member certain facts. While a written notification might arguably best serve this goal and the promotion of transparency and certainty among Members, and might also provide a written record upon which an importing Member could rely in the event of a subsequent claim of inconsistency with Article 5.5 of the AD Agreement, the text of Article 5.5 does not expressly require that the notification be in writing.[364]"[365]

(iii) Content of notification

275. In *Thailand – H-Beams*, the Panel examined what must be notified under Article 5.5, as follows:

> "The text of Article 5.5 does not specify the contents of the notification. It provides: 'after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned'.[366] Because the text of the provision specifies that notification necessarily follows the receipt of a properly documented application, we consider that the fact of the receipt of a properly documented application would be

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354 Panel Report on *Guatemala – Cement II*, para. 8.82.
355 Panel Report on *Guatemala – Cement I*, para. 7.34.
356 Appellate Body Report on *Guatemala – Cement I*, para. 89.
357 WT/DSB/M/51, section 9(a).
358 Panel Report on *Guatemala – Cement II*, para. 8.83.
359 Panel Report on *Guatemala – Cement II*, para. 8.83.
360 Panel Report on *Guatemala – Cement II*, para. 8.83.
361 (*footnote original*) As for Guatemala's defences claiming acquiescence and estoppel, harmless error or lack of nullification or impairment of a benefit, these issues are addressed in sections VIII.B.5 and VIII.C.7.
362 Panel Report on *Guatemala – Cement II*, para. 8.83.
363 G/ADP/M/13, Section E, in particular, para. 44. The text of the recommendation can be found in G/ADP/5.
364 (*footnote original*) While there have been discussions in the Ad Hoc Group on the issue of the form of the notification (See G/ADP/AHG/R/4, para. 19 (Exhibit Thailand-61); G/ADP/AHG/R/5, paras. 18–19 (Exhibit Thailand-59); G/ADP/AHG/R/2, para. 5 (Exhibit Thailand-60)), there has been no recommendation adopted by the ADP Committee on this issue.
365 Panel Report on *Thailand – H-Beams*, para. 7.89.
366 (*footnote original*) While there have been discussions in the Ad Hoc Group on the elements that certain Members consider relevant in this context (G/ADP/AHG/R/4, para. 18 (Exhibit Thailand-61), G/ADP/AHG/R/5, para. 17 (Exhibit Thailand-59)) there has been no recommendation adopted by the ADP Committee on this issue.

an essential element of the contents of the notification."[367]

(c) "Harmless error" with respect to Article 5.5 violation/Rebuttal against nullification or impairment presumed from a violation of Article 5.5

276. In *Guatemala – Cement II*, Guatemala argued that the alleged violations of Articles 5.5, 12.1.1 and 6.1.3, had not affected the course of the investigation, and thus, (a) the alleged violations were not harmful according to the principle of harmless error, (b) Mexico "convalidated" the alleged violations by not objecting immediately after their occurrence, and (c) the alleged violations did not cause nullification or impairment of benefits accruing to Mexico under the *Anti-Dumping Agreement*. The Panel first responded to the argument on "harmless error", concluding that "the concept of 'harmless error' as presented by Guatemala" had not "attained the status of a general principle of public international law":

> "In our view, the GATT panel referred to by Guatemala in support of its position merely stated that it did not wish 'to exclude that the concept of harmless error could be applicable in dispute settlement proceedings under the Agreement.'[368] It therefore cannot be concluded that the GATT panel referred to 'recognized the principle of harmless error 'as alleged by Guatemala. We do not consider that the concept of 'harmless error' as presented by Guatemala has attained the status of a general principle of public international law. In any event, we consider that our first task in this dispute is to determine whether Guatemala has acted consistently with its obligations under the relevant provisions of the AD Agreement. To the extent that Mexico can demonstrate that Guatemala has not respected its obligations under the relevant provisions of that Agreement, we must next consider arguments raised by Guatemala in respect of the nullification or impairment of benefits accruing to Mexico thereunder. Thus, while arguments regarding the existence and extent of the possible harm suffered by Mexico may be relevant to the issue of nullification or impairment,[369] we do not consider that an argument of harmless error represents a defence in itself to an alleged infringement of a provision of the WTO Agreement."[370]

277. On the second argument put forward by Guatemala in the context of the alleged violations of Articles 5.5, 12.1.1 and 6.1.3, namely the lack of reaction from Mexico, the Panel found that "Mexico was under no obligation to object immediately to the violations it now alleges before the Panel":

> "Guatemala uses both the concepts of 'acquiescence' and 'estoppel' in support of this argument. We note that 'acquiescence' amounts to 'qualified silence', whereby silence in the face of events that call for a reaction of some sort may be interpreted as a presumed consent.[371] The concept of estoppel, also relied on by Guatemala in support of its argument, is akin to that of acquiescence. Estoppel is premised on the view that where one party has been induced to act in reliance on the assurances of another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is 'estopped', that is precluded.[372]
>
> Regarding both arguments of acquiescence and estoppel we note that Mexico was under no obligation to object immediately to the violations it now alleges before the Panel.[373] Mexico raised claims concerning Articles 5.5, 12.1.1 and 6.1.3 at an appropriate moment under the dispute settlement procedure envisaged by the AD Agreement and the DSU. Thus, Mexico cannot therefore be considered as having acquiesced to belated notification by Guatemala, to insufficiency in the public notice or to delay in providing the full text of the application, much less to have given 'assurances' to Guatemala that it would not later challenge these actions in WTO dispute settlement. Since Mexico raised its claims at an appropriate moment under the WTO dispute settlement procedures, Guatemala could not have reasonably relied upon Mexico's alleged lack of protest to conclude that Mexico would not bring a WTO complaint. In any event, Guatemala has not satisfied us that, had Mexico complained after the fact, but during the course of the investigation, Guatemala could or would have taken action to remedy the situation. Specifically, with respect to the delay in the Article 5.5 notification, Guatemala asserts that had Mexico objected to the notification delay in a timely manner, the Guatemalan authorities would have reinitiated the investigation after presenting Mexico with the notification under Article 5.5. We are of the view that this argument presented by Guatemala is highly speculative and note that the Panel has been established to rule on the WTO conformity of the actions by Guatemala and not on the WTO conformity of the actions Guatemala alleges it could have taken. In any event, Guatemala states at para. 217 of its first written submission that Mexico first raised the Article 5.5 issue on 6 June 1996, that is at a relatively early stage of the Ministry's investigation, and precedes the Ministry's preliminary affirmative determination. Nevertheless, Guatemala failed to take any steps to address the delayed Article 5.5 notification at that time. Based

[367] Panel Report on *Thailand – H-Beams*, para. 7.91.
[368] (*footnote original*) Panel Report on Brazil – EEC Milk, para. 271.
[369] (*footnote original*) Or in the event Article 22 is invoked, to the issues of compensation and/or suspension of equivalent concessions.
[370] Panel Report on *Guatemala – Cement II*, para. 8.22.
[371] (*footnote original*) V.D. Degan, *Sources of International Law*, Martinus Nijhoff Publishers, p. 348–349.
[372] (*footnote original*) Brownlie, Principles of International Law, Clarendon Press, p. 640–642.
[373] (*footnote original*) Regarding acquiescence we note that the precise scope and applicability of this concept is still a matter of debate, and it is clear that not any silence can be considered to constitute consent.

> on these considerations the Panel rejects Guatemala's defence that Mexico 'convalidated' the alleged violations of Articles 5.5, 6.1.3 and 12.1.1 of the AD Agreement."[374]

278. The Panel on *Guatemala – Cement II* then considered the third element of Guatemala's argument in the context of the alleged violations of Articles 5.5, 12.1.1 and 6.1.3, namely that no nullification or impairment resulted from the alleged violation of Article 5.5. The Panel found that Guatemala did not rebut the presumption of nullification or impairment under Article 3.8 of the *DSU*, stating:

> "There is no way to ascertain what Mexico might have done if it had received a timely notification. The extension of time for response to the questionnaire granted to Cruz Azul has no bearing on the fact that Mexico was not informed in time. Thus, we do not consider that Guatemala has rebutted the presumption of nullification or impairment with respect to violations of Article 5.5."[375]

279. The Panel also rejected Guatemala's argument "that the Panel should examine Guatemala's acts and decide whether the non-fulfilment of a procedural obligation should be overlooked on the grounds that the omission did not prejudice the rights of Mexico or [the Mexican producer on whose products anti-dumping duties had been imposed]":

> "We could find no basis for such a distinction in the DSU, as suggested by Guatemala between substantive and 'mere' procedural violations. There is no reason to regard violations of procedural obligations differently than obligation of a substantial nature. Compliance with the complete set of procedural rules relating to anti-dumping investigations, including those concerning notification and enhanced transparency, is required. This obligation to comply with all provisions, both procedural and substantive should not be taken lightly if one is not to devoid of all meaning the AD Agreement itself. As detailed in sections ... above we have found that Guatemala violated Articles 5.5, 6.1.3 and 12.1.1 of the AD Agreement by failing to timely notify Mexico of the decision to initiate an investigation, to timely provide Mexico and Cruz Azul a copy of the application, and to publish an adequate notice of initiation. We consider that a key function of the transparency requirements of the AD Agreement is to ensure that interested parties, including Members, are able to take whatever steps they deem appropriate to defend their interests. Where a required notification is not made in a timely fashion, or the application is not provided in time, or the public notice is inadequate the ability of the interested party to take such steps is vitiated. It is not for us to now speculate on what steps Mexico might have taken had it been timely notified or provided with the application, or had the public notice been adequate, and how Guatemala might have responded to those steps. Thus, while there is a possibility that the investigation would have proceeded in the same manner had Guatemala complied with its transparency obligations, we cannot state with certainty that the course of the investigation would not have been different."[376]

280. The Panel on *Guatemala – Cement I* also addressed the argument for the concept of "harmless error".[377] However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach a conclusion on the discussion of Article 5.5 by the Panel.[378] The Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.[379]

6. Article 5.7

281. In *Guatemala – Cement II*, with the understanding that Mexico argued that "the initiation of an investigation in the absence of sufficient evidence to justify initiation (contrary to Article 5.3) necessarily constitutes a violation of Article 5.7", the Panel held :

> "Article 5.7 requires the investigating authority to examine the evidence before it on dumping and injury simultaneously, rather than sequentially. We do not consider that the fulfilment of this requirement is conditioned in any way on the substantive nature of that evidence."[380]

282. The Panel on *Argentina – Poultry Anti-Dumping Duties* rejected the argument that evidence of dumping and injury must cover simultaneous periods. It was thus of the view that an argument which concerned the substantive nature of the evidence considered by the authorities in the decision whether or not to initiate an investigation, rather than the timing of the consideration itself, was "outside the scope of the obligation contained in Article 5.7".[381] The Panel considered that:

> "Article 5.7 imposes a procedural obligation on the investigating authority to examine the evidence before it of dumping and injury simultaneously, rather than sequentially, *inter alia* in the decision whether or not to initiate an investigation. We are of the view that Article 5.7 is not concerned with the substance of the decision to initiate an investigation, which is dealt with in Article 5.3 of the *AD Agreement*."[382]

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[374] Panel Report on *Guatemala – Cement II*, paras. 8.23–8.24.
[375] Panel Report on *Guatemala – Cement II*, para. 8.109.
[376] Panel Report on *Guatemala – Cement II*, para. 8.111. In support of this proposition, the Panel cited Panel Report on *Guatemala – Cement I*, para. 7.42.
[377] Panel Report on *Guatemala – Cement I*, paras. 7.42–7.43.
[378] Appellate Body Report on *Guatemala – Cement I*, para. 89.
[379] WT/DSB/M/51, section 9(a).
[380] Panel Report on *Guatemala – Cement II*, para. 8.67.
[381] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.119.
[382] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.118.

7. Article 5.8

(a) Rejection of an application to initiate an investigation

283. The Panel on *Mexico – Corn Syrup* noted that "Article 5.8 does not impose additional substantive obligations beyond those in Article 5.3 on the authority in connection with the initiation of an investigation. That is, if there is sufficient evidence to justify initiation under Article 5.3, there is no violation of Article 5.8 in not rejecting the application."[383]

284. In *Guatemala – Cement II*, the Panel addressed the question of applicability of Article 5.8 before the initiation of an investigation, in order to examine Mexico's claim that Guatemala violated Article 5.8 by not rejecting the application made by a Guatemalan producer and by not refraining from initiating the investigation due to the lack of sufficient evidence of dumping and threat of material injury to justify initiation. Citing the finding of the Panel on *Mexico – Corn Syrup* referenced in paragraph 285 below, Guatemala argued that Article 5.8 applies only after the initiation of an investigation. The Panel rejected this argument, and stated:

> "We note that Article 5.8 makes specific reference to the rejection of an application as soon as the authorities conclude that there is not sufficient evidence of dumping or injury to justify proceeding with the case. This language on rejection of an application seems to be in contrast with Guatemala's argument that Article 5.8 applies only after initiation. We are of the view that, if the drafters intended that Article 5.8 apply only after initiation, the reference to promptly terminating an investigation would have sufficed. By referring to the rejection of an application Article 5.8 addresses the situation where an application has been received but an investigation has not yet been initiated. That the text of Article 5.8 continues after the quoted section to describe situations in which an initiated investigation should be terminated, does not support Guatemala's argument that the whole of Article 5.8 applies only after the investigation has been initiated. On the contrary, the second sentence of Article 5.8, by specifying that 'there shall be immediate termination in cases' confirms that the first sentence of Article 5.8 expressly contemplates its application pre-initiation by including a reference to the rejection of an application. Otherwise, mere reference to the termination of an investigation, as in the second sentence of Article 5.8, would have been all that was needed in the first sentence to make it clear that it applied once an investigation was underway."[384]

285. With respect to the finding of the Panel on *Mexico – Corn Syrup* cited by Guatemala, the Panel stated:

> "In our view, the findings in *Mexico – HFCS* on this issue do not support the interpretation that Article 5.8 applies only after an investigation has been initiated.
>
> . . .
>
> The panel in *Mexico – HFCS* determined that there had not been a violation of Article 5.3 as there was sufficient evidence to justify initiation. After having made that determination the *Mexico – HFCS* panel proceeded to find that given that there was sufficient evidence to justify initiation under Article 5.3, there was no possible violation of Article 5.8. This in no way detracts from our position that Article 5.8 applies pre-initiation. The Panel in *Mexico – HFCS* would not have even considered the question of whether rejection of the application was warranted if it had not considered that Article 5.8 applies before initiation."[385]

286. On the issue of whether Article 5.8 applied only after the initiation of an investigation, the Panel on *Guatemala – Cement I* reached the same conclusion as the Panel on *Guatemala – Cement II*.[386] However, the Appellate Body found that the dispute was not properly before the Panel and did not reach any conclusion on the interpretation of Article 5.8 by the Panel[387], and accordingly, the Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.[388]

287. The Panel on *US – Lumber V* stated that Article 5.8 does not require an investigating authority, after initation, to continue to assess the sufficiency of the evidence *in the application* and to terminate the investigation on the grounds that other information undermines the sufficiency of that evidence:

> "We can however find no basis to conclude that Article 5.8 imposes upon an investigating authority a continuing obligation after initiation to continue to assess the sufficiency of the evidence *in the application* and to terminate the investigation on the grounds that other information undermines the sufficiency of that evidence. Once an investigation has been initiated on the basis of sufficient evidence of dumping, the application has served its purpose. Logically, the continuing obligation to terminate an investigation where an investigating authority is satisfied that there is not sufficient evidence to justify proceeding must be based on an assessment of the overall state of the evidence deduced before it in the investigation, not on an assessment of the continuing sufficiency of the information in the application. We are of the view that it could not have been the intention of the drafters of Article 5.8 that its interpretation could result in that an investigation could have been initiated on the basis of sufficient evidence, but that the very same investigation had to be terminated if additional evidence was made available by the

[383] Panel Report on *Mexico – Corn Syrup*, para. 7.99.
[384] Panel Report on *Guatemala – Cement II*, para. 8.72.
[385] Panel Report on *Guatemala – Cement II*, paras. 8.73–8.74.
[386] Panel Report on *Guatemala – Cement I*, para. 7.59.
[387] Appellate Body Report on *Guatemala – Cement I*, para. 89.
[388] WT/DSB/M/51, section 9(a).

respondents at a later stage, while the evidence being gathered during the course of the investigation, indicates dumping".[389]

(b) "cases"

288. The Panel on *US – DRAMS* was called upon to decide whether the scope of Article 5.8, as defined by the word "cases" in the second sentence, includes both anti-dumping investigations and Article 9.3 duty assessment procedures. The Panel held that it did not see "how the sufficiency of evidence concerning a subsequent duty assessment could be relevant to the treatment of an 'application' or the conduct of an 'investigation'":

> "First, the term 'case' is used in the first sentence of Article 5.8. The first sentence is concerned explicitly and exclusively with the circumstances in which an 'application' ('under [Article 5,] paragraph 1') shall be rejected and an 'investigation' terminated as a result of insufficient evidence to justify proceeding with the 'case'. As the treatment of the 'application' and conduct of the 'investigation' is dependent on the sufficiency of evidence concerning the 'case', we consider that the term 'case' in the first sentence must at least encompass the notions of 'application' and 'investigation'. In our view, it would [be] meaningless for the term 'case' in the first sentence to also encompass the concept of an Article 9.3 duty assessment procedure, since we fail to see how the sufficiency of evidence concerning a subsequent duty assessment could be relevant to the treatment of an 'application' or the conduct of an 'investigation', both of which precede the Article 9.3 duty assessment procedure. As we consider that the term 'case' in the first sentence of Article 5.8 does not include the concept of 'duty assessment', we see no reason to adopt a different approach to the term 'cases' in the second sentence of that provision."[390]

(c) "*de minimis*" test

289. Having determined that that term "cases" in Article 5.8 does not encompass the concept of an Article 9.3 duty assessment procedure[391], as referenced in paragraph 288 above, the Panel on *US – DRAMS* then concluded that "Article 5.8, second sentence, does not require Members to apply a *de minimis* test in Article 9.3 duty assessment procedures".[392] The Panel described the function of the Article 5.8 *de minimis* test as "to determine whether or not an exporter is subject to an anti-dumping order" and clearly distinguished this from any *de minimis* test applied under Article 9.3 duty assessment procedures.[393]

290. For further discussion of this issue by the Panel on *US – DRAMS*, see also paragraphs 461–462 below.

(d) Negligible import volumes

291. On 27 November 2002, the Committee on Anti-Dumping Practices adopted the "Recommendation concerning the time-period to be considered in making a determination of negligible import volumes for purposes of Article 5.8 of the Agreement".[394] In this Recommendation, the Committee on Anti-Dumping Practices notes that Article 5.8 of the *Anti-Dumping Agreement*, which provides that there shall be immediate termination in cases where the authorities determine that the volume of dumped imports, actual or potential, is negligible, does define the volume of dumped imports from a particular country that shall normally be regarded as negligible but does not however establish a period of time over which imports are to be counted in determining whether the volume of imports is negligible. The Committee therefore considered that guidance regarding an appropriate time-period for that determination would be useful. Accordingly, the Committee on Anti-Dumping Practices recommends:

> ". . . with respect to original investigations to determine the existence of dumping and consequent injury, whether the volume of dumped imports, actual or potential, from a particular country is regarded as negligible shall be determined with reference to the volume of dumped imports from that country during:
>
> (a) the period of data collection for the dumping investigation; or
>
> (b) the most recent 12 consecutive months prior to initiation for which data are available; or
>
> (c) the most recent 12 consecutive months prior to the date on which the application was filed, for which data are available, provided that the lapse of time between the filing of the application and the initiation of the investigation is no longer than 90 days.
>
> Not later than 60 days after the approval of this recommendation Members shall notify to the Committee on Anti-Dumping Practices which of the time-periods set out above, they will use in all investigations thereafter. If in any investigation the chosen methodology is not utilized, one of the two other methodologies shall be adopted, and an explanation shall be made in the public notice or separate public report of that investigation. Members which adopt the time-period mentioned in item (c) above shall also notify which of the other two time-periods they shall use in any case in which the lapse

[389] Panel Report on *US – Softwood Lumber V*, para. 7.137.
[390] Panel Report on *US – DRAMS*, para. 6.87.
[391] Panel Report on *US – DRAMS*, para. 6.87.
[392] Panel Report on *US – DRAMS*, para. 6.89.
[393] Panel Report on *US – DRAMS*, para. 6.90.
[394] G/ADP/10.

> of time between the filing of the application and the initiation of the investigation is longer than 90 days, unless a Member's domestic law prohibits such a lapse."[395]

(e) Relationship with other paragraphs of Article 5

292. With respect to the relationship between Articles 5.3 and 5.8, see paragraph 283 above.

8. Relationship with other Articles

(a) Article 1

293. The *Guatemala – Cement II* Panel referred to footnote 1 to Article 1 in interpreting Article 5.5. See paragraph 269 above.

294. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 5. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, among them Article 1, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[396] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

(b) Article 2

295. The Panel on *Guatemala – Cement II* discussed the relationship between Articles 2, 5.2 and 5.3 in order to clarify the requirements under Article 5.3. See paragraph 248 above.

(c) Article 3

296. The relationship between Article 5.2(iv) and Articles 3.2 and 3.4 was discussed in *Mexico – Corn Syrup*. See paragraph 238 above.

297. In *Thailand – H-Beams*, the Appellate Body referred to Articles 3.7, 5.2 and 5.3 in interpreting Article 3.1. See paragraph 112 above.

298. Article 3 was discussed in interpreting which elements of "injury" have to be supported by sufficient evidence under Article 5.3 in *Guatemala – Cement II*. See paragraphs 253–254 above.

(d) Article 6

299. In *Guatemala – Cement II*, the Panel referred to Article 5.10 in examining Mexico's claim under Article 6.1.3. See paragraph 325 below.

(e) Article 9

300. Also, in *US – DRAMS*, the Panel discussed the relationship between Articles 5.8 and 9.3. See paragraphs 288–289 above, and 461–462 below.

301. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 5. The Panel then determined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, among them Article 9, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[397] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

(f) Article 10

302. In *US – Hot-Rolled Steel*, the Panel interpreted the term "sufficient evidence" in Article 10.7 by reference to Article 5.3. See paragraph 483 below.

(g) Article 12

303. The Panel on *Guatemala – Cement II* touched on the relationship between Articles 5.3 and 12.1 in addressing a claim under Article 12.1. See paragraph 548 below.

304. In *Thailand – H-Beams*, the Panel examined Poland's argument that Article 12 of the *Anti-Dumping Agreement* is "useful context" in connection with its Article 5.5 claim. The Panel responded as follows:

> "We note that both Articles 5.5 and 12.1 contain a requirement to notify the government of the exporting Member concerned of certain events connected with the initiation of an investigation at a certain point in time. However, it is clear that the requirements as to the timing, form and content of these notifications is different. Article 5.5 makes it clear that the notification referred to in that provision must take place 'after receipt of a properly documented application and before proceeding to initiate an investigation'. By contrast, Article 12.1 of the AD Agreement concerns notification of initiation, as it requires notification to 'the Member or Members the products of which are subject to such investigation . . .', '[w]hen the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5 . . .' and requires 'public notice' of initiation. As Article 12.1 provides that such 'public notice' must 'contain, or otherwise make available through a separate report, adequate information. . . .',

[395] G/ADP/10.
[396] Panel Report on *Guatemala – Cement II*, para. 8.296.
[397] Panel Report on *Guatemala – Cement II*, para. 8.296.

the notice must presumably be in writing. Furthermore, Article 12 involves the notification of a decision to initiate, which a Member may not yet have taken at the time of an Article 5.5 notification. That Article 12 specifically enumerates certain requirements with respect to the contents and form of the notice it requires, and Article 5.5 does not, strongly suggests to us that the requirements of Article 12 do not apply to notification under Article 5.5, and in no way changes our interpretation of the requirements concerning the timing, form and content of the notification to be given under Article 5.5."[398]

(h) Article 17

305. With respect to the application of Article 17 in the examination required under Article 5.3, see paragraphs 256–259 above.

(i) Article 18

306. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 5. The Panel then found that Mexico's claims under other articles of the *Anti-Dumping Agreement*, among them Article 18, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[399] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

9. Relationship with other WTO Agreements

(a) Article VI of the GATT 1994

307. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 5. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement* and under Article VI of *GATT 1994*, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[400] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

VI. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6
Evidence

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.[15] Due consideration should be given to any request for an extension of the 30–day period and, upon cause shown, such an extension should be granted whenever practicable.

(*footnote original*) [15] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters[16] and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

(*footnote original*) [16] It being understood that, where the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member or to the relevant trade association.

6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

[398] Panel Report on *Thailand – H-Beams*, para. 7.93.
[399] Panel Report on *Guatemala – Cement II*, para. 8.296.
[400] Panel Report on *Guatemala – Cement II*, para. 8.296.

6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.

6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[17]

(*footnote original*) [17] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[18]

(*footnote original*) [18] Members agree that requests for confidentiality should not be arbitrarily rejected.

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I[401] shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II[402] shall be observed in the application of this paragraph.

6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be

[401] See Section XIX.
[402] See Section XX.

considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

6.11 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;

(ii) the government of the exporting Member; and

(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

6.13 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

1. Article 6.1

(a) General

(i) Failure to indicate the information required

308. In *Argentina – Ceramic Tiles*, the Panel, when examining whether the investigating authorities were entitled to resort to facts available pursuant to Article 6.8, concluded that an investigating authority could not fault an interested party for not providing information it was not clearly requested to submit:

> "Article 6.1 of the AD Agreement thus requires that interested parties be given notice of the information which the authorities require. In our view, it follows that, independently of the purpose for which the information or documentation is requested, an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit."[403]

(ii) Failure to set time-limits for the presentation of arguments and evidence

309. In *Guatemala – Cement II*, Mexico argued that Guatemala's investigating authority had violated Article 6.1 by failing to set a time-limit for the presentation of arguments and evidence during the final stage of the investigation while it had fixed a time-limit for the submission of arguments and evidence for the early part of the investigation. The Panel rejected this argument:

> "In our view, Article 6.1 of the AD Agreement does not require investigating authorities to set time-limits for the presentation of arguments and evidence during the final stage of the investigation. The only time-limit provided for in Article 6.1 is that contained in Article 6.1.1, whereby exporters shall be given at least 30 days for replying to questionnaires. . . .
>
> Article 6.1 requires investigating authorities to provide interested parties 'ample opportunity' to present in writing certain evidence. Article 6.1 does not explicitly require an investigating authority to set time limits for the submission of arguments and evidence during the final stage of an investigation.[404] Article 6.1 simply requires that interested parties shall have 'ample' opportunity to present evidence and 'full' opportunity to defend their interests. Interested parties may have such opportunity without the investigating authority setting time limits for the submission of evidence. In other words, these provisions impose substantive obligations, without requiring those obligations to be met through any particular form (except as provided for in subparagraphs 1 through 3 of Article 6.1). What counts is whether, in practice, sufficient opportunity was provided, not whether time limits for the submission of evidence were set. Thus, even if the Ministry had failed to set time-limits for the submission of arguments and evidence during the final stage of the investigation, this would not *ipso facto* constitute a violation of Article 6.1 of the AD Agreement."[405]

[403] Panel Report on *Argentina – Ceramic Tiles*, para. 6.54.

[404] (*footnote original*) This does not, of course, preclude an authority from establishing such limits, so long as the basic requirements (such as "ample opportunity", or 30 days in respect of questionnaire replies) are respected.

[405] Panel Report on *Guatemala – Cement II*, paras. 8.118–8.119.

310. The Panel further rejected Mexico's argument that "the Ministry's public notice of initiation granted interested parties 30 days in which to defend their interests, whereas no such time-limit was included in the public notice concerning the imposition of a provisional measure":[406]

> "We would note that Article 12.1.1(vi) explicitly provides that a public notice of the initiation of an investigation shall include adequate information on the 'time-limits allowed to interested parties for making their views known'. No such obligation is included in Article 12.2.1, concerning the contents of public notices on the imposition of provisional measures. We consider that Article 12.2.1 constitutes useful context when examining Mexico's claim under Article 6.1. In particular, the fact that there is no requirement for investigating authorities to include time-limits for the submission of evidence in the public notice of their preliminary determinations confirms the conclusion set forth in the preceding paragraph."[407]

(iii) Failure to provide information concerning the extension of the period of investigation

311. In *Guatemala – Cement II*, Mexico argued that because Guatemala's authority extended the period of investigation during the investigation procedure, and did not respond to requests for information from a Mexican producer concerning the extension, the Mexican producer was unable to defend its interests in respect of the extension of the period of investigation contrary to Articles 6.1 and 6.2. The Panel rejected this argument, stating:

> "[W]e consider that Mexico's interpretation of that provision is too expansive. The plain language of Article 6.1 merely requires that interested parties be given (1) notice of the information which the authorities require, and (2) ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation. First, we note that Cruz Azul [the Mexican producer] was given two weeks in which to present data concerning the extended POI. Cruz Azul therefore had two weeks' notice of the information required by the Ministry in respect of the extended POI.[408] Second, Mexico has made no claim to the effect that Cruz Azul was prevented from adducing written 'evidence' concerning the extended POI. Whereas Mexico claims that Cruz Azul was denied any opportunity to comment on the extension of the POI *per se*, Article 6.1 does not explicitly require the provision of opportunities for interested parties to comment on decisions taken by the investigating authority in respect of the information it requires."[409]

(iv) Failure to allow interested parties access to information

312. In *Guatemala – Cement II*, the Panel examined Mexico's argument that Guatemala's authority acted inconsistently with Articles 6.1, 6.2 and 6.4 by failing to allow a Mexican producer "proper access" to the information submitted by a Guatemalan domestic producer at the public hearing it held. Noting that it had found a violation of Articles 6.1.2 and 6.4 on the same factual foundation, as referenced in paragraphs 321–322 below, the Panel stated:

> "Since we consider [Articles 6.1.2 and 6.4] to be the specific provisions of the AD Agreement governing an interested party's right to information submitted by another interested party, we do not consider it necessary to address Mexico's claims under Articles 6.1 and 6.2. These provisions do not specifically address an interested party's right of access to information submitted by another interested party."[410]

313. In *Guatemala – Cement II*, the Panel rejected Mexico's claim that Guatemala's authority had acted inconsistently with Articles 6.1, 6.2 and 6.9 by changing its injury determination from a preliminary determination of threat of material injury to a final determination of actual material injury during the course of the investigation, without informing a Mexican producer of that change, and without giving the producer a full and ample opportunity to defend itself. Referring to Article 12.2, the Panel first made the following general observation:

> "We do not consider that an investigating authority need inform interested parties in advance when, having issued a preliminary affirmative determination on the basis of threat of material injury, it subsequently makes a final determination of actual material injury. No provision of the AD Agreement requires an investigating authority to inform interested parties, during the course of the investigation, that it has changed the legal basis for its injury determination. Investigating authorities are instead required to forward to interested parties a public notice, or a separate report, setting forth 'in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities', consistent with Article 12.2 of the AD Agreement. If decisions on issues of law had to be disclosed to interested parties during the course of the

[406] Panel Report on *Guatemala – Cement II*, para. 8.120.
[407] Panel Report on *Guatemala – Cement II*, para. 8.120.
[408] (*footnote original*) We note that Mexico has not alleged that a failure to provide Cruz Azul with at least 30 days to respond to the Ministry's supplementary questionnaire (which required the provision of data for an additional six-month POI) constitutes a violation of Article 6.1.1 of the AD Agreement. That being the case, we shall refrain from making any findings on this matter.
[409] Panel Report on *Guatemala – Cement II*, para. 8.178.
[410] Panel Report on *Guatemala – Cement II*, para. 8.216.

investigation, there would be little need for interested parties to receive the notice provided for in Article 12.2. Furthermore, to the extent that there is any difference between the preliminary determination of injury and the final determination of injury, that change will be apparent to interested parties comparing the public notice of the investigating authority's preliminary determination with the public notice of its final determination."[411]

314. The Panel on *Guatemala – Cement II* then went on to draw a distinction, in regard to Article 6.1, between "information", "evidence" and "essential facts" on the one hand and "legal determinations" on the other:

"We note that Articles 6.1 and 6.9 impose certain obligations on investigating authorities in respect of 'information', 'evidence' and 'essential facts'. However, Mexico's claim does not concern interested parties' right to have access to certain factual information during the course of an investigation. Mexico's claim concerns interested parties' alleged right to be informed of an investigating authority's legal determinations during the course of an investigation."[412]

(b) Article 6.1.1

(i) "questionnaires"

315. In *Egypt – Steel Rebar*, the Panel addressed the question of whether "questionnaires" as referred to in Article 6.1.1 are only the original questionnaires in an investigation, or whether this term would also include all other requests for information, or certain types of requests, including requests in addition and subsequent to original questionnaires.[413] The Panel, which noted that the term "questionnaire" was not defined anywhere in the *Anti-Dumping Agreement*, considered that the references in Annex I, paragraphs 6 and 7, to this term provide strong contextual support for its interpretation in Article 6.1.1 as referring only to the original questionnaires sent to interested parties at the outset of an investigation:

"The term 'questionnaire' as used in Article 6.1.1 is not defined in the AD Agreement, and in fact, this term only appears in Article 6.1.1, and in paragraphs 6 and 7 of Annex I. In our view, the references in Annex I, paragraphs 6 and 7 provide strong contextual support for interpreting the term 'questionnaires' in Article 6.1.1 as referring only to the original questionnaires sent to interested parties at the outset of an investigation. In particular, both of these provisions refer to 'the questionnaire' in the singular, implying that there is only one document that constitutes a 'questionnaire' in a dumping investigation, namely the initial questionnaire, at least as far as the foreign companies (producers and exporters) that might be visited are concerned. Paragraph 6 refers to visits by an investigating authority to the territory of an exporting Member 'to explain *the questionnaire*'. Paragraph 7 provides that 'on-the-spot investigation . . . should be carried out after the response to *the questionnaire* has been received . . .'

If any requests for information other than the initial questionnaire were to be considered 'questionnaires' in the sense of Article 6.1.1, a number of operational and logistical problems would arise in respect of other obligations under the AD Agreement. First, there is no basis in the AD Agreement on which to determine that some, but not all, information requests other than the initial questionnaire also would constitute 'questionnaires'. Thus, even if an investigating authority was not obligated to provide the minimum time-period in Article 6.1.1 in respect of every request for information, it would not be able to determine from the Agreement which of its requests were and were not subject to that time-period. On the other hand, if all requests for information in an investigation were 'questionnaires' in the sense of Article 6.1.1, this could make it impossible for an investigation to be completed within the maximum one year (or exceptionally, 18 months) allowed by the AD Agreement in Article 5.10. Moreover, a 30– or 37–day deadline for requests for information made in the context of an on-the-spot verification – i.e., the 'obtain[ing of] further details' explicitly referred to in Article 6.7 to as one of the purposes of such verifications – obviously would be completely illogical as well as unworkable. Finally, such an interpretation would render superfluous the requirement in Annex II, paragraph 6 to allow a 'reasonable period . . .' for the provision of any explanations concerning identified deficiencies in submitted information."[414]

316. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered that Article 6.1.1 does not, however, address what sort of questionnaires are to be sent to exporters or foreign producers. According to the Panel, the first sentence of Article 6.1.1 means "that if questionnaires are sent to exporters or foreign producers, they shall be given at least 30 days for reply", and, accordingly, "the failure to send a particular questionnaire to exporters or foreign producers does not constitute a violation of Article 6.1.1."[415]

(ii) Deadlines

317. In *US – Hot-Rolled Steel*, the United States authorities had rejected certain information provided by two Japanese exporters which was submitted beyond the

[411] Panel Report on *Guatemala – Cement II*, para. 8.237.
[412] Panel Report on *Guatemala – Cement II*, para. 8.238. In regard to the Panel's finding regarding the claims under Articles 6.2 and 6.9, see the excerpts referenced in paras. 314, 336 and 432 of this Chapter.
[413] Panel Report on *Egypt – Steel Rebar*, para. 7.275.
[414] Panel Report on *Egypt – Steel Rebar*, paras. 7.276–7.277.
[415] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.145.

deadlines for responses to the questionnaires and thus applied "facts available" in the calculation of the dumping margins. The United States interpreted Article 6.8[416] as permitting investigating authorities to rely upon reasonable, pre-established deadlines for the submission of data and argued that such an interpretation is supported by Article 6.1.1. The Appellate Body agreed with the Panel that "in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines".[417] It further considered that those deadlines are "*not* necessarily absolute and immutable":

> "We observe that Article 6.1.1 does not explicitly use the word 'deadlines'. However, the *first* sentence of Article 6.1.1 clearly contemplates that investigating authorities may impose appropriate time-limits on interested parties for responses to questionnaires. That first sentence also prescribes an absolute minimum of 30 days for the initial response to a questionnaire. Article 6.1.1, therefore, recognizes that it is fully consistent with the *Anti-Dumping Agreement* for investigating authorities to impose time-limits for the submission of questionnaire responses. Investigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination. Indeed, in the absence of time-limits, authorities would effectively cede control of investigations to the interested parties, and could find themselves unable to complete their investigations within the time-limits mandated under the *Anti-Dumping Agreement*. We note, in that respect, that Article 5.10 of the *Anti-Dumping Agreement* stipulates that anti-dumping investigations shall normally be completed within one year, and in any event in no longer than 18 months, after initiation. Furthermore, Article 6.14 provides generally that the procedures set out in Article 6 'are not intended to prevent the authorities of a Member from proceeding *expeditiously*'. (emphasis added) We, therefore, agree with the Panel that 'in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines.'[418]
>
> While the United States stresses the significance of the *first* sentence of Article 6.1.1, we believe that importance must also be attached to the *second* sentence of that provision. According to the express wording of the second sentence of Article 6.1.1, investigating authorities must extend the time-limit for responses to questionnaires 'upon *cause shown* ', where granting such an extension is '*practicable* '. (emphasis added) This second sentence, therefore, indicates that the time-limits imposed by investigating authorities for responses to questionnaires are *not* necessarily absolute and immutable."[419]

318. The Panel on *US – Corrosion-Resistant Steel Sunset Review* stated that "the right of interested parties to submit information in a sunset review cannot be unlimited. One of the important limitations that can legitimately be imposed on that right is deadlines for the submission of information"[420]. The Panel considered that by virtue of the cross-reference in Article 11.4, the requirements of Article 6.1 and 6.2 also applied in the case of sunset reviews.[421] According to the Panel, in a sunset review as well, "there must be a balance struck between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account".[422]

319. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* also considered that Articles 6.1 and 6.2 do not provide for indefinite rights so as to enable respondents to submit relevant evidence, attend hearings, or participate in the inquiry as and when they choose:

> "Therefore, the 'ample' and 'full' opportunities guaranteed by Articles 6.1 and 6.2, respectively, cannot extend indefinitely and must, at some point, legitimately cease to exist. This point must be determined by reference to the right of investigating authorities to rely on deadlines in the conduct of their investigations and reviews. Where the continued granting of opportunities to present evidence and attend hearings would impinge on an investigating authority's ability to 'control the conduct' of its inquiry and to 'carry out the multiple steps' required to reach a timely completion of the sunset review, a respondent will have reached the limit of the 'ample' and 'full' opportunities provided for in Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*."[423]

320. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* was of the view that the right to present evidence and request a hearing cannot be said to have been "denied" to a respondent that is given an

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[416] See paras. 374–425 of this Chapter.

[417] Panel Report on *US – Hot-Rolled Steel*, para. 7.54. Appellate Body Report, para. 73.

[418] (*footnote original*) Panel Report, para. 7.54.

[419] Appellate Body Report on *US – Hot-Rolled Steel*, paras. 73–74.

[420] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.258.

[421] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.254–7.255.

[422] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.258. On appeal, the Appellate Body agreed that claims under Article 6 may be made in relation to sunset review determinations on the basis of the cross-reference to Article 6 found in Article 11.4. Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 152.

[423] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 237. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* thus considered that disregarding evidence presented by a respondent in a sunset review because it is "incomplete" is incompatible with the respondent's right under Article 6.1 to present evidence that it considers relevant in respect of the sunset review. As the respondent will also be denied any opportunity to confront parties with adverse interests in a hearing, this respondent is denied its rights, pursuant to Article 6.2, to the "full opportunity for the defence of its interest". See Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 246.

opportunity to submit an initial response to the notice of initiation simply because it must do so by a deadline that is conceded to be reasonable:

> "We do not see it as an unreasonable burden on respondents to require them to file a timely submission in order to preserve their rights for the remainder of the sunset review. Indeed, even an incomplete submission will serve to preserve those rights. Accordingly, we are of the view that, if a respondent decides not to undertake the necessary initial steps to avail itself of the 'ample' and 'full' opportunities available for the defence of its interests, the fault lies with the respondent, and not with the deemed waiver provision."[424]

(c) Article 6.1.2

(i) "evidence presented . . . by one party shall be made available promptly to other interested parties"

321. In *Guatemala – Cement II*, Mexico claimed that Guatemala's authority violated Articles 6.1.2, 6.2 and 6.4 by (a) refusing a Mexican producer access to the file at a certain date during the investigation, and (b) failing to promptly provide the producer with a copy of a submission made by the applicant. In examining this claim, the Panel juxtaposed the notion of "access to the file" on the one hand and, on the other hand, the requirements that evidence presented by one interested party be "made available promptly" and that parties shall have "timely opportunities" to see all relevant information:

> "Article 6.1.2 of the AD Agreement provides that evidence presented by one interested party shall be 'made available promptly' to other interested parties. Article 6.4 provides that an interested party shall have 'timely opportunities' to see all information that is relevant to the presentation of its case. On their face, neither Article 6.1.2 nor Article 6.4 necessarily require access to the file. For example, if an investigating authority required each interested party to serve its submissions on all other interested parties, or if the investigating authority itself undertook to provide copies of each interested party's submission to other interested parties, there may be no need for interested parties to have access to the file. If, however, there is no service of evidence by interested parties, or no provision of copies by the investigating authority, access to the file may be the only practical means by which evidence presented by one interested party could be 'made available promptly' to other interested parties (consistent with Article 6.1.2), or by which interested parties could have 'timely opportunities' to see information relevant to the presentation of their cases (consistent with Article 6.4). Assuming access to the file is the only practical means of complying with Articles 6.1.2 and 6.4, access to the file need not necessarily be unlimited. Nor need the file be made available on demand. Provided access to the file is regular and routine, we consider that the requirements of Articles 6.1.2 and 6.4 would be satisfied."[425]

322. The Panel on *Guatemala – Cement II* then stated that "[i]n principle, . . . a 20–day delay is inconsistent with . . . Article 6.1.2 obligation [of Guatemala's authority] to make [the subject] submission available to [other interested parties] 'promptly'."[426]

(ii) "interested parties participating in the investigation"

323. The Panel on *Argentina – Poultry Anti-Dumping Duties* underlined that Article 6.1.2 does not refer to "interested parties" but to "interested parties participating in the investigation". It thus considered that had the drafters intended to extend the obligation imposed by Article 6.1.2 to all interested parties as defined in Article 6.11 of the *AD Agreement*, they would not have included the term "participating". According to the Panel the term "participating" suggests that, a party must undertake some action. In the view of the Panel, "the mere knowledge by an interested party of an ongoing investigation does not make that party an interested party 'participating in the investigation' within the meaning of Article 6.1.2 unless it actively takes part in the investigation".[427] According to the Panel, an investigating authority is not required to promptly make evidence presented in writing by other interested parties available to exporters which were not even aware of the investigation such that they could participate in it.[428]

(iii) "subject to the requirement to protect confidential information"

324. With respect to the claim by Mexico that the failure to make a submission available to a Mexican producer was inconsistent with Article 6.1.2, the Panel on *Guatemala – Cement II* rejected Guatemala's argument that the failure was justified because the submission contained confidential information:

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[424] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 252.

[425] Panel Report on *Guatemala – Cement II*, para. 8.133.

[426] Panel Report on *Guatemala – Cement II*, para. 8.142.

[427] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.153.

[428] In a footnote, the Panel on *Argentina – Poultry Anti-Dumping Duties* expressed the view that "a violation of Article 12.1 does not automatically entail a violation of Article 6.1.2. The fact that interested parties were not participating in the investigation because they were not notified of the initiation of the investigation does not change the fact that the beneficiaries of the obligations in Articles 12.1 and 6.1.2 are different. We consider that the Brazilian exporters were not aware of the investigation because they had not been notified in accordance with Article 12.1 of the *AD Agreement*." Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.153, fn. 128.

"In this regard, we note that the obligation in Article 6.1.2 is qualified by the words '[s]ubject to the requirement to protect confidential information'. In principle, therefore, evidence presented by one interested party need not be made available 'promptly' to other interested parties if it is 'confidential'. However, insofar as confidentiality is concerned, Article 6.1.2 must be read in the context of Article 6.5, which governs the treatment of confidential information. We examine Article 6.5 in detail . . . below. We have noted that Article 6.5 reserves special treatment for 'confidential' information only 'upon good cause shown', and we have determined that the requisite 'good cause' must be shown by the interested party which submitted the information at issue. Guatemala has not demonstrated, or even argued, that Cementos Progreso [the applicant] requested confidential treatment for its . . . submission, or that 'good cause' for confidential treatment was otherwise shown.[429] The Article 6.1.2 proviso regarding the 'requirement to protect confidential information', when read in the context of Article 6.5, cannot be interpreted to allow an investigating authority to delay making available evidence submitted by one interested party to another interested party for 20 days simply because of the possibility – which is unsubstantiated[430] by any request for confidential treatment from the party submitting the evidence – that the evidence contains confidential information. We do not believe that the specific requirement of Article 6.1.2 may be circumvented simply by an investigating authority determining that there is a possibility that the evidence at issue contains confidential information. Such an interpretation could undermine the purpose of Article 6.1.2, since in principle there is a possibility that any evidence could contain confidential information (and therefore not be 'made available promptly' to interested parties). Accordingly, we find that the Ministry violated Article 6.1.2 of the AD Agreement by failing to make Cementos Progreso's 19 December 1996 submission available to Cruz Azul until 8 January 1997."[431]

(d) Article 6.1.3

325. In *Guatemala – Cement II*, the Panel found the communication of Guatemala of the full text of the application at the earliest 18 days after initiation of the investigation to be inconsistent with Article 6.1.3. The Panel based its findings under Article 6.1.3 on the interpretation of the phrase that the text of the application be provided "as soon as an investigation has been initiated":

"We note that Article 6.1.3 does not specify the number of days within which the text of the application shall be provided. What it does specify is that the text of the application be provided 'as soon as' the investigation has been initiated. In this regard, the term 'as soon as' conveys a sense of substantial urgency. In fact, the terms 'immediately' and 'as soon as' are considered to be interchangeable. We do not consider that providing the text of the application 24 or even 18 days after the date of initiation fulfils the requirement of Article 6.1.3 that the text be provided 'as soon as an investigation has been initiated.'

We further consider that the timeliness of the provision of the text of the application should be evaluated in the context of its purpose and function. Timely access to the application is important for the exporters to enable preparation of the arguments in defence of their interests before the investigating authorities. Moreover, once the investigation has been initiated the timetable of the investigation commences and the timing for many events in the proceeding are counted from initiation including the 12 or 18 months total for completion of the investigation provide for in Article 5.10. Since deadlines in the timetable of the investigation are counted from the date of initiation it is critical that the investigating authority provide the text of the application 'as soon as an investigation has been initiated', for the exporter to be able to devise a strategy to defend the allegations it is being confronted with. Also, Article 7.3 of the AD Agreement allows a Member to impose provisional measures as early as sixty days after the date of initiation of an investigation. Access to the text of the application is crucial for the exporter to prepare its defence, and even more so if the authorities are likely to consider applying a provisional measure which may come as early as 60 days after initiation.[432]"[433]

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[429] (*footnote original*) Even if Cementos Progreso had requested confidential treatment, the Ministry should (consistent with 6.5.1) have required it to furnish a non-confidential version thereof which could have been made available to Cruz Azul "promptly", or to provide "a statement of the reasons why [non-confidential] summarization is not possible".

[430] (*footnote original*) The Cementos Progreso submission at issue was made at a public hearing on 19 December 1996. Guatemala argues that, although the Ministry authorized parties to make submissions in writing, the Ministry had not specified whether such written submissions could contain confidential information or not. According to Guatemala, this justified the Ministry in assuming that the Cementos Progreso submission may contain confidential information. We are not at all convinced by this argument. The instructions issued by the Ministry concerning the public hearing state that "[t]he hearing is being organized for the purpose of receiving the final arguments of the parties, which may submit *a written version thereof*" (emphasis supplied). Thus, any written submission was simply to be a written version of arguments presented orally. Arguments made by a party at a public hearing will presumably not contain confidential information. Similarly, therefore, written versions of arguments presented orally will also not contain information. Thus, to the extent that Cementos Progreso would not have included confidential information in its oral presentation, similarly its written version of that oral presentation also would not have included confidential information. In these circumstances, we fail to see how Cementos Progreso's written submission – which, consistent with the Ministry's instructions, was to be a written version of its oral presentation – could have contained confidential information.

[431] Panel Report on *Guatemala – Cement II*, para. 8.143.

[432] (*footnote original*) On a similar issue the *Korea-Dairy Safeguards* panel found that a 14 day delay on notification to the WTO Safeguards Committee as required by Article 12.1 of the Safeguards Agreement did not satisfy the requirement that the notification be provided "immediately" after initiation. See Panel Report on *Korea – Dairy*, para. 7.134.

[433] Panel Report on *Guatemala – Cement II*, paras. 8.101–8.102.

326. The Panel on *Argentina – Poultry Anti-Dumping Duties* addressed the meaning of the term "to provide" in the first sentence of Article 6.1.3. The Panel considered that "the term 'provide' would require a positive action on the part of the investigating authority akin to that of furnishing or supplying something (i.e., the full text of the application) to someone (i.e., known exporters and authorities of the exporting Member). Therefore, we cannot agree with Argentina that the term 'provide' in the English text of the *AD Agreement* or 'facilitar' in its Spanish text can be interpreted as meaning 'permitting access'. In our view, an investigating authority cannot comply with the obligation to 'provide the (. . .) application (. . .) to the known exporters and to the authorities of the exporting Member' simply by permitting them access to that application."[434] The Panel distinguished between the obligation to provide the application to the known exporters and to the authorities of the exporting Member, and the obligation to "make available" the application to other interested parties upon request. According to the Panel, "with the use of different verbs in the first sentence of Article 6.1.3, 'provide' on the one hand and 'make available' on the other, the drafters intended to impose different obligations on investigating authorities depending on the party concerned. The first obligation requires a positive action on the part of the investigating authority, while the second envisages only a passive act".[435]

327. In *Guatemala – Cement II*, the Panel rejected Guatemala's argument that the actions of its investigating authority under Articles 5.5, 12.1.1 and 6.1.3, even if the Panel were to find that they constituted violations of the *Anti-Dumping Agreement*, had not affected the course of the investigation, and thus: (a) the alleged violations were not harmful according to the principle of "harmless error"; (b) Mexico "convalidated" the alleged violations by not objecting immediately after their occurrence; and (c) the alleged violations did not cause nullification or impairment of benefits accruing to Mexico under the *Anti-Dumping Agreement*. See paragraphs 276–279 above.

(e) Relationship with other paragraphs of Article 6

328. The Panel on *Guatemala – Cement II* addressed Mexico's claims of violations of Articles 6.1, 6.2, 6.4, 6.5, 6.5.1 and 6.5.2, all of which were based on the same factual foundation. See paragraph 360 below.

329. In *Guatemala – Cement II*, Mexico claimed that Guatemala's investigating authority violated Articles 6.1, 6.2, 6.8 and Annex II(5) and (6) of the *Anti-Dumping Agreement* by rejecting certain technical accounting evidence submitted by a Mexican interested party one day before the public hearing held by Guatemala's authority. The Panel considered it unnecessary to address this claim, on the ground that the claim was dependent on the issue of whether the cancellation by the authority of its verification visit to the Mexican producer was inconsistent with Article 6.8, and the Panel had already found the cancellation in violation of Article 6.8.[436]

330. In *Guatemala – Cement II*, the Panel considered it unnecessary to examine Article 6.2 claims because it had already found violations of Article 6.1.2, 6.1.3, 6.4 and 6.5.1 on the same sets of facts. See paragraph 341 below.

331. The Panel on *Guatemala – Cement II* addressed Mexico's claims of violations of Articles 6.1, 6.2, 6.4, 6.5, 6.5.1 and 6.5.2, all of which were based on the same factual foundation. See paragraph 360 below.

332. The Panel on *Argentina – Ceramic Tiles,* when examining whether the investigating authorities were entitled to resort to facts available pursuant to Article 6.8, referred to Article 6.1 to support its conclusion that the investigating authorities could not do so when they did not clearly request the relevant information from the party in question. See paragraphs 308 above and 384 below. The Appellate Body in *US – Hot-Rolled Steel* further analysed the relationship of Article 6.8 and Annex II with Article 6.1.1. See paragraphs 317 above and 397 and 400 below.

333. The Panel on *Guatemala – Cement II* further referred to Article 6.5 in interpreting Article 6.1.2. See paragraph 324 above.

334. In *Guatemala – Cement II*, having found that Guatemala's failure to disclose the "essential facts" forming the basis of its final determination was in violation of Article 6.9, as referenced in paragraphs 429, 430 and 432 below, the Panel considered it unnecessary to examine whether it was also inconsistent with Articles 6.1 and 6.2.[437]

2. Article 6.2

(a) "shall have a full opportunity for the defence of their interests"

(i) Article 6.2, first sentence as a fundamental due process provision

335. In *Guatemala – Cement II*, Mexico argued that because Guatemala's authority extended the period of

[434] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.169.
[435] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.170.
[436] Panel Report on *Guatemala – Cement II*, para. 8.125.
[437] Panel Report on *Guatemala – Cement II*, para. 8.232.

investigation during the investigation procedure, and did not respond to requests for information from a Mexican producer concerning the extension, the Mexican producer was not given any opportunity to comment on the applicant's request for extension of the period of investigation contrary to Article 6.2. The Panel, which agreed with this argument, interpreted the first sentence of Article 6.2 "as a fundamental due process provision":

> "We interpret the first sentence of Article 6.2 of the AD Agreement as a fundamental due process provision. In our view, when a request for an extension of the POI comes from one interested party, due process requires that the investigating authority seeks the views of other interested parties before acting on that request. Failure to respect the requirements of due process would conflict with the requirement to provide interested parties with 'a full opportunity for the defence of their interests', consistent with Article 6.2.[438] Clearly, an interested party is not able to defend its interests if it is prevented from commenting on requests made by other interested parties in pursuit of their interests. In the present case, Cementos Progreso's request for extension of the POI was made on 1 October 1996. The Ministry's decision to extend the POI was made on 4 October 1996, only three days after Cementos Progreso's request. There is no evidence to suggest that the Ministry sought the views of Cruz Azul [the Mexican producer], or other interested parties, before deciding to extend the POI. Accordingly, we find that by extending the POI pursuant to a request from Cementos Progreso without seeking the views of other interested parties in respect of that request, the Ministry failed to provide Cruz Azul with 'a full opportunity for the defence of [its] interests', contrary to Guatemala's obligations under Article 6.2 of the AD Agreement."[439]

(ii) General nature and extent of the obligations under Article 6.2

336. In *Guatemala – Cement II*, the Panel rejected Mexico's claim that Guatemala's authority was in violation of Articles 6.1, 6.2 and 6.9 by changing its injury determination from a preliminary determination of threat of material injury to a final determination of actual material injury during the course of the investigation, without informing the Mexican producer of that change, and without giving the producer a full and ample opportunity to defend itself. Following the observation based upon Article 12.2, quoted in paragraph 313 above, the Panel explained that the first sentence of Article 6.2 is very general in nature:

> "As for Article 6.2, we note that the first sentence of that provision is very general in nature. We are unable to interpret such a general sentence in a way that would impose a specific obligation on investigating authorities to inform interested parties of the legal basis for its final determination on injury during the course of an investigation, when the express wording of Article 12.2 only imposes such a specific obligation on investigating authorities at the end of the investigation."[440]

337. In *Egypt – Steel Rebar*, the Panel emphasized that "the language of the provision at issue creates an obligation on the [investigating authorities] to *provide opportunities* for interested parties to defend their interests." The Panel further considered that the "[f]ailure by respondents to take the initiative to defend their own interests in an investigation cannot be equated, through WTO dispute settlement, with failure by an investigating authority to provide opportunities for interested parties to defend their interests".[441]

(b) Relationship with other paragraphs of Article 6

338. In *Guatemala – Cement II*, the Panel examined Mexico's argument that Guatemala's authority was in violation of Articles 6.1, 6.2 and 6.4 by failing to allow the Mexican producer "proper access" to the information submitted by the Guatemalan domestic producer at the public hearing it held. Noting that it had found a violation of Articles 6.1.2 and 6.4 on the same factual foundation, the Panel considered it unnecessary to examine the claim of a violation of Articles 6.1 and 6.2 because these provisions, in the view of the Panel, did not specifically address the issue. See paragraph 312 above.

339. The Panel on *Guatemala – Cement II* addressed Mexico's claims of violations of Articles 6.1, 6.2, 6.4, 6.5, 6.5.1 and 6.5.2, all of which were based on the same factual foundation. See paragraph 360 below.

340. In *Guatemala – Cement II*, Mexico claimed that Guatemala's investigating authority violated Articles 6.1, 6.2, 6.8 and Annex II(5) and (6) of the *Anti-*

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[438] (*footnote original*) We do not consider that the obligation in the first sentence of Article 6.2 is qualified by the second sentence of that provision. Thus, we do not consider that the obligation in the first sentence of Article 6.2 is concerned exclusively with "providing opportunities for all interested parties to meet those parties with adverse interests. . .". Although the words "[t]o this end" at the beginning of the second sentence suggest that such meetings are one way in which the obligation of the first sentence can be fulfilled, it does not follow that such meetings provide the only means by which the obligation of the first sentence may be fulfilled. If that were the case, there would be no need for the first sentence of Article 6.2.

[439] Panel Report on *Guatemala – Cement II*, para. 8.179. See also para. 311 of this Chapter with respect to the same issue in the context of Article 6.1.

[440] Panel Report on *Guatemala – Cement II*, para. 8.238. In regard to the Panel's finding regarding the claims under Articles 6.1 and 6.9, see the excerpts referenced in paras. 314 and 432 of this Chapter. See also Panel Report on *Egypt – Steel Rebar*, paras. 7.77–7.96.

[441] Panel Report on *Egypt – Steel Rebar*, para. 7.88.

Dumping Agreement by rejecting certain technical accounting evidence submitted by a Mexican producer one day before the public hearing held by Guatemala's authority. The Panel considered it unnecessary to address this claim, on the grounds that the claim was dependent on the issue of whether the cancellation by the authority of its verification visit to the Mexican producer was inconsistent with Article 6.8, and the Panel had found the cancellation in violation of Article 6.8.[442]

341. The Panel on *Guatemala – Cement II* touched on the relationship between the obligations under Article 6.2 and other provisions. See paragraph 343 below. The Panel went on to find it unnecessary to examine Article 6.2 claims because it had already found violations of Article 6.1.2, 6.1.3, 6.4 and 6.5.1 on the same set of facts.[443]

342. In *Guatemala – Cement II*, having found that Guatemala's failure to disclose the "essential facts" forming the basis of its final determination was in violation of Article 6.9, as referenced in paragraphs 429, 430 and 432 below, the Panel considered it unnecessary to examine whether it was also inconsistent with Articles 6.1 and 6.2.[444]

(c) Relationship with other provisions of the Anti-Dumping Agreement

343. Addressing Mexico's claim that Guatemala's authority had violated Article 6.2, the Panel on *Guatemala – Cement II* decided to exercise judicial economy because it had already made findings concerning the conduct allegedly violating Article 6.2 under other, more specific provisions of the *Anti-Dumping Agreement*:

> "Whereas this provision clearly imposes a general duty on investigating authorities to ensure that interested parties have a full opportunity throughout an anti-dumping investigation for the defence of their interests, it provides no specific guidance as to what steps investigating authorities must take in practice. By contrast, other more specific provisions apply to the facts at hand, in respect of which Mexico has also made claims. Although there may be cases in which a panel will nevertheless need to address claims under Article 6.2, we do not consider it necessary for us to do when we have already made findings concerning the conduct allegedly violating Article 6.2 under other, more specific provisions of the AD Agreement.[445]"[446]

3. Article 6.4

(a) "shall . . . provide timely opportunities for all interested parties to see all information"

344. In *Guatemala – Cement II*, Mexico claimed that Guatemala's authority violated Articles 6.1.2, 6.2 and 6.4 by: (a) refusing the Mexican producer access to the file on a certain date during the investigation; and (b) failing to promptly provide the producer with a copy of a submission made by the applicant for the investigation. Mexico also claimed that Guatemala's investigating authority violated Article 6.4 by: (a) failing to provide the Mexican producer with copies of the file; and (b) failing to provide the producer with a full record of a public hearing held by the authority. In examining these claims, the Panel explained the scope and precise meaning of the relevant provisions. See paragraph 321 above.

345. In *Guatemala – Cement II*, in response to Mexico's claim that in violation of Article 6.4, Guatemala's authority did not provide copies of the file to the Mexican producer, Guatemala argued that it was justified in doing so because the producer had not paid the required fee. The Panel found a violation of Article 6.4 because the Mexican producer had offered to pay for the copies it requested. In so doing, the Panel noted that "[t]here are various ways in which an investigating authority could satisfy the Article 6.4 obligation to provide 'whenever practicable . . . timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases . . .'"[447]

346. In *Guatemala – Cement II*, Mexico's argued that Guatemala's authority had acted inconsistently with Article 6.4 by not providing the Mexican producer with a complete copy of the record of its public hearing. The copy of the record of the public hearing which had been transmitted to Mexico was missing two identified individual pages, such that the words at the beginning of one page did not follow on from the phrase at the end of the immediately preceding page. Guatemala argued that even if the copy was incomplete, the Mexican producer could have requested a complete copy as soon as it realized that an omission had occurred. The Panel did not find a violation of Article 6.4:

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[442] Panel Report on *Guatemala – Cement II*, para. 8.125.
[443] Panel Report on *Guatemala – Cement II*, para. 8.164.
[444] Panel Report on *Guatemala – Cement II*, para. 8.232.
[445] (*footnote original*) In this regard, we recall that the Appellate Body stated in *EC – Bananas III* that "[a]lthough Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures" (Appellate Body Report on *EC – Bananas III*, para. 204). Furthermore, the panel in *US – 1916 Act (EC)* stated that "[i]t is a general principle of international law that, when applying a body of norms to a given factual situation, one should consider that factual situation under the norm which most specifically addresses it" (Panel Report on *US – 1916 Act (EC)*) (footnote deleted).
[446] Panel Report on *Guatemala – Cement II*, para. 8.162.
[447] Panel Report on *Guatemala – Cement II*, para. 8.151.

"Despite the factual accuracy of Mexico's argument, we do not consider that [the Ministry's action] amounts to a violation of Article 6.4 of the AD Agreement, as Mexico has failed to adduce any evidence that the Ministry's failure to provide a full copy of its record of the public hearing was anything other than inadvertent. Although we consider that an interested party is entitled to see a full version of the investigating authority's record of any public hearing, it is not inconceivable that an investigating authority which chooses to provide interested parties with a copy of the record could inadvertantly fail to provide a complete copy. In our view, such an inadvertent omission on the part of an investigating authority does not constitute a violation of Article 6.4. Although a violation could arise if an investigating authority failed to correct its omission after having been informed of that omission by an interested party, there is no evidence that Cruz Azul informed the Ministry of its omission in the present case."

347. Referring to its finding quoted in paragraph 276 above, the Panel emphasized that it was not finding a "harmless error", an argument put forward previously by Guatemala in a different context:

"In order to avoid any uncertainty, we wish to emphasize that we do not consider that the inadvertent nature of the Ministry's omission renders that omission 'harmless', in the sense of being a defence to a violation of Article 6.4 of the AD Agreement . . . . Our position is not that there was a violation of Article 6.4, but that such violation should be disregarded because it was 'harmless'. Rather, our position is that the factual circumstances before us do not amount to a violation. The question of whether or not any violation is 'harmless' therefore does not arise."[448]

(b) "to see all information that is relevant to the presentation of their cases"

348. The Appellate Body on *EC – Tube or Pipe Fittings* stated that the issue of what information is relevant such that it has to be disclosed must be examined from the perspective of *the interested parties*. It thus reversed the Panel's finding in this case that the investigating authority was not obliged to disclose certain information that *the investigating authority* considered not relevant to its conclusions:

"Article 6.4 refers to 'provid[ing] timely opportunities for all interested parties to see all information that is relevant to the presentation of *their* cases'. (emphasis added) The possessive pronoun 'their' clearly refers to the earlier reference in that sentence to 'interested parties'. The investigating authorities are not mentioned in Article 6.4 until later in the sentence, when the provision refers to the additional requirement that the information be 'used by the authorities'. Thus, whether or not the investigating authorities regarded the information in Exhibit EC-12 to be relevant does not determine whether the information would in fact have been 'relevant' for the purposes of Article 6.4."[449]

349. In addition, the Appellate Body on *EC – Tube or Pipe Fittings* was of the view that information relating to the Article 3.4 injury factors was necessarily "relevant" information which is to be disclosed under Article 6.4:

"This conclusion is supported by our reasoning in *US – Hot Rolled Steel*, where we explained that 'Article 3.4 lists certain factors *which are deemed to be relevant in every investigation* and which must always be evaluated by the investigating authorities.'[450] Thus, because Exhibit EC-12 contains information on some of the injury factors listed in Article 3.4, and the injury factors listed in that provision 'are deemed to be relevant in every investigation', Exhibit EC-12 must be considered to contain information that is relevant to the investigation carried out by the European Commission. As such, the information in Exhibit EC-12 was necessarily relevant to the presentation of the interested parties' cases and is, therefore, 'relevant' for purposes of Article 6.4."[451]

350. The Panel on *EC – Tube or Pipe Fittings* distinguished between information already in the possession of an interested party and information that must be available to interested parties within the meaning of Article 6.4:

"We do not view information that is already in the possession of an interested party and that has been submitted by an interested party to an investigating authority in the course of an anti-dumping proceeding as information that an investigating authority must provide opportunities for that same interested parties to see within the meaning of Article 6.4. This provision relates to information that would not initially be in the possession of an interested party and would therefore be unknown or unfamiliar to an interested party if it were not disclosed to that party in the course of an investigation."[452]

(c) Relationship with other paragraphs of Article 6

351. The Panel on *Guatemala – Cement II* addressed Mexico's claims of violations of Articles 6.1, 6.2, 6.4, 6.5, 6.5.1 and 6.5.2, all of which were based on the same factual foundation. See paragraph 360 below.

352. In *Guatemala – Cement II*, the Panel examined Mexico's argument that Guatemala's authority was in violation of Articles 6.1, 6.2 and 6.4 by failing to allow

[448] Panel Report on *Guatemala – Cement II*, para. 8.158.
[449] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 145.
[450] (*footnote original*) Appellate Body Report, *US – Hot-Rolled Steel*, para. 194. (emphasis added)
[451] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 146.
[452] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.208.

the Mexican producer "proper access" to the information submitted by the Guatemalan domestic producer at the public hearing it held. Noting that it had found a violation of Articles 6.1.2 and 6.4 on the same factual foundation, the Panel considered it unnecessary to examine the claim of a violation of Articles 6.1 and 6.2 because these provisions do not specifically address the issue. See paragraph 312 above.

353. In *Guatemala – Cement II*, the Panel addressed Mexico's claim that Guatemala's delay in making a submission of the applicant available to the Mexican producer was inconsistent with Articles 6.1.2 and 6.4. After having found a violation of Article 6.1.2, the Panel considered it unnecessary to examine whether the subject facts also constituted a violation of Article 6.4.[453]

354. In *Guatemala – Cement II*, the Panel also considered it unnecessary to examine Article 6.2 claims because it had already found violations of Article 6.1.2, 6.1.3, 6.4 and 6.5.1 on the same sets of facts. See paragraph 341 above.

355. The Panel on *Guatemala – Cement II* touched on the relationship between the obligations under Articles 6.4 and 6.9. See paragraph 430 below.

356. The Appellate Body on *EC – Tube or Pipe Fittings* expressed the view that a finding of violation in that case under Article 6.4 would necessarily entail a violation of Article 6.2.[454]

4. Article 6.5

(a) Showing of "good cause" for confidential treatment

357. In *Guatemala – Cement II*, the Panel examined the claim that Guatemala's authority violated Articles 6.5, 6.5.1 and 6.5.2 by granting a submission from the domestic producer confidential treatment on its own initiative, i.e. without "good cause" having been shown by the producer. The Panel upheld this claim, stating:

> "The text of Article 6.5 distinguishes between two types of confidential information: (1) 'information which is by nature confidential', and (2) information 'which is provided on a confidential basis'. Article 6.5 then provides that the provision of confidential treatment is conditional on 'good cause' being shown. Logically, one might expect that 'good cause' for confidential treatment of information which is 'by nature confidential' could be presumed, and that 'good cause' need only be shown for information which is not 'by nature confidential' (but for which confidential treatment is nonetheless sought). It is presumably for this reason that, in rejecting Mexico's claim, Guatemala argues that the relevant information was 'clearly of a confidential nature'. While we have some sympathy for Guatemala's argument, given the logical appeal of such an interpretation of Article 6.5, we note that Article 6.5 is not drafted in a way which suggests this approach. Instead, the requirement to show 'good cause' appears to apply for both types of confidential information, such that even information 'which is by nature confidential' cannot be afforded confidential treatment unless 'good cause' has been shown.[455]
>
> In our view, the requisite 'good cause' must be shown by the interested party submitting the confidential information at issue. We do not consider that Article 6.5 envisages 'good cause' being shown by the investigating authority itself, since – with respect to information that is not 'by nature confidential' in particular – the investigating authority may not even know whether or why there is cause to provide confidential treatment."[456]

(b) Article 6.5.1

(i) Purpose of non-confidential summaries

358. In *Argentina – Ceramic Tiles*, the Panel, while examining whether the authorities were allowed to based themselves on confidential information in their determination (see paragraph 416 below), considered that the purpose of the non-confidential summaries is to inform the interested parties so as to enable them to defend their interests:

> "Consistent with our view that authorities may rely on confidential information in making their determination, the purpose of the non-confidential summaries provided for in Article 6.5.1 is to inform the interested parties so as to enable them to defend their interests. We do not consider that the purpose of the non-confidential summaries is to enable the authorities to arrive at public conclusions, as Argentina contends. [footnote omitted] Thus, an authority would not in our view be justified in rejecting the exporters' responses simply because the information in the non-confidential summaries was not sufficient to allow the calculation of normal value, export price, and the margin of dumping."[457]

(ii) Requirement to provide reasons for confidentiality

359. In *Guatemala – Cement II*, Mexico argued that Guatemala's authority violated Article 6.5.2 by failing to require the domestic producer to provide reasons why certain information could not be made public. The Panel agreed with this argument, stating:

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[453] Panel Report on *Guatemala – Cement II*, para. 8.145.
[454] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 149.
[455] (*footnote original*) Although we will now consider who must show "good cause", we make no findings as to how "good cause" may be shown in respect of information which is "by nature" confidential.
[456] Panel Report on *Guatemala – Cement II*, paras. 8.219–8.220.
[457] Panel Report on *Argentina – Ceramic Tiles*, para. 6.39.

"Although Article 6.5.1 does not explicitly provide that 'the authorities shall require' interested parties to provide a statement of the reasons why summarization is not possible, any meaningful interpretation of Article 6.5.1 must impose such an obligation on the investigating authorities. It is certainly not possible to conclude that the obligation concerning the need to provide a statement of reasons is an obligation imposed exclusively on the interested party submitting the information, and not the investigating authority, since the AD Agreement is not addressed at interested parties. The AD Agreement imposes obligations on WTO Members and their investigating authorities. Accordingly, in our view Article 6.5.1 imposes an obligation on investigating authorities to require parties that indicate that information is not susceptible of summary to provide a statement of the reasons why summarization is not possible. . . . In making this finding, we attach no importance whatsoever to Guatemala's assertions concerning the alleged treatment of similar information by other WTO Members. Whether or not other WTO Members act in conformity with Article 6.5.1 is of no relevance to the present dispute, which concerns the issue of whether or not the Ministry acted in conformity with that provision."[458]

360. The Panel then considered it unnecessary to address Mexico's claim under Articles 6.1, 6.2, 6.4, 6.5 and 6.5.2 on the same factual ground, because "the need for a statement of the reasons why the information is not susceptible of summary is specifically addressed by Article 6.5.1."[459]

(c) Article 6.5.2

361. In *Guatemala – Cement II*, the Panel rejected Mexico's claim that Guatemala's authority had violated Article 6.5.2 by agreeing to provide confidential treatment for certain information submitted during the verification visit at the domestic producer's premises. Mexico's claim of violation was based on the domestic producer's alleged failure to justify its request for confidential treatment. The Panel held:

"Article 6.5.2 does not require any justification to be provided by the interested party requesting confidential treatment. If any such obligation exists, it derives from Article 6.5, not 6.5.2. Mexico has not based this claim on Article 6.5. Article 6.5.2 speaks only to events when 'the authorities find that a request for confidentiality is not warranted'."[460]

(d) Relationship with other paragraphs of Article 6

362. The Panel on *Guatemala – Cement II* addressed Mexico's claims of violations of Articles 6.1, 6.2, 6.4, 6.5, 6.5.1 and 6.5.2, all of which were based on the same factual foundation. See paragraph 360 above.

363. In *Guatemala – Cement II*, the Panel considered it unnecessary to examine Article 6.2 claims because it had already found violations of Article 6.1.2, 6.1.3, 6.4 and 6.5.1 on the same sets of facts. See paragraph 341 above.

364. The Panel, in *Argentina – Ceramic Tiles*, referred to Articles 6.5 and 6.5.1 of the *Anti-Dumping Agreement* as support of its conclusion that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information. See paragraph 416 below.

5. Article 6.6

(a) "satisfy themselves as to the accuracy of the information"

365. In support of its opinion that the text of Article 6.6 does not explicitly require verification of all information relied upon, the Panel on *US – DRAMS* stated:

"Article 6.6 simply requires Members to 'satisfy themselves as to the accuracy of the information'. In our view, Members could 'satisfy themselves as to the accuracy of the information' in a number of ways without proceeding to some type of formal verification, including for example reliance on the reputation of the original source of the information. Indeed, we consider that anti-dumping investigations would become totally unmanageable if investigating authorities were required to actually verify the accuracy of all information relied on.[461]"[462]

366. In *Guatemala – Cement II*, addressing Mexico's claim under Article 6.6, the Panel explained the nature of the obligation under this Article:

"In our view, it is important to distinguish between the accuracy of information, and the substantive relevance of such information. Once an investigating authority has determined what information is of substantive relevance to its investigation, Article 6.6 requires the investigating authority to satisfy itself (except when 'best information available' is used) that the substantively relevant information is accurate. Thus, Article 6.6 applies once an initial determination has been made that the information is of substantive relevance to the investigation. Article 6.6 provides no guidance in respect of the initial determination of whether information is, or is not, of substantive relevance to the investigation."[463]

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[458] Panel Report on *Guatemala – Cement II*, para. 8.213.
[459] Panel Report on *Guatemala – Cement II*, para. 6.215.
[460] Panel Report on *Guatemala – Cement II*, para. 8.209.
[461] (*footnote original*) For example, we query whether investigating authorities should be required to verify import statistics from a different government office. We also query whether investigating authorities should be required to verify "official" exchange rates obtained from a central bank.
[462] Panel Report on *US – DRAMS*, para. 6.78.
[463] Panel Report on *Guatemala – Cement II*, para. 8.172.

(b) Burden on the investigating authorities

367. In *Argentina – Ceramic Tiles*, the Panel confirmed that "the burden of satisfying oneself of the accuracy of the information" is "on the investigating authority":

> "Article 6.6 of the AD Agreement thus places the burden of satisfying oneself of the accuracy of the information on the investigating authority. As a general rule, the exporters are therefore entitled to assume that unless otherwise indicated they are not required to also automatically and in all cases submit evidence to demonstrate the accuracy of the information they are supplying. . . .[464] We believe that if no on-the-spot verification is going to take place but certain documents are required for verification purposes, the authorities should in a similar manner inform the exporters of the nature of the information for which they require such evidence and of any further documents they require."[465]

6. Article 6.7 and Annex I

(a) Relationship between Article 6.7 and Annex I

368. As regards the relationship between Article 6.7 and Annex I, in *Egypt – Steel Rebar*, the Panel came to the same conclusion as with the relationship between Article 6.8 and Annex II (see paragraph 379 below), i.e. that Annex I is incorporated by reference into Article 6.7:

> "Concerning the relationship of Annex I to Article 6.7, we come to the same conclusion as in respect of Annex II and Article 6.8.[466] In particular, we note Article 6.7's explicit cross-reference to Annex I: '[T]he procedures described in Annex I shall apply to investigations carried out in the territory of other Members'. This language thus establishes that the specific parameters that must be respected in carrying out foreign verifications in compliance with Article 6.7 are found in Annex I."[467]

(b) On-the-spot verifications as an option

369. The Panel on *Argentina – Ceramic Tiles*, indicated in a footnote that, although common practice, there is no requirement to carry out on-the-spot verifications:

> "There does not exist a requirement in the Agreement to carry out investigations in the territory of other Members for verification purposes. Article 6.7 of the AD Agreement merely provides for this possibility. While such on-site verification visits are common practice, the Agreement does not say that this is the only way or even the preferred way for an investigating authority to fulfil its obligation under Article 6.6 to satisfy itself as to the accuracy of the information supplied by interested parties on which its findings are based."[468]

370. The Panel on *EC – Tube or Pipe Fittings* rejected the argument that Article 2.4 required the investigating authority to base the adjustment on a visual/physical inspection of the working activities and practices in the packaging area at the company's premises. The Panel stated that it viewed verification as an essentially "documentary" exercise that may be supplemented by an actual on-site visit, which is not mandated by the Agreement. According to the Panel, "[a]n essentially documentary approach to verification – which focuses upon documented support for claims for adjustment – seems to us to be entirely consistent with the nature of an anti-dumping investigation[469]"[470]

(c) Information verifiable on-the-spot

371. In *Guatemala – Cement II*, Mexico argued Guatemala's authority had acted inconsistently with Article 6.7 and paragraph 7 of Annex I by seeking to verify certain information that was not submitted by the Mexican producer subject to the investigation because it pertained to a period of investigation newly added during the course of the investigation. The Panel rejected this argument:

> "Although Annex I(7) provides that the 'main purpose' of the verification visit is to verify information already provided, or to obtain further details in respect of that information, it also provides that an investigating authority may 'prior to the visit . . . advise the firms concerned . . . of any further information which needs to be provided'. Since there would be little point in advising a firm of 'further information . . . to be provided' in advance of the verification visit if the investigating authority were precluded from examining that 'further information' during the visit, we consider that the phrase 'further information . . . to be provided' refers to information to be provided during the course of the verification. Mexico's view that an investigating authority may only verify information submitted prior to the verification visit is not consistent with this interpretation of Annex I(7).

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[464] (*footnote original*) There does not exist a requirement in the Agreement to carry out investigations in the territory of other Members for verification purposes. Article 6.7 of the AD Agreement merely provides for this possibility. While such on-site verification visits are common practice, the Agreement does not say that this is the only way or even the preferred way for an investigating authority to fulfill its obligation under Article 6.6 to satisfy itself as to the accuracy of the information supplied by interested parties on which its findings are based.

[465] Panel Report on *Argentina – Ceramic Tiles*, para. 6.57.

[466] (*footnote original*) *See* paras. 7.152–7.154.

[467] Panel Report on *Egypt – Steel Rebar*, para. 7.325.

[468] Panel Report on *Argentina – Ceramic Tiles*, footnote 65. See also Panel Report on *Egypt – Steel Rebar*, paras. 7.326–7.327.

[469] (*footnote original*) Article 6.7 of the *Anti-dumping Agreement*, which deals with verification visits, states that "authorities shall make the results of any such investigations available, or shall provide disclosure thereof . . . to the firms to which they pertain and may make such results available to the applicants." This supports our view that the nature of verification exercise is primarily documentary.

[470] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.192

> In response to a question from the Panel, Mexico argues that the phrase 'any further information . . . to be provided' refers to accounting information to be provided by the verified company during verification in order to substantiate the information previously supplied to the investigating authority. We note, however, that the phrase does not read 'any further accounting information . . . to be provided'. The term 'information' is not qualified in any way by the express wording of Annex I(7), and there are no elements in the context which plead for such qualification.
>
> Furthermore, we note that the last phrase of Annex I(7) refers to on-the-spot requests for further details to be provided in light of 'information obtained'. Thus, although it should be 'standard practice' to advise firms of additional information to be provided in advance of the verification visit, this does not preclude an investigating authority from requesting 'further details' during the course of the investigation, 'in light of the information obtained'. In our view, the reference to 'information obtained' cannot mean the information obtained from the exporter in advance of the verification visit, since (consistent with 'standard practice') requests regarding that information should be made prior to the visit, and not during the course of the investigation. Accordingly, the 'information obtained' must refer to information obtained during the course of the verification visit, since it is only information obtained during the course of a verification visit which may prompt a request for further details during the course of the verification visit. The last phrase of Annex I(7) therefore confirms our understanding that an investigating authority may seek new information during the course of the verification visit."[471]

(d) Participation of non-governmental experts in the on-the-spot verification

372. In *Guatemala – Cement II*, Mexico claimed that a verification visit by Guatemala's authority to the Mexican producer's site was inconsistent with Article 6.7 and Annex I(2), (3), (7) and (8) because the authority included non-governmental experts with an alleged conflict of interest in its verification team. The Panel rejected this claim because none of the cited provisions explicitly prohibits such conduct.[472] However, the Panel found that given the participation of non-governmental experts with an alleged conflict of interest in Guatemala's verification team, the investigating authority could not argue that the Mexican producer's refusal to allow the verification meant that the producer was "significantly impeding" the investigation within the meaning of Article 6.8. See also paragraph 410 below.

373. In *Guatemala – Cement II*, the Panel considered that under paragraph 2 of Annex I, a national authority is required to inform the government of exporting Members of its intention to include non-governmental experts in the verification team for visit to foreign producers/exporters.[473] With respect to the burden of proof on this point, referring to a finding of the Panel on *US – Section 301 Trade Act*[474], the Panel stated:

> "In principle, Mexico bears the burden to prove that the Ministry failed to inform it of the inclusion of non-governmental experts in the Ministry's verification team. As a practical matter, this burden is impossible for Mexico to meet: one simply cannot prove that one was not informed of something. Although Mexico cannot establish definitively that it was not informed by the Ministry of the Ministry's intention to include non-governmental experts in its verification team, there is sufficient evidence before us to suggest strongly that it was not so informed. Although an investigating authority should normally be able to demonstrate that it complied with a formal requirement to inform the authorities of another Member, Guatemala has failed to rebut the strong suggestion that it failed to do so. In fact, Guatemala has simply referred to the very letter which suggests strongly that Mexico was *not* notified by Guatemala.[475] In these circumstances, we do not consider that the evidence and arguments of the parties 'remain in equipoise'. Accordingly, we find that the Ministry violated paragraph 2 of Annex I of the AD Agreement by failing to inform the Government of Mexico of the inclusion of non-governmental experts in the Ministry's verification team.[476]"[477]

374. In *Guatemala – Cement II*, the Panel disagreed with Mexico's argument that under paragraph 2 of Annex I, Guatemala's authority should have informed the Government of Mexico not only of the Guatemalan

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[471] Panel Report on *Guatemala – Cement II*, paras. 8.203–8.205.
[472] Panel Report on *Guatemala – Cement II*, para. 8.189.
[473] Panel Report on *Guatemala – Cement II*, para. 8.193.
[474] Panel Report on *US – Section 301*, para. 7.14.
[475] (*footnote original*) The fact that the Mexican authorities knew of the inclusion of non-governmental experts in the Ministry's verification team (by virtue of Cruz Azul sending SECOFI a copy of the 26 November 1996 letter Cruz Azul had received from the Ministry) is not relevant to Mexico's claim. This is because Annex I(2) requires that the authorities of the exporting Member be "informed" of the inclusion of non-governmental experts. In our view, the obligation to "inform" is clearly on the authorities of the investigating Member. Those authorities cannot rely on exporters informing their own authorities of the inclusion of non-governmental experts in order to establish compliance with Annex I(2).
[476] (*footnote original*) Paragraph 2 of Annex I provides that exporting Members "should" be informed of the inclusion of non-governmental experts in a verification team. It does not provide that exporting Members "shall" be so informed. Although the word "should" is often used colloquially to imply an exhortation, it can also be used "to express a duty [or] obligation" (See The Concise Oxford English Dictionary, Clarendon Press, 1995, page 1283). Since Article 6.7 provides in relevant part that the provisions of Annex I "shall" apply, we see no reason why Annex I (2) should not be interpreted in the mandatory sense. In our view, a hortatory interpretation of the provisions of Annex I would be inconsistent with Article 6.7. Furthermore, Guatemala has not argued that paragraph 2 of Annex I is merely hortatory. Accordingly, we proceed on the basis that paragraph 2 of Annex I should be interpreted in a mandatory sense.
[477] Panel Report on *Guatemala – Cement II*, para. 8.196.

authority's intention to include non-governmental experts in its verification team, but also of the exceptional circumstances justifying the participation of these experts in the investigating team:

> "Whereas paragraph 2 of Annex I requires the exporting Member to be 'so informed', the logical conclusion from the structure of that provision is that the exporting Member need only be informed of the intention to include non-governmental experts in the investigating team. If the intention of the drafters had been to impose an obligation on authorities to inform exporting Members of the 'exceptional circumstances' at issue, presumably the first sentence of Annex I(2) would have been drafted in a manner that clearly provided for that obligation."[478]

7. Article 6.8 and Annex II: "facts available"

(a) General

(i) Function of Article 6.8 and Annex II

375. In *US – Hot-Rolled Steel*, the Panel indicated that "[o]ne of the principle elements governing anti-dumping investigations that emerges from the whole of the AD Agreement is the goal of ensuring objective decision-making based on facts. Article 6.8 and Annex II advance that goal by ensuring that even where the investigating authority is unable to obtain the 'first-best' information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps 'second-best' facts."[479]

376. In *Egypt – Steel Rebar*, the Panel stated that Article 6.8 "addresses the dilemma in which investigating authorities might find themselves – they must base their calculations of normal value and export price on some data, but the necessary information may not have been submitted". The Panel indicated that "Article 6.8 identifies the circumstances in which an [investigating authority] may overcome this lack of necessary information by relying on facts which are otherwise available to the investigating authority."[480] The Panel also concluded that it is clear that the provisions of Annex II that address what information can be used as facts available "have to do with ensuring the reliability of the information used by the investigating authority" and referred to the negotiating history of Annex II as confirmation of its conclusions:

> "It is clear that the provisions of Annex II that address what information can be used as facts available (which, along with the other provisions of Annex II, 'shall be observed') have to do with ensuring the reliability of the information used by the investigating authority. This view may further be confirmed, as foreseen in Article 32 of the Vienna Convention on the Law of Treaties[481], by the negotiating history of Annex II. In particular, this Annex was originally developed by the Tokyo Round Committee on Anti-Dumping Practices, which adopted it on 8 May 1984 as a 'Recommendation Concerning Best Information Available in Terms of Article 6:8'.[482] During the Uruguay Round negotiations, the substantive provisions of the original recommendation were incorporated with almost no changes as Annex II to the AD Agreement. A preambular paragraph to the original recommendation, which was not retained when Annex II was created, in our view, provides some insight into the intentions of the drafters concerning its application. This paragraph reads as follows:
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> > 'The authorities of the importing country have a right and an obligation to make decisions on the basis of the best information available during the investigation from whatever source, even where evidence has been supplied by the interested party. The Anti-Dumping Code recognizes the right of the importing country to base findings on the facts available when any interested party refuses access to or does not provide the necessary information within a reasonable period, or significantly impedes the investigation (Article 6:8). However, all reasonable steps should be taken by the authorities of the importing countries to avoid the use of information from unreliable sources.'
>
> To us, this preambular language conveys that the *full* package of provisions in the recommendation, applicable in implementing Article 6:8 of the Tokyo Round Anti-Dumping Code, was intended, *inter alia,* to ensure that in using facts available (i.e, in applying Article 6:8), information from unreliable sources would be avoided."[483]

(ii) Relationship between Article 6.8 and Annex II

377. In *US – Hot-Rolled Steel*, the Appellate Body ruled that Annex II "is incorporated by reference into Article 6.8".[484]

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[478] Panel Report on *Guatemala – Cement II*, para. 8.198.
[479] Panel Report on *US – Hot-Rolled Steel*, para. 7.72 and 7.55.
[480] Panel Report on *Egypt – Steel Rebar*, para. 7.146.
[481] (*footnote original*) Art. 32 of the Vienna Convention of the Law of Treaties provides:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
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> (a) leaves the meaning ambiguous or obscure; or
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> (b) leads to a result which is manifestly absurd or unreasonable".

[482] (*footnote original*) ADP/21.
[483] Panel Report on *Egypt – Steel Rebar*, para. 7.154.
[484] Appellate Body Report on *US – Hot-Rolled Steel*, para. 75. The Panel on *Egypt – Steel Rebar* indicated that its "view of the relationship of Annex II to Article 6.8 is consistent with that of the Appellate Body in *United States – Hot-Rolled Steel*. In that case, the Appellate Body stated that Annex II is 'incorporated by reference' into Article 6.8, i.e., that it forms part of Article 6.8." Panel Report on *Egypt – Steel Rebar,* para. 7.153.

378. In *US – Steel Plate*, the Panel explained the relationship between Article 6.8 and Annex II of the *Anti-Dumping Agreement* and concluded that the provisions of Annex II inform the investigating authority's evaluation whether necessary information has been provided and whether resort to facts available with respect to that element of information is justified:

> "In our view, the failure to provide necessary information, that is information which is requested by the investigating authority and which is relevant to the determination to be made,[485] triggers the authority granted by Article 6.8 to make determinations on the basis of facts available. The provisions of Annex II, which set out conditions on the use of facts available, inform the question of whether necessary information has not been provided, by establishing considerations for when information submitted must be used by the investigating authority. Thus, the provisions of Annex II inform an investigating authority's evaluation whether necessary information, in the sense of Article 6.8, has been provided, and whether resort to facts available with respect to that element of information is justified. If, after considering the provisions of Annex II, and in particular the criteria of paragraph 3, the conclusion is that information provided satisfies the conditions therein, the investigating authority must use that information in its determinations, and may not resort to facts available with respect to that element of information. That is, the investigating authority may not conclude, with respect to that information, that 'necessary information' has not been provided."[486]

379. In *Egypt – Steel Rebar*, the Panel considered that the cross-reference in Article 6.8 to Annex II, "[t]he provisions of Annex II shall be observed in the application of this paragraph" indicates that Annex II applies to Article 6.8 in its entirety:

> "[W]e find significant the specific wording of that cross-reference: '[t]he provisions of Annex II *shall* be observed in the application *of this paragraph*' (emphasis added). In other words, the reference to 'this paragraph' indicates that Annex II applies to Article 6.8 in its entirety, and thus contains certain substantive parameters for the application of the individual elements of that article. The phrase 'shall be observed' indicates that these parameters, which address both when facts available can be used, and what information can be used as facts available, must be followed.
>
> Our view of the relationship of Annex II to Article 6.8 is consistent with that of the Appellate Body in *United States – Hot-Rolled Steel*. In that case, the Appellate Body stated that Annex II is 'incorporated by reference' into Article 6.8,[487] i.e., that it forms part of Article 6.8."[488]

(iii) Mandatory nature of Annex II provisions

380. In *US – Steel Plate*, the Panel considered that the wording of Article 6.8 reference to Annex II provisions establishes that the provisions of Annex II are mandatory:

> "We note that there is disagreement between the parties as to whether the provisions of Annex II, which are largely phrased in the conditional tense ('should') are mandatory. We consider that Article 6.8 itself answers this question. Article 6.8. explicitly provides that 'The provisions of Annex II **shall** be observed in the application of this paragraph' (emphasis added). In our view, the use of the word 'shall' in this context establishes that the provisions of Annex II are mandatory. Indeed, this would seem a necessary conclusion. The alternative reading would mean that investigating authorities are required ('shall') to apply provisions which are not themselves required, an interpretation that makes no sense.[489] Moreover, the provisions of Annex II, while worded in the conditional, give specific guidance to investigating authorities regarding certain aspects of their determinations which, without more, clearly establish the operational requirements. Thus, we consider that that the provisions of Annex II are mandatory, not because of the wording of those provisions themselves, but because of the obligation to observe them set out in Article 6.8."[490][491]

(b) Authorities' duty to "specify in detail the information required from an interested party"

(i) "as soon as possible"

381. In *Guatemala – Cement II*, Mexico pointed out that paragraph 1 of Annex II requires "[a]s soon as possible after the initiation of the investigation" that the investigating authorities specify in detail the information

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[485] (*footnote original*) We are not dealing here with the possibility that the investigating authority might request irrelevant information. Obviously, such information would not be "necessary" in the sense of Article 6.8. However, there is no suggestion in this case that the investigating authority requested information beyond that which was necessary to the determinations it had to make.

[486] Panel Report on *US – Steel Plate*, para. 7.55.

[487] (*footnote original*) Appellate Body Report, *US – Hot-Rolled Steel*, para.75.

[488] Panel Report on *Egypt – Steel Rebar*, paras. 7.152–7.153.

[489] (*footnote original*) We note that the Panel on, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy* ("*Argentina – Ceramic Tiles*"), WT/DS189/R, adopted 5 November 2001, treated the provisions of Annex II as obligations in its analysis and findings.

[490] (*footnote original*) We note in this regard the Appellate Body's statement that "Article 6.8 requires that the provisions of Annex II of the *Anti-Dumping Agreement* be observed in the use of facts available." Appellate Body Report, *US – Hot-Rolled Steel*, at para 78. The Appellate Body appears to have treated the provisions of Annex II which are phrased in the conditional as mandatory, but did not specifically address the question, which was not raised before it, or indeed before the *Hot-Rolled Steel* Panel.

[491] Panel Report on *US – Steel Plate*, para. 7.56.

required from interested parties. Mexico argued that, in the light of this requirement, investigating authorities are effectively precluded from extending the period of investigation during the course of the investigation. The Panel disagreed with Mexico's argument, agreeing with Guatemala that there may be a number of circumstances in which the investigating authority will need updated information during the course of its investigation:

> "We are not persuaded that paragraph 1 of Annex II, or any other provision of the AD Agreement, prevents an investigating authority from extending the POI during the course of an investigation. We agree with Guatemala that there may be a number of circumstances in which the investigating authority will need updated information during the course of its investigation. In this regard, we would also note that the extension of a POI may in certain cases lead to negative findings of dumping and/or injury, to the benefit of exporters. The fact that the POI may be extended after the imposition of provisional measures is not necessarily problematic, since even without any extension of the POI there is no guarantee that the factual basis for the preliminary determination will be the same as that of the final determination. The factual basis may change, for example, if a preliminary affirmative determination of injury is made on the basis of data provided by the complainant, and if some (or all) of that data are shown to be erroneous during verification of the domestic industry. Indeed, in such cases differences in the factual bases of the preliminary and final determinations would normally be necessary in order to preserve the integrity of the investigation. Although Annex II(1) provides that interested parties should be informed of the information required by the investigating authority 'as soon as possible after the initiation of the investigation', this does not mean that information concerning a particular period of time may only be required if the request for that information is made immediately after initiation. We interpret the first sentence of paragraph 1 of Annex II to mean that any request for specific information should be communicated to interested parties 'as soon as possible'. Since Mexico has not advanced any argument that it was possible for the Ministry to have requested information concerning the extended POI before it actually did so, we reject Mexico's claim that the Ministry's extension of the POI violated Guatemala's obligations under paragraph 1 of Annex II of the AD Agreement."[492]

382. In *Egypt – Steel Rebar*, the Panel indicated that paragraph 1 of Annex II sets forth rules to be followed by the authority, in particular that it must specify the required information "in detail", "as soon as possible after the initiation of the investigation", and that it also must specify "the manner in which that information should be structured by the interested party in its response". Thus, in the Panel's view, "there is a clear burden on the authority to be both prompt and precise in identifying the information that it needs from a given interested party".[493]

383. In *Egypt – Steel Rebar*, the investigating authorities had requested certain supplemental cost information as well as explanations concerning certain of the cost information originally submitted in response to the questionnaires. The Panel found "no basis on which to conclude that an investigating authority is precluded by paragraph 1 of Annex II or by any other provision from seeking additional information during the course of an investigation".[494]

(ii) Failure to specify in detail the information required

384. In *Argentina – Ceramic Tiles*, the Panel, when analysing whether the investigating authorities were entitled to resort to facts available because the alleged failure on a party to provide sufficient supporting documentation, considered that "a basic obligation concerning the evidence-gathering process is for the investigating authorities to indicate to the interested parties the information they require for their determination", as set forth in Article 6.1. The Panel concluded that, "independently of the purpose for which the information or documentation is requested, an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit."[495] The Panel further stated that:

> "In our view, the inclusion, in an Annex relating specifically to the use of best information available under Article 6.8, of a requirement to specify in detail the information required, strongly implies that investigating authorities are *not* entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required.
>
> . . .
>
> . . . we conclude that an investigating authority may not disregard information and resort to facts available under Article 6.8 on the grounds that a party has failed to provide sufficient supporting documentation in respect of information provided unless the investigating authority has clearly requested that the party provide such supporting documentation."[496]

(c) When to resort to facts available

385. In *Argentina – Ceramic Tiles*, the Panel enunciated the conditions under which the investigating authorities may resort to facts available:

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[492] Panel Report on *Guatemala – Cement II*, para. 8.177.
[493] Panel Report on *Egypt – Steel Rebar*, para. 7.155.
[494] Panel Report on *Egypt – Steel Rebar*, para. 7.320.
[495] Panel Report on *Argentina – Ceramic Tiles*, paras. 6.53–6.54.
[496] Panel Report on *Argentina – Ceramic Tiles*, paras. 6.55 and 6.58.

> "It is clear to us, and both parties agree, that an investigating authority may disregard the primary source information and resort to the facts available only under the specific conditions of Article 6.8 and Annex II of the AD Agreement. Thus, an investigating authority may resort to the facts available only where a party: (i) refuses access to necessary information; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes the investigation."[497]

386. In *Egypt – Steel Rebar*, the Panel explained that paragraphs 3 and 5 of Annex II "together . . . provide key elements of the substantive basis" for the investigating authority to determine whether it can resort to facts available.

> "These two paragraphs together thus provide key elements of the substantive basis for an IA to determine whether it can justify rejecting respondents' information and resorting to facts available in respect of some item, or items, of information, or whether instead, it must rely on the information submitted by respondents 'when determinations are made'. Some of the elements referred to in these paragraphs have to do with the inherent quality of the information itself, and some have to do with the nature and quality of the interested party's participation in the IA's information-gathering process. Where all of the mentioned elements are satisfied, resort to facts available is not justified under Article 6.8."[498]

387. In *Egypt – Steel Rebar*, the Panel reiterated that paragraph 3 of Annex II applies to an investigating authority's decision to use "facts available" in respect of certain elements of information and stressed that "it does not have to do with determining which particular facts available will be used for those elements of information once that decision has been made".[499]

(d) When not to resort to facts available

388. In *US – Hot-Rolled Steel*, the Appellate Body concluded that, according to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances, four, conditions are satisfied. These conditions are that the information is (i) verifiable, (ii) appropriately submitted so that it can be used in the investigation without undue difficulties, (iii) supplied in a timely fashion, and, where applicable, (iv) supplied in a medium or computer language requested by the authorities. The Appellate Body concluded that, in its view, "if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination".[500]

389. In *US – Steel Plate*, the Panel analysed the extent of the limitation that paragraph 3 of Annex II puts on investigating authorities to reject information submitted and instead resort to facts available. The Panel concluded that the "Members [do not] have an unlimited right to reject all information submitted in a case where some necessary information is not provided":

> "Paragraph 3 states that all information provided that satisfies the criteria set out in that paragraph is to be taken into account when determinations are made. We consider in this regard that the use of the final connector 'and' in the list of criteria makes it clear to us that an investigating authority, when making determinations, is only **required** to take into account information which satisfies all of the applicable criteria of paragraph 3.[501] In order to assess the limitations this provision puts on the right of an investigating authority to reject information submitted and instead resort to facts available,[502] we look to the ordinary meaning of the text, in its context and in light of its object and purpose. Paragraph 3 starts with the phrase 'all information'. 'All' means 'the whole amount, quantity, extent or compass of' and 'the entire number of, the individual constituents of, without exception . . . every'.[503] To 'take into account' is defined as 'take into consideration, notice'.[504] Thus, a straightforward reading of paragraph 3 leads to the understanding that it requires that every element of information submitted which satisfies the criteria set out therein must be considered by the investigating authority when making its determinations. If information must be considered under paragraph 3, an investigating authority may not conclude, with respect to that information, that necessary information has not been provided, in the sense of Article 6.8. Consequently, we do not accept the United States' position that 'information' in Article 6.8 means all information, such that Members have an unlimited right to reject all information submitted in a case where some necessary information is not provided.
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> Of course, we do not mean to suggest that the investigating authority must, in every case, scrutinize each item

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[497] Panel Report on *Argentina – Ceramic Tiles*, para. 6.20. See also Panel Report on *US – Steel Plate*, para. 7.55, in para. 378 of this Chapter; Panel Report on *Egypt – Steel Rebar*, para. 7.147.

[498] Panel Report on *Egypt – Steel Rebar*, para. 7.159.

[499] Panel Report on *Egypt – Steel Rebar*, para. 7.309.

[500] Appellate Body Report on *US – Hot-Rolled Steel*, para. 81. See also Panel Report on *US – Steel Plate*, para. 7.55, in para. 378 of this Chapter.

[501] (*footnote original*) The Appellate Body has stated explicitly that:

> "according to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances, four, conditions are satisfied. In our view, it follows that if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination."

Appellate Body Report, *US – Hot-Rolled Steel*, at para 81.

[502] (*footnote original*) We note in this context the statement of the Appellate Body that paragraph 3 of Annex II bears on the issue of "when the investigating authorities are entitled to *reject* information submitted by interested parties." Appellate Body Report, *US – Hot-Rolled Steel*, at para 80.

[503] (*footnote original*) New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

[504] (*footnote original*) New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

of information submitted in order explicitly to determine whether it satisfies the criteria of paragraph 3 of Annex II before it uses it in its determination. Clearly, if the authority is satisfied with the information submitted, and concludes that an interested party has fully complied with the requests for information, there is no need to undertake any separate analysis under paragraph 3 of Annex II. However, to the extent the authority is not satisfied with the information submitted, it must examine those elements of information with which it is **not** satisfied, in light of the criteria of paragraph 3."[505]

390. In *US – Steel Plate*, the Panel further qualified its conclusions by stating that the investigating authorities were not obliged to judge each category of information separately. The Panel however indicated that the various elements, or categories, of information necessary to an anti-dumping determination are often interconnected, and a failure to provide certain information may have ramifications beyond the category into which it falls:

"... we also do not accept India's view that each category of information submitted must be judged separately. India recognizes that there may be cases where a piece of information submitted which otherwise satisfies paragraph 3 is so minor an element of the information necessary to make determinations that it cannot be used in the investigation without undue difficulties, and that it is possible that so much of the information submitted in a particular 'category' fails to satisfy the criteria of paragraph 3, for instance, cannot be verified, that the entire category of information cannot be used without undue difficulty.[footnote omitted]

We consider in addition that the various elements, or categories, of information necessary to an anti-dumping determination are often interconnected, and a failure to provide certain information may have ramifications beyond the category into which it falls. For instance, a failure to provide cost of production information would leave the investigating authority unable to determine whether sales were in the ordinary course of trade, and further unable to calculate a constructed normal value. Thus, a failure to provide cost of production information might justify resort to facts available with respect to elements of the determination beyond just the calculation of cost of production. Moreover, without considering any particular 'categories' of information, it seems clear to us that if certain information is not submitted, and facts available are used instead, this may affect the relative ease or difficulty of using the information that has been submitted and which might, in isolation, satisfy the requirements of paragraph 3 of Annex II. However, to accept that view does not necessarily require the further conclusion, espoused by the United States, that in a case in which any 'essential' element of requested information is not provided in a timely fashion, the investigating authority may disregard all the information submitted and base its determination exclusively on facts available. To conclude otherwise would fly in the face of one of the fundamental goals of the AD Agreement as a whole, that of ensuring that objective determinations are made, based to the extent possible on facts.[506]

... In a case in which some information is rejected and facts available used instead, the ... question may arise whether the fact that some information submitted was rejected has consequences for the remainder of the information submitted. In particular, the investigating authority may need to consider whether the fact that some information is rejected results in other information failing to satisfy the criteria of paragraph 3. In this context, we consider to be critical the question of whether information which itself may satisfy the criteria of paragraph 3 can be used without undue difficulties in light of its relationship to rejected information.[507]"[508]

391. In *US – Steel Plate*, the Panel faced the question of whether a conclusion that some information submitted fails to satisfy the criteria of paragraph 3 of Annex II, and thus may be rejected, can in any case justify a decision to reject other information submitted which, in isolation, satisfies that criteria:

"... The more difficult question, presented in this dispute, is whether a conclusion that some information submitted fails to satisfy the criteria of paragraph 3, and thus may be rejected, can in any case justify a decision to reject other information submitted which, if considered in isolation, would satisfy the criteria of paragraph 3. We consider that the answer to this question is yes, in some cases, but that the result in any given case will depend on the specific facts and circumstances of the investigation at hand."[509]

(e) Information which is "verifiable"

(i) General

392. In *Guatemala – Cement II*, the Panel indicated that recourse to "best information available" should not be had when information is "verifiable", and when "it can be used in the investigation without undue difficulties":

"Furthermore, Annex II(3) provides that all information which is 'verifiable', and 'appropriately submitted so that it can be used in the investigation without undue difficulties', should be taken into account by the investigating authority when determinations are made. In other words, 'best information available' should not be used when information is 'verifiable', and when 'it can be used in the investigation without undue difficulties'. In

[505] Panel Report on *US – Steel Plate*, paras. 7.57–7.58.
[506] The Panel refers to the Panel Report on *US – Hot-Rolled Steel*, para. 7.55, *see* para. 375 of this Chapter.
[507] (*footnote original*) In addition, as discussed below, the explanation of such findings is vital.
[508] Panel Report on *US – Steel Plate*, paras. 7.59–7.61.
[509] Panel Report on *US – Steel Plate*, para. 7.62.

our view, the information submitted by Cruz Azul was 'verifiable'. The fact that it was not actually verified as a result of the Ministry's response to reasonable concerns raised by Cruz Azul does not change this. In addition, there is nothing in the Ministry's final determination to suggest that the information submitted by Cruz Azul could not be used in the investigation 'without undue difficulties'. Since the information was 'verifiable', and since the Ministry did not demonstrate that it could not be used 'without undue difficulties', Annex II(3) provides strong contextual support for the above conclusion that the Ministry violated Article 6.8 in using the 'best information available' as a result of the cancelled verification visit."

(ii) When is information verifiable?

393. In *US – Steel Plate*, the Panel considered that the information is "verifiable" when "the accuracy and reliability of the information can be assessed by an objective process of examination" and that this process does not require an on-the-spot verification. In a footnote to its report, the Panel stated:

"While the parties have addressed this concept in terms of the 'on the spot' verification process provided for in Article 6.7 and Annex I of the Agreement, we note that such verification is not in fact required by the AD Agreement. Thus, the use of the term in paragraph 3 of Annex II is somewhat unclear. However, Article 6.6 establishes a general requirement that, unless they are proceeding under Article 6.8 by relying on facts available, the authorities shall 'satisfy themselves as to the accuracy supplied by interested parties upon which their findings are based'. 'Verify' is defined as 'ascertain or test the accuracy or correctness of, esp. by examination of by comparison of data etc; check or establish by investigation'. New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993. Thus, even in the absence of on-the-spot verification, the authorities are, in a more general sense of assessing the accuracy of information relied upon, required to base their decisions on information which is 'verified'."[510]

(iii) Relevance of good faith cooperation

394. In *Egypt – Steel Rebar*, the Panel considered that, pursuant to paragraphs 3 and 5 of Annex II, if read together[511], "information that is of a very high quality, although not perfect, must not be considered unverifiable solely because of its minor flaws, so long as the submitter has acted to the best of its ability. That is, so long as the level of good faith cooperation by the interested party is high, slightly imperfect information should not be dismissed as unverifiable."[512]

(f) Information "appropriately submitted so that it can be used in the investigation without undue difficulties"

395. In *US – Steel Plate*, the Panel considered that the question of whether information submitted can be used in the investigation "without undue difficulties" is a highly fact-specific issue. It thus concluded that the investigating authority must explain, as required by paragraph 6 of Annex II, the basis of a conclusion that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties:

"The second criterion of paragraph 3 requires that the information be 'appropriately submitted so that it can be used in the investigation without undue difficulties.' In our view, 'appropriately' in this context has the sense of 'suitable for, proper, fitting'.[513] That is, the information is suitable for the use of the investigating authority in terms of its form, is submitted to the correct authorities, etc. More difficult is the requirement that the information can be 'used without undue difficulties'. 'Undue' is defined as 'going beyond what is warranted or natural, excessive, disproportionate'.[514] Thus, 'undue difficulties' are difficulties beyond what is otherwise the norm in an anti-dumping investigation. This recognizes that difficulties in using the information submitted in an anti-dumping investigation are not, in fact, unusual. This conclusion is hardly surprising, given that enterprises that become interested parties in an anti-dumping investigation and are asked to provide information are not likely to maintain their internal books and records in exactly the format and with precisely the items of information that are eventually requested in the course of an anti-dumping investigation. Thus, it is frequently necessary for parties submitting information to collect and organize raw data in a form that responds to the information request of the investigating authorities. Similarly, it is frequently necessary for the investigating authority to make adjustments of its own in order to be able to take into account information that does not fully comply with its request. This is part of the obligation on both sides to cooperate, recognized by the Appellate Body in the *US – Hot-Rolled Steel* case.[515]

. . .

[510] Panel Report on *US – Steel Plate*, footnote 67. See also paras. 369–374 of this Chapter about on-the-spot verifications.
[511] See para. 386 of this Chapter.
[512] (*footnote original*) We note that there is an interplay between the concepts of acting to the best of one's ability in Annex II, paragraph 5, and "refusing access to" necessary information or "significantly impeding" an investigation in Article 6.8. That is, the behaviour of the interested party is relevant to the right to use facts available in a given situation.
[513] (*footnote original*) New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.
[514] (*footnote original*) New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.
[515] *See* para. 411 of this Chapter.

> In our view, it is not possible to determine in the abstract what 'undue difficulties' might attach to an effort to use information submitted. We consider the question of whether information submitted can be used in the investigation 'without undue difficulties' is a highly fact-specific issue. Thus, we consider that it is imperative that the investigating authority explain, as required by paragraph 6 of Annex II, the basis of a conclusion that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties."[516]

396. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered that "the reference to the terms 'appropriately submitted' is designed to cover *inter alia* information which is submitted in accordance with relevant procedural provisions of WTO Members' domestic laws"[517]:

> "In our view, paragraph 3 of Annex II to the *AD Agreement* can be interpreted to mean that information not 'appropriately submitted' in accordance with relevant procedural provisions of WTO Members' domestic laws may be disregarded. In the circumstances of this case, we consider that information submitted by Catarinense was not 'appropriately submitted' within the meaning of paragraph 3 of Annex II to the *AD Agreement* because Catarinense had not complied with Argentina's accreditation requirements. Accordingly, the DCD was entitled to reject that information."[518]

(g) Necessary information submitted in a timely fashion

(i) Timeliness

397. The Appellate Body in *US – Hot-Rolled Steel* concluded that paragraph 3 of Annex II directs investigating authorities not to resort to reject information submitted by the parties if this is submitted "in a timely fashion" and interpreted this as a reference to a "reasonable period" of Article 6.8 or a "reasonable time" of paragraph 1 of Annex II (see paragraphs 401–403 below). The Appellate Body also refers to Article 6.1.1, second sentence which requires investigating authorities to extend deadlines "upon cause shown", if "practicable":

> ". . . according to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances, four, conditions are satisfied. In our view, it follows that if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination. One of these conditions is that information must be submitted 'in a *timely* fashion'.
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> The text of paragraph 3 of Annex II of the *Anti-Dumping Agreement* is silent as to the appropriate measure of 'timeliness' under that provision. In our view, 'timeliness' under paragraph 3 of Annex II must be read in light of the collective requirements, in Articles 6.1.1 and 6.8, and in Annex II, relating to the submission of information by interested parties. Taken together, these provisions establish a coherent framework for the treatment, by investigating authorities, of information submitted by interested parties. Article 6.1.1 establishes that investigating authorities may fix time-limits for responses to questionnaires, but indicates that, 'upon cause shown', and if 'practicable', these time-limits are to be extended. Article 6.8 and paragraph 1 of Annex II provide that investigating authorities may use facts available only if information is not submitted within a reasonable period of time, which, in turn, indicates that information which *is* submitted in a reasonable period of time should be used by the investigating authorities.
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> That being so, we consider that, under paragraph 3 of Annex II, investigating authorities should not be entitled to reject information as untimely if the information is submitted within a reasonable period of time. In other words, we see, 'in a timely fashion', in paragraph 3 of Annex II as a reference to a 'reasonable period' or a 'reasonable time'. This reading of 'timely' contributes to, and becomes part of, the coherent framework for fact-finding by investigating authorities. Investigating authorities *may* reject information under paragraph 3 of Annex II only in the same circumstances in which they are entitled to overcome the lack of this information through recourse to facts available, under Article 6.8 and paragraph 1 of Annex II of the *Anti-Dumping Agreement*. The coherence of this framework is also secured through the second sentence of Article 6.1.1, which requires investigating authorities to extend deadlines 'upon cause shown', if 'practicable'. In short, if the investigating authorities determine that information was submitted within a reasonable period of time, Article 6.1.1 calls for the extension of the time-limits for the submission of information."[519]

(ii) "necessary information"

398. In *Egypt – Steel Rebar*, the Panel examined the concept of "necessary information" in the sense of Article 6.8 and stressed that "Article 6.8 refers to 'necessary' information, and not to 'required' or 'requested' information". Since Article 6.8 itself does not define the concept of "necessary" information, the Panel considered whether there is guidance on this point anywhere else in the *Anti-Dumping Agreement*, in particular in Annex II, given Article 6.8's explicit cross-reference to it.[520] The Panel concluded that, subject to the requirements of Annex II, paragraph 1, it is left to the discretion of the

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[516] Panel Report on *US – Steel Plate*, paras. 7.72 and 7.74.
[517] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.191.
[518] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.191.
[519] Appellate Body Report on *US – Hot-Rolled Steel*, paras. 81–83. See also Panel Report on *US – Steel Plate*, para. 7.76; Panel Report on *Egypt – Steel Rebar*, para. 7.153.
[520] Panel Report on *Egypt – Steel Rebar*, paras. 7.150–7.151.

investigating authority to specify what information is "necessary" in the sense of Article 6.8:

> "On the question of the 'necessary' information, reading Article 6.8 in conjunction with Annex II, paragraph 1, it is apparent that it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.), as the authority is charged by paragraph 1 to 'specify . . . the information required from any interested party'. This paragraph also sets forth rules to be followed by the authority, in particular that it must specify the required information 'in detail', 'as soon as possible after the initiation of the investigation', and that it also must specify 'the manner in which that information should be structured by the interested party in its response'. Thus, there is a clear burden on the authority to be both prompt and precise in identifying the information that it needs from a given interested party . . ."[521]

399. In *Egypt – Steel Rebar*, Turkey had claimed that because the basis for initially questioning and then rejecting Turkish respondents' costs was unfounded, resort to facts available by the investigating authorities was unjustified under Article 6.8 of the Agreement. Egypt argued that its investigating authority was not in a position to make this determination because the required information to enable it to make the determination was not submitted by the respondents in their responses to the initial questionnaire. The Panel considered that, "[o]n its face, this justification for seeking the detailed cost information appears plausible to us, given, as noted, that a below-cost test is explicitly provided for in Articles 2.2 and 2.2.1 of the AD Agreement". The Panel thus concluded that "the requested information would seem to be 'necessary' in the sense of Article 6.8".[522]

(iii) Information submitted after a deadline

400. In *US – Hot-Rolled Steel*, the United States authorities had rejected certain information provided by two Japanese companies which was submitted beyond the deadlines for responses to the questionnaires and thus applied "facts available" in the calculation of the dumping margins. The United States interpreted Article 6.8 as permitting investigating authorities to rely upon reasonable, pre-established deadlines for the submission of data and that this is supported by Article 6.1.1. The Appellate Body, although it upheld the Panel's finding that the United States had infringed Article 6.8 by rejecting that information and applying best facts available, did so following a different line of reasoning.[523] As regards the Appellate Body's interpretation of Article 6.1.1 in this context, see paragraph 317 above. The Appellate Body considered that deadlines are indeed relevant in determining whether information had been submitted within a reasonable period of time but that a balance needs to be made between the rights of the investigating authorities to control and expedite the investigation and the legitimate interest of the parties to submit information and to have it taken into account:

> "In determining whether information is submitted within a reasonable period of time, it is proper for investigating authorities to attach importance to the time-limit fixed for questionnaire responses, and to the need to ensure the conduct of the investigation in an orderly fashion. Article 6.8 and paragraph 1 of Annex II are not a license for interested parties simply to disregard the time-limits fixed by investigating authorities.[524] Instead, Articles 6.1.1 and 6.8, and Annex II of the *Anti-Dumping Agreement*, must be read together as striking and requiring a balance between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account."[525]

(iv) "within reasonable period" and "within reasonable time"

401. In *US – Hot-Rolled Steel*, the Appellate Body looked into the issue of when investigating authorities are entitled to reject information submitted by the parties after a deadline established by the investigating authorities, and instead resort to facts available, as the United States did in this case. The Appellate Body considered that when information is provided "within a reasonable period of time" as mandated by Article 6.8, the investigating authorities cannot resort to best facts available:

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[521] Panel Report on *Egypt – Steel Rebar*, para. 7.155.

[522] Panel Report on *Egypt – Steel Rebar*, para. 7.217.

[523] Appellate Body Report on *US – Hot-Rolled Steel*, para. 90. The Appellate Body found that the United States authorities had "acted inconsistently with Article 6.8 of the *Anti-Dumping Agreement* through its failure to consider whether, in the light of all the facts and circumstances, the weight conversion factors submitted by [the Japanese exporters] were submitted within a reasonable period of time." It however pointed out that "[i]n reaching this conclusion, we are *not* finding that[United States authorities] *could not*, consistently with the *Anti-Dumping Agreement*, have rejected the weight conversion factors submitted by [the Japanese exporters]. Rather, we conclude simply that, under Article 6.8, [United States authorities were] not entitled to reject this information *for the sole reason* that it was submitted beyond the deadlines for responses to the questionnaires." Para. 89.

[524] (*footnote original*) Indeed, as we have already noted, *supra*, para. 73, Article 6.14 of the *Anti-Dumping Agreement* provides that:

> The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

[525] Appellate Body Report on *US – Hot-Rolled Steel*, para. 86.

"Article 6.8 identifies the circumstances in which investigating authorities may overcome a lack of information, in the responses of the interested parties, by using 'facts' which are otherwise 'available' to the investigating authorities. According to Article 6.8, where the interested parties do not 'significantly impede' the investigation, recourse may be had to facts available only if an interested party fails to submit necessary information 'within a reasonable period'. Thus, if information is, in fact, supplied 'within a reasonable period', the investigating authorities *cannot* use facts available, but must use the information submitted by the interested party."[526]

402. The Appellate Body in *US – Hot-Rolled Steel* also drew from paragraph 1 of Annex II to support its conclusion that investigating authorities may resort to facts available only "if information is not supplied within a reasonable time":

"Although [. . .] paragraph [1 of Annex II] is specifically concerned with ensuring that respondents receive proper notice of the rights of the investigating authorities to use facts available, it underscores that resort may be had to facts available only 'if information is not supplied within a reasonable time'. Like Article 6.8, paragraph 1 of Annex II indicates that determinations may *not* be based on facts available when information is supplied within a 'reasonable time' but should, instead, be based on the information submitted."[527]

403. As regards the meaning of "reasonable period" under Article 6.8 and "reasonable time" under paragraph 1 of Annex II, the Appellate Body in *US – Hot-Rolled Steel* considered that both concepts should be approached on a case-by-case basis "in the light of the specific circumstances of each investigation":

". . . The word 'reasonable' implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is 'reasonable' in one set of circumstances may prove to be less than 'reasonable' in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time, under Article 6.8 and Annex II of the *Anti-Dumping Agreement*, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation.

In sum, a 'reasonable period' must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of 'reasonableness', and in a manner that allows for account to be taken of the particular circumstances of each case. In considering whether information is submitted within a reasonable period of time, investigating authorities should consider, in the context of a particular case, factors such as: (i) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the numbers of days by which the investigated exporter missed the applicable time-limit."[528]

(h) Information submitted in the medium or computer language requested

404. In *US – Steel Plate*, the Panel refer to this fourth criterion of paragraph 3 of Annex II but it did not consider it further because it seemed to it to be straightforward and it was not in dispute in this case.[529]

(i) Non-cooperation: "refuse access to" or "otherwise fail to provide"

(i) Meaning of cooperation

405. In *US – Hot-Rolled Steel*, the United States authorities had resorted to "adverse"[530] facts available to calculate the dumping margins of an exporter as a punishment for not having cooperated by failing to provide certain data as requested. The Appellate Body, which upheld the Panel's finding to the effect that the authorities' conclusion that the exporter failed to "cooperate" in the investigation "did not rest on a permissible interpretation of that word"[531], looked into the meaning of cooperation under paragraph 7 of Annex II. The Appellate Body considered that cooperation is a process which is "in itself not determinative of the end result of the cooperation":

"Paragraph 7 of Annex II indicates that a lack of 'cooperation' by an interested party may, by virtue of the use made of facts available, lead to a result that is 'less favourable' to the interested party than would have been the case had that interested party cooperated. We note that the Panel referred to the following dictionary meaning of 'cooperate': to 'work together for the same purpose or in the same task.'[532] This meaning suggests that cooperation is a *process*, involving joint effort, whereby parties work together towards a common goal. In that respect, we note that parties may very well 'cooperate' to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of 'cooperating' is in itself not determinative of

[526] Appellate Body Report on *US – Hot-Rolled Steel*, para. 77.
[527] Appellate Body Report on *US – Hot-Rolled Steel*, para. 79.
[528] Appellate Body Report on *US – Hot-Rolled Steel*, paras. 84 – 85.
[529] Panel Report on *US – Steel* Plate, para. 7.77.
[530] See para. 413 of this Chapter.
[531] Panel Report on *US – Hot-Rolled Steel*, para. 8.1(b).
[532] (*footnote original*) *The New Shorter Oxford English Dictionary*, Lesley Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 506; Panel Report, para. 7.73.

the end result of the cooperation. Thus, investigating authorities should not arrive at a 'less favourable' outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has 'cooperated' with the investigating authorities, within the meaning of paragraph 7 of Annex II of the *Anti-Dumping Agreement*."[533]

(ii) Degree of cooperation: "to the best of its ability"

406. The Appellate Body in *US – Hot-Rolled Steel*, when analysing the concept of cooperation under paragraph 7 of Annex II, noted that this provision does not indicate the degree of cooperation which is expected from interested parties to avoid the possibility of the investigating authorities resorting to "less favourable" result. The Appellate Body considered that, on the basis of the wording of paragraph 5 of Annex II, the degree of cooperation required is to cooperate to the "'best' of their abilities". The Appellate Body also draws from paragraph 2 of Annex II to maintain that the principle of good faith commands for a balance to be kept by the investigating authorities between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities:

"Paragraph 7 of Annex II does not indicate what *degree* of 'cooperation' investigating authorities are entitled to expect from an interested party in order to preclude the possibility of such a 'less favourable' outcome. To resolve this question we scrutinize the context found in Annex II. In this regard, we consider it relevant that paragraph 5 of Annex II prohibits investigating authorities from discarding information that is 'not ideal in all respects' if the interested party that supplied the information has, nevertheless, acted 'to the *best* of its ability'. (emphasis added) This provision suggests to us that the level of cooperation required of interested parties is a high one – interested parties must act to the 'best' of their abilities.

We note, however, that paragraph 2 of Annex II authorizes investigating authorities to request responses to questionnaires in a particular medium (for example, computer tape) but, at the same time, states that such a request should not be 'maintained' if complying with that request would impose an '*unreasonable extra burden*' on the interested party, that is, would 'entail *unreasonable additional cost and trouble*'. (emphasis added) This provision requires investigating authorities to strike a balance between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities. We see this provision as another detailed expression of the principle of good faith, which is, at once, a general principle of law and a principle of general international law, that informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements.[534] This organic principle of good faith, in this particular context, restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable."[535]

407. In *US – Steel Plate*, India had argued that even if information submitted fails to satisfy the criteria of paragraph 3 of Annex II to some degree, if the party submitting that information acted to the best of its ability, the investigating authority is required under paragraph 5 of Annex II to make "more concerted efforts" to use it. The Panel did not agree with India:

"Paragraph 5 establishes that information provided which is not ideal is not to be disregarded if the party submitting it has acted to the best of its ability. As the Appellate Body found in *US – Hot-Rolled Steel*, the degree of effort demanded of interested parties by this provision is significant.[536] We are somewhat troubled by the implications of India's view of this provision, which might be understood to require that information which fails to satisfy the criteria of paragraph 3, and therefore need not be taken into account when determinations are made, must nonetheless 'not be disregarded' if the party submitting it has acted to the best of its ability. We find it difficult to conclude that an investigating authority must use information which is, for example, not verifiable, or not submitted in a timely fashion, or regardless of the difficulties incumbent upon its use, merely because the party supplying it has acted to the best of its ability. This would seem to undermine the recognition that the investigating authority must be able to complete its investigation and must make determinations based to the extent possible on facts, the accuracy of which has been established to the authority's satisfaction.

However, if we understand paragraph 5 to emphasize the obligation on the investigating authority to cooperate with interested parties, and particularly to actively make efforts to use information submitted if the interested party has acted to the best of its ability, we believe that it does not undo the framework for use of information submitted and resort to facts available set out in the AD Agreement overall. Similarly, paragraph 5 can be understood to highlight that information that satisfies the requirements of paragraph 3, but which is not perfect, must nonetheless not be disregarded."[537]

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[533] Appellate Body Report on *US – Hot-Rolled Steel*, para. 99.

[534] (*footnote original*) Appellate Body Report, *United States – Import Prohibition of Certain Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 158; Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.

[535] Appellate Body Report on *US – Hot-Rolled Steel*, paras. 100–101.

[536] (*footnote original*) Appellate Body Report, *US – Hot-Rolled Steel*, at para. 102.

[537] Panel Report on *US – Steel Plate*, paras. 7.64–7.65.

408. In *Egypt – Steel Rebar*, the Panel considered that the phrase "acted to the best of its ability" in paragraph 5 of Annex II does not exist in isolation, either from other paragraphs of Annex II or from Article 6.8 itself. The Panel indicated that "this is because an interested party's level of effort to submit certain information does not necessarily have anything to do with the substantive *quality* of the information submitted":

> "[P]aragraph 5 [of Annex II] does not exist in isolation, either from other paragraphs of Annex II, or from Article 6.8 itself. Nor, *a fortiori*, does the phrase 'acted to the best of its ability'. In particular, even if, with the best possible intentions, an interested party has acted to the very best of its ability in seeking to comply with an investigating authority's requests for information, that fact, by itself, would not preclude the investigating authority from resorting to facts available in respect of the requested information. This is because an interested party's level of effort to submit certain information does not necessarily have anything to do with the substantive *quality* of the information submitted, and in any case is not the *only* determinant thereof. We recall that the Appellate Body, in *US – Hot-Rolled Steel*, recognized this principle (although in a slightly different context), stating that 'parties may very well "cooperate" to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of "cooperating" is in itself not determinative of the end result of the cooperation'.[538]"[539]

409. In *Egypt – Steel Rebar*, the Panel looked at the dictionary meaning of the phrase to the "best" of an interested party's ability:

> "Considering in more detail the concrete meaning of the phrase to the 'best' of an interested party's ability, we note that the *Concise Oxford Dictionary* defines the expression 'to the best of one's ability' as 'to the *highest level* of one's *capacity* to do something' (emphasis added). In similar vein, the *Shorter Oxford Dictionary* defines this phrase as 'to the *furthest extent* of one's *ability*; so far as one can do'. We note that in a legal context, the concept of 'best endeavours', is often juxtaposed with the concept of 'reasonable endeavours' in defining the degree of effort a party is expected to exert. In that context, 'best endeavours' connotes efforts going beyond those that would be considered 'reasonable' in the circumstances. We are of the opinion that the phrase the 'best' of a party's ability in paragraph 5 connotes a similarly high level of effort."[540]

(iii) Justification for non-cooperation

410. In *Guatemala – Cement II*, the Panel examined whether Guatemala's authority had made recourse to the "best information available" in compliance with Article 6.8. In rejecting Guatemala's argument that the Mexican producer concerned significantly impeded the investigation of the authority by failing to cooperate with the authority's verification visit to its premises, the Panel found that the objection of the Mexican producer to the verification visit was reasonable:

> "[W]e do not consider that an objective and impartial investigating authority could properly have found that Cruz Azul significantly impeded its investigation by objecting to the inclusion of non-governmental experts with a conflict of interest in its verification team. We do not consider that a failure to cooperate necessarily constitutes significant impediment of an investigation, since in our view the AD Agreement does not require cooperation by interested parties at any cost. Although there are certain consequences (under Article 6.8) for interested parties if they fail to cooperate with an investigating authority, in our view such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner. In light of the facts of this case, we find that the Ministry did not act in such a manner."[541]

(iv) Cooperation as a two-way process

411. The Appellate Body in *US – Hot-Rolled Steel* also considered that both paragraphs 2 and 5 of Annex II and Article 6.13 of the *Anti-Dumping Agreement* call for a "balance between the interests of investigating authorities and exporters" and therefore see "cooperation" as "a two-way process involving joint effort":

> "We, therefore, see paragraphs 2 and 5 of Annex II of the *Anti-Dumping Agreement* as reflecting a careful balance between the interests of investigating authorities and exporters. In order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the 'best of their abilities' – from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters.
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> . . .
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> Article 6.13 thus underscores that 'cooperation' is, indeed, a two-way process involving joint effort. This provision requires investigating authorities to make certain allowances for, or take action to assist, interested parties in supplying information. If the investigating authorities fail to 'take due account' of genuine 'difficulties' experienced by interested parties, and made known to the investigating authorities, they cannot, in our view, fault the interested parties concerned for a lack of cooperation."[542]

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[538] (*footnote original*) Appellate Body Report, *US – Hot-Rolled Steel*, para. 99.
[539] Panel Report on *Egypt – Steel Rebar*, para. 7.242. See also Appellate Body Report on *US – Hot-Rolled Steel*, para. 405.
[540] Panel Report on *Egypt – Steel Rebar*, para. 7.244.
[541] Panel Report on *Guatemala – Cement II*, para. 8.251.
[542] Appellate Body Report on *US – Hot-Rolled Steel*, paras. 102 and 104.

(j) Information used in case of resorting to facts available

(i) "secondary source . . . with special circumspection"

412. In *Egypt – Steel Rebar*, Egypt has resorted to facts available in the calculation of the cost of production and constructed value of a Turkish company concerned. In particular, Egypt had added a 5 per cent for inflation to that company reported costs when constructing its normal value. Turkey had claimed that the addition of 5 per cent was arbitrary and, as information from a "secondary source", should have been used with "special circumspection", and in particular, should have been "check[ed] . . . from other independent sources at [the investigating authority's] disposal". The Panel rejected Turkey's claim and emphasized that "applying 'special circumspection' does not mean that only one outcome is possible on a given point in an investigation. Rather, even while using special circumspection, an investigating authority may have a number of equally credible options in respect of a given question. In our view, when no bias or lack of objectivity is identified in respect of the option selected by an investigating authority, the option preferred by the complaining Member cannot be preferred by a panel."[543]

(ii) "Adverse" facts available

413. In *US – Hot-Rolled Steel*, the United States authorities had resorted to "adverse" facts available to calculate the dumping margins of an exporter as a punishment for not having cooperated by failing to provide certain data as requested. In this case, Japan had not contested the possibility of resorting to "adverse" facts available in case of non-cooperation by a party. Its claim was that the Japanese exporter concerned had cooperated and thus the United States authorities should have not declared them non-cooperating parties and thus used "adverse" facts available. The Panel focussed its analysis on whether or not the Japanese exporter had cooperated without entering into an analysis of the compatibility of resorting to "adverse" effects with the *Anti-Dumping Agreement*. The Panel held that the authorities' conclusion that the exporter failed to "cooperate" in the investigation "did not rest on a permissible interpretation of that word".[544] The Appellate Body, which upheld the Panel's finding, indicated in a footnote to its Report, that "the term 'adverse' does not appear in the *Anti-Dumping Agreement* in connection with the use of facts available. Rather, the term appears in the provision of the United States Code that applies to the use of facts available".[545] It however indicated that it would not consider "whether, or to what extent, it is permissible, under the *Anti-Dumping Agreement*, for investigating authorities consciously to choose facts available that are *adverse* to the interests of the party concerned"[546] The Appellate Body stressed that its analysis was circumscribed to using the term "adverse" facts available simply to denote that the authorities had drawn "an inference that was adverse to the interests of the non-cooperating party 'in selecting among the facts otherwise available' ".[547] For its analysis of the term non-cooperation, see paragraphs 405–411 above.

(k) Authorities' duty to inform on reasons for disregarding information

414. In *Argentina – Ceramic Tiles*, the Panel considered that "Article 6.8, read in conjunction with paragraph 6 of Annex II, requires an investigating authority to inform the party supplying information of the reasons why evidence or information is not accepted, to provide an opportunity to provide further explanations within a reasonable period, and to give, in any published determinations, the reasons for the rejection of evidence or information".[548]

415. In *Egypt – Steel Rebar*, the Panel considered that "the fact that an investigating authority may request information in several tranches during an investigation[549] cannot, however, relieve of it of its Annex II, paragraph 6 obligations in respect of the second and later tranches, as that requirement applies to 'information and evidence' without temporal qualification.[550]"[551]

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[543] Panel Report on *Egypt – Steel Rebar*, para. 7.305.

[544] Panel Report on *US – Hot-Rolled Steel*, para. 8.1(b).

[545] Appellate Body Report on *US – Hot-Rolled Steel*, footnote 45. This footnote further indicates that "[p]ursuant to 19 U.S.C. § 1677e(b), if the investigating authorities find that 'an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information', then they may, in reaching their determination, 'use an inference that is *adverse* to the interests of that party in selecting from among the facts otherwise available'. (emphasis added) The United States explained to us at the oral hearing that, in practice, an 'adverse inference' is used because it is assumed that the information that a non-cooperative party did not provide would have been adverse to its interests . . ."

[546] Appellate Body Report on *US – Hot-Rolled Steel*, footnote 45.

[547] Appellate Body Report on *US – Hot-Rolled Steel*, footnote 60.

[548] Panel Report on *Argentina – Ceramic Tiles*, para. 6.21.

[549] See paras. 699–700 of this Chapter concerning paragraph 6 of Annex II.

[550] (*footnote original*) We do not mean to imply here that an interested party can impose on an investigating authority an Annex II, paragraph 6 requirement simply by submitting new information *sua sponte* during an investigation. Rather, the role of paragraph 6 of Annex II, namely that it forms part of the basis for an eventual decision pursuant to Article 6.8 whether or not to use facts available, makes it clear that its requirements to inform interested parties that information is being rejected and to give them an opportunity to provide explanations, pertain to "necessary" information in the sense of Article 6.8. As discussed above, "necessary" information is left to the discretion of the investigating authority to specify, subject to certain requirements, notably those in Annex II, paragraph 1.

[551] Panel Report on *Egypt – Steel Rebar*, para. 7.262.

(l) Confidential *versus* non-confidential information

416. In *Argentina – Ceramic Tiles*, Argentina had argued that the failure to provide a non-confidential summary which is sufficiently detailed to permit the calculation of normal value, export price and the margin of dumping amounts to a refusal to provide access to information that is necessary for the authority in the determination of a dumping margin determination. The Panel disagreed with Argentina and supported its position by reference to Article 6.5 of the *Anti-Dumping Agreement* which requires an investigating authority to treat information which is by nature confidential or which is provided on a confidential basis as confidential information and prescribes that such information shall not be disclosed without specific permission of the party submitting it. The Panel considered that it would be contradictory to suggest that the *Anti-Dumping Agreement* creates a mechanism for the protection of confidential information, but precludes investigating authorities from relying on such information in making its determinations. It further concluded that nothing in this Article authorises a Member to disregard confidential information solely on the basis that the non-confidential summary does not permit dumping calculations:

> "In our view, the presence in [Article 6.5] the AD Agreement of a requirement to protect confidential information indicates that investigating authorities might need to rely on such information in making the determinations required under the AD Agreement. The AD Agreement therefore contains a mechanism that allows parties to provide investigating authorities with such information for the purposes of making their determinations, while ensuring that the information is not used for other purposes. In accordance with the accepted principles of treaty interpretation, we are to give meaning to all the terms of the Agreement.[552] It would be contradictory to suggest that the AD Agreement creates a mechanism for the protection of confidential information, but precludes investigating authorities from relying on such information in making its determinations. If that were the case, then there would be no reason for the investigating authority to seek such information in the first place.
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> . . .
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> We are aware that, for the purpose of transparency, Article 6.5.1 obliges an authority to require the parties providing confidential information to furnish non-confidential summaries which shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. We consider that this is an important element of the AD Agreement which reflects the balance struck by the Agreement between the need to protect the confidentiality of certain information, on the one hand, and the need to ensure that all parties have a full opportunity to defend their interests, on the other. However, we see nothing in Article 6.5.1, nor elsewhere in Article 6.5, that authorizes a Member to disregard confidential information solely on the basis that the non-confidential summary of that information contains insufficient detail to permit authorities to calculate normal value, export price and the margin of dumping.[553]"[554]

417. The Panel, in *Argentina – Ceramic Tiles*, further referred to Article 12 of the *Anti-Dumping Agreement*, which sets forth requirements regarding the contents of public notices in confirmation of its conclusion above that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information:

> "Thus, the transparency requirement which obligates the authority to explain its determination in a public notice is subject to the need to have regard to the requirement for the protection of confidential information of Article 6.5 of the AD Agreement. Confidentiality of the information submitted therefore limits the manner in which the authority explains its decision and supports its determination in a public notice. In sum, Article 12 implies, to our mind, that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information."[555]

418. The Panel, in *Argentina – Ceramic Tiles*, also found support for its view on the Appellate Body decision in *Thailand – H-Beams*, which addressed the question of the use of confidential information by the investigating authorities as a basis for its final determinations under Article 3 of the *Anti-Dumping Agreement*.

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[552] (*footnote original*) As the Appellate Body noted in the case of *United States – Standards for reformulated and Conventional Gasoline*, "one of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996, p. 21.

[553] (*original footnote)* We note that Article 6.5.2 of the AD Agreement specifically provides for a situation in which the authorities may disregard confidentially submitted information: in case the authorities consider that a request for confidentiality is not warranted and the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form. We note, however, that the DCD considered the request for confidential treatment was warranted and treated the information as such. Argentina has not invoked Article 6.5.2 as a justification for the DCD's rejection of the exporters' information either.

[554] Panel Report on *Argentina – Ceramic Tiles*, paras. 6.34 and 6.38.

[555] Panel Report on *Argentina – Ceramic Tiles*, para. 6.36.

(m) Scope of Panel's review: national authorities' justification at the time of its determination

419. With respect to the use of "best information available", the Panel on *Guatemala – Cement II* restricted the scope of its examination to the reasoning provided by Guatemala's authority in its determination, citing the finding of the Panel on *Korea – Dairy*.[556] The Panel stated that "[e]ven if the additional factors identified by Guatemala before the Panel could justify the use of 'best information available', such *ex post* justification by Guatemala should not form part of our assessment of the conduct of the Ministry leading up to the imposition of the January 1997 definitive anti-dumping measure."[557] Subject to this limitation, however, the Panel stated that "[a]n impartial and objective investigating authority could not properly rely on 'best information available' sales data for the original [period of investigation], simply on the basis of [the] failure [of the subject Mexican producer] to provide sales data for the extended [period of investigation]."[558]

(n) Consistency of domestic legislation with Article 6.8 and Annex II

420. In *US – Steel Plate*, the Panel was asked to consider the consistency of United States law with Article 6.8 and Annex II of the *Anti-Dumping Agreement*. In reference to the existing jurisprudence on mandatory *versus* discretionary legislation[559], the Panel considered that the question before it was whether the US statutory provision at issue *required* the US authorities to resort to facts available in circumstances other than the circumstances in which Article 6.8 and paragraph 3 of Annex II permit resort to facts available.[560] The Panel found that the "practice" of the US authorities concerning the application of "total facts available" was not a measure which can give rise to an independent claim of violation of the *Anti-Dumping Agreement*.[561]

(o) Relationship with other paragraphs of Article 6

421. In *Guatemala – Cement II*, the Panel addressed Mexico's claim that Guatemala's investigating authority violated Articles 6.1, 6.2, 6.8 and Annex II(5) and (6) of the *Anti-Dumping Agreement* by rejecting certain technical accounting evidence submitted by the Mexican producer one day before the public hearing held by Guatemala's authority. See paragraph 328 above.

422. In *US – Hot-Rolled Steel*, the Appellate Body referred to Article 6.13 as support for its view that paragraphs 2 and 5 of Annex II call for a balance between the interests of investigating authorities and exporters as regards cooperation in anti-dumping investigations. See paragraph 409 above.

423. The Panel on *Argentina – Ceramic Tiles*, when examining whether the investigating authorities were entitled to resort to facts available pursuant to Article 6.8, referred to Article 6.1 to support its conclusion that the investigating authorities could not do so when they did not clearly request the relevant information to the party in question. See paragraphs 308 above and 384 above. The Appellate Body in *US – Hot-Rolled Steel* further analysed the relationship of Article 6.8 and Annex II with Article 6.1.1. See paragraphs 314, 397 and 400 above.

424. The Panel, in *Argentina – Ceramic Tiles*, referred to Article 6.5 of the *Anti-Dumping Agreement* as support of its conclusion above that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information. See paragraph 416 above.

425. In *Egypt – Steel Rebar*, the Panel addressed the relationship of Article 6.2 with Annex II and Article 6.8. See paragraph 704 below.

8. Article 6.9

(a) "shall, before a final determination is made, inform all interested parties of the essential facts under consideration"

(i) Means to inform all interested parties of the essential facts

426. In Argentina – Ceramic Tiles, the Panel, further to noting that Article 6.9 does not prescribe the manner in which the investigating authority is to comply with the disclosure obligation, provided some examples of how investigating authorities may comply with this requirement:

> "We agree with Argentina that the requirement to inform all interested parties of the essential facts under consideration may be complied with in a number of ways. Article 6.9 of the AD Agreement does not pre-

[556] Panel Report on *Korea – Dairy*, para. 7.67.
[557] Panel Report on *Guatemala – Cement II*, para. 8.245.
[558] Panel Report on *Guatemala – Cement II*, para. 8.254.
[559] *See* Section VI.B.3(c)(ii) of the Chapter on the *DSU*. The Panel also indicated that it kept "in mind that it is a well accepted principle of international law that for the purposes of international adjudication national law is to be considered as a fact. Our analysis of the consistency of the US statute with the AD Agreement takes into account, therefore, the principles of statutory interpretation applied by the administering agency and judicial authorities of the United States". Panel Report on *US – Steel Plate*, paras. 7.88–7.90.
[560] Panel Report on *US – Steel Plate*, para. 7.92.
[561] Panel Report on *US – Steel Plate*, para. 8.3.

scribe the manner in which the authority is to comply with this disclosure obligation. The requirement to disclose the 'essential facts under consideration' may well be met, for example, by disclosing a specially prepared document summarizing the essential facts under consideration by the investigating authority or through the inclusion in the record of documents – such as verification reports, a preliminary determination, or correspondence exchanged between the investigating authorities and individual exporters – which actually disclose to the interested parties the essential facts which, being under consideration, are anticipated by the authorities as being those which will form the basis for the decision whether to apply definitive measures. This view is based on our understanding that Article 6.9 anticipates that a final determination will be made and that the authorities have identified and are considering the essential facts on which that decision is to be made. Under Article 6.9, these facts must be disclosed so that parties can defend their interests, for example by commenting on the completeness of the essential facts under consideration."[562]

(ii) "the essential facts . . . which form the basis for the decision whether to apply definitive measures"

427. The Panel on *Argentina – Poultry Anti-Dumping Duties* stated that facts which do not form the basis for the decision whether to apply definitive measures cannot be considered to be "essential facts" within the meaning of Article 6.9 of the *AD Agreement*. The Panel was thus of the view that data which "is not going to be relied on in making a final determination is not a fact which forms the basis for the decision whether to apply definitive measures".[563] In other words, while the Panel accepted that normal value and export price data ultimately used in the final determination are essential facts which form the basis for the decision whether to apply definitive measures, "the fact that certain normal value and export price data is not going to be used is not".[564]

428. The Panel on *Argentina – Poultry Anti-Dumping Duties* further considered that the term "essential facts" refers to "factual information" rather than "reasoning". In the Panel's view, the failure to inform an interested party of the reasons why the authority failed to use certain data does not equate to a failure to inform an interested party of an essential fact:

> "We do not believe that the ordinary meaning of the word 'fact' would support a conclusion that Article 6.9, when using the term 'fact', refers not only to 'facts' in the sense of 'things which are known to have occurred, to exist or to be true', but also to 'motives, causes or justifications'."[565]

(iii) Relevance of the fact that information is made available in the authorities' record

429. In *Guatemala – Cement II*, the Panel considered that, although the information of the essential facts under consideration may be available in the authorities' file, interested parties with access to that file will not know whether a particular information in that file forms the basis of the authorities' determination. In the Panel's view, one purpose of Article 6.9 is to resolve this problem. Accordingly, the Panel rejected Guatemala's argument that interested parties had been informed that a certain directorate would make a technical study on the basis of the evidence in the file, and that copies of the file had been available. The Panel explained:

> "We note that an investigating authority's file is likely to contain vast amounts of information, some of which may not be relied on by the investigating authority in making its decision whether to apply definitive measures. For example, the file may contain information submitted by an interested party that was subsequently shown to be inaccurate upon verification. Although that information will remain in the file, it would not form the basis of the investigating authority's decision whether to apply definitive measures. The difficulty for an interested party with access to the file, however, is that it will not know whether particular information in the file forms the basis of the authority's final determination. One purpose of Article 6.9 is to resolve this difficulty for interested parties. . . . An interested party will not know whether a particular fact is 'important' or not unless the investigating authority has explicitly identified it as one of the 'essential facts' which form the basis of the authority's decision whether to impose definitive measures."[566]

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[562] Panel Report on *Argentina – Ceramic Tiles*, para. 6.125.

[563] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.224.

[564] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.224.

[565] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.225.

[566] Panel Report on *Guatemala – Cement II*, para. 8.229. In *Argentina – Ceramic Tiles*, the Argentine authorities had relied primarily upon evidence submitted by petitioners and derived from secondary sources, rather than upon information provided by the exporters, as the factual basis for a determination of the existence of dumping. The Panel found that, in light of the state of the record, "the exporters could not be aware in this case, simply by reviewing the complete record of the investigation, that evidence submitted by petitioners and derived from secondary sources, rather than facts submitted by the exporters, would, despite the responses of the exporters to the DCD's information requests as summarized above, form the primary basis for the determination of the existence and extent of dumping. . . . Under these circumstances, we find that the DCD did not, by referring the exporters to the complete file of the investigation, fulfil its obligation under Article 6.9 to inform the exporters of the 'essential facts under consideration which form the basis for the decision whether to apply definitive measures'." Panel Report on *Argentina – Ceramic Tiles*, para. 6.129.

430. In support of its rejection of Guatemala's argument that it had disclosed the facts forming the basis of its definitive determination by merely allowing access to the file, the Panel referred to Article 6.4 and found that if Guatemala's interpretation were accepted, there would be "little, if any, practical difference between Article 6.9 and Article 6.4":

> "Furthermore, if the disclosure of 'essential facts' under Article 6.9 could be undertaken simply by providing access to all information in the file, there would be little, if any, practical difference between Article 6.9 and Article 6.4. Guatemala is effectively arguing that it complied with Article 6.9 by complying with Article 6.4, *i.e.*, by providing 'timely opportunities for interested parties to see all information that is relevant to the presentation of their cases . . . and that is used by the authorities . . .'. We do not accept an interpretation of Article 6.9 that would effectively reduce its substantive requirements to those of Article 6.4. In our view, an investigating authority must do more than simply provide 'timely opportunities for interested parties to see all information that is relevant to the presentation of their cases . . . and that is used by the authorities . . .' in order to 'inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures'."[567]

(iv) Disclosure of information forming the basis of a preliminary ruling

431. In *Guatemala – Cement II*, Mexico claimed that Guatemala's authority acted inconsistently with Article 6.9 by failing to inform the Mexican producer subject to investigation of the "essential facts under consideration". In response, Guatemala first argued that the "essential facts under consideration" had been disclosed to interested parties in a detailed report setting out its authority's preliminary rulings. The Panel rejected Guatemala's justification, pointing out, among other things, that while the preliminary measures had been based on a threat of material injury, the final determination was based on actual material injury:

> "Article 6.9 provides explicitly for disclosure of the 'essential facts . . . which form the basis for the decision whether to apply *definitive* measures' (emphasis supplied). Disclosure of the 'essential facts' forming the basis of a preliminary determination is clearly inadequate in circumstances where the factual basis of the provisional measure is significantly different from the factual basis of the definitive measure. In the present case, the preliminary measure was based on a preliminary determination of *threat* of material injury, whereas the final determination was based on *actual* material injury. Furthermore, the Ministry's preliminary determination (16 August 1996) was based on a [period of investigation ('POI')] different from that used for its final determination, since the POI was extended on 4 October 1996. Indeed, Guatemala has cited the United States' assertion that '[i]n the course of an anti-dumping investigation, the bulk of the evidence which forms the basis of the final determination is generally gathered after the preliminary determination'. If the bulk of the evidence which forms the basis of the final determination is generally gathered after the preliminary determination, we fail to see how disclosure of the 'essential facts' forming the basis of the preliminary determination could amount to disclosure of the 'essential facts' forming the basis of the final determination, since the 'bulk' of the 'essential facts' underlying the final determination would not yet have been gathered. In these circumstances, we do not consider that the Ministry could satisfy the Article 6.9 obligation to 'inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures' by providing disclosure of the essential facts forming the basis of its preliminary determination."[568]

(v) Failure to inform the changes in factual foundation from a preliminary determination to final determination

432. In *Guatemala – Cement II*, the Panel rejected Mexico's claim that Guatemala's authority was in violation of Articles 6.1, 6.2 and 6.9 by changing its injury determination from a preliminary determination of threat of material injury to a final determination of actual material injury during the course of the investigation, without informing the Mexican producer of that change, and without giving the producer a full and ample opportunity to defend itself. Following the observation based upon Article 12.2, as referenced in paragraph 313 above, the Panel explained with regard to Article 6.9, as follows:

> "We note that Articles 6.1 and 6.9 impose certain obligations on investigating authorities in respect of 'information', 'evidence' and 'essential facts'. However, Mexico's claim does not concern interested parties' right to have access to certain factual information during the course of an investigation. Mexico's claim concerns interested parties' alleged right to be informed of an investigating authority's legal determinations during the course of an investigation."[569]

(b) Relationship with other paragraphs of Article 6

433. In *Guatemala – Cement II*, having found that Guatemala's failure to disclose the "essential facts" forming the basis of its final determination was in vio-

[567] Panel Report on *Guatemala – Cement II*, para. 8.230.
[568] Panel Report on *Guatemala – Cement II*, para. 8.228.
[569] Panel Report on *Guatemala – Cement II*, para. 8.238. In regard to the Panel's finding regarding the claims under Articles 6.1 and 6.2, see the excerpts quoted in paras. 314 and 336 of this Chapter.

lation of Article 6.9, as referenced in paragraphs 429, 430 and 432 above, the Panel considered it unnecessary to examine whether it was also inconsistent with Articles 6.1 and 6.2.[570]

434. The Panel on *Guatemala – Cement II* touched on the relationship between the obligations under Articles 6.4 and 6.9. See paragraph 430 above.

9. Article 6.10

(a) General

435. In *Argentina – Ceramic Tiles*, the Panel explained the structure of the obligations set forth in Article 6.10 as follows:

> "The first sentence of Article 6.10 of the AD Agreement sets forth a general rule that the authorities determine an individual margin of dumping for each known exporter or producer of the product under investigation. The second sentence of Article 6.10 permits an investigating authority to deviate from the general rule by permitting the investigating authorities to 'limit their examination either to a reasonable number of interested parties or products by using samples . . . or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated', in cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable . . ."[571]

436. The Panel, in *Argentina – Ceramic Tiles*, put the second sentence of Article 6.10 in context by referring to Article 9.4:

> "Article 9.4 provides that, where the authorities have limited their examination in accordance with the second sentence of Article 6.10, the anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed an amount calculated on the basis of the margins of dumping for exporters or producers that were included in the examination. Finally, in cases where the authorities have limited their examination under Article 6.10, subparagraph 2 of Article 6.10 provides that the authorities shall nevertheless determine an individual margin of dumping for any exporter not initially selected who submits the necessary information in time for that information to be considered, except where the number of exporters is so large that individual examination would be unduly burdensome to the authorities and prevent timely completion of the investigation."[572]

(b) "individual margin of dumping for each known exporter or producer"

437. In *Argentina – Ceramic Tiles*, the Argentine authorities had established a dumping margin for three size categories of ceramic tile irrespective of the exporter. The Panel concluded that "[w]hile the second sentence of Article 6.10 allows an investigating authority to limit its examination to certain exporters or producers, it does not provide for a deviation from the general rule that individual margins be determined for those exporters or producers that are examined":[573]

> "In our view, the general rule in the first sentence of Article 6.10, that individual margins of dumping be determined for each known exporter or producer of the product under investigation, is fully applicable to exporters who are selected for examination under the second sentence of Article 6.10. While the second sentence of Article 6.10 allows an investigating authority to limit its examination to certain exporters or producers, it does not provide for a deviation from the general rule that individual margins be determined for those exporters or producers that are examined. To the contrary, Article 9.4 provides that, where the authorities limit their examination under Article 6.10, the anti-dumping duty for exporters or producers that are not examined shall not exceed a level determined on the basis of the results of the examination of those exporters or producers that were examined. That Article 9.4 does not provide any methodology for determining the level of duties applicable to exporters or producers that are examined in our view confirms that the general rule requiring individual margins remains applicable to those exporters or producers. We find further confirmation in Article 6.10.2, which requires that, in general, an individual margin of dumping must be calculated even for the producers/exporters not initially included in the sample, if they provide the necessary information and if to do so is not unduly burdensome. If even producers not included in the original sample are entitled to an individual margin calculation, then it follows that producers that were included in the original sample are so entitled as well.[574]"

438. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered that Article 6.10 is purely procedural

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[570] Panel Report on *Guatemala – Cement II*, para. 8.232.

[571] Panel Report on *Argentina – Ceramic Tiles*, para. 6.89. The Panel on *Argentina – Poultry Anti-Dumping Duties* agreed with the view that Article 6.10, first sentence, imposes a general obligation on investigating authorities to calculate individual margins of dumping for each known exporter or producer concerned of the product under investigation. Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.214.

[572] Panel Report on *Argentina – Ceramic Tiles*, para. 6.90.

[573] The Panel acknowledged the "usefulness of grouping (by size, model, type) for the purpose of making a fair comparison under Article 2.4" but indicated that this should not be confused with "the requirement under Article 6.10 to determine an individual margin of dumping for the product as a whole." Panel Report on *Argentina – Ceramic Tiles*, para. 6.99.

[574] As the Panel on *EC – Bed Linen* stated:

> "[T]he fact that Article 2.4.2 refers to the existence of margins of dumping in the plural is a general statement, taking account of the fact that, as is made clear in Article 6.10 and 9 of the AD Agreement, individual dumping margins are determined for each producer or exporter under investigation, and for each product under investigation." (emphasis added)

Panel Report on *EC – Bed Linen*, para. 6.118.

in nature, in the sense that it imposes a procedural obligation on the investigating agency to determine individual margins of dumping for each known exporter or producer concerned of the product under investigation. According to the Panel "Article 6.10 is *not* concerned with substantive issues concerning the determination of individual margins, such as the availability of the relevant data. Such issues are addressed by provisions such as Articles 2 and 6.8 of the *AD Agreement*."[575] The Panel thus rejected the argument that for the requirement under Article 6.10 to apply, the exporter or producer concerned should supply the documentation needed to determine an individual margin of dumping.

10. Article 6.13

(a) Relationship with paragraphs 2 and 5 of Annex II

439. In *US – Hot-Rolled Steel*, the Appellate Body referred to Article 6.13 as support for its view that paragraphs 2 and 5 of Annex II call for a balance between the interests of investigating authorities and exporters as regards cooperation in anti-dumping investigations. See paragraph 411 above.

11. Relationship with other Articles

(a) Article 1

440. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the AD Agreement, including Article 6. The Panel then opined that Mexico's claims under other articles of the AD Agreement, including Article 1, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[576] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

(b) Article 2

441. In *US – Stainless Steel*, the Panel considered that it was unnecessary to examine Korea's claim using Articles 6.1, 6.2 and 6.9 with respect to the United States' methodologies which the Panel had already found in violation of Article 2.[577]

442. With respect to the relationship between Article 6.8 and Articles 2.2 and 2.4, see paragraph 94 above.

443. In *Argentina – Ceramic Tiles,* the Argentine authorities had established a dumping margin for three size categories of ceramic tiles irrespective of the exporter. The Panel, when analysing the compatibility of Argentina's measure with Article 6.10, acknowledged the "usefulness of grouping (by size, model, type) for the purpose of making a fair comparison under Article 2.4" but indicated that this should not be confused with "the requirement under Article 6.10 to determine an individual margin of dumping for the product as a whole."[578]

(c) Article 3

444. In *Thailand – H-Beams*, the Appellate Body referred to Article 6 in interpreting Article 3.1. See paragraph 112 above.

(d) Article 9

445. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 6. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement,* including Article 9, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[579] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

446. With respect to the relationship between Article 6.8 and Article 9.3 and 9.4, see paragraphs 476–477 below.

447. As regards the relationship between Article 9.4 and Article 6.10, see paragraphs 436–437 above.

(e) Article 12

448. In *Guatemala – Cement II*, the Panel referred to Article 12.2 in rejecting Mexico's claim of a violation of Articles 6.1, 6.2 and 6.9. See paragraph 313 above.

449. The Panel, in *Argentina – Ceramic Tiles,* referred to Article 12 of the *Anti-Dumping Agreement* as support of its conclusion above that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information. See paragraph 417 above.

(f) Article 18

450. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 6. The Panel then opined that Mexico's claims under other articles of the *Anti-*

[575] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.215.
[576] Panel Report on *Guatemala – Cement II*, para. 8.296.
[577] Panel Report on *US – Stainless Steel*, para. 6.137.
[578] Panel Report on *Argentina – Ceramic Tiles*, para. 6.99.
[579] Panel Report on *Guatemala – Cement II*, para. 8.296.

Dumping Agreement, including Article 18, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[580] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

12. Relationship with other WTO Agreements

(a) Article VI of the GATT 1994

451. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 6. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement* and under Article VI of GATT 1994, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[581] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

VII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7
Provisional Measures

7.1 Provisional measures may be applied only if:

(i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;

(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and

(iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

7.2 Provisional measures may take the form of a provisional duty or, preferably, a security – by cash deposit or bond – equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

7.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

7.5 The relevant provisions of Article 9 shall be followed in the application of provisional measures.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. General

452. In *Guatemala – Cement II*, after having found that the subject definitive measure was inconsistent with the *Anti-Dumping Agreement*, the Panel considered it unnecessary to address claims concerning the provisional measure, stating:

> "At most, Mexico's claims concerning the provisional measure could only result in a ruling with respect to part of the definitive measure insofar as it relates to retrospective collection of the provisional measure (i.e., where it is mandated that the 'provisional anti-dumping duties collected would remain in favor of the treasury'). Since we have already made findings that give rise to a recommendation concerning the totality of the definitive measure, we do not consider it necessary to further address claims (i.e. concerning the provisional measure) that could only result in a ruling concerning only part of the definitive measure."[582]

2. Relationship with other Articles

(a) Article 1

453. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 7. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, including Article 1, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[583] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

[580] Panel Report on *Guatemala – Cement II*, para. 8.296.
[581] Panel Report on *Guatemala – Cement II*, para. 8.296.
[582] Panel Report on *Guatemala – Cement II*, para. 8.298.
[583] Panel Report on *Guatemala – Cement II*, para. 8.296.

(b) Article 6

454. In *Guatemala – Cement II*, the Panel referred to Article 7.3 in examining Mexico's claim under Article 6.1.3. See paragraph 325 above.

(c) Article 9

455. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 7. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, including Article 9, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[584] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

(d) Article 17

456. In *Mexico – Corn Syrup*, the Panel touched on the relationship between Article 7 (Articles 7.1 and 7.4) and Article 17.4. See paragraphs 615–616 below.

(e) Article 18

457. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 7. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, including Article 18, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[585] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

3. Relationship with other WTO Agreements

(a) Article VI of the GATT 1994

458. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 7. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement* and Article VI of GATT 1994 were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[586] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

VIII. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8
Price Undertakings

8.1 Proceedings may[19] be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.

(*footnote original*) [19] The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings except as provided in paragraph 4.

8.2 Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping.

8.3 Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

8.4 If an undertaking is accepted, the investigation of dumping and injury shall nevertheless be completed if the exporter so desires or the authorities so decide. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of a price undertaking. In such cases, the authorities may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

8.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that exporters do not offer such undertakings, or do not

[584] Panel Report on *Guatemala – Cement II*, para. 8.296.
[585] Panel Report on *Guatemala – Cement II*, para. 8.296.
[586] Panel Report on *Guatemala – Cement II*, para. 8.296.

accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

8.6 Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

459. The Panel on *US – Offset Act (Byrd Amendment)* considered the extent of the obligation under Article 8.3 of the *Anti-Dumping Agreement* concerning price undertakings. According to the Panel, under Article 8:

> "[W]hen offered, the investigating authority need not accept the undertaking if it considers it impractical or if for other reasons it does not want to accept the undertaking. The decision to accept an undertaking or not under the Agreements is one the investigating authority is to take, and it may reject an undertaking for various reasons, including reasons of general policy. The fact that domestic producers may or may not be influenced by the CDSOA to suggest to the authority not to accept the undertaking, does not affect the possibility for interested parties concerned to offer an undertaking or for that undertaking to be accepted, in light of the non-decisive role of the domestic industry in this process."[587]

IX. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9
Imposition and Collection of Anti-Dumping Duties

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made.[20] Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

(*footnote original*) [20] It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings.

9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized

[587] Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.80.

should normally be made within 90 days of the above-noted decision.

9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

9.5 If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

1. Article 9.2

(a) Relationship with Article 9.3

460. The Panel on *Argentina – Poultry Anti-Dumping Duties* made the following observations concerning the relationship between Article 9.2 and Article 9.3:

> "We note that Article 9.3 contains a specific obligation regarding the amount of anti-dumping duty to be imposed, whereas Article 9.2 employs far more general language in referring to the collection of duties in 'appropriate' amounts. In particular, Article 9.2 provides no guidance on what an 'appropriate' amount of duty may be in a given case. In the absence of any other guidance regarding the appropriateness of the amount of anti-dumping duties, it would appear reasonable to conclude that an anti-dumping duty meeting the requirements of Article 9.3 (i.e., not exceeding the margin of dumping) would be 'appropriate' within the meaning of Article 9.2.agreed with the argument made by one of the parties that a violation of Article 9.2 is entirely dependent on a violation of Article 9.3".[588]

2. Article 9.3

(a) "*de minimis*" test

461. The Panel on *US – DRAMS* concluded that "Article 5.8, second sentence, does not apply in the context of Article 9.3 duty assessment procedures. As Article 5.8, second sentence, does not require Members to apply a *de minimis* test in Article 9.3 duty assessment procedures, it certainly cannot require Members to apply a particular *de minimis* standard in such procedures."[589]

462. The Panel on *US – DRAMS* further stated: "A *de minimis* test in the context of an Article 9.3 duty assessment will not remove an exporter from the scope of the order. Thus, the implication of the *de minimis* test required by Article 5.8, and any *de minimis* test that Members choose to apply in Article 9.3 duty assessment procedures, differ significantly."[590]

463. The Panel on *US – DRAMS* discussed the different functions of the *de minimis* test in Article 5.8 and Article 9.3, respectively. See paragraph 289 above.

[588] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.365.
[589] Panel Report on *US – DRAMS*, para. 6.89.
[590] Panel Report on *US – DRAMS*, para. 6.90.

(b) variable duties

464. The Panel on *Argentina – Poultry Anti-Dumping Duties* addressed the argument that variable anti-dumping duties are inconsistent with Article 9.3 because they are collected by reference to a margin of dumping established at the time of collection (i.e., the difference between a "minimum export price", or reference normal value, and actual export price), rather than by reference to the margin of dumping established during the investigation. Brazil argued that from the moment the anti-dumping duty is imposed until a review of the imposition of that duty is made, the only margin of dumping available, calculated pursuant to Article 2, is the margin assessed in the investigation, and found in the final determination. The Panel rejected this argument and concluded that Article 9.3 does not prohibit the use of variable anti-dumping duties:

> "In addressing this claim, we note that nothing in the *AD Agreement* explicitly identifies the form that anti-dumping duties must take. In particular, nothing in the *AD Agreement* explicitly prohibits the use of variable anti-dumping duties. Brazil's Claim 29 is based on Article 9.3 of the *AD Agreement*. As the title of Article 9 of the *AD Agreement* suggests, Article 9.3 is a provision concerning the imposition and collection of anti-dumping duties. Article 9.3 provides that a duty may not be collected in excess of the margin of dumping as established under Article 2. The modalities for ensuring compliance with this obligation are set forth in sub-paragraphs 1, 2 and 3 of Article 9.3, each of which addresses duty assessment and the reimbursement of excess duties. The primary focus of Article 9.3, read together with sub-paragraphs 1–3, is to ensure that final anti-dumping duties shall not be assessed in excess of the relevant margin of dumping, and to provide for duty refund in cases where excessive anti-dumping duties would otherwise be collected. Our understanding that Article 9.3 is concerned primarily with duty assessment is confirmed by the fact that the broadly equivalent provision in the *SCM Agreement* (i.e., Article 19.4) refers to the 'lev[ying]' of duties, and footnote 51 to that provision states that '"levy" shall mean the definitive or final legal **assessment or collection** of a duty or tax' (emphasis added).[591] When viewed in this light, it is not obvious that – as Brazil effectively argues – Article 9.3 prohibits variable anti-dumping duties by ensuring that anti-dumping duties do not exceed the margin of dumping established during 'the investigation phase' pursuant to Article 2.4.2. Neither the ordinary meaning of Article 9.3, nor its context (i.e., sub-paragraphs 1–3), supports that view. If Article 9.3 were designed to prohibit the use of variable customs duties, presumably that prohibition would have been clearly spelled out."[592]

465. The Panel also pointed to Article 9.3.1 dealing with retrospective duty assessment as support for its view that duties may be collected on the basis of a margin of dumping established after the end of the investigation.[593] Similarly, the Panel considered that the Article 9.3.2 refund mechanism in the case of a prospective duty assessment would include refunds of anti-dumping duties paid in excess of the margin of dumping prevailing at the time the duty is collected and drew the following conclusions:

> "This therefore further undermines Brazil's argument that the only margin of dumping relevant until such time that there is an Article 11.2 review is the margin established during the investigation. If the basis for duty refund is the margin of dumping prevailing at the time of duty collection, we see no reason why a Member should not use the same basis for duty collection. Brazil has noted that refunds do not imply modification of the duty, and are only available if requested by the importer.[594] While these points may be correct, they do not change the fact that the refund mechanism operates by reference to the margin of dumping prevailing at the time of duty collection. It is this aspect of the refund mechanism that renders it contextually relevant to the issue before us. Accordingly, we see no reason why it is not permissible[595] for a Member to levy anti-dumping duties on the basis of the actual margin of dumping prevailing at the time of duty collection."[596]

(c) Relationship with Article 9.2

466. In this regard, see paragraph 460 above.

3. Article 9.4

(a) Purpose of Article 9.4

467. In *US – Hot-Rolled Steel*, the Appellate Body indicated that "Article 9.4 seeks to prevent the exporters, who were *not* asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters."[597]

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[591] (*footnote original*) The Tokyo Round *AD Agreement* is also instructive, since Article 8.3 of that Agreement stated "[t]he amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2. **Therefore**, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible" (emphasis added). This provision clearly demonstrates that the general requirement that anti-dumping duties shall not exceed the margin of dumping is concerned with duty assessment.

[592] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.355.

[593] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.361.

[594] (*footnote original*) Brazil's second written submission, para. 141.

[595] (*footnote original*) We use this term with particular regard to the Article 17.6(ii) standard of review.

[596] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.361.

[597] Appellate Body Report on *US – Hot-Rolled Steel*, para. 123.

(b) Ceiling for "all others" rate

468. In *US – Hot-Rolled Steel*, the Appellate Body explained that Article 9.4 does not provide for a method to calculate "all others" rate but simply provides for a "ceiling" for such a rate and establishes two "prohibitions" on the use of certain margins in the calculation of the "all others" rate, i.e. not to use (i) zero or *de minimis* margins and (ii) margins established on the basis of best facts available:

> "Article 9.4 does not prescribe any method that WTO Members must use to establish the 'all others' rate that is actually applied to exporters or producers that are not investigated. Rather, Article 9.4 simply identifies a maximum limit, or ceiling, which investigating authorities '*shall not exceed*' in establishing an 'all others' rate. Sub-paragraph (i) of Article 9.4 states the general rule that the relevant ceiling is to be established by calculating a 'weighted average margin of dumping established' with respect to those exporters or producers who *were* investigated. However, the clause beginning with 'provided that', which follows this sub-paragraph, qualifies this general rule. This qualifying language mandates that, 'for the purpose of this paragraph', investigating authorities '*shall disregard*', first, zero and *de minimis* margins and, second, 'margins established under the circumstances referred to in paragraph 8 of Article 6.' Thus, in determining the amount of the ceiling for the 'all others' rate, Article 9.4 establishes two *prohibitions*. The first prevents investigating authorities from calculating the 'all others' ceiling using zero or *de minimis* margins; while the second precludes investigating authorities from calculating that ceiling using 'margins established under the circumstances referred to' in Article 6.8."[598]

(i) Article 9.4(i): "weighted average margin of dumping with respect to selected exporters or producers"

"margins"

469. In *US – Hot-Rolled Steel*, the Appellate Body looked into the meaning of the word "margins" under Article 9.4. The Appellate Body recalled the interpretation made by the Panel of the word "margins" under Article 2.4.2 in *EC – Bed Linen* and considered that the same meaning should apply to the word "margins" under Article 9.4:

> "[W]e recall that the word 'margins', which appears in Article 2.4.2 of that Agreement, has been interpreted in *European Communities – Bed Linen*. The Panel found, in that dispute, and we agreed, that 'margins' means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product.[599] This margin reflects a comparison that is based upon examination of all of the relevant home market and export market transactions. We see no reason, in Article 9.4, to interpret the word 'margins' differently from the meaning it has in Article 2.4.2, and the parties have not suggested one."[600]

"exporters or producers"

470. Referring to provisions which use the plural form, but which are also applicable in the singular case, the Panel on *EC – Bed Linen* stated that "Article 9.4(i) provides that the dumping duty applied to imports from producers/exporters not examined as part of a sample shall not exceed 'the weighted average margin of dumping established with respect to the selected exporters or producers'. We consider that this provision does not become inoperative if there is only one selected exporter or producer – rather, the dumping margin for that exporter or producer may be applied."[601] However, see paragraph 42 above for a reversal by the Appellate Body of a panel finding under Article 2.2.2(ii) that the plural form "other exporters and producers" could also be interpreted as referring to one single exporter or producer.

(ii) Prohibitions in the calculation of "all others" rate: zero and de minimis margins, margins based on facts available

Margins established under the circumstances referred to in paragraph 8 of Article 6

471. In *US – Hot-Rolled Steel*, Japan had claimed that the United States statutory method for calculating the "all others" rate in section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended[602], as well as the authorities' application of the statutory method were inconsistent with Article 9.4 because they require the consideration of margins based in part on facts available in the calculation of the "all others" rate. The United States contended that only those margins which are calculated entirely on the basis of facts available could not be taken into account for the "all others" rate.[603] The Panel found that the phrase in Article 9.4 excludes, from the calculation of the ceiling for the "all others" rate, any

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[598] Appellate Body Report on *US – Hot-Rolled Steel*, para. 116.

[599] (*footnote original*) Panel Report, *European Communities – Bed Linen*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para. 6.118; Appellate Body Report, *European Communities – Bed Linen, supra*, footnote 36, para. 53.

[600] Appellate Body Report on *US – Hot-Rolled Steel*, para. 118.

[601] Panel Report on *EC – Bed Linen*, para. 6.72.

[602] See also para. 597 of this Chapter.

[603] The United States interpreted this sentence of Article 9.4 as meaning to cover only those margins which are calculated *entirely* on the basis of the facts available, that is, where *both* components of the calculation of a dumping margin – normal value and export price – are determined *exclusively* using facts available. Appellate Body Report on *US – Hot-Rolled Steel*, para. 117.

margins which are calculated, *even in part*, using facts available.[604] The Appellate Body, which upheld the Panel's finding, found that "the application of Article 6.8, authorizing the use of facts available, is *not* confined to cases where the *entire* margin is established using *only* facts available":

> "We proceed to examine the phrase 'margins established under the circumstances referred to in paragraph 8 of Article 6.' This provision permits investigating authorities, in certain situations, to reach 'preliminary or final determinations . . . on the basis of the facts available'. There is, however, no requirement in Article 6.8 that resort to facts available be limited to situations where there is *no* information whatsoever which can be used to calculate a margin. Thus, the application of Article 6.8, authorizing the use of facts available, is *not* confined to cases where the *entire* margin is established using *only* facts available. Rather, under Article 6.8, investigating authorities are entitled to have recourse to facts available *whenever* an interested party does not provide some necessary information within a reasonable period, or significantly impedes the investigation. Whenever such a situation exists, investigating authorities may remedy the lack of *any* necessary information by drawing appropriately from the 'facts available'. . ."

Circumstances referred to in Article 6.8

472. On the basis of its conclusions above, the Appellate Body in *US – Hot-Rolled Steel* considered that the circumstances referred to in Article 6.8 cover all circumstances under which an investigating authority can have recourse to facts available, even if it involves only a small amount of information used in the calculation of an individual dumping margin:

> "In consequence, we are of the view that the '*circumstances* referred to' in Article 6.8 are the circumstances in which the investigating authorities properly have recourse to 'facts available' to overcome a lack of necessary information in the record, and that these 'circumstances' may, in fact, involve only a small amount of information to be used in the calculation of the individual margin of dumping for an exporter or producer."[605]

"established"

473. The Appellate Body in *US – Hot-Rolled Steel* then considered what "established" meant in the context of Article 9.4 as regards the "margins established under the circumstances referred to in Article 6.8". The Appellate Body concluded that "a margin does not cease to be 'established under the circumstances referred to' in Article 6.8 simply because not every aspect of the calculation involved the use of 'facts available'". The Appellate Body further concluded that the purpose of Article 9.4 is to prevent the exporters, who were not asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters:

> "We turn to the word 'established' in the phrase 'margins established under the circumstances' referred to in Article 6.8. The essence of the United States' argument is that this word should be read as if it were qualified by the word 'entirely', or 'exclusively', or 'wholly': only where a margin is established 'entirely' under the 'circumstances' of Article 6.8 must that margin be disregarded.
>
> We have noted that Article 9.4 establishes a prohibition, in calculating the ceiling for the all others rate, on using 'margins established under the circumstances referred to' in Article 6.8. Nothing in the text of Article 9.4 supports the United States' argument that the scope of this prohibition should be narrowed so that it would be limited to excluding only margins established 'entirely' on the basis of facts available. As noted earlier, Article 6.8 applies even in situations where only limited use is made of facts available. To read Article 9.4 in the way the United States does is to overlook the many situations where Article 6.8 allows a margin to be calculated, *in part*, using facts available. Yet, the text of Article 9.4 simply refers, in an open-ended fashion, to 'margins established under the circumstances' in Article 6.8. Accordingly, we see no basis for limiting the scope of this prohibition in Article 9.4, by reading into it the word 'entirely' as suggested by the United States. In our view, a margin does not cease to be 'established under the circumstances referred to' in Article 6.8 simply because not every aspect of the calculation involved the use of 'facts available'.
>
> Our reading of Article 9.4 is consistent with the purpose of the provision. Article 6.8 authorizes investigating authorities to make determinations by remedying gaps in the record which are created, in essence, as a result of deficiencies in, or a lack of, information supplied by the investigated exporters. Indeed, in some circumstances, as set forth in paragraph 7 of Annex II of the *Anti-Dumping Agreement*, 'if an interested party *does not cooperate* and thus relevant information is being withheld from the authorities, this situation could lead to a result which is *less favourable* to the party than if the party did cooperate.' (emphasis added) Article 9.4 seeks to prevent the exporters, who were *not* asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters. This objective would be compromised if the ceiling for the rate applied to 'all others' were, as the United States suggests, calculated – due to the failure of investigated parties to supply certain information – using margins 'established' even in part on the basis of the facts available."[606]

[604] As regards the use of facts available under Article 6.8, see paras. 375–425 of this Chapter.
[605] Appellate Body Report on *US – Hot-Rolled Steel*, para. 120.
[606] Appellate Body Report on *US – Hot-Rolled Steel*, paras. 121–123.

4. Relationship with other Articles

474. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with Articles 3, 5, 6, 7, 12, and paragraph 2 of Annex I of the *Anti-Dumping Agreement*. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, among them Article 9, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement. There would be no basis to Mexico's claims under Articles 1, 9 and 18 of the AD Agreement, and Article VI of *GATT 1994*, if Guatemala were not found to have violated other provisions of the AD Agreement."[607] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.

(a) Article 9.3 with Article 5.8

475. The Panel on *US – DRAMS* discussed the relationship between Articles 5.8 and 9.3. See paragraphs 288–289 above.

(b) Article 9.3 with Article 6.8

476. With respect to the relationship between Article 6.8 and Article 9.3, the Panel on *US – Steel Plate*, having found a violation of Article 6.8, considered it unnecessary to determine, in addition, whether the circumstances of that violation also constituted a violation of Article 9.3 (and Article 2.4 and Articles VI:1 and 2 of GATT 1994). In the Panel's view, findings on these claims would serve no useful purpose, as they would neither assist the Member found to be in violation of its obligations to implement the ruling of the Panel, nor would they add to the overall understanding of the obligations found to have been violated.[608]

(c) Article 9.4 with Article 6.8

477. In *US – Hot-Rolled Steel*, both the Panel and the Appellate Body analysed the relationship between Article 9.4 and Article 6.8 as regards the prohibition to calculate the "all others" rate in sample cases on the basis of margins calculated on facts available pursuant to Article 6.8. See 471–473 above.

(d) Article 9.4 with Article 6.10

478. In *Argentina – Ceramic Tiles*, the Panel analysed the relationship between Article 9.4 and Article 6.10 as regards the authorities' duty to calculate a dumping margin per known exporter (see paragraphs 436–437 above).

5. Relationship with other WTO Agreements

(a) Article VI:2 of the GATT 1994

479. The Appellate Body in *US – 1916 Act* addressed the argument that the phrase "may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product" in Article VI:2 of the GATT 1994 implies that a Member is permitted to impose a measure other than an anti-dumping measure:

> "We believe that the meaning of the word 'may' in Article VI:2 is clarified by Article 9 of the *Anti-Dumping Agreement* . . . . Article VI of the GATT 1994 and the *Anti-Dumping Agreement* are part of the same treaty, the *WTO Agreement*. As its full title indicates, the *Anti-Dumping Agreement* is an 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994'. Accordingly, Article VI must be read in conjunction with the provisions of the *Anti-Dumping Agreement*, including Article 9."[609]

X. ARTICLE 10

A. TEXT OF ARTICLE 10

Article 10
Retroactivity

10.1 Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.

10.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

10.3 If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

10.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is

[607] Panel Report on *Guatemala – Cement II*, para. 8.296.
[608] Panel Report on *US – Steel Plate*, para. 7.103.
[609] Appellate Body Report on *US – 1916 Act*, para. 114.

made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.6 A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:

(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and

(ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

10.7 The authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied.

10.8 No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation.

B. INTERPRETATION AND APPLICATION OF ARTICLE 10

1. Article 10.1

480. In *US – Hot-Rolled Steel*, Japan had challenged the consistency with Articles 10.6 and 10.7 of the United States statutory provisions on preliminary critical circumstances determination[610] and their application by the authorities in this case. Japan claimed that by violating these two provisions, the United States' authorities also acted inconsistently with Article 10.1. The Panel, in a finding not reviewed by the Appellate Body, concluded that neither the statutory provision nor its application in that case were inconsistent with Article 10.6 and Article 10.7. The Panel further found that the statutory provision was not, on its face, inconsistent with, *inter alia*, Article 10.1[611] and that the authorities preliminary critical circumstances determination "was not inconsistent with Article 10.1 of the AD Agreement either since it complied with the conditions of Article 10.7 of the AD Agreement".[612]

2. Article 10. 6

481. In *US – Hot-Rolled Steel*, the Panel, in a finding not reviewed by the Appellate Body, analysed the conditions imposed by Article 10.6 in the context of the retroactive imposition of anti-dumping duties permitted by Article 10.7. This provision requires, *inter alia*, that national authorities provide sufficient evidence that all the conditions of Article 10.6 are satisfied. See paragraphs 482–488 below.

3. Article 10.7

(a) "such measures"

482. In *US – Hot-Rolled Steel*, the Panel, whose interpretation was not reviewed by the Appellate Body, interpreted Article 10.7 "as allowing the authority to take certain necessary measures of a purely conservatory or precautionary kind which serve the purpose of preserving the possibility of later deciding to collect duties retroactively under Article 10.6":

> "Article 10.7 provides that once the authorities have sufficient evidence that the conditions of Article 10.6 are satisfied, they may take such measures as, for example, the withholding of appraisement or assessment, as may be necessary to collect anti-dumping duties retroactively. We read this provision as allowing the authority to take certain necessary measures of a purely conservatory or precautionary kind which serve the purpose of preserving the possibility of later deciding to collect duties retroactively under Article 10.6. Unlike provisional measures, Article 10.7 measures are not primarily intended to prevent injury being caused during the investigation. They are taken in order to make subsequent retroactive duty collection possible as a practical matter. Measures taken under Article 10.7 are not based on evaluation of the same criteria as final measures that may be imposed at the end of the investigation. They are of a different kind – they preserve the possibility of imposing anti-dumping duties retroactively, on the basis of a determination additional to the ultimate final determination.

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[610] Section 733(e)(1) of the Tariff Act of 1930, as amended, requires the United States' authorities to make certain preliminary determinations in a case in which a petitioner requests the imposition of anti-dumping duties retroactively for 90 days prior to a preliminary determination of dumping. Panel Report on *US – Hot-Rolled Steel*, para. 7.139.

[611] Panel Report on *US – Hot-Rolled Steel*, para. 7.150.

[612] Panel Report on *US – Hot-Rolled Steel*, para. 7.168.

Our understanding in this regard is confirmed by the fact that, unlike provisional measures, which can only be imposed after a preliminary affirmative determination of dumping and injury, Article 10.7 measures may be taken at any time 'after initiating an investigation'. . . ."[613]

(b) "sufficient evidence" that the conditions of Article 10.6 are satisfied

(i) Concept of "sufficient evidence"

483. In *US – Hot-Rolled Steel*, the Panel interpreted the term "sufficient evidence" in Article 10.7. The Panel, whose interpretation was not reviewed by the Appellate Body, explained that Article 10.7 does not define "sufficient evidence". The Panel then referred to Article 5.3 which also reflects this standard by requiring "sufficient evidence to initiate an investigation". In this regard, the Panel considered past GATT and WTO Panels' approach to this standard and concluded that "what constitutes 'sufficient evidence' must be addressed in light of the timing and effect of the measure imposed or the determination made." Furthermore, in the Panel's view, "the possible effect of the measures an authority is entitled to take under Article 10.7 of the AD Agreement informs what constitutes sufficient evidence" and it therefore "is not a standard that can be determined in the abstract":

"Article 10.7 of the AD Agreement does not define 'sufficient evidence'. However, Article 5.3 also reflects this standard, in requiring that the authorities examine the accuracy and adequacy of the evidence provided in the application 'to determine whether there is sufficient evidence to justify the initiation of an investigation'. The Article 5.3 requirement of 'sufficient evidence to initiate an investigation' has been addressed by previous GATT and WTO panels. Their approach to understanding this standard has been to examine whether the evidence before the authority at the time it made its determination was such that an unbiased and objective investigating authority evaluating that evidence could properly have made the determination.[614] These Panels have noted that what will be sufficient evidence varies depending on the determination in question. The Panel on *Mexico – HFCS* quoted with approval from the Panel's report in the *Guatemala – Cement I* case that 'the type of evidence needed to justify initiation is the same as that needed to make a preliminary or final determination of threat of injury, although the quality and quantity is less'.[615]

. . . We are of the view that what constitutes 'sufficient evidence' must be addressed in light of the timing and effect of the measure imposed or the determination made. Evidence that is sufficient to warrant initiation of an investigation may not be sufficient to conclude that provisional measures may be imposed. In a similar vein, the possible effect of the measures an authority is entitled to take under Article 10.7 of the AD Agreement informs what constitutes sufficient evidence. Whether evidence is sufficient or not is determined by what the evidence is used for. In sum, whether evidence is sufficient to justify initiation or to justify taking certain necessary precautionary measures under Article 10.7 is not a standard that can be determined in the abstract . . ."[616]

(ii) Extent of the authorities' determination

484. In *US – Hot-Rolled Steel*, the Panel, whose interpretation was not reviewed by the Appellate Body, considered that the requirement of "sufficient evidence that the conditions of Article 10.6 are satisfied" did not require the authorities to make a preliminary affirmative determination of dumping and consequent injury to the domestic industry:

". . . In light of the timing and effect of the measures that are taken on the basis of Article 10.7, we consider that the Article 10.7 requirement of 'sufficient evidence that the conditions of Article 10.6 are satisfied' does not require an authority to first make a preliminary affirmative determination within the meaning of Article 7 of the AD Agreement of dumping and consequent injury to a domestic industry. If it were necessary to wait until after such a preliminary determination, there would, in our view, be no purpose served by the Article 10.7 determination. The opportunity to preserve the possibility of applying duties to a period prior to the preliminary determination would be lost, and the provisional measure that could be applied on the basis of the preliminary

[613] Panel Report on *US – Hot-Rolled Steel*, paras. 7.155–7.156.

[614] (*footnote original*) Panel Report, *Mexico – HFCS*, para. 7.95. (referring to *Guatemala – Cement I*, para. 7.57 and *United States – Softwood Lumber*, SCM/162, BISD 40S/358, para. 335, (adopted 27–28 October 1993)). The Panel on *Guatemala – Cement I* also stated that "the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury and causation. made after investigation", Panel Report, *Guatemala – Cement I*, para. 7.57, referring to *United States – Softwood Lumber*, para. 332.

[615] (*footnote original*) Panel Report, *Mexico – HFCS*, para. 7.97; Panel Report, *Guatemala – Cement I*, para 7.77

[616] Panel Report on *US – Hot-Rolled Steel*, paras. 7.153–7.154. The Panel considered that "'sufficient evidence' refers to the quantum of evidence necessary to make a determination." The Panel made this statement in its analysis of the comparability of the terms "sufficient evidence" and the term used by the statutory provision at issue, namely "a reasonable basis to believe or suspect". The Panel found that "'sufficient evidence' refers to the quantum of evidence necessary to make a determination. 'A reasonable basis to believe or suspect' on the other hand, seems to refer to the conclusion reached on the basis of evidence presented, that is, a legal mindset that certain facts exist, based on the evidence presented. It appears that in past cases the US authorities have applied the standard as set out in the statute interchangeably with a standard expressed as 'sufficient evidence' and have made affirmative determinations when sufficient evidence was adduced that the conditions of application were satisfied. We therefore consider that the US statute, as it has been applied is not inconsistent with the requirement of the AD Agreement that the investigating authority must have sufficient evidence of the conditions of Article 10.6 before taking measures necessary to collect the duties retroactively." Panel Report on *US – Hot-Rolled Steel*, para. 7.144.

affirmative determination under Article 7 would prevent further injury during the course of the investigation. Moreover, the requirement in Article 7 that provisional measures may not be applied until 60 days after initiation cannot be reconciled with the right, under Article 10.6, to apply duties retroactively to 90 days prior to the date on which a provisional measure is imposed, if a preliminary affirmative determination is a prerequisite to the Article 10.7 measures which preserve the possibility of retroactive application of duties under Article 10.6."[617]

(iii) Conditions of Article 10.6

485. The Panel, in *US – Hot-Rolled Steel*, noted that Japan had not challenged the initiation of the investigation which, pursuant to Article 5.3, was based on a determination that there was sufficient evidence of dumping, injury and causal link. The Panel, whose interpretation was not reviewed by the Appellate Body, indicated that, "given the precautionary nature of the measures that may be taken under Article 10.7", it "can perceive of no reason ... why that same information might not justify a determination of sufficient evidence of dumping and consequent injury in the context of Article 10.6 as required by Article 10.7."[618]

Importers' knowledge of exporters' dumping

486. The Panel, in *US – Hot-Rolled Steel*, commenced its analysis of whether the United States authorities had sufficient evidence that all conditions of Article 10.6 were satisfied by looking at the first condition: whether the importers knew or should have known that exporters were dumping and that such dumping would cause injury. The Panel considered that the evidence of dumping in the petition was "sufficient for an unbiased and objective investigating authority to reach this conclusion". The Panel also noted that Japan, the complainant, had "not alleged that an imputed knowledge of dumping is, *per se*, inconsistent with Article 10.7, but rather argues that [the United States' authorities] did not have sufficient evidence of dumping at all, for the purposes of Article 10.7."[619]

"injury caused"

487. In *US – Hot-Rolled Steel*, the United States authorities had adopted certain measures to collect anti-dumping duties retroactively. These authorities had made a preliminary determination of, *inter alia*, threat of serious injury. The Panel considered whether threat of serious injury fell within the concept of injury for the purpose of satisfying the conditions of Article 10.6 as required by Article 10.7. The Panel concluded that sufficient evidence of threat of injury is enough to justify a determination to apply protective measures under Article 10.7:

"[W]e note that Article 10.6 itself refers to a determination that an importer knew or should have known that there was dumping that would cause injury. The term 'injury' is defined in footnote 9 to Article 3 of the Agreement to include threat of material injury or material retardation of the establishment of an industry, unless otherwise specified. Article 10.6 does not 'otherwise specify'. Consequently, in our view, sufficient evidence of threat of injury would be enough to justify a determination to apply protective measures under Article 10.7.

The role of Article 10.7 in the overall context of the AD Agreement confirms this interpretation. This provision is clearly aimed at preserving the possibility to impose and collect anti-dumping duties retroactively to 90 days prior to the date of application of provisional measures. Thus, Article 10.7 preserves the option provided in Article 10.6 to impose definitive duties even beyond the date of provisional measures. Assume *arguendo* Article 10.7 were understood to require sufficient evidence of actual material injury. In a situation in which, at the time Article 10.7 measures are being considered, there is evidence only of threat of material injury, no measures under Article 10.7 could be taken. Assume further that in this same investigation, there was a final determination of actual material injury caused by dumped imports. At that point, it would be impossible to apply definitive anti-dumping duties retroactively, even assuming the conditions set out in Article 10.6 were satisfied, as the necessary underlying Article 10.7 measures had not been taken.[620] Thus, in a sense, Article 10.7 measures serve the same purpose as an order at the beginning of a lawsuit to preserve the *status quo* – they ensure that at the end of the process, effective measures can be put in place should the circumstances warrant."[621]

"massive imports in a relatively short period of time"

488. The Panel on *US – Hot-Rolled Steel*, in a conclusion not reviewed by the Appellate Body, analysed the third condition of Article 10.6 of which sufficient evidence is required by Article 10.7, namely that the injury be caused by massive dumped imports in a relatively short period of time. The Panel noted that the *Anti-Dumping Agreement* does not indicate what period should be used in order to assess whether there were massive imports over a short period of time. Nevertheless, the Panel concluded that "massive imports that were not made *in tempore non suspectu* but at a moment in time where it had become public knowledge that an

[617] Panel Report on *US – Hot-Rolled Steel*, para. 7.155.
[618] Panel Report on *US – Hot-Rolled Steel*, paras. 7.158.
[619] Panel Report on *US – Hot-Rolled Steel*, paras. 7.160.
[620] (*footnote original*) We note that our findings concern the obligations regarding determinations of whether to apply "such measures ... as may be necessary" under Article 10.7. We are not ruling on the obligations regarding retroactive application of final anti-dumping duties under Article 10.6.
[621] Panel Report on *US – Hot-Rolled Steel*, paras. 7.162–7.163.

investigation was imminent may be taken into consideration in assessing whether Article 10.7 measures may be imposed":

> "The Agreement does not determine what period should be used in order to assess whether there were massive imports over a short period of time. Japan asserts that the latter part of Article 10.6 (ii) of the AD Agreement, referring to whether the injury caused by massive imports is likely to seriously undermine the remedial effect of the duty, implies that the period for comparison is the months before and after the initiation of the investigation. Japan argues that since the duty cannot be imposed retroactively to the period before the initiation, the remedial effect of the duty cannot be undermined by massive imports before initiation.
>
> We disagree with this conclusion. Article 10.7 allows for certain necessary measures to be taken **at any time after initiation of the investigation**. In order to be able to make any determination concerning whether there are massive dumped imports, a comparison of data is obviously necessary. However, if a Member were required to wait until information concerning the volume of imports for some period after initiation were available, this right to act at any time after initiation would be vitiated. By the time the necessary information on import volumes for even a brief period after initiation were available, as a practical matter, the possibility to impose final duties retroactively to initiation would be lost, as there would be no Article 10.7 measures in place. Moreover, as with the situation if a Member were required to wait the minimum 60 days and make a preliminary determination under Article 7 before applying measures under Article 10.7, the possibility of retroactively collecting duties under Article 10.6 at the final stage would have been lost.
>
> Moreover, in our view, it is not unreasonable to conclude that the remedial effect of the definitive duty could be undermined by massive imports that entered the country before the initiation of the investigation but at a time at which it had become clear that an investigation was imminent. We consider that massive imports that were not made *in tempore non suspectu* but at a moment in time where it had become public knowledge that an investigation was imminent may be taken into consideration in assessing whether Article 10.7 measures may be imposed. Again, we emphasize that we are not addressing the question whether this would be adequate for purposes of the final determination to apply duties retroactively under Article 10.6."[622]

4. Relationship with other Articles

489. In *US – Hot-Rolled Steel*, the Panel interpreted the term "sufficient evidence" of Article 10.7 by reference to Article 5.3. See paragraph 483 above.

XI. ARTICLE 11

A. TEXT OF ARTICLE 11

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

11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.[21] Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

(*footnote original*) [21] A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[22] The duty may remain in force pending the outcome of such a review.

(*footnote original*) [22] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8.

[622] Panel Report on *US – Hot-Rolled Steel*, paras. 7.165–7.168.

B. INTERPRETATION AND APPLICATION OF ARTICLE 11

1. Article 11.1

(a) Necessity

490. The Panel on *US – DRAMS* described the requirement in Article 11.1 whereby anti-dumping duties "shall remain in force only as long as and to the extent necessary" to counteract injurious dumping, as "a general necessity requirement."[623]

491. In assessing the essential character of the necessity involved in Article 11.1, the Panel on *US – DRAMS* stated the following:

> "We note that the necessity of the measure is a function of certain objective conditions being in place, *i.e.* whether circumstances require continued imposition of the anti-dumping duty. That being so, such continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced."[624]

492. The Panel on *US – DRAMS* held that "the necessity of the continued imposition of the anti-dumping duty can only arise in a defined situation pursuant to Article 11.2: *viz* to offset dumping".[625] See paragraph 500 below.

493. With respect to the relationship between Article 11.1 and 11.2, see paragraph 494 below.

(b) Relationship with other paragraphs of Article 11

494. The Panel on *US – DRAMS* examined the relationship between Articles 11.1 and 11.2 by considering whether the terms of Article 11.2 preclude the continued imposition of anti-dumping duties on the basis that an authority fails to satisfy itself that recurrence of dumping is "not likely". Referring to the general necessity requirement in Article 11.1, the Panel further noted that "the application of the general rule in Article 11.1 is specified in Article 11.2".[626]

495. The Panel on *EC – Tube or Pipe Fittings* considered that "Article 11.1 does not set out an independent or additional obligation for Members"[627] but rather "furnishes the basis for the review procedures contained in Article 11.2 (and 11.3) by stating a general and overarching principle, the modalities of which are set forth in paragraph 2 (and 3) of that Article".[628]

2. Article 11.2

(a) "whether the continued imposition of the duty is necessary to offset dumping"

496. Considering whether Article 11.2 precludes an anti-dumping duty being deemed "necessary to offset dumping" where there is no present dumping to offset, the Panel on *US – DRAMS* addressed the issue as follows:

> "First, we note that the second sentence of Article 11.2 refers to an examination of 'whether the continued imposition of the duty is necessary to offset dumping.' We note further that this sentence is expressed in the present tense. In addition, the second sentence of Article 11.2 does not explicitly include any reference to dumping being 'likely' to 'recur', as is the case with the injury review envisaged by that sentence.
>
> However, the second sentence of Article 11.2 requires an investigating authority to examine whether the 'continued imposition' of the duty is necessary to offset dumping. The word 'continued' covers a temporal relationship between past and future. In our view, the word 'continued' would be redundant if the investigating authority were restricted to considering only whether the duty was necessary to offset *present* dumping. Thus, the inclusion of the word 'continued' signifies that the investigating authority is entitled to examine whether imposition of the duty may be applied henceforth to offset dumping.
>
> Furthermore, with regard to injury, Article 11.2 provides for a review of 'whether the injury would be likely to continue or *recur* if the duty were removed or varied' (emphasis supplied). In conducting an Article 11.2 injury review, an investigating authority may examine the causal link between injury and dumped imports. If, in the context of a review of such a causal link, the only injury under examination is injury that may recur following revocation (*i.e.*, future rather than present injury), an investigating authority must necessarily be examining whether that future injury would be caused by dumping with a commensurately prospective timeframe. To do so, the investigating authority would first need to have established a status regarding the prospects of dumping. For these reasons, we do not agree that Article 11.2 precludes *a priori* the justification of continued imposition of anti-dumping duties when there is no present dumping.
>
> In addition, we note that there is nothing in the text of Article 11.2 of the AD Agreement that explicitly limits a Member to a 'present' analysis, and forecloses a prospective analysis, when conducting an Article 11.2 review."[629]

[623] Panel Report on *US – DRAMS*, para. 6.41.
[624] Panel Report on *US – DRAMS*, para. 6.42.
[625] Panel Report on *US – DRAMS*, para. 6.43.
[626] Panel Report on *US – DRAMS*, para. 6.41.
[627] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.113.
[628] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.113.
[629] Panel Report on *US – DRAMS*, paras. 6.26–6.29.

497. The Panel on *US – DRAMS* considered Article 11.3 to be particularly relevant in giving support for, and reinforcing, its interpretation of Article 11.2 regarding the issue whether Article 11.2 precludes an anti-dumping duty being deemed "necessary to offset dumping" where there is no present dumping to offset.[630] The Panel stated the following regarding Article 11.3:

> "We note that with regard to dumping, the 'sunset provision' in Article 11.3 of the AD Agreement envisages *inter alia* an examination of whether the expiry of an anti-dumping duty would be likely to lead to 'continuation or *recurrence*' of dumping. If, as argued . . ., an anti-dumping duty must be revoked as soon as present dumping is found to have ceased, the possibility (explicitly envisaged by Article 11.3) of the expiry of that duty causing dumping to *recur* could never arise. This is because the reference to 'expiry' in Article 11.3 assumes that the duty is still in force, and the reference to 'recurrence' of dumping assumes that dumping has ceased, but may 'recur' as a result of revocation. [This] textual interpretation of Article 11.2 would effectively exclude the possibility of an Article 11.3 review in circumstances where dumping has ceased but the duty remains in force. [This] interpretation therefore renders part of Article 11.3 ineffective. As stated by the Appellate Body in *Gasoline*, '[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'. An interpretation of Article 11.2 which renders part of Article 11.3 meaningless is contrary to the customary or general rules of treaty interpretation, and thus should be rejected."[631]

498. The Panel on *US – DRAMS* also rejected the argument that Article 11.2 requires the immediate revocation of an anti-dumping duty in case of a finding of "no dumping". The Panel opined that such interpretation would render footnote 22 under Article 11.3 meaningless:

> "Furthermore, [the] argument that Article 11.2 requires the immediate revocation of an anti-dumping duty in case of a finding of 'no dumping' (*e.g.,* when a retrospective assessment finds that no duty is to be levied) is also inconsistent with note 22 of the AD Agreement. Note 22 states that, in cases where anti-dumping duties are levied on a retrospective basis, 'a finding in the most recent assessment proceeding . . . that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty'. If [this] interpretation of Article 11.2 were accurate, then an investigating authority would be obligated under Article 11.2 to terminate an anti-dumping duty upon making such a finding, and note 22 would be meaningless. In our view, this confirms a finding that the absence of present dumping does not in and of itself require the immediate termination of an anti-dumping duty pursuant to Article 11.2."[632]

499. As a result of its findings quoted in paragraphs 496–498 above, the Panel on *US – DRAMS* rejected the argument that "Article 11.2 of the AD Agreement requires revocation as soon as an exporter is found to have ceased dumping, and that the continuation of an anti-dumping duty is precluded *a priori* in any circumstances other than where there is present dumping."[633]

500. Referring to the general necessity requirement in Article 11, the Panel on *US – DRAMS* held that such necessity can only arise "in a defined situation pursuant to Article 11.2". While "the necessity involved in Article 11.2 is not to be construed in some absolute and abstract sense", it should nevertheless "be demonstrable on the basis of the evidence adduced":

> "The necessity of the continued imposition of the anti-dumping duty can only arise in a defined situation pursuant to Article 11.2: *viz* to offset dumping. Absent the prescribed situation, there is no basis for continued imposition of the duty: the duty cannot be 'necessary' in the sense of being demonstrable on the basis of the evidence adduced because it has been deprived of its essential foundation. In this context, we recall our finding that Article 11.2 does not preclude *a priori* continued imposition of anti-dumping duties in the absence of present dumping. However, it is also clear from the plain meaning of the text of Article 11.2 that the continued imposition must still satisfy the 'necessity' standard, even where the need for the continued imposition of an anti-dumping duty is tied to the 'recurrence' of dumping. We recognize that the certainty inherent to such a prospective analysis could be conceivably somewhat less than that attached to purely retrospective analysis, reflecting the simple fact that analysis involving prediction can scarcely aspire to a standard of inevitability. This is, in our view, a discernable distinction in the degree of certainty, but not one which would be sufficient to preclude that the standard of necessity could be met. In our view, this reflects the fact that the necessity involved in Article 11.2 is not to be construed in some absolute and abstract sense, but as that appropriate to circumstances of practical reasoning intrinsic to a review process. Mathematical certainty is not required, but the conclusions should be demonstrable on the basis of the evidence adduced. This is as much applicable to a case relating to the prospect of recurrence of dumping as to one of present dumping."[634]

501. With respect to other findings of the Panel on *US – DRAMS* concerning "necessity" under Article 11, see paragraphs 490–491 above.

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[630] Panel Report on *US – DRAMS*, para. 6.30.
[631] Panel Report on *US – DRAMS*, para. 6.31.
[632] Panel Report on *US – DRAMS*, para. 6.32.
[633] Panel Report on *US – DRAMS*, para. 6.34.
[634] Panel Report on *US – DRAMS*, para. 6.43.

(b) "injury"

502. In *US – DRAMS*, the Panel stated that "by virtue of note 9 of the AD Agreement, the term 'injury' in Article 11.2 'shall be interpreted in accordance with the provisions of' Article 3."[635] See further the excerpt quoted in paragraph 506 below.

(c) "likely to lead to continuation or recurrence"

503. The Panel on *US – DRAMS* considered Korea's claim that the test applied by the United States' authorities was inconsistent with the "likely to lead to continuation or recurrence" language of Article 11.2. The Panel noted that under United States' law, the competent authority will not revoke anti-dumping duties unless it is "satisfied that future dumping is *not likely*."[636] (emphasis added) Korea argued that this "not likely" test is inconsistent with Article 11.2, because Article 11.2 mentions a likelihood test only with respect to *injury*. Furthermore, Korea argued that, even if the "likely" standard, established under Article 11.2 only in the context of *injury*, applied also in the context of *dumping*, the United States' "not likely" test was in any case incompatible with the "likely" standard set forth in Article 11.2. The Panel found that the "'not likely'-standard is not in fact equivalent to, and falls decisively short of, establishing that dumping is 'likely to recur if the order is revoked'."[637] In reaching this finding, the Panel considered both the "clear conceptual difference between establishing something as a positive finding and failing to establish something as a negative finding"[638], and the common usage of the relevant terms.[639] The Panel noted that situations could exist where the "not likely" standard would be satisfied, while the "likely" standard would not be and concluded by stating that the United States' "not likely" test did not provide a "demonstrable basis for consistently and reliably determining that the likelihood criterion is satisfied".[640]

504. After finding that the United States' test of "not likely" was inconsistent with the "likely" test mandated by the *Anti-Dumping Agreement*, the Panel on *US – DRAMS* decided not to address the issue whether the "likely" standard in the *dumping context* (as opposed to the injury context, where it is explicitly established) is consistent with the terms of Article 11.2 of the *Anti-Dumping Agreement*. The Panel then made the following observations, stating that a "likelihood" standard, applied in the context of injury under Article 11.2, could be applicable also in the anti-dumping context. More specifically, the Panel held, *inter alia*, that "there could be reason to support a view that authorities are entitled to apply the same test concerning the likelihood of recurrence or continuation of dumping for both Article 11.2 and 11.3 reviews":

> "We note that Article 11.3 provides for termination of a definitive anti-dumping duty five years from its imposition. However, such termination is conditional. First, the terms of Article 11.3 itself lay down that this should occur unless the authorities determine that the expiry would be 'likely to lead to continuation or recurrence of dumping and injury.' Where there is a determination that both are likely, the duty may remain in force, and the five year clock is reset to start again from that point. Second, Article 11.3 provides also for another situation whereby this five year period can be otherwise effectively extended, viz in a situation where a review under paragraph 2 covering both dumping and injury has taken place. If, for instance, such a review took place at the four year point, it could effectively extend the sunset review until 9 years from the original determination. In the first case, we note that the provisions of Article 11.3 explicitly conditions the prolongation of the five year period on a finding that there is <u>likelihood</u> of dumping and injury continuing or recurring. In the second case, where there is reference to review under Article 11.2, there is no such explicit reference.
>
> However, we note that both instances of review have the same practical effect of prolonging the application of anti-dumping duties beyond the five year point of an initial sunset review. This at the very least suggests, in our view, that there could be reason to support a view that authorities are entitled to apply the same test concerning the likelihood of recurrence or continuation of dumping for both Article 11.2 and 11.3 reviews. There certainly appears to be nothing that explicitly provides to the contrary. Nor do we see any reason why this conclusion would be materially affected by whether or not the dumping review occurred in conjunction with an injury review. There is nothing in the text of Article 11 which suggests there should be some fundamental bifurcation of the applicable standard for dumping review contingent on whether there is also an Article 11.2 injury review being undertaken.
>
> We also note that 'likelihood' or 'likely' carries with it the ordinary meaning of 'probable'. That being so, it seems to us that a 'likely standard' amounts to the view that where recurrence of dumping is found to be probable as a consequence of revocation of an anti-dumping duty, this probability would constitute a proper basis for entitlement to maintain that anti-dumping duty in force. Without prejudice to the legal status of such a view in terms of its consistency with the terms of Article 11.2 – a matter on which we are not required to rule as noted in the text above – we feel obliged to at least take note that, at least as a practical matter, rejection of such a

[635] Panel Report on *US – DRAMS*, fn 501.
[636] Panel Report on *US – DRAMS*, para. 6.38. (emphasis added)
[637] Panel Report on *US – DRAMS*, para. 6.48.
[638] Panel Report on *US – DRAMS*, para. 6.45.
[639] Panel Report on *US – DRAMS*, para. 6.46.
[640] Panel Report on *US – DRAMS*, para. 6.47.

view would effectively amount to a systematic requirement that reviewing authorities are obliged to revoke anti-dumping duties precisely where doing so would render recurrence of dumping probable."[641]

(d) "warranted"

505. In deciding whether "Article 11.2 necessarily requires an investigating authority, following three years and six months' findings of no dumping, to find an ex officio Article 11.2 review of 'whether the injury would be likely to continue or recur if the duty were removed or varied' is 'warranted'"[642], the Panel on *US – DRAMS* stated whether such "injury" review would be "warranted" would be entirely dependent upon a determination of whether dumping will recur:

"A review of 'whether the injury would be likely to continue or recur if the duty were removed or varied' could include a review of whether (1) injury that is (2) caused by dumped imports would be likely to continue or recur if the duty were removed or varied. With regard to injury, we believe that an absence of dumping during the preceding three years and six months is not in and of itself indicative of the likely state of the relevant domestic industry if the duty were removed or varied. With regard to causality, an absence of dumping during the preceding three years and six months is not in and of itself indicative of causal factors other than the absence of dumping. If the only causal factor under consideration is three years and six months' no dumping, the issue of causality becomes whether injury caused by dumped imports will recur. This necessarily requires a determination of whether dumping will recur. Thus, the 'injury' review that [is believed to be] 'warranted' on the basis of three years and six months' no dumping would be entirely dependent upon a determination of whether dumping will recur. . . . The mere fact of three years and six months' findings of no dumping does not require the investigating authority to, in addition, self-initiate a review of 'whether the injury would be likely to continue or recur if the duty were removed or varied'."[643]

506. In a footnote to the statement quoted in paragraph 507 below, the Panel on *US – DRAMS* noted:

"[B]y virtue of note 9 of the AD Agreement, the term 'injury' in Article 11.2 'shall be interpreted in accordance with the provisions of' Article 3. Article 3.5 of the AD Agreement requires the establishment of a causal link between the dumped imports and the injury found to exist. Thus, we consider that the Article 11.2 examination of 'whether the injury would be likely to continue or recur if the duty were removed or varied' may also involve an examination of whether any injury that is found to be likely to continue or recur is caused by dumped imports. We can envisage circumstances, however, when an Article 11.2 injury review need not necessarily include an examination of causal link."[644]

507. The Panel on *EC – Tube or Pipe Fittings* understood the "phrase 'where warranted' in Article 11.2 to denote circumstances furnishing good and sufficient grounds for, or justifying, the self-initiation of a review. Where an investigating authority determines such circumstances to exist, an investigating authority must self-initiate a review. Such a review, once initiated, will examine whether continued imposition of the duty is necessary to offset dumping, whether the dumping would be likely to continue or recur, or both. Article 11.2 therefore provides a review mechanism to ensure that Members comply with the rule contained in Article 11.1."[645] As the Panel pointed out, "the determination of whether or not good and sufficient grounds exist for the self-initiation of a review necessarily depends upon the factual situation in a given case and will necessarily vary from case to case".[646]

(e) Relationship with other paragraphs of Article 11

508. The *US – DRAMS* Panel touched on the relationship between Article 11.1 and Article 11.2. See paragraph 494 above.

509. The relationship between Article 11.2 and Article 11.3 was also discussed in *US – DRAMS*. See the excerpts quoted in paragraphs 497 and 504 above. The relationship between Article 11.2 and footnote 22 to Article 11.3 was addressed by the Panel on *US – DRAMS*. See paragraph 498 above.

3. Article 11.3

(a) General

(i) Mandating rule / exception

510. The Appellate Body on *US – Corrosion-Resistant Steel Sunset Review* considered that Article 11.3 lays down a mandatory rule with an exception and thus imposes a temporal limitation on the imposition of anti-dumping duties:

"Specifically, Members are required to terminate an anti-dumping duty within five years of its imposition '*unless*' the following conditions are satisfied: first, that a review be initiated before the expiry of five years from the date of the imposition of the duty; second, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *dumping*; and third, that in the review the authorities determine that the expiry of the duty would be likely to

[641] Panel Report on *US – DRAMS*, para. 6.48, fn 494.
[642] Panel Report on *US – DRAMS*, para. 6.58.
[643] Panel Report on *US – DRAMS*, para. 6.59.
[644] Panel Report on *US – DRAMS*, fn 501.
[645] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.112.
[646] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.115.

lead to continuation or recurrence of *injury*. If any one of these conditions is not satisfied, the duty must be terminated.[647]"[648]

511. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* also viewed the continuation of an anti-dumping duty as "an exception to the otherwise mandated expiry of the duty after five years".[649]

(ii) Difference between original investigation and sunset reviews

512. With respect to the determination of a likelihood of recurrence or continuation of dumping and injury, the Appellate Body on *US – Corrosion-Resistant Steel Sunset Review* noted that, as this likelihood determination is a prospective determination, "the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated".[650] In this respect, the Appellate Body pointed to the important difference between original investigations and sunset reviews:

"In an original anti-dumping investigation, investigating authorities must determine whether *dumping exists* during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be *likely to lead to continuation or recurrence of dumping*."[651]

(iii) Active role of investigating authorities

513. Based on an analysis of the various terms used in Article 11.3, the Appellate Body on *US – Corrosion-Resistant Steel Sunset Review*, then reached the following general conclusions:

"This language in Article 11.3 makes clear that it envisages a process combining *both* investigatory and adjudicatory aspects. In other words, Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words 'review' and 'determine' in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination. In view of the use of the word 'likely' in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated – and not simply if the evidence suggests that such a result might be possible or plausible."[652]

514. The Panel on *US – Corrosion-Resistant Steel Sunset Review* also underlined the importance of the need for sufficient positive evidence on which to base the likelihood determination:

"The requirement to make a 'determination' concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence."[653]

(iv) Positive evidence

515. The Panel on *US – Corrosion-Resistant Steel Sunset Review* expressed its view on the use of historical data as a basis for the inherently prospective likelihood determination of Article 11.3:

"Future 'facts' do not exist. The only type of facts that exist and that may be established with certainty and precision relate to the past and, to the extent they may be accurately recorded and evaluated, to the present. We recall that one of the fundamental goals of the *Anti-dumping Agreement* as a whole is to ensure that objective determinations are made, based, to the extent possible, on facts.[654] Thus, to the extent that it will rest upon a factual foundation, the prospective likelihood determination will inevitably rest on a factual foundation

[647] (*footnote original*) We note that Article 11.3 is textually identical to Article 21.3 of the *SCM Agreement*, except that, in Article 21.3, the word "countervailing" is used in place of the word "anti-dumping" and the word "subsidization" is used in place of the word "dumping". Given the parallel wording of these two articles, we believe that the explanation, in our Report in *US – Carbon Steel*, of the nature of the sunset review provision in the *SCM Agreement* also serves, *mutatis mutandis*, as an apt description of Article 11.3 of the *Anti-Dumping Agreement*. (Appellate Body Report, *US – Carbon Steel*, paras. 63 and 88)

[648] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 104.

[649] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 178.

[650] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 105.

[651] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 107. The Panel on *US – Corrosion-Resistant Steel Sunset Review* also pointed to the fact that orginal investigations and sunset reviews are distinct processes with different purposes and it stated that "[I]n light of the fundamental qualitative differences in the nature of these two distinct processes, [. . .] it would not be surprising to us that the textual obligations pertaining to each of the two processes may differ". Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.8.

[652] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 111. Also see Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 179.

[653] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271. The Appellate Body agreed with this view. Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 114.

[654] (*footnote original*) See Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel* "), *WT/DS213/R and Corr.1, adopted 19 December 2002 as modified by Appellate Body Report*, supra, note 22, para. 8.94 and Panel Report, *US – Hot-Rolled Steel*, supra, note 204, para. 7.55.

relating to the past and present. The investigating authority must evaluate this factual foundation and come to a reasoned conclusion about likely future developments."[655]

516. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* adopted a similar approach to the need to base a prospective likelihood determination on "positive evidence":

"The requirements of 'positive evidence' must, however, be seen in the context that the determinations to be made under Article 11.3 are prospective in nature and that they involve a 'forward-looking analysis'.[656] Such an analysis may inevitably entail assumptions about or projections into the future. Unavoidably, therefore, the inferences drawn from the evidence in the record will be, to a certain extent, speculative. In our view, that some of the inferences drawn from the evidence on record are projections into the future does not necessarily suggest that such inferences are not based on 'positive evidence'."[657]

(b) No specific methodology

517. The Panel on *US – Corrosion-Resistant Steel Sunset Review* considered that Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review:

"Similarly, we observe that Article 11.3 is silent as to how an authority should or must establish that dumping is likely to continue or recur in a sunset review. That provision itself prescribes no parameters as to any methodological requirements that must be fulfilled by a Member's investigating authority in making such a 'likelihood' determination."[658]

518. This view was confirmed by the Appellate Body on *US – Corrosion-Resistant Steel Sunset Review*. It thus considered that "no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review."[659] According to the Appellate Body, "in a sunset review, dumping margins may well be relevant to, but they will not necessarily be conclusive of, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping".[660]

519. However, the Appellate Body on *US – Corrosion-Resistant Steel Sunset Review* added, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2 in general and Article 2.4 in particular:

"It follows that we disagree with the Panel's view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood determination to be made in a sunset review under Article 11.3."[661]

520. The Panel on *US – Oil Country Tubular Goods Sunset Reviews* came to a similar conclusion with respect to the likelihood of injury determination. According to the Panel, obligations contained in the various paragraphs of Article 3 do not "normally" apply to sunset reviews:

"Just as the Appellate Body stated that an investigating authority is not required to make a dumping determination in a sunset review, we consider that an investigating authority is not required to make an injury determination in a sunset review. It follows, then, that the obligations set out in Article 3 do not normally apply to sunset reviews"[662]

521. However, the Panel was of the view that, to the extent that an investigating authority relies on a determination of injury when conducting a sunset review, the obligations of Article 3 would apply to that determination:

"If, however, an investigating authority decides to conduct an injury determination in a sunset review, or if it uses a past injury determination as part of its sunset determination, it is under the obligation to make sure that its injury determination or the past injury determination it is using conforms to the relevant provisions of Article 3.[663] For instance, Article 11.3 does not mention whether an investigating authority is required to calculate the price effect of future dumped imports on the prices of the domestic industry. In our view, this means that an investigating authority is not necessarily required to carry out that calculation in a sunset review. However, if the investigating authority decides to do such a calculation, then it would be bound by the relevant provisions of Article 3 of the Agreement. Similarly, if, in its sunset injury determinations, an investigating authority uses a price effect calculation made in the original investigation or in the intervening reviews, it has to assure the consis-

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[655] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.279.

[656] (*footnote original*) Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 105.

[657] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 341.

[658] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.166.

[659] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 123.

[660] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 124.

[661] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 128.

[662] Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.273, citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 123.

[663] (*footnote original*) We find support for this proposition in the Appellate Body's findings in *US – Corrosion-Resistant Steel Sunset Review*. See, Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 126–130.

tency of that calculation with the existing provisions of Article 3."[664]

522. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* agreed with this approach by the Panel. The Appellate Body considered that "when Article 11.3 requires a determination as to the likelihood of continuation or recurrence of 'injury', the investigating authority must consider the continuation or recurrence of 'injury' as defined in footnote 9."[665] According to the Appellate Body, "it does not follow, however, from this single definition of 'injury', that all of the provisions of Article 3 are applicable in their entirety to sunset review determinations under Article 11.3"[666]:

> "In our view, however, the *Anti-Dumping Agreement* distinguishes between 'determination[s] of injury', addressed in Article 3, and determinations of likelihood of 'continuation or recurrence . . . of injury', addressed in Article 11.3. In addition, Article 11.3 does not contain any cross-reference to Article 3 to the effect that, in making the likelihood-of-injury determination, all the provisions of Article 3 – or any particular provisions of Article 3 – *must* be followed by investigating authorities. Nor does any provision of Article 3 indicate that, wherever the term 'injury' appears in the *Anti-Dumping Agreement*, a determination of injury must be made following the provisions of Article 3."[667]

523. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* concluded that "investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination".[668] However, the Appellate Body added, this does not imply that in a sunset review determination, an investigating authority is never required to examine any of the factors listed in the paragraphs of Article 3:

> "Certain of the analyses mandated by Article 3 and necessarily relevant in an original investigation may prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a 'reasoned conclusion'. In this respect, we are of the view that the fundamental requirement of Article 3.1 that an injury determination be based on 'positive evidence' and an 'objective examination' would be equally relevant to likelihood determinations under Article 11.3. It seems to us that factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. An investigating authority may also, in its own judgement, consider other factors contained in Article 3 when making a likelihood-of-injury determination. But the necessity of conducting such an analysis in a given case results from the requirement imposed by *Article 11.3* – not Article 3 – that a likelihood-of-injury determination rest on a 'sufficient factual basis' that allows the agency to draw 'reasoned and adequate conclusions'."[669]

(c) Use of presumptions in a likelihood determination

524. The Appellate Body on *US – Corrosion-Resistant Steel Sunset Review* clearly stated that the use of presumptions may be inconsistent with an obligation to make a particular determination in each case using positive evidence. It considered "that a firm evidentiary foundation is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping. Such a determination cannot be based solely on the mechanistic application of presumptions."[670]

525. The Appellate Body on *US – Corrosion-Resistant Steel Sunset Review* saw no problem in investigating authorities being instructed to examine, in every sunset review, dumping margin and import volumes.[671] However, it noted that the significance and probative value of the two factors for a likelihood determination in a sunset review will necessarily vary from case to case. It stated that it "would have difficulty accepting that dumping margins and import volumes are always 'highly probative' in a sunset review by USDOC if this means that either or both of these factors are presumed, by themselves, to constitute sufficient evidence that the expiry of the duty would be likely to lead to continuation or recurrence of dumping"[672] The Appellate Body thus concluded that the consistency of the provisions of a measure with Article 11.3 hinges upon whether those provisions instruct the investigating authority to treat "dumping margins and/or import volumes as determinative or conclusive, on the one hand, or merely

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[664] Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 7. 274.

[665] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 276.

[666] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 277.

[667] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 278.

[668] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 281.

[669] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.

[670] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 178.

[671] The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* was of the view that "'volume of dumped imports' and 'dumping margins', before and after the issuance of anti-dumping duty orders, are highly important factors for any determination of likelihood of continuation or recurrence of dumping in sunset reviews, although other factors may also be as important, depending on the circumstances of the case". Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 208.

[672] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 177

indicative or probative, on the other hand, of the likelihood of future dumping."[673]

526. The Panel on *US – Oil Country Tubular Goods Sunset Reviews* considered that a scheme that attributes a "determinative" / "conclusive" value to certain factors in sunset determinations – as opposed to only an indicative value – is likely to violate Article 11.3 of the *Anti-Dumping Agreement*.[674] On appeal, the Appellate Body considered that the Panel had correctly articulated the standard for determining whether a measure was inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*.[675]

527. The Panel on *US – Oil Country Tubular Goods Sunset Reviews* considered that both the so-called deemed waiver and affirmative waiver provisions of United States law were inconsistent with Article 11.3 because they required an authority to make an affirmative determination of likelihood of continuation or recurrence of dumping, without taking into consideration the facts submitted by the exporter filing an incomplete submission, or without any further inquiry in the event where the exporter filed no submission or declared its intention not to participate in the review.[676] On appeal, the Appellate Body agreed with the Panel's analysis:

> "Because the waiver provisions require the USDOC to arrive at affirmative company-specific determinations without regard to any evidence on record, these determinations are merely *assumptions* made by the agency, rather than findings supported by evidence. The United States contends that respondents waiving the right to participate in a sunset review do so 'intentionally', with full knowledge that, as a result of their failure to submit evidence, the evidence placed on the record by the domestic industry is likely to result in an unfavourable determination on an order-wide basis. In these circumstances, we see no fault in making an unfavourable order-wide determination by taking into account evidence provided by the domestic industry in support thereof. However, the USDOC also takes into account, in such circumstances, statutorily-mandated *assumptions*. Thus, even assuming that the USDOC takes into account the totality of record evidence in making its order-wide determination, it is clear that, as a result of the operation of the waiver provisions, certain *order-wide* likelihood determinations made by the USDOC will be based, at least in part, on statutorily-mandated *assumptions* about a company's likelihood of dumping. In our view, this result is inconsistent with the obligation of an investigating authority under Article 11.3 to 'arrive at a reasoned conclusion' on the basis of 'positive evidence'."[677]

(d) Order-wide basis of a likelihood determination

528. In its report on *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body addressed the question whether authorities must make a separate determination, for each individual exporter or producer, on whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping by that exporter or producer or whether it would be possible to make a single order-wide determination on whether revocation of a particular anti-dumping duty order would be likely to lead to continuation or recurrence of dumping. The Appellate Body considered that, on its face, Article 11.3 does not oblige investigating authorities in a sunset review to make "company-specific" likelihood determinations:

> "We reiterate that Article 11.3 does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review. In particular, Article 11.3 does not expressly state that investigating authorities must determine that the expiry of the duty would be likely to lead to dumping *by each known exporter or producer concerned*. In fact, Article 11.3 contains no express reference to individual exporters, producers, or interested parties. This contrasts with Article 11.2, which does refer to 'any interested party' and '[i]nterested parties'. We also note that Article 11.3 does not contain the word 'margins', which might implicitly refer to individual exporters or producers. On its face, Article 11.3 therefore does not oblige investigating authorities in a sunset review to make 'company-specific' likelihood determinations in the manner suggested by Japan."[678]

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[673] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 178.

[674] Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, paras. 7.142–7.143.

[675] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 197.

[676] Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, paras. 7.93–7.99.

[677] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 234.

[678] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 149. The Appellate Body rejected the argument that Article 6.10 would require such company-specific sunset review determinations:

> "We have already concluded that investigating authorities are not *required* to calculate or rely on *dumping margins* in making a likelihood determination in a sunset review under Article 11.3. This means that the requirement in Article 6.10 that dumping margins, 'as a rule', be calculated 'for each known exporter or producer concerned' is not, in principle, relevant to sunset reviews. Therefore, the reference in Article 11.4 to '[t]he provisions of Article 6 regarding evidence and procedure' does not import into Article 11.3 an obligation for investigating authorities to calculate dumping margins (on a company-specific basis or otherwise) in a sunset review. Nor does Article 11.4 import into Article 11.3 an obligation for investigating authorities to make their likelihood determination on a company-specific basis."
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> Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 155.

(e) No prescribed time-frame for likelihood of continuation or recurrence of injury

529. The Panel on *US – Oil Country Tubular Goods Sunset Reviews* noted that Article 11.3 of the *Anti-Dumping Agreement* does not prescribe any time-frame for likelihood of continuation or recurrence of injury; nor does it require investigating authorities to specify the time-frame on which their likelihood determination is based:

> "As we already stated, Article 11.3 does not impose a particular time-frame on which the investigating authority has to base its likelihood determination. Further, in our view, the investigating authority does not have to base its likelihood determination on a uniform time-frame with respect to each injury factor that it takes into consideration. The time-frame regarding different injury factors may be different from one another depending on the circumstances of each sunset review. For instance, in a case where the exporters have excessive inventories, the investigating authority's evaluation of likely volume of dumped imports can be based on a relatively short time-frame. On the other hand, an analysis regarding the cash flows or productivity of the domestic industry may necessarily have to be based on a longer time-frame."[679]

530. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* agreed with the Panel that "an assessment regarding whether injury is likely to recur that focuses 'too far in the future would be highly speculative'[680], and that it might be very difficult to justify such an assessment. However, like the Panel, we have no reason to believe that the standard of a 'reasonably foreseeable time' set out in the United States statute is inconsistent with the requirements of Article 11.3."[681] The Appellate Body rejected the argument that the requirement set out in Article 3.7 that the threat of material injury be "imminent" is to be imported into Article 11.3 in the form of a temporal limitation on the time-frame within which "injury" must be determined to continue or recur. The Appellate Body considered that "sunset reviews are not subject to the detailed disciplines of Article 3, which include the specific requirement of Article 3.7".[682]

531. In addition, the Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* rejected the argument that an authority would be required to specify the relevant time-frame for injury to continue or recur for the authority's determination to be a "properly reasoned and supported determination":

> "As we have noted above, the text of Article 11.3 does not establish any requirement for the investigating authority to specify the timeframe on which it bases its determination regarding injury. Thus, the mere fact that the timeframe of the injury analysis is not presented in a sunset review determination is not sufficient to undermine that determination. Article 11.3 requires that a determination of likelihood of continuation or recurrence of injury rest on a sufficient factual basis to allow the investigating authority to draw reasoned and adequate conclusions. A determination of injury can be properly reasoned and rest on a sufficient factual basis even though the timeframe for the injury determination is not explicitly mentioned."[683]

(f) Applicability of procedural obligations

(i) Evidentiary standards for initiation

532. The Panel on *US – Corrosion-Resistant Steel Sunset Review* rejected the argument that the same evidentiary standards that apply to the self-initiation of original investigations under Article 5.6 also apply to the self-initiation of sunset reviews under Article 11.3. The Panel based itself on the text of Article 11.3:

> "As Japan concedes, Article 11.3, on its face, does not mention, either explicitly or by way of reference, any evidentiary standard that should or must apply to the self-initiation of sunset reviews. Article 11.3 contemplates initiation of a sunset review in two alternative ways, as is evident through the use of the word 'or'. Either the authorities make their determination in a review initiated 'on their own initiative', or they make their determination in a review initiated 'upon a duly substantiated request made by or on behalf of the domestic industry'. Although Article 11.3 provides for a certain qualification regarding initiations based on complaints lodged by the domestic industry – that such requests be 'duly substantiated' – the text clearly indicates that this qualification is germane only to that specific situation and does not apply to self-initiations. Consequently, since the drafters did not set forth any evidentiary requirements for the self-initiation of sunset reviews in the text of Article 11.3 itself, at first blush, it seems to us that they intended not to impose any evidentiary standards in respect of the self-initiation of a sunset review."[684]

533. The Panel on *US – Corrosion-Resistant Steel Sunset Review* found further support for its conclusion in the absence of any cross-referencing in Article 11 to the evidentiary standards concerning original investigations in Article 5.6:

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[679] Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.187

[680] (*footnote original*) Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.185.

[681] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 360.

[682] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 358.

[683] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 364.

[684] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.26.

"Although paragraphs 4 and 5 of Article 11 contain several cross-references to other articles in the *Anti-dumping Agreement*, no such cross-reference has been made in the text of Article 11 to Article 5.6. These cross-references (as well as other cross-references in the *Anti-dumping Agreement*, such as, for example, in Article 12.3) indicate that, when the drafters intended to make a particular provision also applicable in a different context, they did so explicitly. Therefore, their failure to include a cross-reference in the text of Article 11.3, or, for that matter, in any other paragraph of Article 11, to Article 5.6 (or *vice versa*) demonstrates that they did not intend to make the evidentiary standards of Article 5.6 applicable to sunset reviews."[685]

(ii) De minimis standard in sunset reviews

534. The Panel on *US – Corrosion-Resistant Steel Sunset Review* rejected the argument that the *Anti-Dumping Agreement* requires that the same de minimis standard that applies to investigating authorities under Article 5.8 also applies to sunset reviews under Article 11.3:

"On its face, Article 11.3 does not provide, either explicitly or by way of reference, for any *de minimis* standard in making the likelihood of continuation or recurrence of dumping determinations in sunset reviews. Therefore, Article 11.3 itself is silent as to whether the *de minimis* standard of Article 5.8 (or any other *de minimis* standard) is applicable to sunset reviews. However, '[s]uch silence does not exclude the possibility that the requirement was intended to be included by implication.'

We therefore look to the context of Article 11.3. The immediate context of Article 11.3 does not, however, yield a different result. Article 11.1 sets out the general rule that an anti-dumping duty can remain in force only as long as and to the extent necessary to counteract injurious dumping. Articles 11.2 and 11.3 reflect the application of that general rule under different circumstances. Article 11.4 contains a cross-reference to Article 6, which sets forth rules relating to evidence and procedure applicable to investigations. Given that, similar to Article 6, Article 5 also contains rules applicable to original investigations, we consider the absence in Article 11.4 of a similar cross-reference to Article 5 to indicate that the drafters did not intend to have the obligations in Article 5 apply also to sunset reviews."[686]

535. In the view of the Panel on *US – Corrosion-Resistant Steel Sunset Review*, it was clear that Article 5.8 did not suggest that the de minimis standard set out for investigations also applied to sunset reviews:

"In particular, the text of paragraph 8 of Article 5 refers expressly to the termination of an *investigation* in the event of *de minimis* dumping margins. There is, therefore, no textual indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also applies to sunset reviews. Nor is there any such suggestion or requirement in the other provisions of Article 5."[687]

536. On the basis of this textual analysis of the relevant provisions of the *Anti-Dumping Agreement*, the Panel on *US – Corrosion-Resistant Steel Sunset Review* concluded that the 2 per cent *de minimis* standard of Article 5.8 does not apply in the context of sunset reviews.[688]

(iii) Cumulation

Whether cumulation is permissible in sunset reviews

537. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* examined the question whether cumulation is permissible in sunset reviews. It found that, while Articles 3.3 and 11.3 are silent on this issue, this silence "cannot be understood to imply that cumulation is prohibited in sunset reviews".[689] The Appellate Body, recalling the apparent rationale behind the practice of cumulation in injury investigations as discussed by the Appellate Body on *EC – Tube or Tube or Pipe Fittings*[690] considered that this rationale is equally applicable to likelihood of injury determinations in sunset reviews. The Appellate Body thus concluded that cumulation in sunset reviews is permissible:

"Therefore, notwithstanding the differences between original investigations and sunset reviews, cumulation remains a useful tool for investigating authorities in both inquiries to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination as to whether to impose – or continue to impose – anti-dumping duties on products from those sources. Given the rationale for cumulation – a rationale that we consider applies to original investigations as well as to sunset reviews – we are of the view that it would be anomalous for Members to have limited authorization for cumulation in the *Anti-Dumping Agreement* to original investigations".[691]

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[685] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.27. With respect to Article 5.6, the Panel noted that "the text of Article 5.6 gives no indication that its evidentiary standards apply to anything but the self-initiation of investigations". Panel Report on *United States – Corrosion Resistant Steel Sunset Review*, para. 7.36.

[686] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.67–7.68.

[687] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.70.

[688] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.85.

[689] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 294.

[690] See Appellate Body Report on *EC – Tube or Tube or Pipe Fittings*, para. 116.

[691] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 297.

Non-application of negligibility standards

538. The Panel on *US – Corrosion-Resistant Steel Sunset Review* considered that the negligibility standards under Article 5.8 for the purposes of a cumulative injury assessment under Article 3.3 in original investigations, do not apply to sunset reviews under Article 11.3:

> "Article 11.3 speaks of a review to determine, *inter alia*, the likelihood of continuation or recurrence of injury. On its face, Article 11.3 does not mention, either explicitly or by way of reference, any negligibility standard that applies to the likelihood of continuation or recurrence of injury determinations in sunset reviews. Nor does the immediate context of Article 11.3 yield a different result. Article 11.1 sets out the general rule that an anti-dumping duty can remain in force only as long as and to the extent necessary to counteract injurious dumping. Articles 11.2 and 11.3 reflect the application of that general rule under different circumstances. Although paragraphs 4 and 5 of Article 11 contain several cross-references to other articles of the *Anti-Dumping Agreement*, no such cross-reference has been made to Articles 3.3 or 5.8."[692]

539. The Panel on *US – Corrosion-Resistant Steel Sunset Review* considered that "Article 3.3, by its own terms, is limited in application to investigations and does not apply to sunset reviews. It follows that the cross-reference in Article 3.3 to the negligibility standard in Article 5.8 does not apply to sunset reviews".[693]

540. The Panel on *US – Oil Country Tubular Goods Sunset Reviews* similarly found that cumulation, when used in sunset reviews, does not need to satisfy the conditions of Article 3.3 because "by its own terms Article 3.3 limits its scope of application to investigations".[694] The Appellate Body agreed with the Panel "that the conditions of Article 3.3 do not apply to likelihood-of-injury determinations in sunset reviews".[695]

(g) "likely"

541. The *US – DRAMS* Panel interpreted the term "likely" in Article 11.2 with reference to Article 11.3. See paragraph 504 above.

542. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* considered "that the 'likely' standard of Article 11.3 applies to the overall determinations regarding dumping and injury; it need not necessarily apply to each factor considered in rendering the overall determinations on dumping and injury".[696]

(h) Relationship with other paragraphs of Article 11

543. The relationship between Article 11.3 and Article 11.2 was addressed in *US – DRAMS*. See paragraphs 497 and 504 above.

544. The Panel on *US – DRAMS* also referred to footnote 22 to Article 11.3 in interpreting Article 11.2. See paragraph 498 above.

4. Relationship with other Articles

(a) Article 3

545. The Panel on *US – DRAMS* discussed the relationship between footnote 9 to Article 3 and Article 11.2. See paragraph 506 above.

546. The Panel on *US* – DRAMS also discussed the relationship between Articles 3.5 and 11.2. See paragraph 506 above.

XII. ARTICLE 12

A. TEXT OF ARTICLE 12

Article 12
Public Notice and Explanation of Determinations

12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[23], adequate information on the following:

(*footnote original*) [23] Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

(i) the name of the exporting country or countries and the product involved;

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[692] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.95.

[693] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.102. The Panel was of the view that:

> "even assuming *arguendo* that the provisions of Article 3 may be generally applicable throughout the *Anti-dumping Agreement*, an issue we need not and do not decide, this would not necessarily make every single provision in that article applicable throughout the Agreement. An article that has been found generally to apply throughout the Agreement may well contain certain specific provisions whose scope of application is limited, by their own terms, in certain respects. In our view, Article 3.3 is such a specific provision, which limits its scope of application by its own terms."

Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.101.

[694] Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.336.

[695] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 302.

[696] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 323.

(ii) the date of initiation of the investigation;

(iii) the basis on which dumping is alleged in the application;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested parties should be directed;

(vi) the time-limits allowed to interested parties for making their views known.

12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;

(iv) considerations relevant to the injury determination as set out in Article 3;

(v) the main reasons leading to the determination.

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

12.2.3 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 8 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

12.3 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.

B. INTERPRETATION AND APPLICATION OF ARTICLE 12

1. Article 12.1

(a) General

547. In *Guatemala – Cement II*, Mexico argued that Guatemala had acted inconsistently with the requirements of Article 12.1 by failing to publish a notice of initiation and notify Mexico and its exporter when the Guatemalan authority was satisfied that there was sufficient evidence to justify the initiation of an investigation. The Panel clarified the meaning of Article 12.1:

> "[T]his provision can most reasonably be read to require notification and public notice once a Member has decided to initiate an investigation. This interpretation is confirmed by the fact that the public notice to be provided is a 'notice of initiation of an investigation'. We can conceive of no logical reason why the AD Agreement would require a Member to publish a notice of the initiation of an investigation *before* the decision had been taken that such an investigation should be initiated."[697]

[697] Panel Report on *Guatemala – Cement II*, para. 8.87.

548. The Panel further rejected Mexico's argument that Guatemala was in violation of Article 12.1 by failing to satisfy itself as to the sufficiency of the evidence before giving notice of initiation, stating:

> "Given the function and context of Article 12.1 in the AD Agreement, we interpret this provision as imposing a procedural obligation on the investigating agency to publish a notice and notify interested parties after it has taken a decision that there is sufficient evidence to proceed with an initiation. The Panel is of the view that Article 12.1 is not concerned with the substance of the decision to initiate an investigation, which is dealt with in Article 5.3. By issuing a public notice of initiation in the case before us, the Guatemalan authorities complied with their procedural obligation under Article 12.1 to notify known interested parties and publish a public notice after they had decided to initiate an investigation. Whether or not Guatemala was justified in initiating an investigation on the basis of the evidence before it is an issue governed by Article 5.3."[698]

549. The Panel on *Argentina – Poultry Anti-Dumping Duties* rejected the argument that by fulfilling the requirement to publish a notice of initiation of an investigation, a Member has fulfilled the obligation to notify. According to the Panel, Article 12.1 clearly imposes two separate obligations, one to notify and another to give public notice, and it considered that these separate obligations "must both be fulfilled in any given investigation".[699]

(b) Obligation to notify "interested parties known to the investigating parties to have an interest" in the investigation

550. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered that, by definition, "interested parties" necessarily have an interest in the investigation and should therefore be notified if they are known to the investigating authorities. The Panel rejected the argument that absence of contact details for such interested parties implied that the authority was not able to comply with its notification obligation:

> "We accept that there may be circumstances in which an investigating authority may not have sufficient information to allow it to notify all interested parties known to have an interest in an investigation. In this sense, the fact that an exporter is 'known' by the investigating authority to have an interest in an investigation does not necessarily mean that sufficient details concerning the exporter are 'known' to the investigating authority such that it may make the Article 12.1 notification. In other words, knowledge of an exporter's interest in an investigation does not necessarily imply knowledge of contact details regarding that exporter. In such circumstances, however, we consider that the nature of the Article 12.1 notification obligation is such that the investigating authority should make all reasonable efforts to obtain the requisite contact details. Sending a letter with only a very general request for assistance, without specifying the exporters for which contact details are required, does not satisfy the need to make all reasonable efforts."[700]

(c) Article 12.1.1

(i) General

551. In *Guatemala – Cement II*, Guatemala argued that even if a public notice itself is insufficient, a separate report can satisfy the requirements of Article 12.1.1. The Panel disagreed on the basis of the following analysis:

> "There is no reference to a separate report in the public notice of initiation. Under Article 12.1.1, it is the 'public notice', and not the Member, that must 'make available through a separate report', certain information. We take this to mean that the public notice must at a minimum refer to a separate report. This conclusion is logical in that the separate report is a substitute for certain elements of the public notice and thus should perform a notice function comparable to that of the public notice itself. If there were no reference to a separate report in the public notice, how would the public and the interested parties concerned become aware of its existence? If the public and interested parties do not know of the existence of the report, how can it be considered that the required information was properly made available to them?"[701]

552. In support of its proposition that in order to fulfil the requirements of Article 12.1.1, the public notice must, at a minimum, refer to a separate report, the Panel referred to footnote 23 of the *Anti-Dumping Agreement*, and stated that "[i]t cannot be said that the separate report was 'readily available' to the public, if the public is not informed about where, when and how to have access to this report, leave alone if they were not even publicly informed of its existence."[702]

553. In *Guatemala – Cement II*, the Panel rejected Guatemala's argument that the alleged violations of Articles 5.5, 12.1.1 and 6.1.3, even if found to be violations, had not affected the course of the investigation, and thus: (a) the alleged violations were not harmful according to the principle of harmless error; (b) Mexico "convalidated" the alleged violations by not objecting immediately after their occurrence; and (c) the alleged violations did not cause nullification or impairment of

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[698] Panel Report on *Guatemala – Cement II*, para. 8.89.
[699] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.133.
[700] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.132.
[701] Panel Report on *Guatemala – Cement II*, para. 8.95.
[702] Panel Report on *Guatemala – Cement II*, para. 8.96.

benefits accruing to Mexico under the *Anti-Dumping Agreement*. See paragraphs 276–279 above.

(ii) Article 12.1.1(iv): "a summary of the factors on which the allegation of injury is based"

554. The Panel on *Mexico – Corn Syrup* rejected the argument that the notice of initiation of an investigation must set forth the investigating authority's conclusion regarding the relevant domestic industry, and the bases on which that conclusion was reached. The Panel stated:

> "Article 12.1.1(iv) merely requires that the notice of initiation contain 'a *summary* of the factors on which the *allegation* of injury is based' (emphasis added). It does not require a summary of the *conclusion* of the investigating authority regarding the definition of the relevant domestic industry. Nor does it require a summary of the factors and analysis on which the investigating authority based that conclusion. Still less does it require a summary of the factors and analysis on which the investigating authority based its conclusion regarding exclusion of some producers from consideration as the relevant domestic industry. In other words, in our view, Article 12.1.1 cannot reasonably be read to require that the notice of initiation contain an explanation of the factors underlying, or the investigating authority's conclusion regarding, the definition of the relevant domestic industry."[703]

555. The Panel on *Mexico – Corn Syrup* noted that "a notice of preliminary or final determination must set forth explanations for *all* material elements of the determination. A notice of initiation, on the other hand, pursuant to Article 12.1, must set forth specific information regarding certain factors, but need not contain explanations of or reasons for the resolution of *all* questions of fact underlying the determination that there is sufficient evidence to justify initiation."[704]

2. Article 12.2

(a) General

556. Regarding an explanation in public notices of the reason for a particular period for data collection, the Committee on Anti-Dumping Practices adopted a recommendation at its meeting of 4–5 May 2000. See paragraph 8 above.

(b) Article 12.2.1

557. In *Guatemala – Cement II*, Article 12.2.1 was referred to as part of the context of Article 6.1. See paragraph 310 above.

(c) Article 12.2.2

558. Rejecting the view that Article 12.2.2 requires explanations relating to initiation of the investigation to be set out in the notice of final determination, the Panel on *EC – Bed Linen* stated:

> "There is no reference to the initiation decision among the elements to be addressed in notices under Article 12.2. Moreover, in our view, it would be anomalous to interpret Article 12.2 as also requiring, in addition to the detailed information concerning the decisions of which notice is being given, explanations concerning the initiation of the investigation, of which notice has previously been given under Article 12.1. This is particularly the case with respect to elements which are not within the scope of the information to be disclosed in the notice of initiation itself."[705]

559. The Panel on *EC – Bed Linen* concluded that "[w]e do not believe that Article 12.2.2 requires a Member to explain, in the notice of final determination, aspects of its decision to initiate the investigation in the first place."[706]

560. The Panel on *EC – Tube or Pipe Fittings* considered that the findings and conclusions on issues of fact and law which are to be included in the public notices, or separate report, are those considered "material" by the investigating authority:

> "We understand a 'material' issue to be an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination. We observe that the list of topics in Article 12.2.1 is limited to matters associated with the determinations of dumping and injury, while Article 12.2.2 is more generally phrased ('all relevant information on matters of fact and law and reasons which have led to the imposition of final measures, or the acceptance of a price undertaking'). Nevertheless, the phrase 'have led to', implies those matters on which a factual or legal determination must necessarily be made in connection with the decision to impose a definitive anti-dumping duty. While it would certainly be desirable for an investigating authority to set out steps it has taken with a view to exploring possibilities of constructive remedies, such exploration is not a matter on which a factual or legal determination must necessarily be made since, at most, it might lead to the imposition of remedies other than anti-dumping duties."[707]

3. Relationship with other Articles

(a) General

561. In *Guatemala – Cement II*, the Panel considered it unnecessary to examine Mexico's claim of a violation

[703] Panel Report on *Mexico – Corn Syrup*, para. 7.87.
[704] Panel Report on *Mexico – Corn Syrup*, para. 7.103.
[705] Panel Report on *EC – Bed Linen*, para. 6.260.
[706] Panel Report on *EC – Bed Linen*, para. 6.260.
[707] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.424.

of Articles 12.2 and 12.2.2 because "the issue of Guatemala's' compliance with the transparency obligations deriving from its decision to impose definitive anti-dumping measures on imports of cement from Mexico would only be relevant if the decision to impose the measure itself had been consistent with the AD Agreement."[708]

562. The Panel on *US – Softwood Lumber VI* held a similar view, considering that if it were to find no violation with respect to a particular specific claim, such a conclusion would be based on the USITC's published determination which was then *ipso facto* sufficient. On the contrary, the Panel considered that if it did find a violation of a specific substantive requirement, the question of whether the notice of the determination "sufficient" under Article 12.2.2 of the AD Agreement would be immaterial:

> "In evaluating these claims, we note that our conclusions with respect to each of the alleged substantive violations asserted by Canada rest on our examination of the USITC's published determination, which constitutes the notices provided by the United States under Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement with respect to the injury determination in this case. No additional materials have been cited to us with respect to the determination for consideration in determining whether or not the USITC's determination are consistent with the relevant provisions of the Agreements. Thus, if we find no violation with respect to a particular specific claim, such a conclusion must rest on the USITC's published determination. In this circumstance, it is clear to us that no violation of Articles 12.2.2 and 22.5 could be found to exist in this case, where it is not disputed that the USITC determination accurately reflects the analysis and determination in the investigations. On the other hand, if we find a violation of a specific substantive requirement, the question of whether the notice of the determination is 'sufficient' under Article 12.2.2 of the AD Agreement or Article 22.5 of the SCM Agreement is, in our view, immaterial."[709]

(b) Article 1

563. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 12. The Panel then opined that that Mexico's claims under other articles of the *Anti-Dumping Agreement*, including Article 1, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[710] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

(c) Article 2

564. In *US – Stainless Steel*, after having found that there was inconsistency with Article 2.4.1 if an unnecessary "double conversion" was carried out in order to calculate the prices of local sales which were to be compared to alleged dumping exports (see paragraphs 69–70 above and paragraph 634 below), the Panel considered it unnecessary to examine the claim on the same factual basis under Article 12, referring to a finding of the Appellate Body concerning judicial economy.[711]

(d) Article 3

565. In *Thailand – H-Beams*, the Appellate Body referred to Article 12 in interpreting Article 3.1. See paragraph 112 above.

566. The Panel on *EC – Bed Linen*, after finding a violation of Article 3.4 by the European Communities, found it "neither necessary nor appropriate" to make a finding with respect to a claim of inadequate notice under Article 12.2.2. The Panel held that while a notice may adequately explain the determination that was made, the adequacy of the notice is nevertheless meaningless where the determination was substantively inconsistent with the relevant legal obligations. Furthermore, even if the notice itself was inconsistent with the *Anti-Dumping Agreement*, such a finding "does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the AD Agreement."[712]

(e) Article 5

567. The Panel on *Guatemala – Cement II* touched on the relationship between Articles 5.3 and 12.1. See paragraph 548 above.

568. The Panel on *Thailand – H-Beams* compared the notification requirements under Articles 5.5 and 12. See paragraph 304 above.

(f) Article 6

569. In *Guatemala – Cement II*, the Panel referred to Article 12.2 in rejecting Mexico's claim of a violation of Articles 6.1, 6.2 and 6.9. See paragraph 313 above.

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[708] Panel Report on *Guatemala – Cement II*, para. 8.291. Also see Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.207.

[709] Panel Report on *US – Softwood Lumber VI*, para. 7.41.

[710] Panel Report on *Guatemala – Cement II*, para. 8.296.

[711] Panel Report on *US – Stainless Steel*, para. 6.55. The Panel cited Appellate Body Report on *US – Wool Shirts and Blouses*, p. 19. With respect to judicial economy in general, see the Chapter on the *DSU*, Section XXXVI.F.

[712] Panel Report on *EC – Bed Linen*, para. 6.259. See also Panel Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 6.40; and Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.293.

570. The Panel, in *Argentina – Ceramic Tiles,* referred to Articles 6.5 and Article 12 of the *Anti-Dumping Agreement* as support of its conclusion that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information. See paragraph 416 above.

(g) Article 9

571. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 12. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, including Article 9, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[713] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

(h) Article 15

572. The Panel on *EC – Tube or Pipe Fittings* considered that while it would certainly be desirable for an investigating authority to set out the steps it has taken with a view to exploring the possibilities for constructive remedies, but that "such exploration is not a matter on which a factual or legal determination must necessarily be made since, at most, it might lead to the imposition of remedies other than anti-dumping duties".[714] The Panel concluded that the elements of Article 15 were not of a "material" nature and thus did not consider that "the European Communities erred by not treating these elements as 'material' within the meaning of that term used in Article 12 and [we] thus do not view it as having erred by not having included these in its published final determination".[715]

(i) Article 17

573. In *Thailand – H-Beams*, the Appellate Body referred to Article 12 in interpreting Articles 17.5 and 17.6. See paragraph 633 below.

(j) Article 18

574. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 12. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, including Article 18, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[716] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

4. Relationship with other WTO Agreements

(a) Article VI of the GATT 1994

575. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 12. The Panel then opined that that Mexico's claims under other articles of the *Anti-Dumping Agreement* and Article VI of GATT 1994 were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[717] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

XIII. ARTICLE 13

A. TEXT OF ARTICLE 13

Article 13
Judicial Review

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

B. INTERPRETATION AND APPLICATION OF ARTICLE 13

No jurisprudence or decision of a competent WTO body.

XIV. ARTICLE 14

A. TEXT OF ARTICLE 14

Article 14
Anti-Dumping Action on Behalf of a Third Country

14.1 An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

14.2 Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged

[713] Panel Report on *Guatemala – Cement II*, para. 8.296.
[714] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.424.
[715] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.425.
[716] Panel Report on *Guatemala – Cement II*, para. 8.296.
[717] Panel Report on *Guatemala – Cement II*, para. 8.296.

dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

14.3 In considering such an application, the authorities of the importing country shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say, the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

14.4 The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the Council for Trade in Goods seeking its approval for such action shall rest with the importing country.

B. INTERPRETATION AND APPLICATION OF ARTICLE 14

No jurisprudence or decision of a competent WTO body.

XV. ARTICLE 15

A. TEXT OF ARTICLE 15

Article 15
Developing Country Members

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

B. INTERPRETATION AND APPLICATION OF ARTICLE 15

1. General

(a) The Doha Mandate

576. Paragraph 7.2 of the Doha Ministerial Decision of 14 November 2001 on Implementation-Related Issues and Concerns states that the Ministerial Conference "recognizes that, while Article 15 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is a mandatory provision, the modalities for its application would benefit from clarification. Accordingly, the Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to examine this issue and to draw up appropriate recommendations within twelve months on how to operationalize this provision."

2. First sentence

(a) Extent of Members' obligation

577. In *US – Steel Plate*, in a decision not reviewed by the Appellate Body, the Panel considered that there are no specific legal requirements for specific action in the first sentence of Article 15 and that, therefore, "Members cannot be expected to comply with an obligation whose parameters are entirely undefined". According to the Panel, "the first sentence of Article 15 imposes no specific or general obligation on Members to undertake any particular action."[718]"[719]

578. A similar view was expressed by the Panel on *EC – Tube or Pipe Fittings* as follows:

> "We agree with Brazil that there is no requirement for any specific outcome set out in the first sentence of Article 15. We are furthermore of the view that, even assuming that the first sentence of Article 15 imposes a general obligation on Members, it clearly contains no operational language delineating the precise extent or nature of that obligation or requiring a developed country Member to undertake any specific action. The second sentence serves to provide operational indications as to the nature of the specific action required. Fulfilment of the obligations in the second sentence of Article 15 would therefore necessarily, in our view, constitute fulfilment of any general obligation that might arguably be contained in the first sentence. We do not see this as a 'reduction' of the first sentence into the second sentence, as suggested to us by Brazil. Rather the second sentence articulates certain operational modalities of the first sentence."[720]

(b) When and to whom "special regard" should be given

579. In *US – Steel Plate*, in a decision not reviewed by the Appellate Body, the Panel addressed the question of

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[718] (*footnote original*) In this regard, we note the decision of the GATT Panel that considered similar arguments in the *EEC-Cotton Yarn* dispute. That Panel, in considering Article 13 of the Tokyo Round Agreement, which is substantively identical to it successor, Article 15 of the AD Agreement, stated:

> "582. . . . The Panel was of the view that Article 13 should be interpreted as a whole. In the view of the Panel, assuming arguendo that an obligation was imposed by the first sentence of Article 13, **its wording contained no operative language delineating the extent of the obligation**. Such language was only to be found in the second sentence of Article 13 whereby it is stipulated that 'possibilities of constructive remedies provided for by this Code shall be explored before applying anti-dumping duties where they would affect the essential interests of developing countries'."

Panel Report, *European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil* ("*EEC – Cotton Yarn*"), adopted 30 October 1995, BISD 42S/17, para. 582 (emphasis added).

[719] Panel Report on *US – Steel Plate*, para. 7.110.

[720] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.68.

when and to whom special regard should be given under Article 15. The Panel concluded that Article 15 only requires special regard in respect of the final decision whether to apply a final measure and that such a special regard is to be given to the situation of developing country Members, and not to the situation of companies operating in developing countries:

> "India's arguments as to when and to whom this 'special regard' must be given disregard the text of Article 15 itself. Thus, the suggestion that special regard must be given throughout the course of the investigation, for instance in deciding whether to apply facts available, ignores that Article 15 only requires special regard 'when considering the application of anti-dumping measures under this Agreement'. In our view, the phrase 'when considering the application of anti-dumping measures under this Agreement' refers to the final decision whether to apply a final measure, and not intermediate decisions concerning such matters as investigative procedures and choices of methodology during the course of the investigation. Finally, India's argument focuses on the exporter, arguing that special regard must be given in considering aspects of the investigation relevant to developing country exporters involved in the case. However, Article 15 requires that special regard must be given 'to the special situation of developing country **Members**'. We do not read this as referring to the situation of companies operating in developing countries. Simply because a company is operating in a developing country does not mean that it somehow shares the 'special situation' of the developing country Member."[721]

3. Second sentence

(a) "constructive remedies provided for by this Agreement"

580. The Panel on *EC – Bed Linen*, in a decision not reviewed by the Appellate Body, rejected the argument that a "constructive remedy" might be a decision not to impose anti-dumping duties at all. The Panel stated that "Article 15 refers to 'remedies' in respect of injurious dumping. A decision not to impose an anti-dumping duty, while clearly within the authority of a Member under Article 9.1 of the *Anti-Dumping Agreement*, is not a 'remedy' of any type, constructive or otherwise" for injurious dumping:

> "'Remedy' is defined as, *inter alia*, 'a means of counteracting or removing something undesirable; redress, relief'.[722] 'Constructive' is defined as 'tending to construct or build up something non-material; contributing helpfully, not destructive'.[723] The term 'constructive remedies' might consequently be understood as helpful means of counteracting the effect of injurious dumping. However, the term as used in Article 15 is limited to constructive remedies 'provided for under this Agreement'. . . . In our view, Article 15 refers to 'remedies' in respect of injurious dumping."[724]

581. Discussing what might be encompassed by the phrase "constructive remedies provided for by this Agreement", the Panel on *EC – Bed Linen* mentioned the examples of the imposition of a "lesser duty" or a price undertaking:

> "The Agreement provides for the imposition of anti-dumping duties, either in the full amount of the dumping margin, or desirably, in a lesser amount, or the acceptance of price undertakings, as means of resolving an anti-dumping investigation resulting in a final affirmative determination of dumping, injury, and causal link. Thus, in our view, imposition of a lesser duty, or a price undertaking would constitute 'constructive remedies' within the meaning of Article 15. We come to no conclusions as to what other actions might in addition be considered to constitute 'constructive remedies' under Article 15, as none have been proposed to us."[725]

(b) "shall be explored"

582. The Panel on *EC – Bed Linen*, in interpreting the term "explore", stated that, while the concept of "explore" does not imply any particular outcome, the developed country authorities must actively undertake the exploration of possibilities with a willingness to reach a positive outcome:

> "In our view, while the exact parameters of the term are difficult to establish, the concept of 'explore' clearly does not imply any particular outcome. We recall that Article 15 does not require that 'constructive remedies' must be explored, but rather that the 'possibilities' of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the 'exploration' of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive

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[721] Panel Report on *US – Steel Plate*, para. 7.111.

[722] (*footnote original*) The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

[723] (*footnote original*) Id.

[724] Panel Report on *EC – Bed Linen*, para. 6.228. In *US – Steel Plate*, the Panel agreed with the above conclusions and, applying it in the circumstances of this case, "consider[ed] that the possibility of applying different choices of methodology is not a 'remedy' of any sort under the AD Agreement". Panel Report on *US – Steel Plate*, para. 7.112.

[725] Panel Report on *EC – Bed Linen*, para. 6.229. A similar view was expressed by the Panel on *EC – Tube or Pipe Fittings*, para. 7.71–7.72. The Panel on *EC – Tube or Pipe Fittings* considered that Article 15 does not impose any obligation to explore undertakings other than price undertakings in the case of developing country Members. Panel Report on *EC – Tube or Pipe Fittings*, para. 7.78.

outcome. Thus, in our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered.[726] It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country."[727]

583. The Panel on *EC – Bed Linen* concluded that "[p]ure passivity is not sufficient, in our view, to satisfy the obligation to 'explore' possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned." The Panel consequently regarded the failure of a Member "to respond in some fashion other than bare rejection *particularly once the desire to offer undertakings had been communicated to it*" as a failure to "explore constructive remedies".[728]

584. In *US – Steel Plate*, India had argued that the United States authorities should have considered applying a lesser duty in this case, despite the fact that US law does not provide for application of a lesser duty in any case. The Panel, in a decision not reviewed by the Appellate Body, noted that "consideration and application of a lesser duty is deemed desirable by Article 9.1 of the [Anti-Dumping] Agreement, but is not mandatory." Therefore, it stated, a Member is not obligated to have the possibility of a lesser duty in its domestic legislation. The Panel concluded that "the second sentence of Article 15 [cannot] be understood to require a Member to consider an action that is not required by the WTO Agreement and is not provided for under its own municipal law."[729]

(c) "before applying anti-dumping duties"

585. The Panel on *EC – Bed Linen*, in a decision not reviewed by the Appellate Body, interpreted the phrase "before applying anti-dumping duties" as follows:

> "In our view, [Article 1] implies that the phrase 'before applying anti-dumping duties' . . . means before the application of definitive anti-dumping measures. Looking at the whole of the AD Agreement, we consider that the term 'provisional measures' is consistently used where the intention is to refer to measures imposed before the end of the investigative process. Indeed, in our view, the AD Agreement clearly distinguishes between provisional measures and anti-dumping duties, which term consistently refers to definitive measures. We find no instance in the Agreement where the term 'anti-dumping duties' is used in a context in which it can reasonably be understood to refer to provisional measures. Thus, in our view, the ordinary meaning of the term 'anti-dumping duties' in Article 15 is clear – it refers to the imposition of definitive anti-dumping measures at the end of the investigative process.
>
> Consideration of practical elements reinforces this conclusion. Provisional measures are based on a preliminary determination of dumping, injury, and causal link. While it is certainly permitted, and may be in a foreign producer's or exporter's interest to offer or enter into an undertaking at this stage of the proceeding, we do not consider that Article 15 can be understood to *require* developed country Members to explore the possibilities of price undertakings prior to imposition of provisional measures. In addition to the fact that such exploration may result in delay or distraction from the continuation of the investigation, in some cases, a price undertaking based on the preliminary determination of dumping could be subject to revision in light of the final determination of dumping. However, unlike a provisional duty or security, which must, under Article 10.3, be refunded or released in the event the final dumping margin is lower than the preliminarily calculated margin (as is frequently the case), a 'provisional' price undertaking could not be retroactively revised. We do not consider that an interpretation of Article 15 which could, in some cases, have negative effects on the very parties it is intended to benefit, producers and exporters in developing countries, is required."[730]

4. Relationship with other Articles

586. The *EC – Bed Linen* Panel touched on the relationship between Article 15 and Article 1. See the first paragraph of the quote in paragraph 585 above.

PART II

XVI. ARTICLE 16

A. TEXT OF ARTICLE 16

Article 16
Committee on Anti-Dumping Practices

16.1 There is hereby established a Committee on Anti-Dumping Practices (referred to in this Agreement as

[726] (*footnote original*) We note that our interpretation of Article 15 in this regard is consistent with that of a GATT Panel which considered the predecessor of that provision, Article 13 of the Tokyo Round Anti-Dumping Code, which provision is substantively identical to present Article 15. That Panel found:

> "The Panel noted that if the application of anti-dumping measures 'would affect the essential interests of developing countries', the obligation that then arose was to explore the 'possibilities' of 'constructive remedies'. *It was clear from the words '[p]ossibilities' and 'explored' that the investigating authorities were not required to adopt constructive remedies merely because they were proposed.*" *EC – Cotton Yarn*, para. 584 (emphasis added).

[727] Panel Report on *EC – Bed Linen*, para. 6.233. *See* also Panel Report on *US – Steel Plate*, paras. 7.113–7.115 and Panel Report on EC – Tube or Pipe Fittings, para. 7.72. With respect to the related concept of good faith in general, see Chapter on *DSU*, Section III.B.1(vi).

[728] Panel Report on *EC – Bed Linen*, para. 6.238.

[729] Panel Report on *US – Steel Plate*, para. 7.116.

[730] Panel Report on *EC – Bed Linen*, paras. 6.231–6.232. Also see Panel Report on *EC – Tube or Pipe Fittings*, para. 7.82.

the "Committee") composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

16.2 The Committee may set up subsidiary bodies as appropriate.

16.3 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved. It shall obtain the consent of the Member and any firm to be consulted.

16.4 Members shall report without delay to the Committee all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

16.5 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

B. INTERPRETATION AND APPLICATION OF ARTICLE 16

1. Article 16.1

(a) Rules of procedure

587. At its meeting of 22 May 1996, the Council for Trade in Goods approved rules of procedure for the meetings of the Committee on Anti-Dumping Practices (the "Rules of Procedure").[731]

(b) "shall meet not less than twice a year and otherwise"

588. The Rules of Procedure require that the Committee "shall meet not less than twice a year in regular session, and otherwise as appropriate."[732]

2. Article 16.4

(a) Minimum information to be provided in reporting without delay all preliminary or final anti-dumping actions

589. At its meeting of 30 October 1995, the Committee on Anti-Dumping Practices adopted guidelines for the minimum information to be provided under Article 16.4 of the Agreement in the reports on all preliminary or final anti-dumping actions.[733]

(b) "The semi-annual reports shall be submitted on an agreed standard form"

590. At its meeting of 30 October 1995, the Committee on Anti-Dumping Practices adopted guidelines for the format of, and information to be provided in, the semi-annual reports.[734]

XVII. ARTICLE 17

A. TEXT OF ARTICLE 17

Article 17
Consultation and Dispute Settlement

17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.[735]

17.2 Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.

17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if

731 G/C/M/10, section 1(ii). The text of the adopted rules of procedure can be found in G/ADP/4 and G/L/143.
732 G/L/143, chapter I, rule 1.
733 G/ADP/M/4, section D. The text of the adopted guidelines can be found in G/ADP/2.
734 G/ADP/M/4, section D. The text of the adopted format and guidelines can be found in G/ADP/1.
735 With respect to dispute settlement, in Marrakesh, the Ministers adopted the Declaration on Dispute Settlement pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures. See Section XXII.

final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.

17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

(i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and

(ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

17.6 In examining the matter referred to in paragraph 5:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.[736]

17.7 Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided.

B. INTERPRETATION AND APPLICATION OF ARTICLE 17

1. General

(a) Concurrent application of Article 17 of the *Anti-Dumping Agreement* and the rules and procedures of the *DSU*

591. The Appellate Body in *Guatemala – Cement I* rejected the finding by the Panel that "the provisions of Article 17 provides for a coherent set of rules for dispute settlement specific to anti-dumping cases, … that *replaces* the more general approach of the DSU (emphasis added)."[737] The Appellate Body first held that the special or additional rules within the meaning of Article 1.2 shall prevail over the provisions of the *DSU* only "to the extent that there is a difference between the two sets of provisions":

> "Article 1.2 of the DSU provides that the 'rules and procedures of this Understanding shall apply *subject to such special or additional rules and procedures* on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding.' (emphasis added) It states, furthermore, that these special or additional rules and procedures 'shall prevail' over the provisions of the DSU '[t]o the extent that there is a *difference* between' the two sets of provisions (emphasis added) Accordingly, if there is no 'difference', then the rules and procedures of the DSU apply *together with* the special or additional provisions of the covered agreement. In our view, it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them. An interpreter must, therefore, identify an *inconsistency* or a *difference* between a provision of the DSU and a special or additional provision of a covered agreement *before* concluding that the latter *prevails* and that the provision of the DSU does not apply.
>
> We see the special or additional rules and procedures of a particular covered agreement as fitting together with the generally applicable rules and procedures of the DSU to form a comprehensive, integrated dispute settlement system for the *WTO Agreement*. The special or additional provisions listed in Appendix 2 of the DSU are

[736] With respect to Article 17.6, in Marrakesh, the Ministers adopted the Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. See Section XXIII.

[737] Appellate Body Report on *Guatemala – Cement I*, para. 58, quoting from the Panel Report on *Guatemala – Cement I*, para. 7.16.

designed to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement, while Article 1 of the DSU seeks to establish an integrated and comprehensive dispute settlement system for all of the covered agreements of the *WTO Agreement* as a whole. It is, therefore, only in the specific circumstance where a provision of the DSU and a special or additional provision of another covered agreement are mutually inconsistent that the special or additional provision may be read to *prevail* over the provision of the DSU."[738]

592. The Appellate Body in *Guatemala – Cement I* then found that Article 17 of the *Anti-Dumping Agreement* does not replace the "more general approach of the DSU".

"Clearly, the consultation and dispute settlement provisions of a covered agreement are not meant to *replace*, as a coherent system of dispute settlement for that agreement, the rules and procedures of the DSU. To read Article 17 of the *Anti-Dumping Agreement* as *replacing* the DSU system as a whole is to deny the integrated nature of the WTO dispute settlement system established by Article 1.1 of the DSU. To suggest, as the Panel has, that Article 17 of the *Anti-Dumping Agreement* replaces the 'more general approach of the DSU' is also to deny the application of the often more detailed provisions of the DSU to anti-dumping disputes. The Panel's conclusion is reminiscent of the fragmented dispute settlement mechanisms that characterized the previous GATT 1947 and Tokyo Round agreements; it does not reflect the *integrated* dispute settlement system established in the WTO."[739]

(b) Challenge against anti-dumping legislation as such

593. One of the main issues which arose in the *US – 1916 Act* dispute was whether an anti-dumping statute could, in the light of Article 17 of the *Anti-Dumping Agreement*, be challenged "as such", rather than a specific *application* of such a statute in a particular anti-dumping investigation. Discussing the legal basis for claims brought under the *Anti-Dumping Agreement*, the Appellate Body in *US – 1916 Act* stated:

"Article 17 of the *Anti-Dumping Agreement* addresses dispute settlement under that Agreement. Just as Articles XXII and XXIII of the GATT 1994 create a legal basis for claims in disputes relating to provisions of the GATT 1994, so also Article 17 establishes the basis for dispute settlement claims relating to provisions of the *Anti-Dumping Agreement*. In the same way that Article XXIII of the GATT 1994 allows a WTO Member to challenge *legislation* as such, Article 17 of the *Anti-Dumping Agreement* is properly to be regarded as allowing a challenge to legislation as such, unless this possibility is excluded. No such *express* exclusion is found in Article 17 or elsewhere in the *Anti-Dumping Agreement*."[740]

594. In considering whether Article 17 contains an implicit restriction on challenges to anti-dumping legislation as such, the Appellate Body, in *US – 1916 Act*, noted the following:

"Article 17.1 refers, without qualification, to 'the settlement of disputes' under the *Anti-Dumping Agreement*. Article 17.1 does not distinguish between disputes relating to Anti-Dumping legislation as such and disputes relating to anti-dumping measures taken in the implementation of such legislation. Article 17.1 therefore implies that Members can challenge the consistency of legislation as such with the *Anti-Dumping Agreement* unless this action is excluded by Article 17.

Similarly, Article 17.2 of the *Anti-Dumping Agreement* does not distinguish between disputes relating to anti-dumping legislation as such and disputes relating to anti-dumping measures taken in the implementation of such legislation. On the contrary, it refers to consultations with respect to 'any matter affecting the operation of this Agreement'.[741]

. . .

Article 17.3 does not explicitly address challenges to legislation as such. . . . Articles XXII and XXIII allow challenges to be brought under the GATT 1994 against legislation as such. Since Article 17.3 is the 'equivalent provision' to Articles XXII and XXIII of the GATT 1994, Article 17.3 provides further support for our view that challenges may be brought under the *Anti-Dumping Agreement* against legislation as such unless such challenges are otherwise excluded."[742]

595. After finding that Article 17.3 supported its view that challenges may be brought under the *Anti-Dumping Agreement* against legislation as such, unless such challenges are explicitly excluded, the Appellate Body also addressed Article 17.4:

"Article 17.4 sets out certain conditions that must exist before a Member can challenge action taken by a national investigating authority in the context of an anti-dumping investigation. However, Article 17.4 does not address or affect Member's right to bring a claim of inconsistency with the *Anti-Dumping Agreement* against anti-dumping legislation as such."[743]

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[738] Appellate Body Report on *Guatemala – Cement I*, paras. 65–66.
[739] Appellate Body Report on *Guatemala – Cement I*, para. 67. The Panels on *US – 1916 Act* followed the approach of the Appellate Body. Panel Report on *US – 1916 Act (EC)*, para. 5.21; and Panel Report on *US – 1916 Act (Japan)*, para. 6.85. See also Appellate Body Report on *US – Hot-Rolled Steel*, para. 51.
[740] Appellate Body Report on *US – 1916 Act*, para. 62.
[741] Appellate Body Report on *US – 1916 Act*, paras. 64–65.
[742] Appellate Body Report on *US – 1916 Act*, para. 68.
[743] Appellate Body Report on *US – 1916 Act*, para. 74.

596. The Appellate Body in *US – 1916 Act* finally referred to Articles 18.1 and 18.4 of the *Anti-Dumping Agreement* as contextual support for its reading of Article 17 as allowing Members to bring claims against anti-dumping legislation as such:

> "Nothing in Article 18.4 or elsewhere in the *Anti-Dumping Agreement* excludes the obligation set out in Article 18.4 from the scope of matters that may be submitted to dispute settlement.
>
> If a Member could not bring a claim of inconsistency under the *Anti-Dumping Agreement* against legislation as such until one of the three anti-dumping measures specified in Article 17.4 had been adopted and was also challenged, then examination of the consistency with Article 18.4 of anti-dumping legislation as such would be deferred, and the effectiveness of Article 18.4 would be diminished.
>
> . . .
>
> Article 18.1 contains a prohibition on 'specific action against dumping' when such action is not taken in accordance with the provisions of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*. Specific action against dumping could take a wide variety of forms. If specific action against dumping is taken in a form other than a form authorized under Article VI of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*, such action will violate Article 18.1. We find nothing, however, in Article 18.1 or elsewhere in the *Anti-Dumping Agreement*, to suggest that the consistency of such action with Article 18.1 may only be challenged when one of the three measures specified in Article 17.4 has been adopted. Indeed, such an interpretation must be wrong since it implies that, if a Member's legislation provides for a response to dumping that does *not* consist of one of the three measures listed in Article 17.4, then it would be impossible to test the consistency of that legislation, and of particular responses thereunder, with Article 18.1 of the *Anti-Dumping Agreement*.
>
> Therefore, we consider that Articles 18.1 and 18.4 support our conclusion that a Member may challenge the consistency of legislation as such with the provisions of the *Anti-Dumping Agreement*."[744]

597. In *US – Hot-Rolled Steel*, Japan had challenged Section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, which provided for a method for calculating the "all others" rate (see paragraphs 471–473 above) as inconsistent with Article 9.4. The Panel found that Section 735(c)(5)(A), as amended, was, *on its face*, inconsistent with Article 9.4 "in so far as it requires the consideration of margins based in part on facts available in the calculation of the all others rate". The Panel further found that, in maintaining this Section following the entry into force of the *Anti-Dumping Agreement*, the United States had acted inconsistently with Article 18.4 of this Agreement as well as with Article XVI:4 of the WTO Agreement.[745] The Appellate Body upheld these findings.[746]

598. For more information about challenging legislation as such, see Section VI.B.3(c)(ii) of the Chapter on *DSU*.

(c) Mandatory versus discretionary legislation[747]

(i) General

599. The Appellate Body and the Panels addressed the issue of mandatory versus discretionary legislation with respect to the United States Antidumping Act of 1916. This United States legislation provided for civil and criminal proceedings to counteract predatory pricing from abroad. In addition, the Panel on *US – 1916 Act (EC)*, in a finding explicitly endorsed by the Appellate Body[748], rejected the United States' argument, according to which the 1916 Act was a non-mandatory law, because the US Department of Justice had the discretion to initiate, or not, a case under the 1916 Act:

> "The EC also refers to the panel report in *EC – Audio Cassettes*, which was not adopted.[749] This report stated why the mere fact that the initiation of anti-dumping investigations was discretionary would not make the EC legislation non-mandatory. The panel stated that:
>
> > '[it] did not consider in any event that its task in this case was to determine whether the EC's Basic Regulation was non-mandatory in the sense that the initiation of investigations and impositions of duties were not mandatory functions. Should panels accept this approach, they would be precluded from ever reviewing the content of a party's anti-dumping legislation.'[750]
>
> The *EC – Audio Cassettes* panel based its reasoning on the fact that this would undermine the obligation contained in Article 16.6 of the Tokyo Round Anti-Dumping Agreement. That provision provided that parties had to bring their laws, regulations and administrative procedures into conformity with the provisions of the Tokyo

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[744] Appellate Body Report on *US – 1916 Act*, paras. 78–82.
[745] Panel Report on *US – Hot-Rolled Steel*, para. 7.90.
[746] Appellate Body Report on *US – Hot-Rolled Steel*, para. 129.
[747] This Section only refers to the analysis of this issue in anti-dumping-related disputes. For a detailed analysis of this issue in the WTO jurisprudence, see paras. VI.B.3(c)(ii).
[748] Appellate Body Report on *US – 1916 Act*, para. 91.
[749] (*footnote original*) Panel Report on *EC – Audio Cassette*, para. 4.1. On the legal value of unadopted panel reports, see footnote 358 above and its reference to the Appellate Body Report on *Japan – Alcoholic Beverages II*.
[750] (*footnote original*) Panel Report on *EC – Audio Cassette*, para. 362.

> Round Anti-Dumping Agreement.[751] We note that almost identical terms are found in Article 18.4 of the WTO Anti-Dumping Agreement, . . .
>
> . . .
>
> Since we found that Article VI and the WTO Anti-Dumping Agreement are applicable to the 1916 Act, we consider that the reasoning of the panel in the *EC – Audio Cassettes* case should apply in the present case. Interpreting the provisions of Article 18.4 differently would undermine the obligations contained in that Article and would be contrary to the general principle of useful effect by making all the disciplines of the Anti-Dumping Agreement non-enforceable as soon as a Member would claim that the investigating authority has discretion to initiate or not an anti-dumping investigation."[752]

600. In *US – DRAMS*, Korea challenged certain certification requirements under the United States anti-dumping law. The provision challenged by Korea required exporters to certify, upon removal of anti-dumping duties, that they agree to the reinstatement of the anti-dumping duties on the products of their company if, after revocation of the original anti-dumping duties, the United States authorities find dumping. The Panel rejected the Korean arguments, noting that the certification requirement was not a mandatory requirement for revocation under United States anti-dumping law in general. The Panel held that other provisions of United States anti-dumping law and regulations of the United States authorities make revocation of an anti-dumping order possible contingent upon a different set of requirements, not including the certification requirement:

> "We note section 751(b) of the 1930 Tariff Act (as amended) and section 353.25(d) of the DOC's regulations, whereby an anti-dumping order may be revoked on the basis of 'changed circumstances'. We note that neither of these provisions imposes a certification requirement. In other words, an anti-dumping order may be revoked under these provisions absent fulfilment of the section 353.25(a)(2)(iii) certification requirement. We also note that Korea has not challenged the consistency of these provisions with the WTO Agreement. Thus, because of the existence of legislative avenues for Article 11.2-type reviews that do not impose a certification requirement, and which have not been found inconsistent with the WTO Agreement, we are precluded from finding that the section 353.25(a)(2)(iii) certification requirement in and of itself amounts to a mandatory requirement inconsistent with Article 11.2 of the AD Agreement."[753]

601. In *US – Section 129(c)(1) URAA*, Canada had claimed that certain United States legislation as such violated WTO law. The Panel[754] decided to analyse first whether the United States legislation at issue was mandatory, before analysing whether the behaviour mandated would be inconsistent with the relevant WTO provisions.[755]

(ii) Rejection of the distinction?

602. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body, for the first time, did not follow the traditional mandatory v. discretionary rule and found that it saw no reason for concluding that, in principle, non-mandatory measures cannot be challenged "as such". In this case, the measure at issue was the United States Sunset Policy Bulletin which the Panel had found not to be challengeable as such because it was not mandatory for the competent authorities. The Appellate Body obviously disagreed:

> "We also believe that the provisions of Article 18.4 of the Anti-Dumping Agreement are relevant to the question of the type of measures that may, as such, be submitted to dispute settlement under that Agreement. Article 18.4 contains an explicit obligation for Members to 'take all necessary steps, of a general or particular character' to ensure that their 'laws, regulations and

[751] (*footnote original*) Article 16.6(a) ("National Legislation") of the Tokyo Round Anti-Dumping Agreement provided as follows:

> "Each government accepting or acceding to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Party in question."

[752] Panel Report on *US – 1916 Act (EC)*, para. 6.168. See also Panel Report on *US – 1916 Act (Japan)*, paras. 6.188–6.189. See also, Panel Report on *US – Steel Plate*, paras. 7.88–7.89 and 8.3. In this case, the Panel concluded that the "practice" of the US authorities concerning the application of "total facts available" (Article 6.8 Anti-dumping Agreement) is not a measure which can give rise to an independent claim of violation of the AD Agreement. *See also*, Panel Report on *US – Section 129(c)(1) URAA*, para. 6.22.

[753] Panel Report on *US – DRAMS*, para. 6.53.

[754] The Panel decided not to follow the approach of the Panel on *US – Export Restraints*, which had considered that identifying and addressing the relevant WTO obligations first would facilitate its assessment of the manner in which the legislation addresses those obligations, and whether any violation is involved (Panel Report on *US – Export Restraints*, paras. 8.10–8.13). The Panel on *US – Section 129(c)(1) URAA* justified the different approach as follows: "We note that the Panel on *United States – Measures Treating Exports Restraints as Subsidies* first considered whether certain action was in conformity with WTO requirements and only then addressed whether the measure at issue mandated such action. . . . In the circumstances of the case at hand, where there is a major *factual* dispute regarding whether section 129(c)(1) requires and/or precludes certain action, we think that a panel is of most assistance to the DSB if it examines the factual issues first. Moreover, we do not see how addressing first whether certain actions identified by Canada would contravene particular WTO provisions would facilitate our assessment of whether section 129(c)(1) mandates the United States to take certain action or not to take certain action. Finally, we have taken into account the fact that, in the present case, our ultimate conclusions with respect to Canada's claims would not differ depending on the order of analysis we decided to follow". Panel Report on *US – Section 129(c)(1) URAA*, footnote 72.

[755] Panel Report on *US – Section 129(c)(1) URAA*, para. 6.22–6.25.

administrative procedures' are in conformity with the obligations set forth in the Anti-Dumping Agreement. Taken as a whole, the phrase 'laws, regulations and administrative procedures' seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.[756] If some of these types of measure could not, as such, be subject to dispute settlement under the Anti-Dumping Agreement, it would frustrate the obligation of 'conformity' set forth in Article 18.4.

This analysis leads us to conclude that there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the *Anti-Dumping Agreement*, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the *Anti-Dumping Agreement*. Hence we see no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such'. To the extent that the Panel's findings in paragraphs 7.145, 7.195, and 7.246 of the Panel Report suggest otherwise, we consider them to be in error.

We observe, too, that allowing measures to be the subject of dispute settlement proceedings, whether or not they are of a mandatory character, is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to 'preserve [their] rights and obligations . . . under the covered agreements, and to clarify the existing provisions of those agreements'.[757] As long as a Member respects the principles set forth in Articles 3.7 and 3.10 of the DSU, namely, to exercise their 'judgement as to whether action under these procedures would be fruitful' and to engage in dispute settlement in good faith, then that Member is entitled to request a panel to examine measures that the Member considers nullify or impair its benefits. We do not think that panels are obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory. This issue is relevant, if at all, only as part of the panel's assessment of whether the measure is, as such, inconsistent with particular obligations. It is to this issue that we now turn."[758]

603. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body, referring to its previous report in *US – 1916 Act* where it did follow mandatory/discretionary rule, indicated that it had yet to pronounce itself generally upon the continuing relevance of such a distinction and warned against its "mechanic application":

> "We explained in *US – 1916 Act* that this analytical tool existed prior to the establishment of the WTO, and that a number of GATT panels had used it as a technique for evaluating claims brought against legislation as such.[759] As the Panel seemed to acknowledge[760], we have not, as yet, been required to pronounce generally upon the continuing relevance or significance of the mandatory/discretionary distinction.[761] Nor do we consider that this appeal calls for us to undertake a comprehensive examination of this distinction. We do, nevertheless, wish to observe that, as with any such analytical tool, the import of the 'mandatory/discretionary distinction' may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion."[762]

(d) Challenge of a "practice" as such

604. In *US – Steel Plate*, the United States, referring to the Panel's decision in *US – Export Restraints*[763], argued that United States "practice" (in this case its practice as

[756] (*footnote original*) We observe that the scope of each element in the phrase "laws, regulations and administrative procedures" must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from Member to Member depending on each Member's domestic law and practice.

[757] Article 3.2 of the DSU.

[758] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 87–89.

[759] (*footnote original*) Appellate Body Report, *US – 1916 Act*, paras. 61 and 88.

[760] (*footnote original*) In footnote 95 to para. 7.114, the Panel quoted the following statement from para. 7.88 of the Panel Report in *US – Steel Plate*: "[t]he Appellate Body has recognized the distinction, but has not specifically ruled that it is determinative in consideration of whether a statute is inconsistent with relevant WTO obligations."

[761] (*footnote original*) In our Report in *US – 1916 Act*, we examined the challenged legislation and found that the alleged "discretionary" elements of that legislation were not of a type that, even under the mandatory/discretionary distinction, would have led to the measure being classified as "discretionary" and therefore consistent with the *Anti-Dumping Agreement*. In other words, we *assumed* that the distinction could be applied because it did not, in any event, affect the outcome of our analysis. We specifically indicated that it was not necessary, in that appeal, for us to answer "the question of the continuing relevance of the distinction between mandatory and discretionary legislation for claims brought under the *Anti-Dumping Agreement*". (Appellate Body Report, *US – 1916 Act*, para. 99) We also expressly declined to answer this question in footnote 334 to paragraph 159 of our Report in *US – Countervailing Measures on Certain EC Products*. Furthermore, the appeal in *US – Section 211 Appropriations Act* presented a unique set of circumstances. In that case, in defending the measure challenged by the European Communities, the United States unsuccessfully argued that discretionary regulations, issued under a separate law, cured the discriminatory aspects of the measure at issue.

[762] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

[763] In *US – Export Restraints*, Canada had claimed that the US "practice" of treating export restraints as meeting the "financial contribution" requirement of Article 1.1(a)(1)(iv) of the *SCM Agreement* was a measure and could be challenged as such. Canada defined US "practice" as "an institutional commitment to follow declared interpretations or methodologies that is reflected in cumulative determinations" and claimed that this "practice" has an "operational existence in and of itself". The Panel considered whether the alleged US practice required the US authorities to treat export restraints in a certain way and therefore had "independent operational status". The Panel, which concluded that there was no measure in the form of US practice, indicated:

regards total facts available)[764] could not be the subject of a claim because it does not have "independent operational status" and therefore it is not a "measure".[765] India, on the contrary, claimed that a "practice" becomes a "measure" through repeated similar responses to the same situation.[766] The Panel concluded that "[t]he challenged practice in this case is, in our view, no different from that considered in the *US – Export Restraints* case. It can be departed from so long as a reasoned explanation is given. It therefore lacks independent operational status, as it cannot require USDOC to do something, or refrain from doing something."[767]

2. Article 17.1

(a) "settlement of disputes"

605. Article 17.1 was discussed by the Appellate Body in *US – 1916 Act*. See paragraph 594 above.

3. Article 17.2

(a) "any matter affecting the operation of this Agreement"

606. Article 17.2 was discussed by the Appellate Body in *US – 1916 Act*. See paragraph 594 above.

4. Article 17.3

(a) Exclusion of Article 17.3 of the Anti-Dumping Agreement from Appendix 2 of the DSU

607. In analysing the Panel's interpretation of the relationship between Article 17 of the *Anti-Dumping Agreement* and the *DSU*, the Appellate Body in *Guatemala – Cement I* referred to the exclusion of Article 17.3 from Appendix 2 of the *DSU*, which lists the special or additional rules and procedures contained in the covered agreements:

> "The *Anti-Dumping Agreement* is a covered agreement listed in Appendix 1 of the DSU; the rules and procedures of the DSU, therefore, apply to disputes brought pursuant to the consultation and dispute settlement provisions contained in Article 17 of that Agreement . . . [Article 17.3] is not listed [in Appendix 2 of the DSU,] precisely because it provides the legal basis for consultations to be requested by a complaining Member under the *Anti-Dumping Agreement*. Indeed, it is the equivalent provision in the *Anti-Dumping Agreement* to Articles XXII and XXIII of the GATT 1994, which serve as the basis for consultations and dispute settlement under the GATT 1994, under most of the other agreements in Annex 1A of the . . . *WTO Agreement*, and under the . . . *TRIPS Agreement*."[768]

5. Article 17.4

(a) General

608. In *US – 1916 Act*, the Panel and the Appellate Body were called upon to determine whether the *Anti-Dumping Agreement* allowed challenges to anti-dumping legislation "as such", rather than merely to the specific application of such legislation in individual anti-dumping investigations. The Panel on *US – 1916 Act* found that it had jurisdiction to consider claims "as such".[769] The United States based its objections to the Panel's jurisdiction on Article 17.4. More specifically, the United States argued that Members could not bring a claim of inconsistency with the *Anti-Dumping Agreement* "against legislation as such independently from a claim with respect to one of the three measures identified in Article 17.4, i.e. a definitive anti-dumping duty, a price undertaking, or a provisional measure."[770] Moreover, the United States relied on the Appellate Body's findings in *Guatemala – Cement I*, where the Appellate Body had held that "[a]ccording to Article 17.4, a 'matter' may be referred to the DSB *only if* one of the relevant three anti-dumping measures is in place. This provision, when read together with Article 6.2 of the DSU requires a panel request in a dispute brought under the *Anti-Dumping Agreement* to identify, as the

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Footnote 763 (*cont.*)

> "[W]hile Canada may be right that under US law, 'practice must normally be followed, and those affected by US [CVD] law . . . therefore have reason to expect that it will be', past practice can be departed from as long as a reasoned explanation, which prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action. The argument that expectations are created on the part of foreign governments, exporters, consumers, and petitioners as a result of any particular practice that the DOC 'normally' follows would not be sufficient to accord such a practice an independent operational existence. Nor do we see how the DOC's references in its determinations to its practice gives 'legal effect to that "practice" as determinative of the interpretations and methodologies it applies'. US 'practice' therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada."

Panel Report on *US – Export Restraints*, para. 8.126.

764 In *US – Hot-Rolled Steel*, Japan had also challenged the "general" practice of the US investigating authorities regarding total facts available. The Panel did not rule on whether a general practice could be challenged separately from the statutory measure on which it is based because it concluded that Japan's claim in this regard was outside its terms of reference. Indeed, the Panel found that there was no mention of such a claim in Japan's request for the establishment of a panel. Panel Report on *US – Hot-Rolled Steel*, para. 7.22.

765 Panel Report on *US – Steel Plate*, para. 7.14.

766 Panel Report on *US – Steel Plate*, para. 7.15.

767 Panel Report on *US – Steel Plate*, para. 7.23.

768 Appellate Body Report on *Guatemala – Cement I*, para. 64.

769 Panel Report on *US – 1916 Act (EC)*, para. 5.27; Panel Report on *US – 1916 Act (Japan)*, para. 6.91.

770 Appellate Body Report on *US – 1916 Act*, para. 55

specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure."[771] The Appellate Body upheld the Panels' findings; in doing so, it first clarified its own findings in *Guatemala – Cement I*:

> "In *Guatemala – Cement*, Mexico had challenged Guatemala's *initiation* of anti-dumping proceedings, and its *conduct* of the investigation, without identifying any of the measures listed in Article 17.4 . . .
>
> . . .
>
> Nothing in our Report in *Guatemala – Cement* suggests that Article 17.4 precludes review of anti-dumping legislation as such. Rather, in that case, we simply found that, for Mexico to challenge Guatemala's initiation and conduct of the anti-dumping investigation, Mexico was required to identify one of the three anti-dumping measures listed in Article 17.4 in its request for establishment of a panel. Since it did not do so, the panel in that case did not have jurisdiction."[772]

609. After clarifying its own findings in *Guatemala – Cement I* with respect to Article 17.4, the Appellate Body turned to the considerations underlying the restrictions contained in Article 17.4:

> "In the context of dispute settlement proceedings regarding an anti-dumping investigation, there is tension between, on the one hand, a complaining Member's right to seek redress when illegal action affects its economic operators and, on the other hand, the risk that a responding Member may be harassed or its resources squandered if dispute settlement proceedings could be initiated against it in respect of each step, however small, taken in the course of an anti-dumping investigation, even before any concrete measure had been adopted.[773] In our view, by limiting the availability of dispute settlement proceedings related to an anti-dumping investigation to cases in which a Member's request for establishment of a panel identifies a definitive anti-dumping duty, a price undertaking or a provisional measure[774], Article 17.4 strikes a balance between these competing considerations.
>
> Therefore, Article 17.4 sets out certain conditions that must exist before a Member can challenge action taken by a national investigating authority in the context of an anti-dumping investigation. However, Article 17.4 does not address or affect a Member's right to bring a claim of inconsistency with the *Anti-Dumping Agreement* against anti-dumping legislation as such."[775]

610. After setting out the function of Article 17.4 within the *Anti-Dumping Agreement*, the Appellate Body also stated that it failed to see, in the light of firmly established GATT and WTO jurisprudence according to which claims can be brought against legislation as such, which particular characteristics should distinguish anti-dumping legislation from other legislation so as to render the established case law practice inapplicable in the context of anti-dumping legislation. Finally, the Appellate Body also referred to Articles 18.1 and 18.4 as context for its findings.[776]

611. Noting that Article 17.4 does not refer to "claims", the Panel on *Mexico – Corn Syrup* stated that "Article 17.4 does not, in our view, set out any further or additional requirements with respect to the degree of specificity with which claims must be set forth in a request for establishment challenging a final anti-dumping measure."[777] The Panel concluded that "a request for establishment that satisfies the requirements of Article 6.2 of the *DSU* in this regard also satisfies the requirements of Article 17.4 of the AD Agreement."[778]

(b) Panel terms of reference

(i) Concept of "matter"

612. In *Guatemala – Cement I*, Mexico's complaint related to various aspects of the anti-dumping investigation by Guatemala applied in a specific case. Guatemala requested that the complaint be rejected, because (i) while a provisional anti-dumping measure was identified in the request for panel establishment, Mexico had not asserted and demonstrated that the measure had had a "significant impact" as required under Article 17.4, and (ii) neither of a final anti-dumping measure and a price undertaking had been identified in Mexico's request for the establishment of the panel. The Appellate Body described the word "matter" in paragraphs 2, 3, 4, 5 and 6 of Article 17 as "the key concept in defining the scope of a dispute that may be referred to the DSB under the *Anti-Dumping Agreement* and, therefore, in identifying the parameters of a Panel's terms of reference in an anti-dumping dispute."[779]

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[771] Appellate Body Report on *Guatemala – Cement I*, para. 79. (See also para. 614 of this Chapter).

[772] Appellate Body Report on *US – 1916*, paras. 71–72.

[773] (*footnote original*) An unrestricted right to have recourse to dispute settlement during an anti-dumping investigation would allow a multiplicity of dispute settlement proceedings arising out of the same investigation, leading to repeated disruption of that investigation.

[774] (*footnote original*) Once one of the three types of measure listed in Article 17.4 is identified in the request for establishment of a panel, a Member may challenge the consistency of any preceding action taken by an investigating authority in the course of an anti-dumping investigation.

[775] Appellate Body Report on *US – 1916 Act*, paras. 73–74.

[776] Appellate Body Report on *US – 1916 Act*, paras. 75–83.

[777] Panel Report on *Mexico – Corn Syrup*, para. 7.14.

[778] Panel Report on *Mexico – Corn Syrup*, para. 7.14. With respect to specificity of requests for the establishment of a panel pursuant to Article 6.2 of the *DSU*, see Chapter on *DSU*, Sections VI.B.3(d) and XXII.3(a).

[779] Appellate Body Report on *Guatemala – Cement I*, para. 70.

613. Regarding the ordinary meaning of "matter", the Appellate Body in *Guatemala – Cement I* stated that "the most appropriate [ordinary meaning] in this context is 'substance' or 'subject-matter'. Although the ordinary meaning is rather broad, it indicates that the 'matter' is the substance or subject-matter of the dispute."[780] The Appellate Body then linked the term "matter" to a panel's terms of reference under Article 7 of the *DSU* and defined matter as consisting of (i) the specific measures at issue and (ii) the legal basis of the complaint or the claims:

> "The word 'matter' appears in Article 7 of the DSU, which provides the standard terms of reference for Panels. Under this provision, the task of a Panel is to examine 'the matter referred to the DSB'. These words closely echo those of Article 17.4 of the *Anti-Dumping Agreement* and, in view of the integrated nature of the dispute settlement system, form part of the context of that provision. Article 7 of the DSU itself does not shed any further light on the meaning of the term 'matter'. However, when that provision is read together with Article 6.2 of the DSU, the precise meaning of the term 'matter' becomes clear. Article 6.2 specifies the requirements under which a complaining Member may refer a 'matter' to the DSB: in order to establish a Panel to hear its complaint, a Member must make, in writing, a 'request for the establishment of a Panel' (a 'Panel request'). In addition to being the document which enables the DSB to establish a Panel, the Panel request is also usually identified in the Panel's terms of reference as the document setting out 'the matter referred to the DSB'. Thus, 'the matter referred to the DSB' for the purposes of Article 7 of the DSU and Article 17.4 of the *Anti-Dumping Agreement* must be the 'matter' identified in the request for the establishment of a Panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a Panel request, to 'identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly.' (emphasis added) The '*matter* referred to the DSB', therefore, consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*).
>
> In our Report in *Brazil – Coconut*, we agreed with previous Panels established under the GATT 1947, as well as under the [AD Agreement], 'that the "matter" referred to a Panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference.'[781] Statements in two of the Panel reports cited by us in that case clarify further the relationship between the 'matter', the 'measures' at issue and the 'claims'. In *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*[782], the Panel found that 'the "matter" consisted of *the specific claims* stated by Norway . . . with respect to *the imposition of these duties*'. (emphasis added) A distinction is therefore to be drawn between the 'measure' and the 'claims'. Taken together, the 'measure' and the 'claims' made concerning that measure constitute the 'matter referred to the DSB', which forms the basis for a Panel's terms of reference."[783]

Concept of "measure"

Relationship with Article 6.2 of the DSU: "specific measure at issue"

614. The Panel on *Guatemala – Cement I* found that Article 17.4 of the *Anti-Dumping Agreement* is a "timing provision", meaning that Article 17.4 established *when* a panel may be requested, rather than a provision setting forth the appropriate subject of a request for establishment of a panel.[784] The Appellate Body disagreed with this finding and stated that "Article 6.2 of the DSU requires 'the specific measures at issue' to be identified in the Panel request."[785] In determining what may constitute a "specific measure" for the purposes of the *Anti-Dumping Agreement*, the Appellate Body in *Guatemala – Cement I* stated:

> "According to Article 17.4, a 'matter' may be referred to the DSB *only if* one of the relevant three anti-dumping measures is in place. This provision, when read together with Article 6.2 of the DSU, requires a Panel request in a dispute brought under the *Anti-Dumping Agreement* to identify, as the specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure. This requirement to identify a specific anti-dumping measure at issue in a Panel request in no way limits the nature of the *claims* that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the *Anti-Dumping Agreement*. As we have observed earlier, there is a difference between the specific measures at issue – in the case of the *Anti-Dumping Agreement*, one of the three types of anti-dumping measure described in Article 17.4 – and the claims or the legal basis of the complaint referred to the DSB relating to those specific measures. In coming to this conclusion, we note that the language of Article 17.4 of the *Anti-Dumping Agreement* is unique to that Agreement.
>
> [I]n disputes under the *Anti-Dumping Agreement* relating to the initiation and conduct of anti-dumping investigations, a definitive anti-dumping duty, the acceptance

[780] Appellate Body Report on *Guatemala – Cement I*, para. 71.
[781] (*footnote original*) Appellate Body Report on *Brazil – Desiccated Coconut*, p. 22.
[782] (*footnote original*) Panel Report on *US – Norwegian Salmon AD*, para. 342.
[783] Appellate Body Report on *Guatemala – Cement I*, paras. 72–73.
[784] Appellate Body Report on *Guatemala – Cement I*, para. 77, quoting the Panel Report on *Guatemala – Cement I*, para. 7.15.
[785] Appellate Body Report on *Guatemala – Cement I*, para. 77.

of a price undertaking or a provisional measure must be identified as part of the matter referred to the DSB pursuant to the provisions of Article 17.4 of the *Anti-Dumping Agreement* and Article 6.2 of the DSU."[786]

615. In *Mexico – Corn Syrup*, the question arose whether, in a dispute where the specific measure challenged is a definitive anti-dumping duty, a Member may assert a claim of violation of Article 7.4 of the *Anti-Dumping Agreement*, a provision establishing maximum time-periods for the imposition of provisional measures. Article 17.4 establishes the possibility of challenging definitive anti-dumping duties, price undertakings or provisional measures; with respect to the latter, Article 17.4 establishes that "[w]hen a provisional measure has a significant impact and [a] Member ... considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB". The Panel, in a decision not reviewed by the Appellate Body, discussed to what extent the United States' claim under Article 7.4 was "related to" Mexico's definitive anti-dumping duty:

"The Appellate Body Report in *Guatemala – Cement* indicates that a complainant may, having identified a specific anti-dumping duty in its request for establishment, bring any claims under the AD Agreement *relating to* that specific measure. That there should be a relationship between the measure challenged in a dispute and the claims asserted in that dispute would appear necessary, given that Article 19.1 of the DSU requires that, 'where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with the agreement'.

[W]e consider that the United States' claim under Article 7.4 of the AD Agreement is nevertheless *related to* Mexico's definitive anti-dumping duty. In this regard, we recall that, under Article 10 of the AD Agreement, a provisional measure represents a basis under which a Member may, if the requisite conditions are met, levy anti-dumping duties retroactively. At the same time, a Member may not, except in the circumstances provided for in Article 10.6 of the AD Agreement, retroactively levy a definitive anti-dumping duty for a period during which provisional measures were not applied. Consequently, because the period of time for which a provisional measure is applied is generally determinative of the period for which a definitive anti-dumping duty may be levied retroactively, we consider that a claim regarding the duration of a provisional measure relates to the definitive anti-dumping duty."[787]

616. The Panel on *Mexico – Corn Syrup* then considered the fact that Article 17.4 refers only to paragraph 1 of Article 7 and decided that it would be incorrect to interpret Article 17.4 in a manner "which would leave Members without any possibility to pursue dispute settlement in respect of a claim alleging a violation of a requirement of the AD Agreement":

"Read literally, this provision could be taken to mean that in a dispute where the specific measure being challenged is a provisional measure, the *only* claim that a Member may pursue is a claim under Article 7.1 of the AD Agreement (and not a claim under Article 7.4 of the AD Agreement). If this conclusion is correct, a ruling that a claim under Article 7.4 could not be pursued in a dispute where the specific measure challenged is a definitive anti-dumping duty would mean that a Member would never be able to pursue an Article 7.4 claim. In our view, it would be incorrect to interpret Article 17.4 of the AD Agreement in a manner which would leave Members without any possibility to pursue dispute settlement in respect of a claim alleging a violation of a requirement of the AD Agreement."[788]

Measure not identified in terms of reference

617. In *US – Hot-Rolled Steel*, the issue arose as to whether the "general" practice of the United States investigating authorities regarding best facts available was within the terms of reference of the Panel. The Panel, which did not rule on whether a general practice could be challenged separately from the statutory measure on which it is based, concluded that Japan's claim in this regard was outside its terms of reference because there was no mention of such a claim in Japan's request for the establishment of a panel.[789]

Claims

618. As regards the concept of claims or legal basis of the complaint, see paragraphs 161–169 of the Chapter on the *DSU*.

Abandoned claims

619. In *US – Steel Plate*, India indicated in its first written submission that it would not pursue several claims that had been set out in its request for establishment of the Panel. However, India changed its position later on and informed the Panel of its intention to pursue one of these claims during the first substantive meeting of the Panel with the parties and in its rebuttal submission. In spite of the lack of specific objection by the US which had noted that the claim was within the Panel's terms of reference, the Panel, in a decision not reviewed by the Appellate Body, concluded that it would not rule on India's abandoned claim:

[786] Appellate Body Report on *Guatemala – Cement I*, paras. 79–80.
[787] Panel Report on *Mexico – Corn Syrup*, paras. 7.52–7.53.
[788] Panel Report on *Mexico – Corn Syrup*, para. 7.54.
[789] Panel Report on *US – Hot-Rolled Steel*, para. 7.22.

"This situation is not explicitly addressed in either the DSU or any previous panel or Appellate Body report. We do note, however, the ruling of the Appellate Body in *Bananas* to the effect that a claim may not be raised for the first time in a first written submission, if it was not in the request for establishment.[790] One element of the Appellate Body's decision in that regard was the notice aspect of the request for establishment. The request for establishment is relied upon by Members in deciding whether to participate in the dispute as third parties. To allow a claim to be introduced in a first written submission would deprive Members who did not choose to participate as third parties from presenting their views with respect to such a new claim.

The situation here is, in our view, analogous. That is, to allow a party to resurrect a claim it had explicitly stated, in its first written submission, that it would not pursue would, in the absence of significant adjustments in the Panel's procedures, deprive other Members participating in the dispute settlement proceeding of their full opportunities to defend their interest with respect to that claim. Paragraphs 4 and 7 of Appendix 3 to the DSU provide that parties shall 'present the facts of the case and their arguments' in the first written submission, and that written rebuttals shall be submitted prior to the second meeting. These procedures, in our view, envision that initial arguments regarding a claim should be presented for the first time in the first written submission, and not at the meeting of the panel with the parties or in rebuttal submissions.

With respect to the interests of third parties, the unfairness of allowing a claim to be argued for the first time at the meeting of the panel with the parties, or in rebuttal submissions, is even more pronounced. In such a circumstance, third parties would be entirely precluded from responding to arguments with respect to such a resurrected claim, as they would not have access to those arguments under the normal panel procedures set out in paragraph 6 of Appendix 3 to the DSU. Further, India has identified no extenuating circumstances to justify the reversal of its abandonment of this claim.[791] Thus, in our view, it would be inappropriate in these circumstances to allow India to resurrect its claim in this manner. Therefore, we will not rule on India's claim under AD Agreement Articles 6.6 and 6.8 and Annex II, paragraph 7 regarding failure to exercise special circumspection in using information supplied in the petition.[792]"[793]

6. Article 17.5

(a) Article 17.5(i)

620. In considering what requirements, if any, must be fulfilled by virtue of Article 17.5(i) of the *Anti-Dumping Agreement* in addition to requirements existing under Article 6.2 of the *DSU*, the Panel on *Mexico – Corn Syrup* stated:

"In our view, Article 17.5(i) does not require a complaining Member to use the words 'nullify' or 'impair' in a request for establishment. However, it must be clear from the request that an allegation of nullification or impairment is being made, and the request must explicitly indicate how benefits accruing to the complaining Member are being nullified or impaired."[794]

621. The Panel on *Mexico – Corn Syrup* went on to state that, in their view, "a request for establishment that alleges violations of the AD Agreement which, if demonstrated, will constitute a *prima facie* case of nullification or impairment under Article 3.8 of the *DSU*, contains a sufficient allegation of nullification or impairment for purposes of Article 17.5(i). In addition, as noted above, the request must indicate how benefits accruing to the complaining Member are being nullified or impaired."[795]

(b) Article 17.5(ii)

(i) Documents not available to the investigating authorities

622. In *US – Hot-Rolled Steel*, the Panel found that, under Article 17.5(ii), "a panel may not, when examining a claim of violation of the AD Agreement[796] in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation".[797] The Panel further concluded that its duty not to consider new evidence with respect to claims under the *Anti-Dumping Agreement* "flows not only from Article 17.5(ii), but also from the fact that a panel is not to perform a *de novo* review of the issues considered and decided by the investigating authorities".[798]

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[790] (*footnote original*) Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, at para. 143.

[791] (*footnote original*) This is **not**, for example, a case where a complainant obtained, through the dispute settlement process, information in support of a claim to which it did not otherwise have access.

[792] (*footnote original*) We note that, since we do not reach India's alternative claims in this dispute, as discussed below in para. 7.80, we also would not have reached this claim in any event.

[793] Panel Report on *US – Steel Plate*, paras. 7.27–7.29.

[794] Panel Report on *Mexico – Corn Syrup*, para. 7.26.

[795] Panel Report on *Mexico – Corn Syrup*, para. 7.28.

[796] (*footnote original*) We note that there is no claim under Article VI of GATT 1994 in this case, so we need not consider whether Article 17.5(ii) has implications for the evidence a panel may consider in that context.

[797] Panel Report on *US – Hot-Rolled Steel*, para. 7.6.

[798] Panel Report on *US – Hot-Rolled Steel*, para. 7.7. See also Panel Report on *Egypt – Steel Rebar*, paras. 7.15–7.21.

(ii) Undisclosed facts

623. In *Thailand – H-Beams*, in reversing the Panel's finding that an injury determination must be based exclusively upon evidence disclosed to, or discernible by, the parties to the investigation, the Appellate Body explained the scope of facts which panels are required to review pursuant to Article 17.5(ii), as follows:

> "Article 17.5 specifies that a panel's examination must be based upon the 'facts made available' to the domestic authorities. Anti-dumping investigations frequently involve both confidential and non-confidential information. The wording of Article 17.5 does not specifically exclude from panel examination facts made available to domestic authorities, but not disclosed or discernible to interested parties by the time of the final determination. Based on the wording of Article 17.5, we can conclude that a panel must examine the facts before it, whether in confidential documents or non-confidential documents."[799]

See also paragraphs 111–114 above.

(iii) Documents created for the purpose of a dispute

624. In deciding whether a document created *post hoc* for the purposes of a dispute could be considered by the Panel, the Panel on *EC – Bed Linen* stated that Article 17.5(ii) "does not require . . . that a panel consider those facts exclusively in the format in which they were originally available to the investigating authority. Indeed, the very purpose of the submissions of the parties to the Panel is to marshal the relevant facts in an organized and comprehensible fashion to elucidate the parties' positions and in support of their arguments."[800] The Panel concluded that "the form of the document, (*i.e.*, a new document) does not preclude us from considering its substance, which comprises facts made available to the investigating authority during the investigation."[801]

(c) Relationship with other paragraphs of Article 17

625. In *Thailand – H-Beams*, the Appellate Body discussed the relationship between Articles 17.5 and 17.6. See paragraphs 113–114 above and 633 below.

7. Article 17.6

(a) Relationship with the standard of review in Article 11 of the DSU

626. In *US – Hot Rolled Steel*, the Appellate Body compared the standards of review under Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU when considering to what extent Article 17.6 may conflict with Article 11 of the DSU.[802] The Appellate Body explained that, whilst Article 17.6 lays down rules relating to a panel's examination of "matters" arising under only one of the covered agreements, i.e. the *Anti-Dumping Agreement*, Article 11 of the DSU rules applies to a panel's examination of "matters" arising under any of the covered agreements.[803] The Appellate Body then focussed on the different structure of both provisions and indicated:

> "Article 11 of the DSU imposes upon panels a comprehensive obligation to make an 'objective assessment of the matter', an obligation which embraces all aspects of a panel's examination of the 'matter', both factual and legal. . . . . Article 17.6 is divided into two separate subparagraphs, each applying to different aspects of the panel's examination of the matter. The first subparagraph covers the *panel's* '*assessment* of the *facts* of the matter', whereas the second covers its '*interpret[ation* of] the *relevant provisions*'. (emphasis added) The structure of Article 17.6, therefore, involves a clear distinction between a panel's assessment of the facts and its legal interpretation of the *Anti-Dumping Agreement*."[804]

627. The Panel on *US – Softwood Lumber VI* addressed the question whether the application of the standard of review under Article 11 of the *DSU* to a determination could, in appropriate factual circumstances, lead to differing outcomes compared to the application of the Article 11 of the *DSU* and Article 17.6(i) of the *Anti-Dumping Agreement* standards together to the same determination:

> "Under the Article 17.6 standard, with respect to claims involving questions of fact, Panels have concluded that whether the measures at issue are consistent with relevant provisions of the AD Agreement depends on whether the investigating authority properly established the facts, and evaluated the facts in an unbiased and objective manner. This latter has been defined as assessing whether an unbiased and objective decision maker, taking into account the facts that were before the investigating authority, and in light of the explanations given, could have reached the conclusions that were reached. A panel's task is not to carry out a *de novo* review of the information and evidence on the record of the underlying investigation. Nor may a panel substitute its judgment for that of the investigating authorities, even though the Panel might have arrived at a different determination were it considering the record evidence for itself.
>
> Similarly, the Appellate Body has explained that, under Article 11 of the DSU, a panel's role is not to substitute

[799] Appellate Body Report on *Thailand – H-Beams*, para. 115.
[800] Panel Report on *EC – Bed Linen*, para. 6.43.
[801] Panel Report on *EC – Bed Linen*, para. 6.43.
[802] In this analysis, the Appellate Body applied its conclusions on the relationship between the provisions of the DSU and the special or additional rules and procedures of a covered agreement developed in *Guatemala – Cement II*, paras. 65–67. *See* para. 591 of this Chapter.
[803] Appellate Body Report on *US – Hot Rolled Steel*, para. 53.
[804] Appellate Body Report on *US – Hot Rolled Steel*, para. 54.

its analysis for that of the investigating authority.[805] The Appellate Body has stated:

> "We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities".[806]

In light of Canada's clarification of its position, and based on our understanding of the applicable standards of review under Article 11 of the DSU and Article 17.6 of the AD Agreement, we do not consider that it is either necessary or appropriate to conduct separate analyses of the USITC determination under the two Agreements.

We consider this result appropriate in view of the guidance in the Declaration of Ministers relating to Dispute Settlement under the AD and SCM Agreements. While the Appellate Body has clearly stated that the Ministerial Declaration does not require the application of the Article 17.6 standard of review in countervailing duty investigations,[807] it nonetheless seems to us that in a case such as this one, involving a single injury determination with respect to both subsidized and dumped imports, and where most of Canada's claims involve identical or almost identical provisions of the AD and SCM Agreements, we should seek to avoid inconsistent conclusions."[808]

628. As regards the relationship of Article 11 of the DSU with Articles 17.6(i) and 17.6(ii) respectively, see paragraphs 640–641 and 644 below respectively.

(b) Article 17.6(i)

(i) General

629. In *Guatemala – Cement II*, the Panel defined the standard of review applicable by virtue of Article 17.6(i):

> "We consider that it is not our role to perform a *de novo* review of the evidence which was before the investigating authority in this case. Rather, Article 17 makes it clear that our task is to review the determination of the investigating authorities. Specifically, we must determine whether its establishment of the facts was proper and the evaluation of those facts was unbiased and objective.[809] In other words, we must determine whether an unbiased and objective investigating authority evaluating the evidence before it at the time of the investigation could properly have made the determinations made by Guatemala in this case. In our review of the investigating authorities' evaluation of the facts, we will first need to examine evidence considered by the investigating authority, and second, this examination is limited by Article 17.5(ii) to the facts before the investigating authority. That is, we are not to examine any new evidence that was not part of the record of the investigation.[810]"[811]

630. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body stated clearly that it "will not interfere lightly with [a] panel's exercise of its discretion under Article 17.6(i) of the *Anti-Dumping Agreement*."[812] In that appeal, it also explained that "[a]n appellant must persuade us, with sufficiently compelling reasons, that we should disturb a panel's assessment of the facts or inter-

[805] (*footnote original*) Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ("*US – Cotton Yarn*"), WT/DS192/AB/R, adopted 5 November 2001, para. 74; Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*US – Lamb*"), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 106.

[806] (*footnote original*) Appellate Body Report, *US – Cotton Yarn*, para. 69, n.42, citing Appellate Body Report, *US – Lamb*, para. 106.

[807] (*footnote original*) Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("*US – Lead and Bismuth II*"), WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601 at para. 49.

[808] Panel Report on *US – Softwood Lumber VI*, paras. 7.15–7.18.

[809] (*footnote original*) We note that, in the context of safeguard measures, the panel in *Korea – Dairy*, said the following of the need for a panel to perform an objective assessment pursuant to Article 11 of the DSU:

> "7.30 We consider that for the Panel to adopt a policy of total deference to the findings of the national authorities could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU. This conclusion is supported, in our view, by previous panel reports that have dealt with this issue. However, we do not see our review as a substitute for the proceedings conducted by national investigating authorities. Rather, we consider that the Panel's function is to assess objectively the review conducted by the national investigating authority, in this case the KTC. For us, an objective assessment entails an examination of whether the KTC had examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Agreement on Safeguards), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea. Finally, we consider that the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it had collected."

[810] (*footnote original*) We note that this standard is consistent with the approach followed by the panel in *Guatemala – Cement I* in para. 7.57 of its report. In that instance the panel was of the opinion that its role was:

> ". . . to examine whether the evidence relied on by the Ministry was sufficient, that is, whether an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify initiating the investigation."

[811] Panel Report on *Guatemala – Cement II*, para. 8.19. See also Panel Report on *US – Stainless Steel*, para. 6.18, Panel Report on *Argentina – Ceramic Tiles*, paras. 6.2 – 6.3 and Panel Report on *Egypt – Steel Rebar*, paras. 7.8–7.14.

[812] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 169, quoting Appellate Body Report, *US – Wheat Gluten*, para. 151.

fere with a panel's discretion as the trier of facts."[813] Applying this standard in the case of *EC – Tube or Pipe Fittings*, the Appellate Body rejected Brazil's claim that the Panel failed to assess whether the establishment of the facts was proper pursuant to Article 17.6(i) of the *Anti-Dumping Agreement*, when it found that an internal note which contained analysis of certain injury factors and which was not disclosed to the interested parties during the investigation, was part of the record of the underlying anti-dumping investigation. The Appellate Body considered highly relevant the fact that the Panel had not just accepted at face value the assertion of the EC that this internal note was contemporaneous to the investigation and formed part of the record of the investigation, but had taken steps to assure itself of the validity of this exhibit and of the fact that it formed part of the contemporaneous written record of the EC investigation.[814]

(ii) "establishment of the facts was proper"

Record of the investigating authority

631. In *Guatemala – Cement I*, in order to examine the claim that the initiation of an investigation was not consistent with Article 5, the Panel "scrutinized all the information which was on the record before the Ministry at the time of initiation in examining whether an unbiased and objective investigating authority could properly have made the determination that was reached by the Ministry."[815] The Appellate Body found that the dispute was not properly before the Panel and therefore did not reach a conclusion on the interpretation of Article 17 by the Panel.[816] Accordingly, the Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.[817] However, the panels on *EC – Bed Linen*, *US – Stainless Steel*, *Guatemala – Cement II*, and *Thailand – H-Beams* also based their factual review of decisions of the investigating authority on the evidence before the authority at the time of the determination.[818] See also paragraphs 622–624 above dealing with Article 17.5(ii) which orders Panels to consider a dispute under the *Anti-Dumping Agreement* on the basis of the facts made available to the investigating authorities.

Treatment of undisclosed facts

632. In *Thailand – H-Beams*, in discussing whether an injury determination must be based only upon evidence disclosed to the parties to the investigation, the Appellate Body interpreted the term "establishment of the facts was proper", as follows:

> "The ordinary meaning of 'establishment' suggests an action to 'place beyond dispute; ascertain, demonstrate, prove'; the ordinary meaning of 'proper' suggests 'accurate' or 'correct'. Based on the ordinary meaning of these words, the proper establishment of the facts appears to have no logical link to whether those facts are disclosed to, or discernible by, the parties to an anti-dumping investigation prior to the final determination."[819]

633. The Appellate Body elaborated on the aim of Article 17.6(i), stating that its function is to "prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective":

> "There is a clear connection between Articles 17.6(i) and 17.5(ii). The facts of the matter referred to in Article 17.6(i) are 'the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member' under Article 17.5(ii). Such facts do not exclude confidential facts made available to the authorities of the importing Member. Rather, Article 6.5 explicitly recognizes the submission of confidential information to investigating authorities and its treatment and protection by those authorities. Article 12, in paragraphs 2.1, 2.2 and 2.3, also recognizes the use, treatment and protection of confidential information by investigating authorities. The 'facts' referred to in Articles 17.5(ii) and 17.6(i) thus embrace 'all facts confidential and non-confidential', made available to the authorities of the importing Member in conformity with the domestic procedures of that Member. Article 17.6(i) places a limitation on the panel in the circumstances defined by the Article. The aim of Article 17.6(i) is to prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective. Whether evidence or reasoning is disclosed or made discernible to interested parties by the final determination is a matter of *procedure* and *due process*. These matters are very important, but they are comprehensively dealt with in other provisions, notably Articles 6 and 12 of the *Anti-Dumping Agreement*."[820]

(iii) "the evaluation of facts was unbiased and objective"

634. In *US – Stainless Steel*, the Panel examined the determinations of the United States authorities on the issue of whether certain local sales were in dollars or

[813] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 170.
[814] Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 127.
[815] Panel Report on *Guatemala – Cement I*, para. 7.60.
[816] Appellate Body Report on *Guatemala – Cement I*, para. 89.
[817] WT/DSB/M/51, section 9(a).
[818] Panel Report on *EC – Bed Linen*, para. 6.45; Panel Report on *US – Stainless Steel*, para. 6.3; Panel Report on *Guatemala – Cement II*, para. 8.19; and Panel Report on *Thailand – H-Beams*, para. 7.51; Panel Report on *Argentina – Ceramic Tiles*, para. 6.27.
[819] Appellate Body Report on *Thailand – H-Beams*, para. 116. With respect to a related topic under Article 3.1, see also paras. 111–114 of this Chapter.
[820] Appellate Body Report on *Thailand – H-Beams*, para. 117. With respect to a related topic under Article 3.1, see also paras. 111–114 of this Chapter.

won. The Panel rejected Korea's argument that Article 17.6(i) did not apply to the examination of this issue because the United States decision on this point was not a factual determination. The Panel stated:

> "Korea's view appears to be that Article 17.6(i) applies only in respect of the establishment of certain objectively-ascertainable underlying facts, e.g., did the invoices express the sales values in terms of dollars or won, in what currency payment was made, etc. We consider that this interpretation does not however coincide with the language of Article 17.6(i). That Article speaks not only to the establishment of the facts, but also to their evaluation. Therefore, the Panel must check not merely whether the national authorities have properly established the relevant facts but also the value or weight attached to those facts and whether this was done in an unbiased and objective manner. This concerns the according of a certain weight to the facts in their relation to each other; it is not a legal evaluation."[821]

635. In *Thailand – H-Beams*, in discussing whether an injury determination must be based only upon evidence disclosed to the parties to the investigation, the Appellate Body touched on the term "unbiased and objective". The Appellate Body stated that "[t]he ordinary meaning of the words 'unbiased' and 'objective' also appears to have no logical link to whether those facts are disclosed to, or discernible by, the parties to an anti-dumping investigation at the time of the final determination."[822] See also the excerpt from the Appellate Body Report on *Thailand – H-Beams* referenced in paragraph 633 above.

(iv) Relevance of the different roles of panels and investigating authorities

636. In *US – Hot-Rolled Steel*, when defining the task of panels under Article 17.6(i), the Appellate Body recalled the importance "to bear in mind the different roles of panels and investigating authorities".[823]

> "Although the text of Article 17.6(i) is couched in terms of an obligation on *panels* – panels 'shall' make these determinations – the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement* in the course of their 'establishment' and 'evaluation' of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities'* establishment and evaluation of the facts under other provisions of the *Anti-Dumping Agreement*. Thus, panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities was *unbiased and objective*. If these broad standards have not been met, a panel must hold the investigating authorities' establishment or evaluation of the facts to be inconsistent with the *Anti-Dumping Agreement*."[824]

637. As regards the different roles of investigating authorities and panels in the context of Article 3.7 (threat of serious injury), see paragraph 199 above.

(v) No ex post rationalization

638. On the question of whether *ex post* rationalization should be taken into account in order to assess an authority's compliance with the provisions of the *Anti-Dumping Agreement*, the Panel on *Argentina – Ceramic Tiles* stated:

> "Under Article 17.6 of the AD Agreement we are to determine whether the DCD established the facts properly and whether the evaluation performed by the DCD was unbiased and objective. In other words, we are asked to review the evaluation of the DCD made at the time of the determination as set forth in a public notice or in any other document of a public or confidential nature. We do not believe that, as a panel reviewing the evaluation of the investigating authority, we are to take into consideration any arguments and reasons that did not form part of the evaluation process of the investigating authority, but instead are *ex post facto* justifications which were not provided at the time the determination was made."[825] (emphasis in original)

639. The Panel on *Argentina – Poultry Anti-Dumping Duties* agreed with the view expressed by the Panel on *Argentina – Ceramic Tiles*, concluding that as a panel reviewing the evaluation of the investigating authority, it did not believe it was to "take into consideration any arguments and reasons that are not demonstrated to have formed part of the evaluation process of the investigating authority"[826]

(vi) Relationship of Article 17.6(i) with Article 11 of the DSU

640. In *US – Hot-Rolled Steel*, the Appellate Body defined the task of panels under Article 17.6(i) by comparing it to their task under Article 11 of the DSU:

> "Under Article 17.6(i), the task of panels is simply to review the investigating authorities' 'establishment' and

[821] Panel Report on *US – Stainless Steel*, para. 6.18.
[822] Appellate Body Report on *Thailand – H-Beams*, para. 116.
[823] Appellate Body Report on *US – Hot Rolled Steel*, para. 55.
[824] Appellate Body Report on *US – Hot Rolled Steel*, para. 56.
[825] Panel Report on *Argentina – Ceramic Tiles*, para. 6.27.
[826] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.49. The Panel thus rejected various arguments that were based on an ex post rationalization by the defendant, such as those put forward with respect to the evaluation of the magnitude of the margin of dumping as an Article 3.4 factor:

> "We note that Argentina has failed to indicate where such arguments are set forth in the CNCE's Record No. 576, or to point us to any other document in which the CNCE is alleged to have considered such arguments. Such arguments therefore constitute *ex post* rationalization which we are precluded from taking into account. [. . .]"

Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.321.

'evaluation' of the facts. To that end, Article 17.6(i) requires panels to make an '*assessment* of the *facts*'. The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an '*objective assessment* of the *facts*'. Thus the text of both provisions requires panels to 'assess' the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts. Article 17.6(i) of the *Anti-Dumping Agreement* does not expressly state that panels are obliged to make an assessment of the facts which is '*objective*'. However, it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* 'assessment of the facts of the matter'. In this respect, we see no 'conflict' between Article 17.6(i) of the *Anti-Dumping Agreement* and Article 11 of the DSU."[827]

641. In *US – Steel Plate*, India requested the Panel to conduct an "active review" of the facts before the US investigating authorities pursuant to both Article 11 of the DSU and Article 17.6(i). India based its request in the Appellate Body's decisions on the application of Article 11 in *US – Cotton Yarn*[828] and of Article 17.6(i) in *US – Hot-Rolled Steel*.[829] The US was opposed to such a request since it considered that India was trying to add to the obligations of investigating authorities. The Panel considered that there was no question that it had to apply Article 17.6 to the dispute and recalled the Appellate Body's decision in *US – Hot-Rolled Steel* to the effect that Article 17.6(i) is not in conflict with Article 11 of the DSU[830] and that Article 17.6(ii) supplemented Article 11 of the DSU.[831] [832] The Panel found:

"[W]e do not consider that India's reference to Article 11 of the DSU constitutes an argument that we apply some other or different standard of review in considering the factual aspects of this dispute than that set out in Article 17.6 of the AD Agreement, which India recognizes is applicable in all anti-dumping disputes. That standard requires us to assess the facts to determine whether the investigating authorities' own establishment of facts was proper, and to assess the investigating authorities' own evaluation of those facts to determine if it was unbiased and objective. What is clear from this is that we are precluded from establishing facts and evaluating them for ourselves – that is, we may not engage in *de novo* review. However, this does not limit our examination of the matters in dispute, but only the manner in which we conduct that examination. In this regard, we keep in mind that Article 17.5(ii) of the AD Agreement establishes that we are to examine the matter based upon 'the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.' "[833]

(c) Article 17.6(ii)

(i) First sentence: customary rules of interpretation

642. In *US – Hot-Rolled Steel*, the Appellate Body looked into the first sentence of Article 17.6(ii) which provides that the Panel "shall" interpret the provisions of the *Anti-Dumping Agreement* "in accordance with customary rules of interpretation", and considered that it echoed closely Article 3.2 of the DSU (See Section III.B.1 of the Chapter on the *DSU*). The Appellate Body stated that such customary rules are embodied in Article 31 and 32 of the Vienna Convention on the Law of the Treaties. On a further note, the Appellate Body indicated that "[c]learly, this aspect of Article 17.6(ii) involves no 'conflict' with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *Anti-Dumping Agreement*".[834]

(ii) Second sentence: more than one permissible interpretation

643. The second sentence of Article 17.6(ii) deals with the situation where there is more than one permissible interpretation of a provision of the *Anti-Dumping Agreement*.[835] In *US – Hot-Rolled Steel*, the Appellate Body defined the term "permissible interpretation" as "one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*".[836] The Appellate Body considered:

"This second sentence of Article 17.6(ii) *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be '*permissible* interpretations'. In that event, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* 'if it rests upon one of those permissible interpretations.'

It follows that, under Article 17.6(ii) of the *Anti-Dumping Agreement*, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the *Anti-Dumping Agreement* which is

[827] Appellate Body Report on *US – Hot Rolled Steel*, para. 55.
[828] See Section XI of the Chapter on *DSU*.
[829] See para. 640 of this Chapter.
[830] See para. 640 of this Chapter.
[831] See para. 644 of this Chapter.
[832] Panel Report on *US – Steel Plate*, paras. 7.1–7.5.
[833] Panel Report on *US – Steel Plate*, para. 7.6.
[834] Appellate Body Report on *US – Hot Rolled Steel*, para. 57. See also Panel Report on *US – Steel Plate*, para. 7.7.
[835] In *EC – Bed Linen*, the EC argued that the Panel had failed to apply the standard of review laid down in Article 17.6(ii) because it had not established that the interpretation of Article 2.4.2 of the Anti-Dumping Agreement was "impermissible". The Appellate Body upheld the Panel's finding and indicated that the Panel had not viewed the interpretation given by the EC of Article 2.4.2 as a "permissible interpretation" within the meaning of Article 17.6(ii). The Appellate Body considered that "the Panel was not faced with a choice of multiple 'permissible' interpretations which would have required it, under Article 17.6(ii), to give deference to the interpretation relied upon by the European Communities. Rather, the Panel was faced with a situation in which the interpretation relied upon by the European Communities was, . . ., 'impermissible'." Appellate Body Report on *EC – Bed Linen*, paras. 63 – 66.
[836] Appellate Body Report on *US – Hot Rolled Steel*, para. 60.

permissible under the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention*."[837]

(iii) Relationship with standard of review in Article 11 of the DSU

644. In *US – Hot-Rolled Steel*, the Appellate Body considered the relationship between Article 17.6(ii) and the DSU, in particular Article 11. The Appellate Body stated:

"[A]lthough the second sentence of Article 17.6(ii) of the *Anti-Dumping Agreement* imposes obligations on panels which are not found in the DSU, we see Article 17.6(ii) as supplementing, rather than replacing, the DSU, and Article 11 in particular. Article 11 requires panels to make an 'objective assessment of the matter' as a whole. Thus, under the DSU, in examining claims, panels must make an 'objective assessment' of the legal provisions at issue, their 'applicability' to the dispute, and the 'conformity' of the measures at issue with the covered agreements. Nothing in Article 17.6(ii) of the *Anti-Dumping Agreement* suggests that panels examining claims under that Agreement should not conduct an 'objective assessment' of the legal provisions of the Agreement, their applicability to the dispute, and the conformity of the measures at issue with the Agreement. Article 17.6(ii) simply adds that a panel shall find that a measure is in conformity with the *Anti-Dumping Agreement* if it rests upon one permissible interpretation of that Agreement."[838]

645. With respect to the question of the legal interpretation under Article 17.6 (ii), the Panel on *US – Softwood Lumber VI* considered that under the *Anti--Dumping Agreement*, a panel is to follow the same rules of treaty interpretation as in any other dispute:

"Thus, it is clear to us that under the AD Agreement, a panel is to follow the same rules of treaty interpretation as in any other dispute. The difference is that if a panel finds more than one permissible interpretation of a provision of the AD Agreement, it may uphold a measure that rests on one of those interpretations. It is not clear whether the same result could be reached under Articles 3.2 and 11 of the DSU. However, it seems to us that there might well be cases in which the application of the Vienna Convention principles together with the additional provisions of Article 17.6 of the AD Agreement could result in a different conclusion being reached in a dispute under the AD Agreement than under the SCM Agreement. In this case, it has not been necessary for us to resolve this question, as we did not find any instances where the question of violation turned on the question whether there was more than one permissible interpretation of the text of the relevant Agreements."[839]

(d) Relationship between subparagraphs (i) and (ii) of Article 17.6

646. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body ruled that "the requirements of the standard of review provided for in Article 17.6(i) and 17.6(ii) are cumulative. In other words, a panel must find a determination made by the investigating authorities to be consistent with relevant provisions of the *Anti-Dumping Agreement* if it finds that those investigating authorities have properly established the facts and evaluated those facts in an unbiased and objective manner, *and* that the determination rests upon a 'permissible' interpretation of the relevant provisions."[840]

8. Relationship with other Articles

(a) Article 3

647. In *Thailand – H-Beams*, the Appellate Body addressed the relationship between Articles 3.1, and 17.5 and 17.6. See paragraph 113 above.

(b) Article 5

648. The Panel on *Guatemala – Cement I* addressed the relationship between Articles 5.3 and 17.6. In determining what constitutes "sufficient evidence to justify the initiation of an investigation" under Article 5.3, the Panel on *Guatemala – Cement I* applied the standard of review set out in Article 17.6(i).[841] The Panel also considered that the standard of review for the initiation of an investigation under Article 5 is less strict than that for preliminary or final determination of dumping, injury and causation.[842] However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach a conclusion on the interpretation of Article 17.6. See paragraph 256 above.

(c) Article 7

649. The relationship between Articles 7.1 and 17.4 was discussed in *Mexico – Corn Syrup*. See paragraph 616 above.

650. Also, the relationship between Articles 7.4 and 17.4 was discussed in *Mexico – Corn Syrup*. See paragraphs 615–616 above.

(d) Article 18

651. Further, the relationship between Articles 17.4, and 18.1 and 18.4 was discussed in *US – 1916 Act*. See paragraph 596 above.

[837] Appellate Body Report on *US – Hot Rolled Steel*, paras. 59–60.
[838] Appellate Body Report on *US – Hot Rolled Steel*, para. 62.
[839] Panel Report on *US – Softwood Lumber VI*, para. 7.22.
[840] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 130.
[841] Panel Report on *Guatemala – Cement I*, para. 7.57.
[842] Panel Report on *Guatemala – Cement I*, para. 7.57.

9. Relationship with other WTO Agreements

(a) GATT 1994

(i) Articles XXII and XXIII

652. The Appellate Body in *Guatemala – Cement I* noted the following regarding the relationship between Article 17 and Articles XXII and XXIII of the GATT 1994:

> "Articles XXII and XXIII of the GATT 1994 are *not* expressly incorporated by reference into the *Anti-Dumping Agreement* as they are into all of the other Annex 1A agreements . . . As a result, . . . Article XXIII of the GATT 1994 does *not* apply to disputes brought under the *Anti--Dumping Agreement*. On the contrary, Articles 17.3 and 17.4 of the *Anti-Dumping Agreement* are the 'consultation and dispute settlement provisions' pursuant to which disputes may be brought under that covered agreement."[843]

653. The Appellate Body, in *Guatemala – Cement I*, further addressed this issue. See paragraph 607 above. Also, this issue was addressed in US – *1916 Act*. See paragraphs 593–594 above.

(b) DSU

(i) Article 1

654. The Appellate Body in *Guatemala – Cement I* considered the concurrent application of Article 17 and the rules and procedures of the DSU. See paragraph 591 above.

(ii) Article 3.8

655. In *Mexico – Corn Syrup*, the Panel touched on the relationship between Article 17.5 of the *Anti-Dumping Agreement* and Article 3.8 of the *DSU*. See paragraph 621 above.

(iii) Article 6.2

656. The Appellate Body in *Guatemala – Cement I* rejected the Panel's conclusion that Article 17.5 of the *Anti-Dumping Agreement* prevails over Article 6.2 of the *DSU* and went on to state that both provisions apply cumulatively:

> "The fact that Article 17.5 contains these additional requirements, which are not mentioned in Article 6.2 of the DSU, does not nullify, or render inapplicable, the specific requirements of Article 6.2 of the DSU in disputes brought under the *Anti-Dumping Agreement*. In our view, there is no *inconsistency* between Article 17.5 of the *Anti-Dumping Agreement* and the provisions of Article 6.2 of the DSU. On the contrary, they are complementary and should be applied together. A Panel request made concerning a dispute brought under the *Anti-Dumping Agreement* must therefore comply with the relevant dispute settlement provisions of both that Agreement and the DSU. Thus, when a 'matter' is referred to the DSB by a complaining party under Article 17.4 of the *Anti-Dumping Agreement*, the Panel request must meet the requirements of Articles 17.4 and 17.5 of the *Anti-Dumping Agreement* as well as Article 6.2 of the DSU."[844]

657. The Panel on *Mexico – Corn Syrup* discussed the relationship between Article 17.4 of the *Anti-Dumping Agreement*, and Article 6.2 of the DSU. See paragraph 611 above.

658. This issue was also discussed by the Appellate Body in *Guatemala – Cement I*. See paragraph 656 above.

(iv) Article 7

659. The Appellate Body in *Guatemala – Cement I* linked the term "matter" in Article 7 of the *DSU*, which provides the standard terms of reference for Panels, to the same word in Article 17.4 of the *Anti-Dumping Agreement*.[845] It specifically stated:

> "[T]he word 'matter' has the same meaning in Article 17 of the *Anti-Dumping Agreement* as it has in Article 7 of the DSU. It consists of two elements: the specific 'measure' and the 'claims' relating to it, both of which must be properly identified in a Panel request as required by Article 6.2 of the DSU."[846]

660. The Appellate Body addressed further this issue. See paragraph 613 above.

(v) Article 11

661. For the relationship between Article 17.6 and the standard of review provision of the DSU, i.e. Article 11, see paragraphs 626, 640, 644 and 627 above. See also Section XI of the Chapter on the *DSU*.

(vi) Article 19.1

662. In *Guatemala – Cement I*, it was disputed whether a complaint of non-compliance in an anti-dumping investigation should be examined even if neither a final anti-dumping measure, a provisional measure nor a price undertaking is identified in the request for panel establishment, as referenced in paragraph 612 above. In this regard, the Panel rejected Guatemala's argument that a final or provisional duty or a price undertaking must be identified in a request for panel establishment in order for a panel to be able to issue a recommendation in terms of Article 19.1 of the *DSU*:

> "This [argument] is clearly in conflict with our conclusion regarding the interpretation of the provisions of the ADP Agreement as *not* limited to disputes involving only specific 'measures'. A restrictive reading of Article 19.1

[843] Appellate Body Report on *Guatemala – Cement I*, para. 64, fn 43.
[844] Appellate Body Report on *Guatemala – Cement I*, para. 75.
[845] Appellate Body Report on *Guatemala – Cement I*, para. 72.
[846] Appellate Body Report on *Guatemala – Cement I*, para. 76.

would mean that, while the ADP Agreement provides for consultations and establishment of a Panel to consider a matter without limitation to a specific 'measure', the Panel so established is not empowered to make a recommendation with respect to that matter. This would clearly run counter to the intention of the drafters of the DSU to establish an effective dispute resolution system for the WTO. In addition, it would undermine the special or additional rules for dispute settlement in anti-dumping cases provided for in the ADP Agreement. A broader reading of Article 19.1, on the other hand, *would* give effect to the special or additional dispute settlement provisions of the ADP Agreement, by allowing Panels in anti-dumping disputes to consider the 'matter' referred to them, and issue a recommendation with respect to that matter. As discussed below, the DSU provisions relied on . . . do not, in our view, limit Panels to the consideration only of certain types of specified 'measures' in disputes."[847]

663. The Appellate Body in *Guatemala – Cement I* found that the dispute was not properly before the Panel and therefore did not come to any conclusion as to the broad reading of Article 19.1 by the Panel.[848] The Appellate Body concluded that the Panel did not consider whether the complainant, Mexico, had properly identified a relevant anti-dumping measure in its panel request, and the Panel had therefore erred in finding the dispute properly before it.[849]

10. List of disputes under the Anti-Dumping Agreement

664. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the *Anti-Dumping Agreement* were invoked:

	Case Name	Case Number	Invoked Articles
1	*Guatemala – Cement I*	WT/DS60	Articles 5.3 and 5.5
2	*US – DRAMS*	WT/DS99	Articles 2, 3, 5.3 and 7.1
3	*Thailand – H-Beams*	WT/DS122	Articles 2.2, 2.2.2, 3.1, 3.4, 3.5, 5.2, 5.5 and 5.5
4	*Mexico – Corn Syrup*	WT/DS132	Articles 5.1, 5.2, 5.3, 5.4, 5.8, 10.2, 10.4, 17.4 and 17.5
5	*US – 1916 Act*	WT/DS136, WT/DS162	Articles 1, 2.1, 2.2, 3, 4.1, 5.1, 5.2, 5.4, 18.1 and 18.4
6	*EC – Bed Linen*	WT/DS141	Articles 2.2, 2.2.2, 2.4.2, 3.1, 3.4, 3.5, 5.3, 5.5, 6.10, 6.11, 12.2.1, 12.2.2 and 15
7	*Guatemala – Cement II*	WT/DS156	Articles 1, 2, 2.1, 2.2, 3, 5, 6.1, 6.1.2, 6.1.3, 6.2, 6.3, 6.4, 6.5, 6.6, 6.7, 6.8, 6.9, 9, 12 and 18
8	*US – Stainless Steel*	WT/DS179	Articles 2.3, 2.4, 2.4.1, 2.4.2, 6.1, 6.2, 6.9, and 12.2
9	*US – Hot-Rolled Steel*	WT/DS184	Articles 2.1, 3.1, 3.4, 3.5, 4, 6.8, 9.4, 10, 17.5(i), 17.6, 17.6(i), 17.6(ii), 18, Annex I, Annex II
10	*Argentina – Ceramic Tiles*	WT/DS189	Articles 2, 6.5, 6.8, 6.9, 6.10, 17.5(ii), 17.6(i), 17.6(ii)
11	*US – Steel Plate*	WT/DS206	Articles 1, 2.2, 2.4, 6.6, 6.8, 9.3, 12, 15, 17.6(i), 17.6(ii), 18, Annex II
12	*Egypt – Steel Rebar*	WT/DS211	Articles 2.2.1.1, 2.2.2, 2.4, 3.1, 3.2, 3.4, 3.5, 6.1, 6.2, 6.8, 17.6, 17.6(i), 17.6(ii), Annex I, Annex II
13	*EC – Tube or Pipe Fittings*	WT/DS219	Articles 1, 2.2, 2.4, 2.4.1, 2.4.2, 3.1, 3.2, 3.3, 3.4, 3.5, 5.2, 5.3, 5.8, 6.2, 6.4, 6.6, 6.9, 9.3, 11.1, 11.2, 12.2, 12.2.2
14	*US – Section 129(c)(1) URAA*	WT/DS221	Articles 1, 9.3, 11.1, 18.1, 18.4
15	*US – Offset Act (Byrd Amendment)*	WT/DS234, WT/DS217	Articles 5.4, 8, 18.1, 18.4
16	*Argentina – Poultry Anti-Dumping Duties*	WT/DS241	Articles 2.4, 5.2, 5.3, 5.7, 5.8, 6.1.1, 6.1.2, 6.1.3, 6.2, 6.8, 6.9, 6.10, 12.2.2, Annex II
17	*US – Corrosion-Resistant Steel Sunset Review*	WT/DS244	Articles 2, 2.4, 3.3, 5.6, 5.8, 6.1, 6.2, 6.6, 6.10, 11.1, 11.2, 11.3, 12.1, 12.3, 18.3, 18.4
18	*US – Softwood Lumber V*	WT/DS264	Articles 1, 2, 2.1, 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.4, 2.4.2, 3, 4.1, 5, 5.2, 5.3, 5.8, 6.10, 9, 9.3, 18.1
19	*US – Oil Country Tubular Goods Sunset Reviews*	WT/DS268	Articles 2, 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 6.1, 6.2, 6.8, 6.9, 11.1, 11.3, 11.4, 12.2, 12.2.2, 18, Annex II
20	*US – Softwood Lumber VI*	WT/DS277	Articles 1, 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 12 and 18.1

[847] Panel Report on *Guatemala – Cement I*, para. 7.21. With respect to the issue of repayment of anti-dumping duties under Article 19.1 of the *DSU*, see Panel Report on *Guatemala – Cement II*, paras. 9.4–9.7.

[848] Appellate Body Report on *Guatemala – Cement I*, para. 89.

[849] Appellate Body Report on *Guatemala – Cement I*, para. 88.

PART III

XVIII. ARTICLE 18

A. TEXT OF ARTICLE 18

Article 18
Final Provisions

18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[24]

(*footnote original*) [24] This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

18.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

18.3 Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

18.3.1 With respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.

18.3.2 For the purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph.

18.4 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

18.5 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

18.6 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

18.7 The Annexes to this Agreement constitute an integral part thereof.

B. INTERPRETATION AND APPLICATION OF ARTICLE 18

1. General

(a) Rules on interpretation of the Anti-Dumping Agreement

665. Regarding the interpretation of the *Anti-Dumping Agreement*, the Panel on *US – DRAMS* referred to Article 3.2 of the *DSU*:

> "[W]e bear in mind that Article 3.2 of the DSU requires Panels to interpret 'covered agreements', including the AD Agreement, 'in accordance with customary rules of interpretation of public international law'. We recall that the rules of treaty interpretation set forth in Article 31 of the Vienna Convention expressly defines the context of the treaty to include the text of the treaty. Thus, the entire text of the AD Agreement may be relevant to a proper interpretation of any particular provision thereof."[850]

2. Article 18.1

(a) "specific action against dumping"

666. The Appellate Body in *US – 1916 Act* considered that "the scope of application of Article VI [of the GATT 1994] is clarified, in particular, by Article 18.1 of the *Anti-Dumping Agreement*".[851] The Appellate Body then found "that Article 18.1 of the *Anti-Dumping Agreement* requires that any 'specific action against dumping' be in accordance with the provisions of Article VI of the GATT 1994 concerning dumping, as those provisions are interpreted by the *Anti-Dumping Agreement*":

> "In our view, the ordinary meaning of the phrase 'specific action against dumping' of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of 'dumping'. 'Specific action against dumping' of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of 'dumping' are present. Since intent is not a constituent element of 'dumping', the *intent* with which action against dumping is taken is not relevant to the determination of whether such action is 'specific action against dumping' of exports within the meaning of Article 18.1 of the *Anti-Dumping Agreement*.
>
> . . .
>
> We note that footnote 24 refers generally to 'action' and not, as does Article 18.1, to 'specific action against dumping' of exports. 'Action' within the meaning of footnote 24 is to be distinguished from 'specific action against dumping' of exports, which is governed by Article 18.1 itself.

[850] Panel Report on *US – DRAMS*, para. 6.21.
[851] Appellate Body Report on *US – 1916 Act*, para. 121.

> Article 18.1 of the *Anti-Dumping Agreement* contains a prohibition on the taking of any 'specific action against dumping' of exports when such specific action is not 'in accordance with the provisions of GATT 1994, as interpreted by this Agreement'. Since the only provisions of the GATT 1994 'interpreted' by the *Anti-Dumping Agreement* are those provisions of Article VI concerning dumping, Article 18.1 should be read as requiring that any 'specific action against dumping' of exports from another Member be in accordance with the relevant provisions of *Article VI* of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*.
>
> We recall that footnote 24 to Article 18.1 refers to '*other* relevant provisions of GATT 1994' (emphasis added). These terms can only refer to provisions other than the provisions of Article VI concerning dumping. Footnote 24 thus confirms that the 'provisions of GATT 1994' referred to in Article 18.1 are in fact the provisions of Article VI of the GATT 1994 concerning dumping.
>
> We have found that Article 18.1 of the *Anti-Dumping Agreement* requires that any 'specific action against dumping' be in accordance with the provisions of Article VI of the GATT 1994 concerning dumping, as those provisions are interpreted by the *Anti-Dumping Agreement*. It follows that Article VI is applicable to any 'specific action against dumping' of exports, i.e., action that is taken in response to situations presenting the constituent elements of 'dumping'.[852]

667. In *US – Offset Act (Byrd Amendment)*, the Appellate Body reiterated its view that "a measure that may be taken only when the constituent elements of dumping or a subsidy are present, is a 'specific action' in response to dumping within the meaning of Article 18.1 of the *Anti-Dumping Agreement*".[853] This implied that the measure must be inextricably linked to, or have a strong correlation with, the constituent elements of dumping. According to the Appellate Body, "such link or correlation may, as in the 1916 Act, be derived from the text of the measure itself".[854] However, not all action taken *in response to* dumping is necessarily action *against* dumping.[855] The Panel on *US – Offset Act (Byrd Amendment)* took the position that an action operates "against" dumping or a subsidy within the meaning of Article 18.1 of the *Anti-Dumping Agreement* if it has an *adverse bearing* on dumping.[856] The Appellate Body agreed with the Panel's interpretation of the term "against" and reached the following conclusion with respect to the Continued Dumping and Subsidy Offset Act (CDSOA):

> "All these elements lead us to conclude that the CDSOA has an adverse bearing on the foreign producers/exporters in that the imports into the United States of the dumped or subsidized products (besides being subject to anti-dumping or countervailing duties) result in the financing of United States competitors – producers of like products – through the transfer to the latter of the duties collected on those exports. Thus, foreign producers/exporters have an incentive not to engage in the practice of exporting dumped or subsidized products or to terminate such practices. Because the CDSOA has an adverse bearing on, and, more specifically, is designed and structured so that it dissuades the practice of dumping or the practice of subsidization, and because it creates an incentive to terminate such practices, the CDSOA is undoubtedly an action 'against' dumping or a subsidy, within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*."[857]

668. In *US – Offset Act (Byrd Amendment)*, the Appellate Body also emphasized that in order to determine whether a specific action is "against" dumping or subsidization, it is neither necessary, nor relevant, to examine the conditions of competition under which domestic products and dumped/subsidized imports compete, and to assess the impact of the measure on the competitive relationship between them. An analysis of the term "against", in the view of the Appellate Body, "is more appropriately centred on the design and structure of the measure; such an analysis does not mandate an economic assessment of the implications of the measure on the conditions of competition under which domestic product and dumped/subsidized imports compete".[858] However, as the Appellate Body also clearly stated, "a measure cannot be against dumping or a subsidy simply because it facilitates or induces the exercise of rights that are WTO-consistent"[859], such as the filing of anti-dumping applications.

(b) "except in accordance with the provisions of GATT 1994"

669. The Panel on *US – 1916 Act (EC)* considered that Article 18.1 of the *Anti-Dumping Agreement* confirms the

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[852] Appellate Body Report on *US – 1916 Act*, paras. 122–126. See also Panel Report on *US – 1916 Act (Japan)*, paras. 6.214–218 and 6.264; and Panel Report on *US – 1916 Act (EC)*, paras. 6.197–6.199.

[853] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 239.

[854] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 239. As the Appellate Body underlined,

> "Our analysis in *US – 1916 Act* focused on the strength of the link between the measure and the elements of dumping or a subsidy. In other words, we focused on the degree of correlation between the scope of application of the measure and the constituent elements of dumping or of a subsidy."

Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 244.

[855] See Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 247.

[856] Panel Report on *US – Offset Act (Byrd Amendment)*, paras. 7.17–7.18.

[857] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 256.

[858] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 257.

[859] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 258.

purpose of Article VI as "to define the conditions under which counteracting dumping *as such* is allowed."[860]

(c) Footnote 24

670. The Panel on *US – 1916 Act (Japan)* considered that "footnote 24 does not prevent Members from addressing the causes or effects of dumping through other trade policy instruments allowed under the WTO Agreement. Nor does it prevent Members from adopting other types of measures which are compatible with the WTO Agreement. Such a possibility does not affect our conclusion that, when a law of a Member addresses the type of price discrimination covered by Article VI and makes it the cause for the imposition of anti-dumping measures, that Member has to abide by the requirements of Article VI and the *Anti-Dumping Agreement*."[861]

671. The Appellate Body on *US – Offset Act (Byrd Amendment)* clarified that footnotes 24 and 56 are clarifications of the main provisions, and were added so as to avoid ambiguity:

> "[T]hey confirm what is implicit in Article 18.1 of the *Anti-Dumping Agreement* and in Article 32.1 of the *SCM Agreement*, namely, that an action that is *not* 'specific' within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*, but is nevertheless related to dumping or subsidization, is not prohibited by Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*."[862]

672. In *US – 1916 Act*, the Appellate Body referred to footnote 24 in order to clarify the scope of Article VI of *GATT 1994*. See paragraph 666 above.

3. Article 18.3

(a) "reviews of existing measures"

673. Referring to its statement that the *Anti-Dumping Agreement* applies only to "reviews of existing measures" initiated pursuant to applications made on or after the date of entry into force of the *Anti-Dumping Agreement* for the Member concerned, the Panel on *US – DRAMS* drew a comparison with the findings of the Panel on *Brazil – Desiccated Coconut*:

> "We note that this approach is in line with that adopted by the Panel on *Desiccated Coconut* in respect of Article 32.3 of the SCM Agreement, which is virtually identical to Article 18.3 of the AD Agreement. That Panel stated that 'Article 32.3 defines comprehensively the situations in which the SCM Agreement applies to measures which were imposed pursuant to investigations not subject to that Agreement. Specifically, the SCM Agreement applies to reviews of existing measures initiated pursuant to applications made on or after the date of entry into force of the WTO Agreement. It is thus through the mechanism of reviews provided for in the SCM Agreement, and only through that mechanism, that the Agreement becomes effective with respect to measures imposed pursuant to investigations to which the SCM Agreement does not apply' (*Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, para. 230, upheld by the Appellate Body in WT/DS22/AB/R, adopted on 20 March 1997)."[863]

(b) Application of the Anti-Dumping Agreement

674. Regarding the application of the *Anti-Dumping Agreement* to pre- and post-WTO measures, the Panel on *US – DRAMS* emphasized that the *Anti-Dumping Agreement* applies only to reviews and existing measures initiated pursuant to applications made on or after the date of entry into force of the Agreement with respect to the Member concerned:

> "In our view, pre-WTO measures do not become subject to the AD Agreement simply because they continue to be applied on or after the date of entry into force of the WTO Agreement for the Member concerned. Rather, by virtue of the ordinary meaning of the terms of Article 18.3, the AD Agreement applies only to 'reviews of existing measures' initiated pursuant to applications made on or after the date of entry into force of the AD Agreement for the Member concerned ('post-WTO reviews'). However, we do not believe that the terms of Article 18.3 provide for the application of the AD Agreement to all aspects of a pre-WTO measure simply because parts of that measure are under post-WTO review. Instead, we believe that the wording of Article 18.3 only applies the AD Agreement to the post-WTO review. In other words, the scope of application of the AD Agreement is determined by the scope of the post-WTO review, so that pursuant to Article 18.3, the AD Agreement only applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. Any aspects of a pre-WTO measure that are not covered by the scope of the post-WTO review do not become subject to the AD Agreement by virtue of Article 18.3 of the AD Agreement. By way of example, a pre-WTO injury determination does not become subject to the AD Agreement merely because a post-WTO review is conducted relating to the pre-WTO determination of the margin of dumping."[864]

4. Article 18.4

(a) Maintenance of inconsistent legislation after entry into force of WTO Agreement

675. In *US – Hot-Rolled Steel*, Japan had challenged Section 735(c)(5)(A) of the United States Tariff Act of

[860] Panel Report on *US – 1916 Act (EC)*, para. 6.114.
[861] Panel Report on *US – 1916 Act (Japan)*, para. 6.218.
[862] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 262.
[863] Panel Report on *US – DRAMS*, para. 6.14, fn 477.
[864] Panel Report on *US – DRAMS*, para. 6.14.

1930, as amended, which provided for a method for calculating the "all others" rate (see paragraphs 471–473 above) as inconsistent with Article 9.4 and, accordingly with Articles XVI:4 of the WTO Agreement and 18.4 of the *Anti-Dumping Agreement*. The Panel found that Section 735(c)(5)(A), as amended, was, *on its face*, inconsistent with Article 9.4 "in so far as it requires the consideration of margins based in part on facts available in the calculation of the all others rate". The Panel further found that, in maintaining this Section following the entry into force of the *Anti-Dumping Agreement*, the United States had acted inconsistently with Article 18.4 of this Agreement as well as with Article XVI:4 of the WTO Agreement.[865] The Appellate Body upheld these findings.[866]

(b) Mandatory versus discretionary legislation

676. In *US – 1916 Act (EC)*, the Panel referred to Article 18.4 in stating that the mere fact that the initiation of anti-dumping investigations was discretionary would not make the legislation at issue non-mandatory. See paragraph 599 above.

(c) Measures subject to dispute settlement

677. In the view of the Appellate Body on *US – Corrosion-Resistant Steel Sunset Review,* all laws, regulations and administrative procedures mentioned in Article 18.4 may, as such, be submitted to dispute settlement. The Appellate Body considered that "the phrase 'laws, regulations and administrative procedures' seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.[867] If some of these types of measure could not, as such, be subject to dispute settlement under the *Anti-Dumping Agreement*, it would frustrate the obligation of 'conformity' set forth in Article 18.4."[868]

678. As regards, the concept of measures subject to WTO dispute settlement, see Section VI.B.3(c) of the Chapter on the *DSU*. See also Sections XVII.B.1(b) and (c) of this Chapter.

5. Article 18.5

679. Article 18.5 of the Agreement provides that "Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations". Pursuant to a decision of the Committee in February 1995, all Members having new or existing legislation and/or regulations which apply in whole or in part to anti-dumping duty investigations or reviews covered by the Agreement are requested to notify the full and integrated text of such legislation and/or regulations to the Committee. Changes in a Member's legislation and/or regulations are to be notified to the Committee as well. Pursuant to that same decision of the Committee, if a Member has no such legislation or regulations, the Member is to inform the Committee of this fact. The Committee also decided that Observer governments should comply with these notification obligations.

680. As of 29 October 2004, 105 Members had notified the Committee regarding their domestic anti-dumping legislation.[869] Of these 105 Members, 29 had notified the Committee that they had no anti-dumping legislation. Members' communications in this regard can be found in document series G/ADP/N/1/. . . . 28 Members had not, as yet, made any notification of anti-dumping legislation and/or regulations. Annex A sets out the status of notifications concerning legislation under Article 18.5 of the Agreement, and sets out the reference symbol of the document(s) containing each Member's current notification in this regard.

6. Article 18.6

(a) Annual reviews

681. Paragraph 7.4 of the Doha Ministerial Decision of 14 November 2001 on Implementation-Related Issues and Concerns states that the Ministerial Conference "[t]akes note that Article 18.6 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 requires the Committee on Anti-Dumping Practices to review annually the implementation and operation of the Agreement taking into account the objectives thereof. The Committee on Anti-dumping Practices is instructed to draw up guide-

[865] Panel Report on *US – Hot-Rolled Steel*, para. 7.90.
[866] Appellate Body Report on *US – Hot-Rolled Steel*, para. 129.
[867] (*footnote original*) We observe that the scope of each element in the phrase "laws, regulations and administrative procedures" must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from Member to Member depending on each Member's domestic law and practice.
[868] Appellate Body Report on *United States – Corrosion Resistant Steel Sunset Review*, para. 87.
[869] The European Communities is counted as one Member. Prior to 1 May 2004, the member-States of the EC were the following: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. As of 1 May 2004, the member-States of the EC included in addition to the afore-listed, the following: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia. This annual report includes a period both before and after the accession of these Members to the European Communities. Therefore, these Members' separate notifications of legislation, submitted prior to their accession to the EC, are listed in this report. See document G/ADPN/1/EEC/2/Suppl.6 for updated information on the current status of laws and regulations of these Members.

lines for the improvement of annual reviews and to report its views and recommendations to the General Council for subsequent decision within 12 months."[870]

682. Further to the Doha mandate, the Committee on Anti-Dumping Practices adopted on 27 November 2002, the "Recommendation regarding Annual Reviews of the Anti-Dumping Agreement".[871] In its recommendation, the Committee on Anti-Dumping Practices considers that "improvements in the reporting of anti-dumping activity under the Agreement and in the Committee's annual reviews are important to promoting transparency". Accordingly, the Recommendation includes the following improvements aimed at providing useful information to Members and the public, and enhancing transparency under the Agreement:

> "1. The Committee's annual report under Article 18.6 should include in the Summary of Anti-Dumping Actions[872], in addition to the column currently included that lists the initiations reported by each Member, a comparable column listing the number of anti-dumping revocations reported by each Member during the reporting period. Where a Member has not provided such information, the report should note this omission. Members are already requested to report the number of revocations in a separate table as an annex to their semi-annual reports of anti-dumping activity. Consequently, such information should be included in the Article 18.6 annual report.
>
> 2. The Committee's Article 18.6 annual report should also include a chart comparing for each Member the number of preliminary and final measures reported in its semi-annual reports with the number of notices of preliminary and final measures the Member submitted to the Secretariat for the comparable period.
>
> 3. Developed country Members should include, when reporting anti-dumping actions in the semi-annual report that Members are required to submit under Article 16.4, the manner in which the obligations of Article 15 have been fulfilled. Without prejudice to the scope and application of Article 15, price undertakings and lesser duty rules are examples of constructive remedies that could be included in such Members' semi-annual reports. The Committee's annual report under Article 18.6 should include, in a separate table, a compilation of the information reported by each Member in this respect during the reporting period. Where a Member has not provided such information, the report should note this omission.
>
> 4. This recommendation does not prejudge the ability of Members to submit other proposals and to agree in the future on other recommendations aimed at improving annual reviews in the Committee on Anti-dumping Practices."[873]

7. Relationship with other Articles

(a) General

683. The relationship between Article 18.1 and other provisions in the *Anti-Dumping Agreement* was discussed in *Guatemala – Cement II*. The Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with Articles 3, 5, 6, 7,12, and paragraph 2 of Annex I of the *Anti-Dumping Agreement*. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, among them Article 18, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement. There would be no basis to Mexico's claims under Articles 1, 9 and 18 of the AD Agreement, and Article VI of GATT 1994, if Guatemala were not found to have violated other provisions of the AD Agreement."[874] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.

684. The Panel on *US – 1916 Act (Japan)* stated that "[t]he meaning of Article 18.4 which immediately comes to mind when reading that Article is that when a law, regulation or administrative procedure of a Member has been found incompatible with the provisions of the *Anti-Dumping Agreement*, that Member is also in breach of its obligations under Article 18.4."[875]

685. The Panel on *US – 1916 Act (Japan)* stated in a footnote that "we did not exercise judicial economy with respect to Article 18.4 because, in that context, a violation of Article 18.4 automatically results from the breach of another provision of the *Anti-Dumping Agreement*."[876]

(b) Article 17

686. In *US – 1916 Act*, the Appellate Body referred to Article 18.1 and 18.4 as contextual support for its reading of Article 17.4 as allowing Members to bring claims against anti-dumping legislation as such.[877]

8. Relationship with other WTO Agreements

(a) Article VI of the GATT 1994

687. The relationship between Article 18 and Article VI of the *GATT 1994* was discussed in *US – 1916 Act*. See paragraphs 666–670 above and 707 below.

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[870] WT/MIN(01)/17.
[871] G/ADP/9.
[872] (*footnote original*) *See* Report (2001) of the Committee on Anti-Dumping Practices, Annex C, G/L/495 (31 October 2001).
[873] G/ADP/9.
[874] Panel Report on *Guatemala – Cement II*, para. 8.296.
[875] Panel Report on *US – 1916 Act (Japan)*, para. 6.286.
[876] Panel Report on *US – 1916 Act (Japan)*, para. 6.286, fn 595.
[877] Appellate Body Report on *US – 1916 Act*, paras. 78–82. See also paras. 596 and 610 of this Chapter.

(b) SCM Agreement

688. The Panel on *US – DRAMS* referred to the applicability of the *SCM Agreement* to measures initiated before the entry into force of the *WTO Agreement*, in deciding on a similar issue under the *Anti-Dumping Agreement*. See paragraph 673 above.

XIX. ANNEX I

A. TEXT OF ANNEX I

ANNEX I
PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 7 OF ARTICLE 6

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. Such a visit may only be made if *(a)* the authorities of the importing Member notify the representatives of the Member in question and *(b)* the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

B. INTERPRETATION AND APPLICATION OF ANNEX I

1. On-the-spot verifications as an option

689. The Panel on *Argentina – Ceramic Tiles*, indicated in a footnote that, although common practice, there is no requirement to carry out on-the-spot verifications. See paragraph 369 above.

2. Participation of non-governmental experts in the on-the-spot verification

690. In *Guatemala – Cement II*, Mexico claimed that a verification visit by Guatemala's authority to a Mexican producer's site was inconsistent with Article 6.7 and Annex I(2), (3), (7) and (8) because the authority included non-governmental experts with an alleged conflict of interest in its verification team. See paragraphs 372–374 above.

3. Information verifiable on-the-spot

691. In Guatemala – Cement II, Mexico argued that in violation of Article 6.7 and paragraph 7 of Annex I, the Guatemalan authority sought to verify certain information not submitted by the Mexican producer under investigation because it pertained to the period of investigation newly added during the course of the investigation. See paragraph 371 above.

4. Relationship with other Articles

692. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with Articles 3, 5, 6, 7, 12, and paragraph 2 of Annex I of the *Anti-Dumping Agreement*. The Panel then opined that Mexico's claims under Articles 1, 9 and 18 of the AD Agreement, and Article VI of GATT 1994, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement. There would be no basis to Mexico's claims under Articles 1, 9 and 18 of the AD Agreement, and Article VI of GATT 1994, if Guatemala were not found to have violated other provisions of the AD Agreement." In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.[878]

693. With respect to the relationship of Annex I and Article 6.7, in *Egypt – Steel Rebar*, the Panel came to the same conclusion as with the relationship between Arti-

[878] Panel Report on *Guatemala – Cement II*, para. 8.296.

cle 6.8 and Annex II (see paragraph 379 above), i.e. that Annex I is incorporated by reference into Article 6.7. See paragraph 368 above.

XX. ANNEX II

A. TEXT OF ANNEX II

ANNEX II
BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

B. INTERPRETATION AND APPLICATION OF ANNEX II

1. "best information available"

694. With respect to Annex II and recourse to "best information available" pursuant to Article 6.8, see paragraphs 375–425 above.

2. Paragraph 1

695. As regards the interpretation of paragraph 1 of Annex II, see paragraphs 381–383, 397–398 and 400–403 above.

3. Paragraph 3

696. As regards the interpretation of paragraph 3, see paragraphs 378 and 388–395 above.

4. Paragraph 5

697. Concerning the interpretation of the concept of cooperation "to the best of its ability", see paragraphs 406–409 above. As regards co-operation as a two-way process, see paragraph 411 above.

5. Paragraph 6

(a) Duty to inform of reasons for disregarding evidence or information

698. See paragraphs 395 and 414–415 above.

(b) "reasonable period, due account being taken of the time-limits of the investigation"

699. In *Egypt – Steel Rebar*, the Panel considered that the text of paragraph 6 of Annex II "makes clear that the obligation for an investigating authority to provide a reasonable period for the provision of further explanations is not open-ended or absolute. Rather, this obligation exists within the overall time constraints of the investigation." The Panel concluded that "in determining a 'reasonable period' an investigating authority must balance the need to provide an adequate period for the provision of the explanations referred to against the time constraints applicable to the various phases of the investigation and to the investigation as a whole."[879]

700. In *Egypt – Steel Rebar*, the Panel considered that the issue of whether the two-to-five day deadline fixed by the investigating authority was unreasonable "must be judged on the basis of the overall factual situation that existed at the time". In this case, the Panel considered whether the information requested was new information, whether any of the other respondents received a longer period in which to respond and what was the attitude of the respondents concerned, and concluded that the deadline in question was not unreasonable.[880]

6. Paragraph 7

701. As regards the possibility of resorting to a "secondary source", see paragraph 412 above.

702. Concerning the concept of cooperation, see paragraphs 405–406 above.

7. Relationship with Article 6

(a) Relationship with Article 6.1

703. In *Egypt – Steel Rebar*, Turkey had claimed a violation of paragraph 1 of Annex II outside the context of Article 6.8. The Panel decided not to rule on whether paragraph 1 could be invoked separately from Article 6.8.[881]

(b) Relationship with Article 6.2

704. In *Egypt – Steel Rebar*, Turkey had made a number of claims of violation of both paragraph 6 of Annex II and Article 6.2. The Panel, who did not take a position on whether paragraph 6 of Annex II can be invoked separately from Article 6.8, considered as follows.

> "As for the claim of violation of the requirement in Annex II, paragraph 6 to provide a 'reasonable period', we recall that this provision forms part of the required procedural and substantive basis for a decision as to whether resort to facts available pursuant to Article 6.8. We further recall that we have found, *supra*[882], that the [investigating authority]'s decision to resort to facts available . . . did not violate Article 6.8, based on considerations under Annex II, paragraphs 3 and 5. Thus, we would not necessarily need to address this aspect of this claim for its own sake. Nonetheless, a full analysis of Annex II, paragraph 6 as it pertains to the factual basis of this claim, appears necessary to evaluate the merits of the claimed violation of Article 6.2 resulting from the deadline for responses to the 23 September requests. In performing this analysis, however, we note that we again do not here take a position on whether Annex II, paragraph 6 can be invoked separately from Article 6.8. We would need to do so only if we find that as a factual matter, the deadline in question was unreasonable."[883]

(c) Relationship with Article 6.8

705. As regards the relationship between Annex II and Article 6.8, see paragraphs 375–425 above.

XXI. RELATIONSHIP WITH OTHER WTO AGREEMENTS

A. ARTICLE VI OF THE GATT 1994

706. Regarding the relationship between Article VI of the GATT 1994 and the *Anti-Dumping Agreement*, the Panel on *US – 1916 Act (EC)*, referring to the Appellate Body Report on *Argentina – Footwear (EC)*, used the term an "inseparable package of rights and disciplines":

> "In our opinion, Article VI and the Anti-Dumping Agreement are part of the same treaty or, as the panel and the Appellate Body put it in *Argentina – Footwear (EC)* with respect to Article XIX and the Agreement on Safeguards, an 'inseparable package of rights and disciplines'. In application of the customary rules of interpretation of international law, we are bound to *interpret* Article VI of the GATT 1994 as part of the WTO Agreement and the Anti-Dumping Agreement is part of the context of Article VI. This implies that Article VI should not be interpreted in a way that would deprive it or the Anti-Dumping Agreement of meaning. Rather, we should give meaning and legal effect to all the relevant provisions. However, the requirement does not prevent us from making *findings* in relation to Article VI only, or in relation to specific provisions of the Anti-Dumping Agreement, as required by our terms of reference."[884]

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[879] Panel Report on *Egypt – Steel Rebar*, para. 7.282.
[880] Panel Report on *Egypt – Steel Rebar*, paras. 7.289–7.295.
[881] Panel Report on *Egypt – Steel Rebar*, para. 7.321.
[882] (*footnote original*) Para.7.248.
[883] Panel Report on *Egypt – Steel Rebar*, para. 7.288.
[884] Panel Report on *US – 1916 Act (EC)*, para. 6.97. See also *US – 1916 Act (Japan)*, para. 6.93.

707. The Panel on *US – 1916 Act (EC)* considered the *Anti-Dumping Agreement* as context in interpreting Article VI of the *GATT 1994* and explained its reasoning as follows:

> "The official title of the Anti-Dumping Agreement is 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994'. This agreement is essential for the interpretation of Article VI. Articles 1 and 18.1 confirm the close link between Article VI and the Anti-Dumping Agreement. Moreover, as was recalled by the Appellate Body in the *Brazil – Coconuts* case, the WTO Agreement is a single treaty instrument which was accepted by the WTO Members as a single undertaking. As a result, Article 18.1 of the Anti-Dumping Agreement is part of the context of Article VI since Article 31.2 of the Vienna Convention provides that 'the context for the purpose of the interpretation of a treaty shall comprise, [. . .] the text [of the treaty], including its preamble and annexes. . .'. We are therefore not only entitled to consider Articles 1 and 18.1 of the Anti-Dumping Agreement even though the European Communities did not mention those provisions as part of its claims in its request for establishment of a panel, but we are also *required* to do so under the general principles of interpretation of public international law."[885]

708. In examining the scope of Article VI of the *GATT 1994*, the Panel on *US – 1916 Act (EC)* stated that Article 1 of the *Anti-Dumping Agreement* "supports the view that Article VI is about what Members are entitled to do when they counteract dumping within the meaning of Article VI . . . by referring to 'anti-dumping *measure[s]*' which may be applied by Members."[886] (emphasis in original) The Panel concluded that "a law that would counteract 'dumping' as defined in Article VI:1 would fall within the scope of Article VI."[887]

709. The Appellate Body in *US – 1916 Act* concluded that "[s]ince an 'Anti-dumping measure' must, according to Article 1 of the *Anti-Dumping Agreement*, be consistent with Article VI of the GATT 1994 and the provisions of the *Anti-Dumping Agreement*, it seems to follow that Article VI would apply to 'an anti-dumping measure', i.e., a measure against dumping."[888]

710. The Panel on *US – 1916 Act (EC)* considered that the first sentence of Article 1 of the *Anti-Dumping Agreement* confirms the purpose of Article VI as "to define the conditions under which counteracting dumping *as such* is allowed."[889]

711. Regarding the relationship between Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*, the Panel on *US – 1916 Act (Japan)* noted that "Article 1.1 of the Anti-Dumping Agreement establishes a link between Article VI and the Anti-Dumping Agreement."[890]

712. The Appellate Body in *US – 1916 Act* agreed with the Panel's conclusion that "[g]iven the link between Article VI of the GATT 1994 and the *Anti-Dumping Agreement*, we find that the applicability of Article VI to the 1916 Act also implies the applicability of the *Anti-Dumping Agreement*."[891]

B. ARTICLE XI OF THE GATT 1994

713. The Panel on *US – 1916 Act (Japan)*, after finding that the measure at issue was inconsistent with provisions of the *Anti-Dumping Agreement* (and Article VI of GATT), exercised judicial economy with respect to a claim under Article XI of *GATT*.[892]

C. ARTICLE 3.2 OF THE DSU

714. The Panel on *US – DRAMS* discussed the interpretation of provisions of the *Anti-Dumping Agreement* in the light of the wording of Article 3.2 of the *DSU*.

D. ARTICLE 11 OF THE DSU

715. As regards the different standard of review under Article 17.6 of the *Anti-Dumping Agreement* and the general standard of review of Article 11 of the DSU, see paragraphs 626–627 above.

E. AGREEMENT ON SAFEGUARDS

716. The Appellate Body in *US – Hot-Rolled Steel* supported its interpretation of the non-attribution language of Article 3.5 by referring to its decisions in two safeguards Reports, *US – Wheat Gluten* and *US – Lamb* where it interpreted the non-attribution language in Article 4.2(b) of the Agreement on Safeguards in a similar manner. See paragraph 183 above. See also the Panel Report in *Guatemala – Cement II*, paragraph 152 above.

F. SCM AGREEMENT

717. The Panel on *US – DRAMS* referred to the applicability of the *SCM Agreement* to measures initiated before the entry into force of the *WTO Agreement*, in deciding on a similar issue under the *Anti-Dumping Agreement*. See paragraph 673 above.

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[885] Panel Report on *US – 1916 Act (EC)*, para. 6.195. See also Panel Report on *US – 1916 Act (Japan)*, para. 6.108.
[886] Panel Report on *US – 1916 Act (EC)*, para. 6.106.
[887] Panel Report on *US – 1916 Act (EC)*, para. 6.107.
[888] Appellate Body Report on *US – 1916 Act*, para. 120.
[889] Panel Report on *US – 1916 Act (EC)*, para. 6.114. See also Panel Report on *US – 1916 Act (Japan)*, para. 6.240.
[890] Panel Report on *US – 1916 Act (Japan)*, para. 6.108. See also Panel Report on *US – 1916 Act (EC)*, para. 6.165.
[891] Appellate Body Report on *US – 1916 Act*, para. 133.
[892] Panel Report on *US – 1916 Act (Japan)*, paras. 6.276–6.281.

XXII. DECLARATION ON DISPUTE SETTLEMENT PURSUANT TO THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 OR PART V OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

A. TEXT

Ministers recognize, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.

B. INTERPRETATION AND APPLICATION

No jurisprudence or decision of a competent WTO body.

XXIII. DECISION ON REVIEW OF ARTICLE 17.6 OF THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

A. TEXT

Ministers decide as follows:

The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article VI of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application.

B. INTERPRETATION AND APPLICATION

No jurisprudence or decision of a competent WTO body.

XXIV. DECISION ON ANTI-CIRCUMVENTION

A. TEXT OF THE DECISION ON ANTI-CIRCUMVENTION

DECISION ON ANTI-CIRCUMVENTION

Ministers,

Noting that while the problem of circumvention of anti-dumping duty measures formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994, negotiators were unable to agree on specific text,

Mindful of the desirability of the applicability of uniform rules in this area as soon as possible,

Decide to refer this matter to the Committee on Anti-Dumping Practices established under that Agreement for resolution.

B. INTERPRETATION AND APPLICATION OF THE DECISION ON ANTI-CIRCUMVENTION

No jurisprudence or decision of a competent WTO body.

Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement)

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I. GENERAL INTRODUCTORY COMMENTARY

A. TEXT OF GENERAL INTRODUCTORY COMMENTARY

1. The primary basis for customs value under this Agreement is "transaction value" as defined in Article 1. Article 1 is to be read together with Article 8 which provides, *inter alia*, for adjustments to the price actually paid or payable in cases where certain specific elements which are considered to form a part of the value for customs purposes are incurred by the buyer but are not included in the price actually paid or payable for the imported goods. Article 8 also provides for the inclusion in the transaction value of certain considerations which may pass from the buyer to the seller in the form of specified goods or services rather than in the form of money. Articles 2 through 7 provide methods of determining the customs value whenever it cannot be determined under the provisions of Article 1.

2. Where the customs value cannot be determined under the provisions of Article 1 there should normally be a process of consultation between the customs administration and importer with a view to arriving at a basis of value under the provisions of Article 2 or 3. It may occur, for example, that the importer has information about the customs value of identical or similar imported goods which is not immediately available to the customs administration in the port of importation. On the other hand, the customs administration may have information about the customs value of identical or similar imported goods which is not readily available to the importer. A process of consultation between the two parties will enable information to be exchanged, subject to the requirements of commercial confidentiality, with a view to determining a proper basis of value for customs purposes.

3. Articles 5 and 6 provide two bases for determining the customs value where it cannot be determined on the basis of the transaction value of the imported goods or of identical or similar imported goods. Under paragraph 1 of Article 5 the customs value is determined on the basis of the price at which the goods are sold in the condition as imported to an unrelated buyer in the country of importation. The importer also has the right to have goods which are further processed after importation valued under the provisions of Article 5 if the importer so requests. Under Article 6 the customs value is determined on the basis of the computed value. Both these methods present certain difficulties and because of this the importer is given the right, under the provisions of Article 4, to choose the order of application of the two methods.

4. Article 7 sets out how to determine the customs value in cases where it cannot be determined under the provisions of any of the preceding Articles.

Members,

Having regard to the Multilateral Trade Negotiations;

Desiring to further the objectives of GATT 1994 and to secure additional benefits for the international trade of developing countries;

Recognizing the importance of the provisions of Article VII of GATT 1994 and desiring to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation;

Recognizing the need for a fair, uniform and neutral system for the valuation of goods for customs purposes that precludes the use of arbitrary or fictitious customs values;

Recognizing that the basis for valuation of goods for customs purposes should, to the greatest extent possible, be the transaction value of the goods being valued;

Recognizing that customs value should be based on simple and equitable criteria consistent with commercial practices and that valuation procedures should be of general application without distinction between sources of supply;

Recognizing that valuation procedures should not be used to combat dumping;

Hereby *agree* as follows:

B. INTERPRETATION AND APPLICATION OF THE GENERAL INTRODUCTORY COMMENTARY

1. General

(a) Implementation of the Agreement

1. At its meeting of 18–19 October 2000, the General Council requested the Committee on Customs Valuation to consider three proposals relating to the implementation of the *Customs Valuation Agreement.*[1]

(b) Adoption of the decisions of the Tokyo Round Committee

2. At its meeting of 12 May 1995, the Committee on Customs Valuation also agreed, *inter alia*, to adopt the decisions adopted by the Tokyo Round Committee on Customs Valuation relating to the interpretation and administration of the of the *Customs Valuation Agreement.*[2]

PART I
RULES ON CUSTOMS VALUATION

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1

1. The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8, provided:

(a) that there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which:

(i) are imposed or required by law or by the public authorities in the country of importation;

(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;

(b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

(c) that no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Article 8; and

(d) that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of paragraph 2.

2. (a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related within the meaning of Article 15 shall not in itself be grounds for regarding the transaction value as unacceptable. In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the importer or otherwise, the customs administration has grounds for considering that the relationship influenced the price, it shall communicate its grounds to the importer and the importer shall be given a reasonable opportunity to respond.

[1] WT/GC/M/59, paras. 22–26.
[2] G/VAL/M/1, Section J. Those decisions are referred to in paragraphs 3, 4, 9, 10, 11, 20, 26, 33 and 34 of this Chapter.

If the importer so requests, the communication of the grounds shall be in writing.

(b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with the provisions of paragraph 1 whenever the importer demonstrates that such value closely approximates to one of the following occurring at or about the same time:

(i) the transaction value in sales to unrelated buyers of identical or similar goods for export to the same country of importation;

(ii) the customs value of identical or similar goods as determined under the provisions of Article 5;

(iii) the customs value of identical or similar goods as determined under the provisions of Article 6.

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 8 and costs incurred by the seller in sales in which the seller and the buyer are not related that are not incurred by the seller in sales in which the seller and the buyer are related.

(c) The tests set forth in paragraph 2(b) are to be used at the initiative of the importer and only for comparison purposes. Substitute values may not be established under the provisions of paragraph 2(b).

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 1

Note to Article 1
Price Actually Paid or Payable

1. The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instruments. Payment may be made directly or indirectly. An example of an indirect payment would be the settlement by the buyer, whether in whole or in part, of a debt owed by the seller.

2. Activities undertaken by the buyer on the buyer's own account, other than those for which an adjustment is provided in Article 8, are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller. The costs of such activities shall not, therefore, be added to the price actually paid or payable in determining the customs value.

3. The customs value shall not include the following charges or costs, provided that they are distinguished from the price actually paid or payable for the imported goods:

(a) charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods such as industrial plant, machinery or equipment;

(b) the cost of transport after importation;

(c) duties and taxes of the country of importation.

4. The price actually paid or payable refers to the price for the imported goods. Thus the flow of dividends or other payments from the buyer to the seller that do not relate to the imported goods are not part of the customs value.

Paragraph 1(a)(iii)

Among restrictions which would not render a price actually paid or payable unacceptable are restrictions which do not substantially affect the value of the goods. An example of such restrictions would be the case where a seller requires a buyer of automobiles not to sell or exhibit them prior to a fixed date which represents the beginning of a model year.

Paragraph 1(b)

1. If the sale or price is subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued, the transaction value shall not be acceptable for customs purposes. Some examples of this include:

(a) the seller establishes the price of the imported goods on condition that the buyer will also buy other goods in specified quantities;

(b) the price of the imported goods is dependent upon the price or prices at which the buyer of the imported goods sells other goods to the seller of the imported goods;

(c) the price is established on the basis of a form of payment extraneous to the imported goods, such as where the imported goods are semi-finished goods which have been provided by the seller on condition that the seller will receive a specified quantity of the finished goods.

2. However, conditions or considerations relating to the production or marketing of the imported goods shall not result in rejection of the transaction value. For example, the fact that the buyer furnishes the seller with engineering and plans undertaken in the country of importation shall not result in rejection of the transaction value for the purposes of Article 1. Likewise, if the buyer undertakes on the buyer's own account, even though by agreement with the seller, activities relating to the marketing of the imported goods, the value of these activities is not part of the customs value nor shall such activities result in rejection of the transaction value.

Paragraph 2

1. Paragraphs 2(a) and 2(b) provide different means of establishing the acceptability of a transaction value.

2. Paragraph 2(a) provides that where the buyer and the seller are related, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted as the customs value provided that the relationship did not influence the price. It is not intended that there should be an examination of the circumstances in all cases where the buyer and the seller are related. Such examination will only be required where there are doubts about the acceptability of the price. Where the customs administration have no doubts about the acceptability of the price, it should be accepted without requesting further information from the importer. For example, the customs administration may have previously examined the relationship, or it may already have detailed information concerning the buyer and the seller, and may already be satisfied from such examination or information that the relationship did not influence the price.

3. Where the customs administration is unable to accept the transaction value without further inquiry, it should give the importer an opportunity to supply such further detailed information as may be necessary to enable it to examine the circumstances surrounding the sale. In this context, the customs administration should be prepared to examine relevant aspects of the transaction, including the way in which the buyer and seller organize their commercial relations and the way in which the price in question was arrived at, in order to determine whether the relationship influenced the price. Where it can be shown that the buyer and seller, although related under the provisions of Article 15, buy from and sell to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship. As an example of this, if the price had been settled in a manner consistent with the normal pricing practices of the industry in question or with the way the seller settles prices for sales to buyers who are not related to the seller, this would demonstrate that the price had not been influenced by the relationship. As a further example, where it is shown that the price is adequate to ensure recovery of all costs plus a profit which is representative of the firm's overall profit realized over a representative period of time (e.g. on an annual basis) in sales of goods of the same class or kind, this would demonstrate that the price had not been influenced.

4. Paragraph 2(b) provides an opportunity for the importer to demonstrate that the transaction value closely approximates to a "test" value previously accepted by the customs administration and is therefore acceptable under the provisions of Article 1. Where a test under paragraph 2(b) is met, it is not necessary to examine the question of influence under paragraph 2(a). If the customs administration has already sufficient information to be satisfied, without further detailed inquiries, that one of the tests provided in paragraph 2(b) has been met, there is no reason for it to require the importer to demonstrate that the test can be met. In paragraph 2(b) the term "unrelated buyers" means buyers who are not related to the seller in any particular case.

Paragraph 2(b)

A number of factors must be taken into consideration in determining whether one value "closely approximates" to another value. These factors include the nature of the imported goods, the nature of the industry itself, the season in which the goods are imported, and, whether the difference in values is commercially significant. Since these factors may vary from case to case, it would be impossible to apply a uniform standard such as a fixed percentage, in each case. For example, a small difference in value in a case involving one type of goods could be unacceptable while a large difference in a case involving another type of goods might be acceptable in determining whether the transaction value closely approximates to the "test" values set forth in paragraph 2(b) of Article 1.

C. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. Valuation of carrier media bearing software for data-processing equipment

3. At its meeting of 12 May 1995, the Committee on Customs Valuation adopted the decision of the Tokyo Round Committee on the valuation of carrier media bearing software for data-processing equipment.[3]

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2

1. (a) If the customs value of the imported goods cannot be determined under the provisions of Article 1, the customs value shall be the transaction value of identical goods sold for export to the same country of importation and exported at or about the same time as the goods being valued.

(b) In applying this Article, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of identical goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable

[3] G/VAL/M/1, paras. 66–67; see also G/VAL/W/1, Section A.4. The text of the decision can be found in G/VAL/5, Section A.4.

to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.

2. Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the identical goods in question arising from differences in distances and modes of transport.

3. If, in applying this Article, more than one transaction value of identical goods is found, the lowest such value shall be used to determine the customs value of the imported goods.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 2

Note to Article 2

1. In applying Article 2, the customs administration shall, wherever possible, use a sale of identical goods at the same commercial level and in substantially the same quantities as the goods being valued. Where no such sale is found, a sale of identical goods that takes place under any one of the following three conditions may be used:

(a) a sale at the same commercial level but in different quantities;

(b) a sale at a different commercial level but in substantially the same quantities; or

(c) a sale at a different commercial level and in different quantities.

2. Having found a sale under any one of these three conditions adjustments will then be made, as the case may be, for:

(a) quantity factors only;

(b) commercial level factors only; or

(c) both commercial level and quantity factors.

3. The expression "and/or" allows the flexibility to use the sales and make the necessary adjustments in any one of the three conditions described above.

4. For the purposes of Article 2, the transaction value of identical imported goods means a customs value, adjusted as provided for in paragraphs 1(b) and 2, which has already been accepted under Article 1.

5. A condition for adjustment because of different commercial levels or different quantities is that such adjustment, whether it leads to an increase or a decrease in the value, be made only on the basis of demonstrated evidence that clearly establishes the reasonableness and accuracy of the adjustments, e.g. valid price lists containing prices referring to different levels or different quantities. As an example of this, if the imported goods being valued consist of a shipment of 10 units and the only identical imported goods for which a transaction value exists involved a sale of 500 units, and it is recognized that the seller grants quantity discounts, the required adjustment may be accomplished by resorting to the seller's price list and using that price applicable to a sale of 10 units. This does not require that a sale had to have been made in quantities of 10 as long as the price list has been established as being bona fide through sales at other quantities. In the absence of such an objective measure, however, the determination of a customs value under the provisions of Article 2 is not appropriate.

C. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. General

(a) Rectification of the French text of paragraph 1 of the Note to Article 2

4. At its meeting of 12 May 1995, the Committee on Customs Valuation adopted the decision of the Tokyo Round Committee on Customs Valuation relating to the rectification of the French text of paragraph 1 of the Note to Articles 2 and 3.[4]

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3

1. (a) If the customs value of the imported goods cannot be determined under the provisions of Articles 1 and 2, the customs value shall be the transaction value of similar goods sold for export to the same country of importation and exported at or about the same time as the goods being valued.

(b) In applying this Article, the transaction value of similar goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of similar goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which

[4] G/VAL/M/1, paras. 66–67; see also G/VAL/W/1, Section A.5. The decision can be found in G/VAL/5, Section A.5.

clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.

2. Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the similar goods in question arising from differences in distances and modes of transport.

3. If, in applying this Article, more than one transaction value of similar goods is found, the lowest such value shall be used to determine the customs value of the imported goods.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 3

Note to Article 3

1. In applying Article 3, the customs administration shall, wherever possible, use a sale of similar goods at the same commercial level and in substantially the same quantities as the goods being valued. Where no such sale is found, a sale of similar goods that takes place under any one of the following three conditions may be used:

(a) a sale at the same commercial level but in different quantities;

(b) a sale at a different commercial level but in substantially the same quantities; or

(c) a sale at a different commercial level and in different quantities.

2. Having found a sale under any one of these three conditions adjustments will then be made, as the case may be, for:

(a) quantity factors only;

(b) commercial level factors only; or

(c) both commercial level and quantity factors.

3. The expression "and/or" allows the flexibility to use the sales and make the necessary adjustments in any one of the three conditions described above.

4. For the purpose of Article 3, the transaction value of similar imported goods means a customs value, adjusted as provided for in paragraphs 1(b) and 2, which has already been accepted under Article 1.

5. A condition for adjustment because of different commercial levels or different quantities is that such adjustment, whether it leads to an increase or a decrease in the value, be made only on the basis of demonstrated evidence that clearly establishes the reasonableness and accuracy of the adjustment, e.g. valid price lists containing prices referring to different levels or different quantities. As an example of this, if the imported goods being valued consist of a shipment of 10 units and the only similar imported goods for which a transaction value exists involved a sale of 500 units, and it is recognized that the seller grants quantity discounts, the required adjustment may be accomplished by resorting to the seller's price list and using that price applicable to a sale of 10 units. This does not require that a sale had to have been made in quantities of 10 as long as the price list has been established as being bona fide through sales at other quantities. In the absence of such an objective measure, however, the determination of a customs value under the provisions of Article 3 is not appropriate.

C. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. General

(a) Rectification of the French text of paragraph 1 of the Note to Article 3

5. With respect to the rectification of the French text of paragraph 1 of the Note to Article 3, see paragraph 4 above.

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4

If the customs value of the imported goods cannot be determined under the provisions of Articles 1, 2 and 3, the customs value shall be determined under the provisions of Article 5 or, when the customs value cannot be determined under that Article, under the provisions of Article 6 except that, at the request of the importer, the order of application of Articles 5 and 6 shall be reversed.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

6. Paragraph 3 of Annex III allows developing countries to make a reservation that would allow customs administrations the right to deny an importer's request to reverse the sequential order of the Articles 5 and 6. See interpretation and application of paragraph 3 of Annex III paragraph 40 below.

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5

1. (a) If the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported, the customs value of the imported goods under the provisions of this

Article shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:

(i) either the commissions usually paid or agreed to be paid or the additions usually made for profit and general expenses in connection with sales in such country of imported goods of the same class or kind;

(ii) the usual costs of transport and insurance and associated costs incurred within the country of importation;

(iii) where appropriate, the costs and charges referred to in paragraph 2 of Article 8; and

(iv) the customs duties and other national taxes payable in the country of importation by reason of the importation or sale of the goods.

(b) If neither the imported goods nor identical nor similar imported goods are sold at or about the time of importation of the goods being valued, the customs value shall, subject otherwise to the provisions of paragraph 1(a), be based on the unit price at which the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported at the earliest date after the importation of the goods being valued but before the expiration of 90 days after such importation.

2. If neither the imported goods nor identical nor similar imported goods are sold in the country of importation in the condition as imported, then, if the importer so requests, the customs value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons in the country of importation who are not related to the persons from whom they buy such goods, due allowance being made for the value added by such processing and the deductions provided for in paragraph 1(a).

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 5

Note to Article 5

1. The term "unit price at which . . . goods are sold in the greatest aggregate quantity" means the price at which the greatest number of units is sold in sales to persons who are not related to the persons from whom they buy such goods at the first commercial level after importation at which such sales take place.

2. As an example of this, goods are sold from a price list which grants favourable unit prices for purchases made in larger quantities.

Sale quantity	*Unit price*	*Number of sales*	*Total quantity sold at each price*
1–10 units	100	10 sales of 5 units 5 sales of 3 units	65
11–25 units	95	5 sales of 11 units	55
over 25 units	90	1 sale of 30 units	80
		1 sale of 50 units	

The greatest number of units sold at a price is 80; therefore, the unit price in the greatest aggregate quantity is 90.

3. As another example of this, two sales occur. In the first sale 500 units are sold at a price of 95 currency units each. In the second sale 400 units are sold at a price of 90 currency units each. In this example, the greatest number of units sold at a particular price is 500; therefore, the unit price in the greatest aggregate quantity is 95.

4. A third example would be the following situation where various quantities are sold at various prices.

(a) Sales

Sale quantity	*Unit price*
40 units	100
30 units	90
15 units	100
50 units	95
25 units	105
35 units	90
5 units	100

(b) Totals

Total quantity sold	*Unit price*
65	90
50	95
60	100
25	105

In this example, the greatest number of units sold at a particular price is 65; therefore, the unit price in the greatest aggregate quantity is 90.

5. Any sale in the importing country, as described in paragraph 1 above, to a person who supplies directly or indirectly free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods any of the elements specified in paragraph 1(b) of Article 8, should not be taken into account in establishing the unit price for the purposes of Article 5.

6. It should be noted that "profit and general expenses" referred to in paragraph 1 of Article 5 should be taken as a whole. The figure for the purposes of this deduction should be determined on the basis of information supplied by or on behalf of the importer unless the importer's figures are inconsistent with those

obtained in sales in the country of importation of imported goods of the same class or kind. Where the importer's figures are inconsistent with such figures, the amount for profit and general expenses may be based upon relevant information other than that supplied by or on behalf of the importer.

7. The "general expenses" include the direct and indirect costs of marketing the goods in question.

8. Local taxes payable by reason of the sale of the goods for which a deduction is not made under the provisions of paragraph 1(a)(iv) of Article 5 shall be deducted under the provisions of paragraph 1(a)(i) of Article 5.

9. In determining either the commissions or the usual profits and general expenses under the provisions of paragraph 1 of Article 5, the question whether certain goods are "of the same class or kind" as other goods must be determined on a case-by-case basis by reference to the circumstances involved. Sales in the country of importation of the narrowest group or range of imported goods of the same class or kind, which includes the goods being valued, for which the necessary information can be provided, should be examined. For the purposes of Article 5, "goods of the same class or kind" includes goods imported from the same country as the goods being valued as well as goods imported from other countries.

10. For the purposes of paragraph 1(b) of Article 5, the "earliest date" shall be the date by which sales of the imported goods or of identical or similar imported goods are made in sufficient quantity to establish the unit price.

11. Where the method in paragraph 2 of Article 5 is used, deductions made for the value added by further processing shall be based on objective and quantifiable data relating to the cost of such work. Accepted industry formulas, recipes, methods of construction, and other industry practices would form the basis of the calculations.

12. It is recognized that the method of valuation provided for in paragraph 2 of Article 5 would normally not be applicable when, as a result of the further processing, the imported goods lose their identity. However, there can be instances where, although the identity of the imported goods is lost, the value added by the processing can be determined accurately without unreasonable difficulty. On the other hand, there can also be instances where the imported goods maintain their identity but form such a minor element in the goods sold in the country of importation that the use of this valuation method would be unjustified. In view of the above, each situation of this type must be considered on a case-by-case basis.

C. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. Article 5.2

7. Paragraph 4 of Annex III allows developing countries to make a reservation with respect to the application of paragraph 2. See interpretation and application of paragraph 4 of Annex III, paragraph 41 below.

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6

1. The customs value of imported goods under the provisions of this Article shall be based on a computed value. Computed value shall consist of the sum of:

(a) the cost or value of materials and fabrication or other processing employed in producing the imported goods;

(b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation;

(c) the cost or value of all other expenses necessary to reflect the valuation option chosen by the Member under paragraph 2 of Article 8.

2. No Member may require or compel any person not resident in its own territory to produce for examination, or to allow access to, any account or other record for the purposes of determining a computed value. However, information supplied by the producer of the goods for the purposes of determining the customs value under the provisions of this Article may be verified in another country by the authorities of the country of importation with the agreement of the producer and provided they give sufficient advance notice to the government of the country in question and the latter does not object to the investigation.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 6

Note to Article 6

1. As a general rule, customs value is determined under this Agreement on the basis of information readily available in the country of importation. In order to determine a computed value, however, it may be necessary to examine the costs of producing the goods being valued and other information which has to be obtained from outside the country of importation. Furthermore, in most cases the producer of the goods will be outside the jurisdiction of the authorities of the country of importation. The use

of the computed value method will generally be limited to those cases where the buyer and seller are related, and the producer is prepared to supply to the authorities of the country of importation the necessary costings and to provide facilities for any subsequent verification which may be necessary.

2. The "cost or value" referred to in paragraph 1(a) of Article 6 is to be determined on the basis of information relating to the production of the goods being valued supplied by or on behalf of the producer. It is to be based upon the commercial accounts of the producer, provided that such accounts are consistent with the generally accepted accounting principles applied in the country where the goods are produced.

3. The "cost or value" shall include the cost of elements specified in paragraphs 1(a)(ii) and (iii) of Article 8. It shall also include the value, apportioned as appropriate under the provisions of the relevant note to Article 8, of any element specified in paragraph 1(b) of Article 8 which has been supplied directly or indirectly by the buyer for use in connection with the production of the imported goods. The value of the elements specified in paragraph 1(b)(iv) of Article 8 which are undertaken in the country of importation shall be included only to the extent that such elements are charged to the producer. It is to be understood that no cost or value of the elements referred to in this paragraph shall be counted twice in determining the computed value.

4. The "amount for profit and general expenses" referred to in paragraph 1(b) of Article 6 is to be determined on the basis of information supplied by or on behalf of the producer unless the producer's figures are inconsistent with those usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation.

5. It should be noted in this context that the "amount for profit and general expenses" has to be taken as a whole. It follows that if, in any particular case, the producer's profit figure is low and the producer's general expenses are high, the producer's profit and general expenses taken together may nevertheless be consistent with that usually reflected in sales of goods of the same class or kind. Such a situation might occur, for example, if a product were being launched in the country of importation and the producer accepted a nil or low profit to offset high general expenses associated with the launch. Where the producer can demonstrate a low profit on sales of the imported goods because of particular commercial circumstances, the producer's actual profit figures should be taken into account provided that the producer has valid commercial reasons to justify them and the producer's pricing policy reflects usual pricing policies in the branch of industry concerned. Such a situation might occur, for example, where producers have been forced to lower prices temporarily because of an unforeseeable drop in demand, or where they sell goods to complement a range of goods being produced in the country of importation and accept a low profit to maintain competitivity. Where the producer's own figures for profit and general expenses are not consistent with those usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation, the amount for profit and general expenses may be based upon relevant information other than that supplied by or on behalf of the producer of the goods.

6. Where information other than that supplied by or on behalf of the producer is used for the purposes of determining a computed value, the authorities of the importing country shall inform the importer, if the latter so requests, of the source of such information, the data used and the calculations based upon such data, subject to the provisions of Article 10.

7. The "general expenses" referred to in paragraph 1(b) of Article 6 covers the direct and indirect costs of producing and selling the goods for export which are not included under paragraph 1(a) of Article 6.

8. Whether certain goods are "of the same class or kind" as other goods must be determined on a case-by-case basis with reference to the circumstances involved. In determining the usual profits and general expenses under the provisions of Article 6, sales for export to the country of importation of the narrowest group or range of goods, which includes the goods being valued, for which the necessary information can be provided, should be examined. For the purposes of Article 6, "goods of the same class or kind" must be from the same country as the goods being valued.

C. INTERPRETATION AND APPLICATION OF ARTICLE 6

No jurisprudence or decision of a competent WTO body.

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7

1. If the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6, inclusive, the customs value shall be determined using reasonable means consistent with the principles and general provisions of this Agreement and of Article VII of GATT 1994 and on the basis of data available in the country of importation.

2. No customs value shall be determined under the provisions of this Article on the basis of:

(a) the selling price in the country of importation of goods produced in such country;

(b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;

(c) the price of goods on the domestic market of the country of exportation;

(d) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6;

(e) the price of the goods for export to a country other than the country of importation;

(f) minimum customs values; or

(g) arbitrary or fictitious values.

3. If the importer so requests, the importer shall be informed in writing of the customs value determined under the provisions of this Article and the method used to determine such value.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 7

Note to Article 7

1. Customs values determined under the provisions of Article 7 should, to the greatest extent possible, be based on previously determined customs values.

2. The methods of valuation to be employed under Article 7 should be those laid down in Articles 1 through 6 but a reasonable flexibility in the application of such methods would be in conformity with the aims and provisions of Article 7.

3. Some examples of reasonable flexibility are as follows:

(a) *Identical goods* – the requirement that the identical goods should be exported at or about the same time as the goods being valued could be flexibly interpreted; identical imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of identical imported goods already determined under the provisions of Articles 5 and 6 could be used.

(b) *Similar goods* – the requirement that the similar goods should be exported at or about the same time as the goods being valued could be flexibly interpreted; similar imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of similar imported goods already determined under the provisions of Articles 5 and 6 could be used.

(c) *Deductive method* – the requirement that the goods shall have been sold in the "condition as imported" in paragraph 1(a) of Article 5 could be flexibly interpreted; the "90 days" requirement could be administered flexibly.

C. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. Article 7.2(f)

8. Developing countries can suspend the application of this paragraph making a reservation to established minimum values, in accordance with paragraph 2 of Annex III. See below interpretation and application of paragraph 2 of Annex III, paragraphs 38–39 below.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8

1. In determining the customs value under the provisions of Article 1, there shall be added to the price actually paid or payable for the imported goods:

(a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:

(i) commissions and brokerage, except buying commissions;

(ii) the cost of containers which are treated as being one for customs purposes with the goods in question;

(iii) the cost of packing whether for labour or materials;

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:

(i) materials, components, parts and similar items incorporated in the imported goods;

(ii) tools, dies, moulds and similar items used in the production of the imported goods;

(iii) materials consumed in the production of the imported goods;

(iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the country of importation and necessary for the production of the imported goods;

(c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller.

2. In framing its legislation, each Member shall provide for the inclusion in or the exclusion from the customs value, in whole or in part, of the following:

(a) the cost of transport of the imported goods to the port or place of importation;

(b) loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation; and

(c) the cost of insurance.

3. Additions to the price actually paid or payable shall be made under this Article only on the basis of objective and quantifiable data.

4. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 8

Note to Article 8

Paragraph 1(a)(i)

The term "buying commissions" means fees paid by an importer to the importer's agent for the service of representing the importer abroad in the purchase of the goods being valued.

Paragraph 1(b)(ii)

1. There are two factors involved in the apportionment of the elements specified in paragraph 1(b)(ii) of Article 8 to the imported goods – the value of the element itself and the way in which that value is to be apportioned to the imported goods. The apportionment of these elements should be made in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles.

2. Concerning the value of the element, if the importer acquires the element from a seller not related to the importer at a given cost, the value of the element is that cost. If the element was produced by the importer or by a person related to the importer, its value would be the cost of producing it. If the element had been previously used by the importer, regardless of whether it had been acquired or produced by such importer, the original cost of acquisition or production would have to be adjusted downward to reflect its use in order to arrive at the value of the element.

3. Once a value has been determined for the element, it is necessary to apportion that value to the imported goods. Various possibilities exist. For example, the value might be apportioned to the first shipment if the importer wishes to pay duty on the entire value at one time. As another example, the importer may request that the value be apportioned over the number of units produced up to the time of the first shipment. As a further example, the importer may request that the value be apportioned over the entire anticipated production where contracts or firm commitments exist for that production. The method of apportionment used will depend upon the documentation provided by the importer.

4. As an illustration of the above, an importer provides the producer with a mould to be used in the production of the imported goods and contracts with the producer to buy 10,000 units. By the time of arrival of the first shipment of 1,000 units, the producer has already produced 4,000 units. The importer may request the customs administration to apportion the value of the mould over 1,000 units, 4,000 units or 10,000 units.

Paragraph 1(b)(iv)

1. Additions for the elements specified in paragraph 1(b)(iv) of Article 8 should be based on objective and quantifiable data. In order to minimize the burden for both the importer and customs administration in determining the values to be added, data readily available in the buyer's commercial record system should be used in so far as possible.

2. For those elements supplied by the buyer which were purchased or leased by the buyer, the addition would be the cost of the purchase or the lease. No addition shall be made for those elements available in the public domain, other than the cost of obtaining copies of them.

3. The ease with which it may be possible to calculate the values to be added will depend on a particular firm's structure and management practice, as well as its accounting methods.

4. For example, it is possible that a firm which imports a variety of products from several countries maintains the records of its design centre outside the country of importation in such a way as to show accurately the costs attributable to a given product. In such cases, a direct adjustment may appropriately be made under the provisions of Article 8.

5. In another case, a firm may carry the cost of the design centre outside the country of importation as a general overhead expense without allocation to specific products. In this instance, an appropriate adjustment could be made under the provisions of Article 8 with

respect to the imported goods by apportioning total design centre costs over total production benefiting from the design centre and adding such apportioned cost on a unit basis to imports.

6. Variations in the above circumstances will, of course, require different factors to be considered in determining the proper method of allocation.

7. In cases where the production of the element in question involves a number of countries and over a period of time, the adjustment should be limited to the value actually added to that element outside the country of importation.

Paragraph 1(c)

1. The royalties and licence fees referred to in paragraph 1(c) of Article 8 may include, among other things, payments in respect to patents, trade marks and copyrights. However, the charges for the right to reproduce the imported goods in the country of importation shall not be added to the price actually paid or payable for the imported goods in determining the customs value.

2. Payments made by the buyer for the right to distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments are not a condition of the sale for export to the country of importation of the imported goods.

Paragraph 3

Where objective and quantifiable data do not exist with regard to the additions required to be made under the provisions of Article 8, the transaction value cannot be determined under the provisions of Article 1. As an illustration of this, a royalty is paid on the basis of the price in a sale in the importing country of a litre of a particular product that was imported by the kilogram and made up into a solution after importation. If the royalty is based partially on the imported goods and partially on other factors which have nothing to do with the imported goods (such as when the imported goods are mixed with domestic ingredients and are no longer separately identifiable, or when the royalty cannot be distinguished from special financial arrangements between the buyer and the seller), it would be inappropriate to attempt to make an addition for the royalty. However, if the amount of this royalty is based only on the imported goods and can be readily quantified, an addition to the price actually paid or payable can be made.

C. INTERPRETATION AND APPLICATION OF ARTICLE 8

1. Article 8.1

(a) Treatment of interest charges in the customs value of imported goods

9. At its meeting of 12 May 1995, the Committee on Customs Valuation adopted the decision of the Tokyo Round Committee on Customs Valuation relating to the treatment of interest charges in the customs value of imported goods.[5]

(b) Article 8.1(b)(iv)

10. At its meeting of 12 May 1995, the Committee on Customs Valuation adopted the decision of the Tokyo Round Committee on Customs Valuation relating to the interpretation of the term "undertaken" used in Article 8.1(b)(iv).[6]

11. At the same meeting, the Committee on Customs Valuation adopted the decision of the Tokyo Round Committee on Customs Valuation relating to the linguistic consistency of the item "development" in Article 8.1(b)(iv).[7]

X. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9

1. Where the conversion of currency is necessary for the determination of the customs value, the rate of exchange to be used shall be that duly published by the competent authorities of the country of importation concerned and shall reflect as effectively as possible, in respect of the period covered by each such document of publication, the current value of such currency in commercial transactions in terms of the currency of the country of importation.

2. The conversion rate to be used shall be that in effect at the time of exportation or the time of importation, as provided by each Member.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 9

Note to Article 9

For the purposes of Article 9, "time of importation" may include the time of entry for customs purposes.

C. INTERPRETATION AND APPLICATION OF ARTICLE 9

No jurisprudence or decision of a competent WTO body.

[5] G/VAL/M/1, paras. 66–67; see also G/VAL/W/1, Section A.3. The text of the decision can be found in G/VAL/5, Section A.3.
[6] G/VAL/M/1, paras. 66–67; see also G/VAL/W/1, Section A.1. The text of the decision can be found in G/VAL/5, Section A.1.
[7] G/VAL/M/1, paras. 66–67; see also G/VAL/W/1, Section A.2. The text of the decision can be found in G/VAL/5, Section A.2.

XI. ARTICLE 10

A. TEXT OF ARTICLE 10

Article 10

All information which is by nature confidential or which is provided on a confidential basis for the purposes of customs valuation shall be treated as strictly confidential by the authorities concerned who shall not disclose it without the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

B. INTERPRETATION AND APPLICATION OF ARTICLE 10

No jurisprudence or decision of a competent WTO body.

XII. ARTICLE 11

A. TEXT OF ARTICLE 11

Article 11

1. The legislation of each Member shall provide in regard to a determination of customs value for the right of appeal, without penalty, by the importer or any other person liable for the payment of the duty.

2. An initial right of appeal without penalty may be to an authority within the customs administration or to an independent body, but the legislation of each Member shall provide for the right of appeal without penalty to a judicial authority.

3. Notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of any rights of further appeal.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 11

Note to Article 11

1. Article 11 provides the importer with the right to appeal against a valuation determination made by the customs administration for the goods being valued. Appeal may first be to a higher level in the customs administration, but the importer shall have the right in the final instance to appeal to the judiciary.

2. "Without penalty" means that the importer shall not be subject to a fine or threat of fine merely because the importer chose to exercise the right of appeal. Payment of normal court costs and lawyers' fees shall not be considered to be a fine.

3. However, nothing in Article 11 shall prevent a Member from requiring full payment of assessed customs duties prior to an appeal.

C. INTERPRETATION AND APPLICATION OF ARTICLE 11

No jurisprudence or decision of a competent WTO body.

XIII. ARTICLE 12

A. TEXT OF ARTICLE 12

Article 12

Laws, regulations, judicial decisions and administrative rulings of general application giving effect to this Agreement shall be published in conformity with Article X of GATT 1994 by the country of importation concerned.

B. INTERPRETATION AND APPLICATION OF ARTICLE 12

No jurisprudence or decision of a competent WTO body.

XIV. ARTICLE 13

A. TEXT OF ARTICLE 13

Article 13

If, in the course of determining the customs value of imported goods, it becomes necessary to delay the final determination of such customs value, the importer of the goods shall nevertheless be able to withdraw them from customs if, where so required, the importer provides sufficient guarantee in the form of a surety, a deposit or some other appropriate instrument, covering the ultimate payment of customs duties for which the goods may be liable. The legislation of each Member shall make provisions for such circumstances.

B. INTERPRETATION AND APPLICATION OF ARTICLE 13

12. In *US – Certain EC Products*, the Panel examined whether the increased bonding requirements imposed by the United States on certain products imported from the European Communities were consistent with, among others, Article II of *GATT 1994* and certain provisions in the *DSU*. The United States put forward Article 13 of the *Customs Valuation Agreement* as a defence, arguing "that the non-compliance of the European Communities [with a certain DSB recommendation] created a risk, which allowed the United States to have concerns over its ability to collect the full amount of duties which might be due"[8], and that the increased bonding requirements were consistent with that Article. The Panel stated as follows:

> "In the present dispute the United States is not claiming that, as of 3 March, it required additional guarantees

[8] Panel Report on *US – Certain EC Products*, para. 6.75.

because the customs value of the EC listed imports had increased or changed on 3 March 1999. In the present dispute, there is no disagreement between the parties on the customs value of the EC listed imports. Article 13 of the Customs Valuation Agreement allows for a guarantee system when there is uncertainty regarding the customs value of the imported products, but is not concerned with the level of tariff obligations as such. Article 13 of the Customs Valuation Agreement does not authorise changes in the applicable tariff levels between the moment imports arrive at a US port of entry and a later date once imports have entered the US market. As we discuss further below, the applicable tariff (the applicable WTO obligation, the applicable law for that purpose), must be the one in force on the day of importation, the day the tariff is applied. In other words, Article 13 of the Customs Valuation Agreement is of no relevance to the present dispute. We reject, therefore, this US defense."[9]

XV. ARTICLE 14

A. TEXT OF ARTICLE 14

Article 14

The notes at Annex I to this Agreement form an integral part of this Agreement and the Articles of this Agreement are to be read and applied in conjunction with their respective notes. Annexes II and III also form an integral part of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 14

13. The text of Annex I is contained in Sections II.B, III.B, IV.B, VI.B, VII.B, VIII.B, IX.B, X.B, XII.B, and XXVI.A. With respect to the interpretation and application of Annex I, see the respective sections referring to paragraphs of Annex I.

14. With respect to Annex II, see Section XXVII.A below.

15. With respect to Annex III, Section XXVIII.A below.

XVI. ARTICLE 15

A. TEXT OF ARTICLE 15

Article 15

1. In this Agreement:

   (a) "customs value of imported goods" means the value of goods for the purposes of levying ad valorem duties of customs on imported goods;

   (b) "country of importation" means country or customs territory of importation; and

   (c) "produced" includes grown, manufactured and mined.

2. In this Agreement:

   (a) "identical goods" means goods which are the same in all respects, including physical characteristics, quality and reputation. Minor differences in appearance would not preclude goods otherwise conforming to the definition from being regarded as identical;

   (b) "similar goods" means goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable. The quality of the goods, their reputation and the existence of a trademark are among the factors to be considered in determining whether goods are similar;

   (c) the terms "identical goods" and "similar goods" do not include, as the case may be, goods which incorporate or reflect engineering, development, artwork, design work, and plans and sketches for which no adjustment has been made under paragraph 1(b)(iv) of Article 8 because such elements were undertaken in the country of importation;

   (d) goods shall not be regarded as "identical goods" or "similar goods" unless they were produced in the same country as the goods being valued;

   (e) goods produced by a different person shall be taken into account only when there are no identical goods or similar goods, as the case may be, produced by the same person as the goods being valued.

3. In this Agreement "goods of the same class or kind" means goods which fall within a group or range of goods produced by a particular industry or industry sector, and includes identical or similar goods.

4. For the purposes of this Agreement, persons shall be deemed to be related only if:

   (a) they are officers or directors of one another's businesses;

   (b) they are legally recognized partners in business;

   (c) they are employer and employee;

   (d) any person directly or indirectly owns, controls or holds 5 per cent or more of the outstanding voting stock or shares of both of them;

   (e) one of them directly or indirectly controls the other;

[9] Panel Report on *US – Certain EC Products*, para. 6.77.

(f) both of them are directly or indirectly controlled by a third person;

(g) together they directly or indirectly control a third person; or

(h) they are members of the same family.

5. Persons who are associated in business with one another in that one is the sole agent, sole distributor or sole concessionaire, however described, of the other shall be deemed to be related for the purposes of this Agreement if they fall within the criteria of paragraph 4.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 15

Note to Article 15
Paragraph 4

For the purposes of Article 15, the term "persons" includes a legal person, where appropriate.

Paragraph 4(e)

For the purposes of this Agreement, one person shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

C. INTERPRETATION AND APPLICATION OF ARTICLE 15

No jurisprudence or decision of a competent WTO body.

XVII. ARTICLE 16

A. TEXT OF ARTICLE 16

Article 16

Upon written request, the importer shall have the right to an explanation in writing from the customs administration of the country of importation as to how the customs value of the importer's goods was determined.

B. INTERPRETATION AND APPLICATION OF ARTICLE 16

No jurisprudence or decision of a competent WTO body.

XVIII. ARTICLE 17

A. TEXT OF ARTICLE 17

Article 17

Nothing in this Agreement shall be construed as restricting or calling into question the rights of customs administrations to satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.

B. INTERPRETATION AND APPLICATION OF ARTICLE 17

16. Pursuant to the Ministerial mandate at Marrakesh, at its meeting of 12 May 1995, the Committee on Customs Valuation adopted the following decision:[10]

"**Decision regarding cases where Customs Administrations have reasons to doubt the truth or accuracy of the declared value**

Ministers invite the Committee on Customs Valuation established under the Agreement on Implementation of Article VII of GATT 1994 to take the following decision:

The Committee on Customs Valuation,

Reaffirming that the transaction value is the primary basis of valuation under the Agreement on Implementation of Article VII of GATT 1994 (hereinafter referred to as the 'Agreement');

Recognizing that the customs administration may have to address cases where it has reason to doubt the truth or accuracy of the particulars or of documents produced by traders in support of a declared value;

Emphasizing that in so doing the customs administration should not prejudice the legitimate commercial interests of traders;

Taking into account Article 17 of the Agreement, paragraph 6 of Annex III to the Agreement, and the relevant decisions of the Technical Committee on Customs Valuation;

Decides as follows:

1. When a declaration has been presented and where the customs administration has reason to doubt the truth or accuracy of the particulars or of documents produced in support of this declaration, the customs administration may ask the importer to provide further explanation, including documents or other evidence, that the declared value represents the total amount actually paid or payable for the imported goods, adjusted in accordance with the provisions of Article 8. If, after receiving further information, or in the absence of a response, the customs administration still has reasonable doubts about the truth or accuracy of the declared value, it may, bearing in mind the provisions of Article 11, be deemed that the customs value of the imported goods cannot be determined under the provisions of Article 1. Before taking a final decision, the customs administration shall communicate to the importer, in writing if requested, its grounds for doubting the truth or accuracy of the particulars or documents produced and the importer shall be given a reasonable opportunity to respond. When a final decision is made, the customs

[10] G/VAL/M/1, Section F. The text of the decision can be found in G/VAL/1.

administration shall communicate to the importer in writing its decision and the grounds therefor.

2. It is entirely appropriate in applying the Agreement for one Member to assist another Member on mutually agreed terms."

17. Further to this Decision, at the Doha Ministerial Conference Members decided that the Agreement on the Implementation of Article VII of GATT 1994:

"[U]nderlines the importance of strengthening cooperation between the customs administrations of Members in the prevention of customs fraud. In this regard, it is agreed that, further to the 1994 Ministerial Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value, when the customs administration of an importing Member has reasonable grounds to doubt the truth of accuracy of the declared value, it may seek assistance from the customs administration of an exporting Member shall offer cooperation and assistance, consistent with its domestic laws and procedures, including furnishing information on the export value of the good concerned. Any information provided in this context shall be treated in accordance with Article 10 of the Customs Valuation Agreement. Furthermore, recognizing the legitimate concerns expressed by the customs administrations of several importing Members on the accuracy of the declared value, the Committee on customs Valuation is directed to identify and assess practical means to address such concerns, including the exchange of information on export values and to report to the General Council by the end of 2002 at the latest."[11]

18. At its meeting on 10–12 and 20 December 2002, the General Council took note of the report of the Customs Valuation Committee[12], and authorized the Committee to continue its work under the existing mandate[13] and to report to the General Council when it had completed this work.

PART II
ADMINISTRATION, CONSULTATIONS AND DISPUTE SETTLEMENT

XIX. ARTICLE 18

A. TEXT OF ARTICLE 18

Article 18
Institutions

1. There is hereby established a Committee on Customs Valuation (referred to in this Agreement as "the Committee") composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall normally meet once a year, or as is otherwise envisaged by the relevant provisions of this Agreement, for the purpose of affording Members the opportunity to consult on matters relating to the administration of the customs valuation system by any Member as it might affect the operation of this Agreement or the furtherance of its objectives and carrying out such other responsibilities as may be assigned to it by the Members. The WTO Secretariat shall act as the secretariat to the Committee.

2. There shall be established a Technical Committee on Customs Valuation (referred to in this Agreement as "the Technical Committee") under the auspices of the Customs Co-operation Council (referred to in this Agreement as "the CCC"), which shall carry out the responsibilities described in Annex II to this Agreement and shall operate in accordance with the rules of procedure contained therein.

B. INTERPRETATION AND APPLICATION OF ARTICLE 18

1. Article 18.1

(a) Observer status

19. With respect to observer status in meetings of the Committee on Customs Valuation, see Chapter on the *WTO Agreement*, Section V.B.6.[14]

20. At its meeting of 12 May 1995, the Committee on Customs Valuation agreed on observership in its meetings.[15]

(b) Rules of procedure

21. On 1 December 1995, the Council for Trade in Goods approved the Rules of Procedure for meetings of the Committee on Customs Valuation adopted by the Committee on Customs Valuation.[16]

22. The Committee on Customs Valuation reports to the Council for Trade in Goods on an annual basis.[17]

(c) Monitoring of the Agreement on Preshipment Inspection

23. At its meeting of 15 June 1999, the General Council adopted the recommendation of the Working Party on Preshipment Inspection[18] that the future monitoring

[11] WT/MIN(01)/17, paragraph 8.3.
[12] G/VAL/50.
[13] WT/GC/70, paragraph 1.i).
[14] In April 1997, the Committee on Customs Valuation granted regular observer status to those organizations which had observer status on an ad hoc basis, see G/VAL/M/5.
[15] G/VAL/M/1, Sections D and E.
[16] G/C/M/7. The text of the adopted rules of procedure can be found in G/L/146.
[17] The reports are contained in documents G/L/55, 121, 205, 323, 414, 488, 590, 654 and 718.
[18] WT/GC/M/40/Add.3, section 5. The text of the recommendation can be found in G/L/300, para. 23.

of the *Agreement on Preshipment Inspection* should be undertaken initially by the Committee on Customs Valuation, and that Preshipment Inspection should be a standing item on its agenda.

XX. ARTICLE 19

A. TEXT OF ARTICLE 19

Article 19
Consultations and Dispute Settlement

1. Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

2. If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective of this Agreement is being impeded, as a result of the actions of another Member or of other Members, it may, with a view to reaching a mutually satisfactory solution of this matter, request consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultations.

3. The Technical Committee shall provide, upon request, advice and assistance to Members engaged in consultations.

4. At the request of a party to the dispute, or on its own initiative, a panel established to examine a dispute relating to the provisions of this Agreement may request the Technical Committee to carry out an examination of any questions requiring technical consideration. The panel shall determine the terms of reference of the Technical Committee for the particular dispute and set a time period for receipt of the report of the Technical Committee. The panel shall take into consideration the report of the Technical Committee. In the event that the Technical Committee is unable to reach consensus on a matter referred to it pursuant to this paragraph, the panel should afford the parties to the dispute an opportunity to present their views on the matter to the panel.

5. Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of this information, authorized by the person, body or authority providing the information, shall be provided.

B. INTERPRETATION AND APPLICATION OF ARTICLE 19

24. The following table lists the dispute in which the panel and Appellate Body reports have been adopted where the provisions of the *Customs Valuation Agreement* were invoked:

	Case Name	Case Number	Invoked Articles
1	*US – Certain EC Products*	WT/DS165	Article 13

PART III
SPECIAL AND DIFFERENTIAL TREATMENT

XXI. ARTICLE 20

A. TEXT OF ARTICLE 20

Article 20

1. Developing country Members not party to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade done on 12 April 1979 may delay application of the provisions of this Agreement for a period not exceeding five years from the date of entry into force of the WTO Agreement for such Members. Developing country Members who choose to delay application of this Agreement shall notify the Director-General of the WTO accordingly.

2. In addition to paragraph 1, developing country Members not party to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade done on 12 April 1979 may delay application of paragraph 2(b)(iii) of Article 1 and Article 6 for a period not exceeding three years following their application of all other provisions of this Agreement. Developing country Members that choose to delay application of the provisions specified in this paragraph shall notify the Director-General of the WTO accordingly.

3. Developed country Members shall furnish, on mutually agreed terms, technical assistance to developing country Members that so request. On this basis developed country Members shall draw up programmes of technical assistance which may include, *inter alia,* training of personnel, assistance in preparing implementation measures, access to sources of information regarding customs valuation methodology, and advice on the application of the provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 20

1. General

25. At its meeting of 31 January 1995, the General Council took a decision on the Continued Application under the WTO Customs Valuation Agreement of Invocations of Provisions for Developing Countries for Delayed Application and Reservations under the Customs Valuation Agreement 1979.[19]

[19] WT/GC/M/1, section 11. The text of the adopted decision can be found in WT/L/38.

26. At its meeting of 12 May 1995, the Committee on Customs Valuation agreed to continue the practice established by the Tokyo Round Committee on Information on Technical Assistance, in order to ensure transparency on technical assistance activities.[20]

2. Article 20.1

27. Pursuant to paragraph 1 of Article 20, 58 developing country Members, which were not party to the 1979 Agreement on Implementation of Article VII of the GATT, requested a five-year delay of the application of the WTO Customs Valuation Agreement. This five-year delay was computed from the date of entry into force of the *WTO Agreement* for each of the Members concerned.[21] However, 22 Members requested a further extension of this five-year period pursuant to paragraph 1 of Annex III. The length of this additional extension varied by Member.[22]

28. At its meeting of 15 December 2000, the General Council adopted a decision concerning implementation-related issues and concerns in respect of several WTO Agreements.[23] With respect to the *Customs Valuation Agreement*, the General Council decided:

> "Noting that the process of examination and approval, in the Customs Valuation Committee, of individual requests from Members for extension of the five-year delay period in Article 20.1 is proceeding well, the General Council encourages the Committee to continue this work."[24]

3. Article 20.2

29. Pursuant to paragraph 2 of Article 20, 51 developing country Members delayed application of paragraph 2(b)(ii) of Article 1 and of Article 6 for three years from the date of entry into force of the WTO Agreement for each of them.[25]

4. Article 20.3

30. At its meeting on 24 July 2001 the Committee agreed on resuming its work on technical assistance in response to a proposal from the European Communities and adopted its work programme on technical assistance[26]. On 26 February 2002, the Committee decided

[20] G/VAL/M/1, para. 80–81; see also G/VAL/W/1, Section B.7. The text of the agreement can be found in G/VAL/5, Section B.4. Its revisions can be found in G/VAL/8.

[21] These 58 developing Members which requested a five-year extension were: Bahrain, Bangladesh, Benin, Bolivia, Brunei Darussalam, Burkina Faso, Burundi, Cameroon, Central Africa Republic, Chad, Chile, Colombia, Costa Rica, Côte d'Ivoire, Cuba, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Gabon, Ghana, Guatemala, Guyana, Haiti, Honduras, Indonesia, Israel, Jamaica, Kenya, Kuwait, Madagascar, Malaysia, Mali, Maldives, Malta, Mauritania, Mauritius, Morocco, Myanmar, Nicaragua, Nigeria, Pakistan, Paraguay, Peru, Philippines, Senegal, Singapore, Sri Lanka, Thailand, Togo, Tunisia, Uganda, United Arab Emirates, Uruguay, Venezuela, Zambia. On 25 April 2002 none of them maintained this special and differential treatment provision, G/L/590 pf 5. See G/VAL/W/3, 13, 22, 29, 43, 77, 89, 108, 124, 136 and G/VAL/2/Rev.19.

[22] The following eight Members, for which the five-year delay period expired before or on 1 January 2000, requested an additional extension pursuant to paragraph 1 of Annex III: (i) Bahrain (requested three years (consultation pending) – G/VAL/W/57 and Adds.1–4); (ii) Côte d'Ivoire (requested five years, extension granted for 18 months (expired 01.07.01) – G/VAL/32); (iii) Kuwait (requested two years, extension granted for one year (expired 01.01.01) – G/VAL/18); (iv) Myanmar (requested five years, extension granted for two years (expired on 01.01.02) – G/VAL/28); (v) Paraguay (requested two years, extension granted for one year (expired 01.01.01) – G/VAL/17/Rev.1); (vi) Senegal (requested five years, extension granted for six months (expired 30.06.01) – G/VAL/39); (vii) Sri Lanka (requested one year, extension granted for one year – G/VAL/23, requested second year extension, granted for 10 months – G/VAL/41, requested third extension, granted for 6 months to 30.04.02 – G/VAL/42, requested fourth extension, granted for six months to 31.10.02 – G/L/46, requested fifth extension, four months expired 28.02.03); and (viii) Tanzania (extension granted for one year (expired 01.01.01) – G/VAL/19). Also, the following 14 Members, for which this delay period expired during 2000 and 2001, requested extension: (i) Bolivia (requested two years, extension granted for 15 months (expired 31.12.01) – G/VAL/37); (ii) Burundi (requested two years, extension granted for two years to 01.08.02 – G/VAL/38); (iii) Cameroon (requested six months – G/VAL/W/80, G/C/W/245 and Add.1 – granted for six months (expired 01.07.01) – WT/L/396); (iv) Dominican Republic (requested two years, extension granted for 16 months (expired 01.07.01) – G/VAL/22); (v) El Salvador (requested two years, extension granted for 16 months (expired 07.09.01) – G/VAL/30); (vi) Egypt (requested three years, extension granted for one year (expired 30.06.01) – G/VAL/31); (vii) Guatemala (requested two years, extension granted for 16 months (expired 21.11.01) – G/VAL/33); (viii) Haiti (requested three years, extension granted for two years to 30.01.03 – G/C/W/256 and Rev.1, was granted by the General Council as Article IX waiver – WT/L/439); (ix) Jamaica (requested one year extension, extension granted for one year (expired 09.03.01) – G/VAL/24); (x) Mauritania (requested three years, extension granted for two years to 31.05.02– G/VAL/29); (xi) Maldives (requested two years, extension granted for two years to 31.05.02– G/VAL/35); (xii) Rwanda (requested three years – G/VAL/W/84); (xiii) Tunisia (requested three years, extension granted for 18 months (expired 28.09.01) – G/VAL/27); and (xiv) United Arab Emirates (expired 01.01.04,, G/VAL/55). On 21 October 2004, no Member had either requested an extension or maintained an extension under Annex III, paragraph 1.

[23] WT/GC/M/62, para. 17. The text of the decision can be found in WT/L/384. *See also* Chapter on *WTO Agreement*, refer to the text on Articles IV:1, IV:2 and IX:1 of the *WTO* on the powers of the General Council more generally.

[24] WT/L/384, para. 4.

[25] Members requesting an extension were: Bahrain, Bangladesh, Bolivia, Brunei Darussalam, Burkina Faso, Burundi, Cameroon, Chile, Colombia, Costa Rica, Côte d'Ivoire, Djibouti, Dominican Republic, Egypt, Ecuador, El Salvador, Gabon, Guatemala, Guyana, Haiti, Honduras, Indonesia, Israel, Jamaica, Kenya, Kuwait, Madagascar, Malaysia, Mali, Malta, Mauritania, Mexico, Morocco, Myanmar, Nicaragua, Nigeria, Pakistan, Peru, Philippines, Senegal, Singapore, Sri Lanka, Tanzania, Thailand, Togo, Tunisia, Turkey, United Arab Emirates, Uruguay, Venezuela, Zambia. See G/VAL/W/3, 13, 22, 29, 43, 77, 89, 108, 124, and 136.

[26] G/VAL/M/21. The technical assistance programme, which started in May 1997, was created with a view to enhancing the capacity of developing countries to implement and to administer the Agreement on Customs Valuation. It was a demand-driven programme. The activities in the early years "focused on improving awareness and understanding of the activities already carried out or being carried out by international organizations and Members either bilaterally or regionally"; G/VAL/W/70. The new phase of the programme is oriented on promoting the coordination and cooperation between providers and donors; G/VAL/W/82/Rev.1.

to start its work programme with a seminar on technical assistance[27].

5. Annex III

31. The special and differential treatment for developing countries in respect of the application of Customs Valuation Agreement is also developed in Annex III. See Section XXVII below.

PART IV
FINAL PROVISIONS

XXII. ARTICLE 21

A. TEXT OF ARTICLE 21

Article 21
Reservations

Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

B. INTERPRETATION AND APPLICATION OF ARTICLE 21

32. At its meeting on 12 May 1995, the Committee on Customs Valuation adopted the decisions of the Tokyo Round Committee on Customs Valuation on reservations.[28]

XXIII. ARTICLE 22

A. TEXT OF ARTICLE 22

Article 22
National Legislation

1. Each Member shall ensure, not later than the date of application of the provisions of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement.

2. Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

B. INTERPRETATION AND APPLICATION OF ARTICLE 22

1. General

(a) Notification

33. At its meeting on 12 May 1995, the Committee on Customs Valuation agreed to adopt for all WTO Members the procedures regarding notification and circulation of national legislation that had been in use by the Tokyo Round Committee on Customs Valuation.[29]

(b) Checklist of Issues

34. As the basis of an initial examination of national legislation, the Committee on Customs Valuation agreed to adopt the checklist of issues elaborated by the Tokyo Round Committee on Customs Valuation.[30] It also decided that in the cases of Members who were Tokyo Round signatories and whose legislation had already been examined, a communication from those Members could be sent to the Secretariat indicating that their responses to the Checklist of Issues remained valid under the WTO Customs Valuation Agreement.[31]

XXIV. ARTICLE 23

A. TEXT OF ARTICLE 23

Article 23
Review

The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the Council for Trade in Goods of developments during the period covered by such reviews[32].

B. INTERPRETATION AND APPLICATION OF ARTICLE 23

No jurisprudence or decision of a competent WTO body.

XXV. ARTICLE 24

A. TEXT OF ARTICLE 24

Article 24
Secretariat

This Agreement shall be serviced by the WTO Secretariat except in regard to those responsibilities specifically assigned to the Technical Committee, which will be serviced by the CCC Secretariat.

B. INTERPRETATION AND APPLICATION OF ARTICLE 24

No jurisprudence or decision of a competent WTO body.

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[27] The seminar was held in Geneva on 6–7 November 2002; G/VAL/47/Rev.2.
[28] G/VAL/M/1, paras. 75–76; see also G/VAL/W/1, Section B.4. The text of the decisions can be found in G/VAL/5, Section B.1.
[29] G/VAL/M/1, Section I; see also G/VAL/W/1, Section B.5. The text of the decisions can be found in G/VAL/5, Section B.2.
[30] G/VAL/M/1, Section I; see also G/VAL/W/1, Section B.6. The text of the decisions can be found in G/VAL/5, Section B.3.
[31] G/VAL/M/1, paras. 36–38.
[32] See above footnote 17.

XXVI. ANNEX I

A. TEXT OF ANNEX I

ANNEX I
INTERPRETATIVE NOTES

General Note

Sequential Application of Valuation Methods

1. Articles 1 through 7 define how the customs value of imported goods is to be determined under the provisions of this Agreement. The methods of valuation are set out in a sequential order of application. The primary method for customs valuation is defined in Article 1 and imported goods are to be valued in accordance with the provisions of this Article whenever the conditions prescribed therein are fulfilled.

2. Where the customs value cannot be determined under the provisions of Article 1, it is to be determined by proceeding sequentially through the succeeding Articles to the first such Article under which the customs value can be determined. Except as provided in Article 4, it is only when the customs value cannot be determined under the provisions of a particular Article that the provisions of the next Article in the sequence can be used.

3. If the importer does not request that the order of Articles 5 and 6 be reversed, the normal order of the sequence is to be followed. If the importer does so request but it then proves impossible to determine the customs value under the provisions of Article 6, the customs value is to be determined under the provisions of Article 5, if it can be so determined.

4. Where the customs value cannot be determined under the provisions of Articles 1 through 6 it is to be determined under the provisions of Article 7.

Use of Generally Accepted Accounting Principles

1. "Generally accepted accounting principles" refers to the recognized consensus or substantial authoritative support within a country at a particular time as to which economic resources and obligations should be recorded as assets and liabilities, which changes in assets and liabilities should be recorded, how the assets and liabilities and changes in them should be measured, what information should be disclosed and how it should be disclosed, and which financial statements should be prepared. These standards may be broad guidelines of general application as well as detailed practices and procedures.

2. For the purposes of this Agreement, the customs administration of each Member shall utilize information prepared in a manner consistent with generally accepted accounting principles in the country which is appropriate for the Article in question. For example, the determination of usual profit and general expenses under the provisions of Article 5 would be carried out utilizing information prepared in a manner consistent with generally accepted accounting principles of the country of importation. On the other hand, the determination of usual profit and general expenses under the provisions of Article 6 would be carried out utilizing information prepared in a manner consistent with generally accepted accounting principles of the country of production. As a further example, the determination of an element provided for in paragraph 1(b)(ii) of Article 8 undertaken in the country of importation would be carried out utilizing information in a manner consistent with the generally accepted accounting principles of that country.

. . .

B. INTERPRETATION AND APPLICATION OF ANNEX I

35. See Sections II.B, III.B, IV.B, VI.B, VII.B, VIII.B, IX.B, X.B, XII.B, and XVI.B which contain the respective parts of Annex I.

XXVII. ANNEX II

A. TEXT OF ANNEX II

ANNEX II
TECHNICAL COMMITTEE ON CUSTOMS VALUATION

1. In accordance with Article 18 of this Agreement, the Technical Committee shall be established under the auspices of the CCC with a view to ensuring, at the technical level, uniformity in interpretation and application of this Agreement.

2. The responsibilities of the Technical Committee shall include the following:

(a) to examine specific technical problems arising in the day-to-day administration of the customs valuation system of Members and to give advisory opinions on appropriate solutions based upon the facts presented;

(b) to study, as requested, valuation laws, procedures and practices as they relate to this Agreement and to prepare reports on the results of such studies;

(c) to prepare and circulate annual reports on the technical aspects of the operation and status of this Agreement;

(d) to furnish such information and advice on any matters concerning the valuation of imported goods for customs purposes as may be requested by any Member or the Committee. Such information and advice may take the form of advisory opinions, commentaries or explanatory notes;

(e) to facilitate, as requested, technical assistance to Members with a view to furthering the international acceptance of this Agreement;

(f) to carry out an examination of a matter referred to it by a panel under Article 19 of this Agreement; and

(g) to exercise such other responsibilities as the Committee may assign to it.

General

3. The Technical Committee shall attempt to conclude its work on specific matters, especially those referred to it by Members, the Committee or a panel, in a reasonably short period of time. As provided in paragraph 4 of Article 19, a panel shall set a specific time period for receipt of a report of the Technical Committee and the Technical Committee shall provide its report within that period.

4. The Technical Committee shall be assisted as appropriate in its activities by the CCC Secretariat.

Representation

5. Each Member shall have the right to be represented on the Technical Committee. Each Member may nominate one delegate and one or more alternates to be its representatives on the Technical Committee. Such a Member so represented on the Technical Committee is referred to in this Annex as a "member of the Technical Committee". Representatives of members of the Technical Committee may be assisted by advisers. The WTO Secretariat may also attend such meetings with observer status.

6. Members of the CCC which are not Members of the WTO may be represented at meetings of the Technical Committee by one delegate and one or more alternates. Such representatives shall attend meetings of the Technical Committee as observers.

7. Subject to the approval of the Chairman of the Technical Committee, the Secretary-General of the CCC (referred to in this Annex as "the Secretary-General") may invite representatives of governments which are neither Members of the WTO nor members of the CCC and representatives of international governmental and trade organizations to attend meetings of the Technical Committee as observers.

8. Nominations of delegates, alternates and advisers to meetings of the Technical Committee shall be made to the Secretary-General.

Technical Committee Meetings

9. The Technical Committee shall meet as necessary but at least two times a year. The date of each meeting shall be fixed by the Technical Committee at its preceding session. The date of the meeting may be varied either at the request of any member of the Technical Committee concurred in by a simple majority of the members of the Technical Committee or, in cases requiring urgent attention, at the request of the Chairman. Notwithstanding the provisions in sentence 1 of this paragraph, the Technical Committee shall meet as necessary to consider matters referred to it by a panel under the provisions of Article 19 of this Agreement.

10. The meetings of the Technical Committee shall be held at the headquarters of the CCC unless otherwise decided.

11. The Secretary-General shall inform all members of the Technical Committee and those included under paragraphs 6 and 7 at least 30 days in advance, except in urgent cases, of the opening date of each session of the Technical Committee.

Agenda

12. A provisional agenda for each session shall be drawn up by the Secretary-General and circulated to the members of the Technical Committee and to those included under paragraphs 6 and 7 at least 30 days in advance of the session, except in urgent cases. This agenda shall comprise all items whose inclusion has been approved by the Technical Committee during its preceding session, all items included by the Chairman on the Chairman's own initiative, and all items whose inclusion has been requested by the Secretary-General, by the Committee or by any member of the Technical Committee.

13. The Technical Committee shall determine its agenda at the opening of each session. During the session the agenda may be altered at any time by the Technical Committee.

Officers and Conduct of Business

14. The Technical Committee shall elect from among the delegates of its members a Chairman and one or more Vice-Chairmen. The Chairman and Vice-Chairmen shall each hold office for a period of one year. The retiring Chairman and Vice-Chairmen are eligible for re-election. The mandate of a Chairman or Vice-Chairman who no longer represents a member of the Technical Committee shall terminate automatically.

15. If the Chairman is absent from any meeting or part thereof, a Vice-Chairman shall preside. In that event, the latter shall have the same powers and duties as the Chairman.

16. The Chairman of the meeting shall participate in the proceedings of the Technical Committee as such and not as the representative of a member of the Technical Committee.

17. In addition to exercising the other powers conferred upon the Chairman by these rules, the Chairman shall declare the opening and closing of each meeting, direct the discussion, accord the right to speak, and, pursuant to these rules, have control of the proceedings. The Chairman may also call a speaker to order if the speaker's remarks are not relevant.

18. During discussion of any matter a delegation may raise a point of order. In this event, the Chairman shall immediately state a ruling. If this ruling is challenged, the Chairman shall submit it to the meeting for decision and it shall stand unless overruled.

19. The Secretary-General, or officers of the CCC Secretariat designated by the Secretary-General, shall perform the secretarial work of meetings of the Technical Committee.

Quorum and Voting

20. Representatives of a simple majority of the members of the Technical Committee shall constitute a quorum.

21. Each member of the Technical Committee shall have one vote. A decision of the Technical Committee shall be taken by a majority comprising at least two thirds of the members present. Regardless of the outcome of the vote on a particular matter, the Technical Committee shall be free to make a full report to the Committee and to the CCC on that matter indicating the different views expressed in the relevant discussions. Notwithstanding the above provisions of this paragraph, on matters referred to it by a panel, the Technical Committee shall take decisions by consensus. Where no agreement is reached in the Technical Committee on the question referred to it by a panel, the Technical Committee shall provide a report detailing the facts of the matter and indicating the views of the members.

Languages and Records

22. The official languages of the Technical Committee shall be English, French and Spanish. Speeches or statements made in any of these three languages shall be immediately translated into the other official languages unless all delegations agree to dispense with translation. Speeches or statements made in any other language shall be translated into English, French and Spanish, subject to the same conditions, but in that event the delegation concerned shall provide the translation into English, French or Spanish. Only English, French and Spanish shall be used for the official documents of the Technical Committee. Memoranda and correspondence for the consideration of the Technical Committee must be presented in one of the official languages.

23. The Technical Committee shall draw up a report of all its sessions and, if the Chairman considers it necessary, minutes or summary records of its meetings. The Chairman or a designee of the Chairman shall report on the work of the Technical Committee at each meeting of the Committee and at each meeting of the CCC.

B. INTERPRETATION AND APPLICATION OF ANNEX II

No jurisprudence or decision of a competent WTO body.

1. Reference to GATT practice

36. With respect to the practice developed under the *GATT 1947*, see GATT Analytical Index, page 265.

XXVIII. ANNEX III

A. TEXT OF ANNEX III

ANNEX III

1. The five-year delay in the application of the provisions of the Agreement by developing country Members provided for in paragraph 1 of Article 20 may, in practice, be insufficient for certain developing country Members. In such cases a developing country Member may request before the end of the period referred to in paragraph 1 of Article 20 an extension of such period, it being understood that the Members will give sympathetic consideration to such a request in cases where the developing country Member in question can show good cause.

2. Developing countries which currently value goods on the basis of officially established minimum values may wish to make a reservation to enable them to retain such values on a limited and transitional basis under such terms and conditions as may be agreed to by the Members.

3. Developing countries which consider that the reversal of the sequential order at the request of the importer provided for in Article 4 of the Agreement may give rise to real difficulties for them may wish to make a reservation to Article 4 in the following terms:

> "The Government of …… reserves the right to provide that the relevant provision of Article 4 of the Agreement shall apply only when the customs authorities agree to the request to reverse the order of Articles 5 and 6."

If developing countries make such a reservation, the Members shall consent to it under Article 21 of the Agreement.

4. Developing countries may wish to make a reservation with respect to paragraph 2 of Article 5 of the Agreement in the following terms:

> "The Government of …… reserves the right to provide that paragraph 2 of Article 5 of the Agreement shall be applied in accordance with the provisions of the relevant note thereto whether or not the importer so requests."

If developing countries make such a reservation, the Members shall consent to it under Article 21 of the Agreement.

5. Certain developing countries may have problems in the implementation of Article 1 of the Agreement insofar as it relates to importations into their countries by

sole agents, sole distributors and sole concessionaires. If such problems arise in practice in developing country Members applying the Agreement, a study of this question shall be made, at the request of such Members, with a view to finding appropriate solutions.

6. Article 17 recognizes that in applying the Agreement, customs administrations may need to make enquiries concerning the truth or accuracy of any statement, document or declaration presented to them for customs valuation purposes. The Article thus acknowledges that enquiries may be made which are, for example, aimed at verifying that the elements of value declared or presented to customs in connection with a determination of customs value are complete and correct. Members, subject to their national laws and procedures, have the right to expect the full cooperation of importers in these enquiries.

7. The price actually paid or payable includes all payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller.

B. INTERPRETATION AND APPLICATION OF ANNEX III

1. Paragraph 1

37. With respect to the extension of the five-year delay in the application of the Customs Valuation Agreement under paragraph 1 of Annex III, see paragraph 27 above.

2. Paragraph 2

38. Pursuant to the Ministerial Decision at Marrakesh, at its meeting of 12 May 1995, the Committee on Customs Valuation adopted the following decision:[33]

> "Decision on Texts relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Solve Concessionaires
>
> *Ministers decide* to refer the following texts to the Committee on Customs Valuation established under the Agreement on Implementation of Article VII of GATT 1994, for adoption.
>
> I
>
> Where a developing country makes a reservation to retain officially established minimum values within the terms of paragraph 2 of Annex III and shows good cause, the Committee shall give the request for the reservation sympathetic consideration.
>
> Where a reservation is consented to, the terms and conditions referred to in paragraph 2 of Annex III shall take full account of the development, financial and trade needs of the developing country concerned.
>
> II
>
> 1. A number of developing countries have a concern that problems may exist in the valuation of imports by sole agents, sole distributors and sole concessionaires. Under paragraph 1 of Article 20, developing country Members have a period of delay of up to five years prior to the application of the Agreement. In this context, developing country Members availing themselves of this provision could use the period to conduct appropriate studies and to take such other actions as are necessary to facilitate application.
>
> 2. In consideration of this, the Committee recommends that the Customs Co-operation Council assist developing country Members, in accordance with the provisions of Annex II, to formulate and conduct studies in areas identified as being of potential concern, including those relating to importations by sole agents, sole distributors and sole concessionaires."

39. Pursuant to paragraph 2 of Annex III, 38 Members made reservations regarding officially established minimum values.[34] The establishment of minimum values allows developing countries to apply the same minimum values to all identical products, without the need to look for the value that the products would have in the event of the application of the mandates contained in the present Agreement. On 21 October 2004, only five Members maintained exceptions in accordance with the terms of this paragraph.[35]

3. Paragraph 3

40. Pursuant to paragraph 3 of Annex III, at the time of the 2004 annual review meeting of the implementation and operation of the Agreement on Customs Valuation, 53 Members maintained reservations concerning reversal of sequential order of Articles 5 and 6.[36]

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[33] G/VAL/M/1, Section F. The text of the decision can be found also in G/VAL/1.

[34] Members requesting a reservation were: Bahrain, Bangladesh, Burkina Faso, Chile, Colombia, Côte d'Ivoire, Djibouti, Dominican Republic, Gabon, Guatemala, Guyana, Haiti, Indonesia, Jamaica, Kenya, Madagascar, Maldives, Mali, Malaysia, Malta, Mauritania, Morocco, Myanmar, Niger, Pakistan, Paraguay, Peru, Philippines, Senegal, Singapore, Sri Lanka, Thailand, Togo, Tunisia, Uganda, Uruguay, Venezuela, Zambia. See G/VAL/W/3, 13, 22, 29, 43, 77, 89 and 108.

[35] The five Members at issue were: El Salvador (reservation granted as Article IX waiver in WT/L/476), Guatemala (reservation granted in G/VAL/43), Pakistan (reservation requested under Article IX waiver in G/C/W/246), Senegal (reservation granted under Article IX waiver in WT/L/571), and Sri Lanka (reservation granted in G/VAL/53). See also G/VAL/2/Rev.19.

[36] These Members were: Argentina, Bahrain, Bangladesh, Benin Brazil, Brunei Darussalam, Burkina Faso, Cameroon, Chile, Colombia, Costa Rica, Côte d'Ivoire, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Gabon, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Israel, Jamaica, Kenya, Madagascar, Maldives, Malawi, Malaysia, Mali, Mexico, Morocco, Myanmar, Nicaragua, Niger, Pakistan, Panama, Peru, Philippines, Senegal, Sri Lanka, Thailand, Togo, Tunisia, Turkey, Uganda, United Arab Emirates, Uruguay, Venezuela, Zambia, Zimbabwe. See G/VAL/W/136; and for previous years see G/VAL/W/3, 13, 22, 29, 43, 77, 89, 108, and 124.

4. Paragraph 4

41. Pursuant to paragraph 4 of Annex III, at the time of the 2004 annual review meeting of the implementation and operation of the Agreement on Customs Valuation, 50 Members maintained reservations concerning application of Article 5.2 whether or not the importer so requests.[37]

5. Paragraph 6

42. See Interpretation and Application of Article 17, paragraphs 16–17 above.

[37] These Members were: Argentina, Bahrain, Bangladesh, Benin, Brazil, Brunei Darussalam, Burkina Faso, Cameroon, Chile, Colombia, Costa Rica, Côte d'Ivoire, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Gabon, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Israel, Jamaica, Kenya, Madagascar, Maldives, Malaysia, Mali, Mexico, Morocco, Myanmar, Nicaragua, Niger, Nigeria, Pakistan, Peru, Philippines, Senegal, Sri Lanka, Thailand, Togo, Tunisia, Turkey, Uruguay, Venezuela, Zambia, Zimbabwe. See G/VAL/W/136; and for previous years see G/VAL/W/3, 13, 22, 29, 43, 77, 89, 108, and 124.

Agreement on Preshipment Inspection

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Noting that Ministers on 20 September 1986 agreed that the Uruguay Round of Multilateral Trade Negotiations shall aim to "bring about further liberalization and expansion of world trade", "strengthen the role of GATT" and "increase the responsiveness of the GATT system to the evolving international economic environment";

Noting that a number of developing country Members have recourse to preshipment inspection;

Recognizing the need of developing countries to do so for as long and in so far as it is necessary to verify the quality, quantity or price of imported goods;

Mindful that such programmes must be carried out without giving rise to unnecessary delays or unequal treatment;

Noting that this inspection is by definition carried out on the territory of exporter Members;

Recognizing the need to establish an agreed international framework of rights and obligations of both user Members and exporter Members;

Recognizing that the principles and obligations of GATT 1994 apply to those activities of preshipment inspection entities that are mandated by governments that are Members of the WTO;

Recognizing that it is desirable to provide transparency of the operation of preshipment inspection entities and of laws and regulations relating to preshipment inspection;

Desiring to provide for the speedy, effective and equitable resolution of disputes between exporters and preshipment inspection entities arising under this Agreement;

Hereby *agree* as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

No jurisprudence or decision of a competent WTO body.

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1
Coverage – Definitions

1. This Agreement shall apply to all preshipment inspection activities carried out on the territory of Mem-

bers, whether such activities are contracted or mandated by the government, or any government body, of a Member.

2. The term "user Member" means a Member of which the government or any government body contracts for or mandates the use of preshipment inspection activities.

3. Preshipment inspection activities are all activities relating to the verification of the quality, the quantity, the price, including currency exchange rate and financial terms, and/or the customs classification of goods to be exported to the territory of the user Member.

4. The term "preshipment inspection entity" is any entity contracted or mandated by a Member to carry out preshipment inspection activities.[1]

(*footnote original*) [1] It is understood that this provision does not obligate Members to allow government entities of other Members to conduct preshipment inspection activities on their territory.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

No jurisprudence or decision of a competent WTO body.

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2
Obligations of User Members

Non-discrimination

1. User Members shall ensure that preshipment inspection activities are carried out in a non-discriminatory manner, and that the procedures and criteria employed in the conduct of these activities are objective and are applied on an equal basis to all exporters affected by such activities. They shall ensure uniform performance of inspection by all the inspectors of the preshipment inspection entities contracted or mandated by them.

Governmental Requirements

2. User Members shall ensure that in the course of preshipment inspection activities relating to their laws, regulations and requirements, the provisions of paragraph 4 of Article III of GATT 1994 are respected to the extent that these are relevant.

Site of Inspection

3. User Members shall ensure that all preshipment inspection activities, including the issuance of a Clean Report of Findings or a note of non-issuance, are performed in the customs territory from which the goods are exported or, if the inspection cannot be carried out in that customs territory given the complex nature of the products involved, or if both parties agree, in the customs territory in which the goods are manufactured.

Standards

4. User Members shall ensure that quantity and quality inspections are performed in accordance with the standards defined by the seller and the buyer in the purchase agreement and that, in the absence of such standards, relevant international standards[2] apply.

(*footnote original*) [2] An international standard is a standard adopted by a governmental or non-governmental body whose membership is open to all Members, one of whose recognized activities is in the field of standardization.

Transparency

5. User Members shall ensure that preshipment inspection activities are conducted in a transparent manner.

6. User Members shall ensure that, when initially contacted by exporters, preshipment inspection entities provide to the exporters a list of all the information which is necessary for the exporters to comply with inspection requirements. The preshipment inspection entities shall provide the actual information when so requested by exporters. This information shall include a reference to the laws and regulations of user Members relating to preshipment inspection activities, and shall also include the procedures and criteria used for inspection and for price and currency exchange-rate verification purposes, the exporters' rights vis-à-vis the inspection entities, and the appeals procedures set up under paragraph 21. Additional procedural requirements or changes in existing procedures shall not be applied to a shipment unless the exporter concerned is informed of these changes at the time the inspection date is arranged. However, in emergency situations of the types addressed by Articles XX and XXI of GATT 1994, such additional requirements or changes may be applied to a shipment before the exporter has been informed. This assistance shall not, however, relieve exporters from their obligations in respect of compliance with the import regulations of the user Members.

7. User Members shall ensure that the information referred to in paragraph 6 is made available to exporters in a convenient manner, and that the preshipment inspection offices maintained by preshipment inspection entities serve as information points where this information is available.

8. User Members shall publish promptly all applicable laws and regulations relating to preshipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them.

Protection of Confidential Business Information

9. User Members shall ensure that preshipment inspection entities treat all information received in the

course of the preshipment inspection as business confidential to the extent that such information is not already published, generally available to third parties, or otherwise in the public domain. User Members shall ensure that preshipment inspection entities maintain procedures to this end.

10. User Members shall provide information to Members on request on the measures they are taking to give effect to paragraph 9. The provisions of this paragraph shall not require any Member to disclose confidential information the disclosure of which would jeopardize the effectiveness of the preshipment inspection programmes or would prejudice the legitimate commercial interest of particular enterprises, public or private.

11. User Members shall ensure that preshipment inspection entities do not divulge confidential business information to any third party, except that preshipment inspection entities may share this information with the government entities that have contracted or mandated them. User Members shall ensure that confidential business information which they receive from preshipment inspection entities contracted or mandated by them is adequately safeguarded. Preshipment inspection entities shall share confidential business information with the governments contracting or mandating them only to the extent that such information is customarily required for letters of credit or other forms of payment or for customs, import licensing or exchange control purposes.

12. User Members shall ensure that preshipment inspection entities do not request exporters to provide information regarding:

(a) manufacturing data related to patented, licensed or undisclosed processes, or to processes for which a patent is pending;

(b) unpublished technical data other than data necessary to demonstrate compliance with technical regulations or standards;

(c) internal pricing, including manufacturing costs;

(d) profit levels;

(e) the terms of contracts between exporters and their suppliers unless it is not otherwise possible for the entity to conduct the inspection in question. In such cases, the entity shall only request the information necessary for this purpose.

13. The information referred to in paragraph 12, which preshipment inspection entities shall not otherwise request, may be released voluntarily by the exporter to illustrate a specific case.

Conflicts of Interest

14. User Members shall ensure that preshipment inspection entities, bearing in mind also the provisions on protection of confidential business information in paragraphs 9 through 13, maintain procedures to avoid conflicts of interest:

(a) between preshipment inspection entities and any related entities of the preshipment inspection entities in question, including any entities in which the latter have a financial or commercial interest or any entities which have a financial interest in the preshipment inspection entities in question, and whose shipments the preshipment inspection entities are to inspect;

(b) between preshipment inspection entities and any other entities, including other entities subject to preshipment inspection, with the exception of the government entities contracting or mandating the inspections;

(c) with divisions of preshipment inspection entities engaged in activities other than those required to carry out the inspection process.

Delays

15. User Members shall ensure that preshipment inspection entities avoid unreasonable delays in inspection of shipments. User Members shall ensure that, once a preshipment inspection entity and an exporter agree on an inspection date, the preshipment inspection entity conducts the inspection on that date unless it is rescheduled on a mutually agreed basis between the exporter and the preshipment inspection entity, or the preshipment inspection entity is prevented from doing so by the exporter or by *force majeure*.[3]

(*footnote original*) [3] It is understood that, for the purposes of this Agreement, "*force majeure*" shall mean "irresistible compulsion or coercion, unforeseeable course of events excusing from fulfilment of contract".

16. User Members shall ensure that, following receipt of the final documents and completion of the inspection, preshipment inspection entities, within five working days, either issue a Clean Report of Findings or provide a detailed written explanation specifying the reasons for non-issuance. User Members shall ensure that, in the latter case, preshipment inspection entities give exporters the opportunity to present their views in writing and, if exporters so request, arrange for re-inspection at the earliest mutually convenient date.

17. User Members shall ensure that, whenever so requested by the exporters, preshipment inspection entities undertake, prior to the date of physical inspection, a preliminary verification of price and, where applicable, of currency exchange rate, on the basis of the contract between exporter and importer, the *pro forma* invoice and, where applicable, the application for import authorization. User Members shall ensure that a price or currency exchange rate that has been accepted by a preshipment inspection entity on the basis of such preliminary verification is not withdrawn, providing the

goods conform to the import documentation and/or import licence. They shall ensure that, after a preliminary verification has taken place, preshipment inspection entities immediately inform exporters in writing either of their acceptance or of their detailed reasons for non-acceptance of the price and/or currency exchange rate.

18. User Members shall ensure that, in order to avoid delays in payment, preshipment inspection entities send to exporters or to designated representatives of the exporters a Clean Report of Findings as expeditiously as possible.

19. User Members shall ensure that, in the event of a clerical error in the Clean Report of Findings, preshipment inspection entities correct the error and forward the corrected information to the appropriate parties as expeditiously as possible.

Price Verification

20. User Members shall ensure that, in order to prevent over- and under-invoicing and fraud, preshipment inspection entities conduct price verification[4] according to the following guidelines:

(*footnote original*) [4] The obligations of user Members with respect to the services of preshipment inspection entities in connection with customs valuation shall be the obligations which they have accepted in GATT 1994 and the other Multilateral Trade Agreements included in Annex 1A of the WTO Agreement.

(a) preshipment inspection entities shall only reject a contract price agreed between an exporter and an importer if they can demonstrate that their findings of an unsatisfactory price are based on a verification process which is in conformity with the criteria set out in subparagraphs (b) through (e);

(b) the preshipment inspection entity shall base its price comparison for the verification of the export price on the price(s) of identical or similar goods offered for export from the same country of exportation at or about the same time, under competitive and comparable conditions of sale, in conformity with customary commercial practices and net of any applicable standard discounts. Such comparison shall be based on the following:

  (i) only prices providing a valid basis of comparison shall be used, taking into account the relevant economic factors pertaining to the country of importation and a country or countries used for price comparison;

  (ii) the preshipment inspection entity shall not rely upon the price of goods offered for export to different countries of importation to arbitrarily impose the lowest price upon the shipment;

  (iii) the preshipment inspection entity shall take into account the specific elements listed in subparagraph (c);

  (iv) at any stage in the process described above, the preshipment inspection entity shall provide the exporter with an opportunity to explain the price;

(c) when conducting price verification, preshipment inspection entities shall make appropriate allowances for the terms of the sales contract and generally applicable adjusting factors pertaining to the transaction; these factors shall include but not be limited to the commercial level and quantity of the sale, delivery periods and conditions, price escalation clauses, quality specifications, special design features, special shipping or packing specifications, order size, spot sales, seasonal influences, licence or other intellectual property fees, and services rendered as part of the contract if these are not customarily invoiced separately; they shall also include certain elements relating to the exporter's price, such as the contractual relationship between the exporter and importer;

(d) the verification of transportation charges shall relate only to the agreed price of the mode of transport in the country of exportation as indicated in the sales contract;

(e) the following shall not be used for price verification purposes:

  (i) the selling price in the country of importation of goods produced in such country;

  (ii) the price of goods for export from a country other than the country of exportation;

  (iii) the cost of production;

  (iv) arbitrary or fictitious prices or values.

Appeals Procedures

21. User Members shall ensure that preshipment inspection entities establish procedures to receive, consider and render decisions concerning grievances raised by exporters, and that information concerning such procedures is made available to exporters in accordance with the provisions of paragraphs 6 and 7. User Members shall ensure that the procedures are developed and maintained in accordance with the following guidelines:

(a) preshipment inspection entities shall designate one or more officials who shall be available during normal business hours in each city or port in which they maintain a preshipment inspection administrative office to receive, consider and render decisions on exporters' appeals or grievances;

(b) exporters shall provide in writing to the designated official(s) the facts concerning the specific transaction in question, the nature of the grievance and a suggested solution;

(c) the designated official(s) shall afford sympathetic consideration to exporters' grievances and shall render a decision as soon as possible after receipt of the documentation referred to in subparagraph (b).

Derogation

22. By derogation to the provisions of Article 2, user Members shall provide that, with the exception of part shipments, shipments whose value is less than a minimum value applicable to such shipments as defined by the user Member shall not be inspected, except in exceptional circumstances. This minimum value shall form part of the information furnished to exporters under the provisions of paragraph 6.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. In its first report (2 December 1997), the PSI Working Party[1] made a set of recommendations to user Members to ensure that they comply with their obligations under Article 2 of the *PSI Agreement*.[2]

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3
Obligations of Exporter Members

Non-discrimination

1. Exporter Members shall ensure that their laws and regulations relating to preshipment inspection activities are applied in a non-discriminatory manner.

Transparency

2. Exporter Members shall publish promptly all applicable laws and regulations relating to preshipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them.

Technical Assistance

3. Exporter Members shall offer to provide to user Members, if requested, technical assistance directed towards the achievement of the objectives of this Agreement on mutually agreed terms.[5]

(*footnote original*) [5] It is understood that such technical assistance may be given on a bilateral, plurilateral or multilateral basis.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. Article 3.3

2. In its first report (2 December 1997), the PSI Working Party considered that "[t]echnical assistance activities, which should be administered on a request basis, could include areas such as tariff and customs administration reforms; simplification and modernization of systems and procedures; and the development of an adequate legal, administrative, and physical infrastructure."[3]

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4
Independent Review Procedures

Members shall encourage preshipment inspection entities and exporters mutually to resolve their disputes. However, two working days after submission of the grievance in accordance with the provisions of paragraph 21 of Article 2, either party may refer the dispute to independent review. Members shall take such reasonable measures as may be available to them to ensure that the following procedures are established and maintained to this end:

(a) these procedures shall be administered by an independent entity constituted jointly by an organization representing preshipment inspection entities and an organization representing exporters for the purposes of this Agreement;

(b) the independent entity referred to in subparagraph (a) shall establish a list of experts as follows:

(i) a section of members nominated by an organization representing preshipment inspection entities;

(ii) a section of members nominated by an organization representing exporters;

(iii) a section of independent trade experts, nominated by the independent entity referred to in subparagraph (a).

The geographical distribution of the experts on this list shall be such as to enable any disputes raised under these procedures to be dealt with expeditiously. This list shall be drawn up within two months of the entry into force of the WTO Agreement and shall be updated annually. The

[1] With respect to the PSI Working Party more generally, see paragraph 8 below.
[2] G/L/214, section B.
[3] G/L/214, page 4.

list shall be publicly available. It shall be notified to the Secretariat and circulated to all Members;

(c) an exporter or preshipment inspection entity wishing to raise a dispute shall contact the independent entity referred to in subparagraph (a) and request the formation of a panel. The independent entity shall be responsible for establishing a panel. This panel shall consist of three members. The members of the panel shall be chosen so as to avoid unnecessary costs and delays. The first member shall be chosen from section (i) of the above list by the preshipment inspection entity concerned, provided that this member is not affiliated to that entity. The second member shall be chosen from section (ii) of the above list by the exporter concerned, provided that this member is not affiliated to that exporter. The third member shall be chosen from section (iii) of the above list by the independent entity referred to in subparagraph (a). No objections shall be made to any independent trade expert drawn from section (iii) of the above list;

(d) the independent trade expert drawn from section (iii) of the above list shall serve as the chairman of the panel. The independent trade expert shall take the necessary decisions to ensure an expeditious settlement of the dispute by the panel, for instance, whether the facts of the case require the panelists to meet and, if so, where such a meeting shall take place, taking into account the site of the inspection in question;

(e) if the parties to the dispute so agree, one independent trade expert could be selected from section (iii) of the above list by the independent entity referred to in subparagraph (a) to review the dispute in question. This expert shall take the necessary decisions to ensure an expeditious settlement of the dispute, for instance taking into account the site of the inspection in question;

(f) the object of the review shall be to establish whether, in the course of the inspection in dispute, the parties to the dispute have complied with the provisions of this Agreement. The procedures shall be expeditious and provide the opportunity for both parties to present their views in person or in writing;

(g) decisions by a three-member panel shall be taken by majority vote. The decision on the dispute shall be rendered within eight working days of the request for independent review and be communicated to the parties to the dispute. This time-limit could be extended upon agreement by the parties to the dispute. The panel or independent trade expert shall apportion the costs, based on the merits of the case;

(h) the decision of the panel shall be binding upon the preshipment inspection entity and the exporter which are parties to the dispute.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

3. At its meeting of 13 and 15 December 1995, the General Council established an "Independent Entity" as a subsidiary body of the Council for Trade in Goods.[4] The International Chamber of Commerce (representing exporters) and the International Federation of Inspections Agencies (representing PSI entities) accepted, in an Agreement concluded with the WTO[5], to constitute jointly the Independent Entity. In consultations with those organizations, the WTO defined the structure and functioning of the Independent Entity[6] and determined the rules of procedure applicable to the conduct of independent reviews by the Independent Entity.[7]

4. The Rules of Procedure for the Independent Entity are included in Annex III to the decision by the General Council establishing the Independent Entity.[8]

5. The Independent Entity reports to the Council for Trade in Goods on an annual basis.[9]

6. As envisaged in Article 4(b), the Independent Entity drew up its list in March 1996[10] and updated it in April 1997.[11]

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5
Notification

Members shall submit to the Secretariat copies of the laws and regulations by which they put this Agreement into force, as well as copies of any other laws and regulations relating to preshipment inspection, when the WTO Agreement enters into force with respect to the Member concerned. No changes in the laws and regulations relating to preshipment inspection shall be enforced before such changes have been officially published. They shall be notified to the Secretariat immediately after their

[4] WT/GC/M/9, section 1.(f).
[5] WT/L/125/Rev.1, Annex I.
[6] WT/L/125/Rev.1, Annex II.
[7] WT/L/125/Rev.1, Annex III.
[8] WT/L/125/Rev.1, Annex III.
[9] The reports of the Independent Entity are numbered G/L/120, 208, 269, 330 and 410.
[10] G/PSI/IE/1.
[11] G/PSI/IE/1/Rev.1.

publication. The Secretariat shall inform the Members of the availability of this information.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

7. In its first report (2 December 1997), the PSI Working Party stated that when Members notify their laws and regulations, they "should endeavour to provide additional descriptive information on how they are implementing the Agreement".[12] [13]

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6
Review

At the end of the second year from the date of entry into force of the WTO Agreement and every three years thereafter, the Ministerial Conference shall review the provisions, implementation and operation of this Agreement, taking into account the objectives thereof and experience gained in its operation. As a result of such review, the Ministerial Conference may amend the provisions of the Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

8. At its meeting of 7, 8 and 13 November 1996, the General Council established a working party under the Council for Trade in Goods to conduct the review provided for under Article 6 of the *PSI Agreement*.[14] The terms of reference of the PSI Working Party were as follows:

"[T]o conduct the review provided for under Article 6 of the Agreement on Preshipment Inspection and to report to the General Council through the Council for Trade in Goods in December 1997".[15]

9. The PSI Working Party issued three reports[16], all of which were approved by the General Council.[17]

10. At its December 1997 meeting the General Council agreed that the life of the Working Party on Preshipment Inspection be extended for one year for the purposes described in paragraph 8 of Section B of the report in G/L/214.[18]

11. In December 1998, the General Council agreed to a further extension of the life of the Working Party until 31 March 1999.[19]

12. The Working Party concluded its final Article 6 review of the Agreement on Preshipment Inspection at its meeting held on 12 March 1999.[20]

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7
Consultation

Members shall consult with other Members upon request with respect to any matter affecting the operation of this Agreement. In such cases, the provisions of Article XXII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, are applicable to this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

No jurisprudence or decision of a competent WTO body.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8
Dispute Settlement

Any disputes among Members regarding the operation of this Agreement shall be subject to the provisions of Article XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

No jurisprudence or decision of a competent WTO body.

X. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9
Final Provisions

1. Members shall take the necessary measures for the implementation of the present Agreement.

2. Members shall ensure that their laws and regulations shall not be contrary to the provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

No jurisprudence or decision of a competent WTO body.

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[12] G/L/214, page 3.
[13] Notice of changes in laws and regulations received are listed in documents G/PSI/N/1, G/PSI/N/1/Add.1–Add.10.
[14] WT/GC/M/16, section 3.
[15] WT/GC/M/16, section 3. The terms of reference can be also found in WT/L/196.
[16] The reports can be found in G/L/214, G/L/273 and G/L/300.
[17] See WT/GC/M/25, item 8; WT/GC/M/32, item 13; WT/GC/M/40/Add.3, item 5.
[18] WT/GC/M/25.
[19] WT/GC/M/32.
[20] The final report was circulated in document G/L/300.

Agreement on Rules of Origin

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Noting that Ministers on 20 September 1986 agreed that the Uruguay Round of Multilateral Trade Negotiations shall aim to "bring about further liberalization and expansion of world trade", "strengthen the role of GATT" and "increase the responsiveness of the GATT system to the evolving international economic environment";

Desiring to further the objectives of GATT 1994;

Recognizing that clear and predictable rules of origin and their application facilitate the flow of international trade;

Desiring to ensure that rules of origin themselves do not create unnecessary obstacles to trade;

Desiring to ensure that rules of origin do not nullify or impair the rights of Members under GATT 1994;

Recognizing that it is desirable to provide transparency of laws, regulations, and practices regarding rules of origin;

Desiring to ensure that rules of origin are prepared and applied in an impartial, transparent, predictable, consistent and neutral manner;

Recognizing the availability of a consultation mechanism and procedures for the speedy, effective and equitable resolution of disputes arising under this Agreement;

Desiring to harmonize and clarify rules of origin;

Hereby *agree* as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

No jurisprudence or decision of a competent WTO body.

PART I
DEFINITIONS AND COVERAGE

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1
Rules of Origin

1. For the purposes of Parts I to IV of this Agreement, rules of origin shall be defined as those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods provided such rules of origin are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences[1] going beyond the application of paragraph 1 of Article I of GATT 1994.

2. Rules of origin referred to in paragraph 1 shall include all rules of origin used in non-preferential commercial policy instruments, such as in the application of: most-favoured-nation treatment under Articles I, II, III, XI and XIII of GATT 1994; anti-dumping and countervailing duties under Article VI of GATT 1994; safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas. They shall also include rules of origin used for government procurement and trade statistics.[1]

(*footnote original*) [1] It is understood that this provision is without prejudice to those determinations made for purposes of defining "domestic industry" or "like products of domestic industry" or similar terms wherever they apply.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

No jurisprudence or decision of a competent WTO body.

PART II
DISCIPLINES TO GOVERN THE APPLICATION OF RULES OF ORIGIN

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2
Disciplines During the Transition Period

Until the work programme for the harmonization of rules of origin set out in Part IV is completed, Members shall ensure that:

(a) when they issue administrative determinations of general application, the requirements to be fulfilled are clearly defined. In particular:

  (i) in cases where the criterion of change of tariff classification is applied, such a rule of origin, and any exceptions to the rule, must clearly specify the subheadings or headings within the tariff nomenclature that are addressed by the rule;

  (ii) in cases where the ad valorem percentage criterion is applied, the method for calculating this percentage shall also be indicated in the rules of origin;

  (iii) in cases where the criterion of manufacturing or processing operation is prescribed, the operation that confers origin on the good concerned shall be precisely specified;

(b) notwithstanding the measure or instrument of commercial policy to which they are linked, their rules of origin are not used as instruments to pursue trade objectives directly or indirectly;

(c) rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade. They shall not pose unduly strict requirements or require the fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin. However, costs not directly related to manufacturing or processing may be included for the purposes of the application of an ad valorem percentage criterion consistent with subparagraph (a);

(d) the rules of origin that they apply to imports and exports are not more stringent than the rules of origin they apply to determine whether or not a good is domestic and shall not dis-

[1] With respect to preferential rules of origin, see Annex II (Section XII).

criminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned[2];

(*footnote original*) [2] It is understood that this provision is without prejudice to those determinations made for purposes of defining "domestic industry" or "like products of domestic industry" or similar terms wherever they apply.

(e) their rules of origin are administered in a consistent, uniform, impartial and reasonable manner;

(f) their rules of origin are based on a positive standard. Rules of origin that state what does not confer origin (negative standard) are permissible as part of a clarification of a positive standard or in individual cases where a positive determination of origin is not necessary;

(g) their laws, regulations, judicial decisions and administrative rulings of general application relating to rules of origin are published as if they were subject to, and in accordance with, the provisions of paragraph 1 of Article X of GATT 1994;

(h) upon the request of an exporter, importer or any person with a justifiable cause, assessments of the origin they would accord to a good are issued as soon as possible but no later than 150 days[3] after a request for such an assessment provided that all necessary elements have been submitted. Requests for such assessments shall be accepted before trade in the good concerned begins and may be accepted at any later point in time. Such assessments shall remain valid for three years provided that the facts and conditions, including the rules of origin, under which they have been made remain comparable. Provided that the parties concerned are informed in advance, such assessments will no longer be valid when a decision contrary to the assessment is made in a review as referred to in subparagraph (j). Such assessments shall be made publicly available subject to the provisions of subparagraph (k);

(*footnote original*) [3] In respect of requests made during the first year from the date of entry into force of the WTO Agreement, Members shall only be required to issue these assessments as soon as possible.

(i) when introducing changes to their rules of origin or new rules of origin, they shall not apply such changes retroactively as defined in, and without prejudice to, their laws or regulations;

(j) any administrative action which they take in relation to the determination of origin is reviewable promptly by judicial, arbitral or administrative tribunals or procedures, independent of the authority issuing the determination, which can effect the modification or reversal of the determination;

(k) all information that is by nature confidential or that is provided on a confidential basis for the purpose of the application of rules of origin is treated as strictly confidential by the authorities concerned, which shall not disclose it without the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. Article 2

(a) Negative list of disciplines prescribed by Article 2(b) through (d) of the Agreement on Rules of Origin

1. With respect to the provisions prescribed by Article 2 of the *Agreement on Rules of Origin*, the Panel on *US – Textiles Rules of Origin* explained that subparagraphs (b) through (d) lay down a negative set of disciplines that apply during the transition period. According to the Panel, during the transition period members enjoy "considerable discretion in designing and applying their rules of origin":

> "With regard to the provisions of Article 2 at issue in this case – subparagraphs (b) through (d) – we note that they set out what rules of origin should not do: rules of origin should not pursue trade objectives directly or indirectly; they should not themselves create restrictive, distorting or disruptive effects on international trade; they should not pose unduly strict requirements or require the fulfilment of a condition unrelated to manufacturing or processing; and they should not discriminate between other Members. These provisions do not prescribe what a Member must do.
>
> By setting out what Members cannot do, these provisions leave for Members themselves discretion to decide what, within those bounds, they can do. In this regard, it is common ground between the parties that Article 2 does not prevent Members from determining the criteria which confer origin, changing those criteria over time, or applying different criteria to different goods.
>
> Accordingly, in assessing whether the relevant United States rules of origin are inconsistent with the provisions of Article 2, we will bear in mind that, while during the post-harmonization period Members will be constrained by the result of the harmonization work programme, during the transition period, Members retain consider-

able discretion in designing and applying their rules of origin."[2]

2. Article 2(b)

(a) Purpose of Article 2(b)

2. The Panel on *US – Textiles Rules of Origin* explained that Article 2(b) is intended to preclude Members from using rules of origin "to substitute for, or to supplement, the intended effect of trade policy instruments":

> "In our view, Article 2(b) is intended to ensure that rules of origin are used to implement and support trade policy instruments, rather than to substitute for, or to supplement, the intended effect of trade policy instruments. Allowing Members to use rules of origin to pursue the objectives of 'protecting the domestic industry against import competition' or 'favouring imports from one Member over imports from another' would be to substitute for, or supplement, the intended effect of a trade policy instrument and, hence, be contrary to the objective of Article 2(b)."[3]

(b) Pursuit of trade objectives

(i) General

3. In *US – Textiles Rules of Origin* India claimed that both Section 334 of the United States Uruguay Agreement Act and Section 405 of the United States Trade and Development Act of 2000 are inconsistent with Article 2(b) of the *Agreement on Rules of Origin*. The Panel agreed with both India and the United States that the operative clause of Article 2(b) is the obligation that rules of origin must not be used as instruments to pursue trade objectives:

> "The Panel agrees with the parties that the operative part of Article 2(b) is the phrase 'rules of origin are not [to be] used as instruments to pursue trade objectives directly or indirectly'. It is clear from this phrase that in order to establish a violation of Article 2(b), a Member needs to demonstrate that another Member is using rules of origin for a specified purpose, *viz*., to pursue trade objectives."[4]

(ii) Panel's duty to conduct an inquiry into the objectives of the measure

4. The Panel on *US – Textiles Rules of Origin* noted the statements of the Appellate Body on *Chile – Alcoholic Beverages* on how Panels should carry on an inquiry into the objectives of a measure. While the *Chile – Alcoholic Beverages* interpretation was related to the second sentence of Article III:2 of the *GATT 1994*, the Panel said that this reasoning also applies in the context of Article 2(b) of the *Agreement on Rules of Origin*:

> "[W]e agree with India that the Appellate Body has already taken a position on how panels should conduct an inquiry into the objectives of a measure. The Appellate Body did so in the context of an analysis under Article III:2, second sentence, of the GATT 1994. In examining whether a tax measure was applied 'so as to afford protection to domestic production', the Appellate Body stated that:
>
> > '[. . .] it is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent.' The *subjective* intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters. It does not follow, however, that the statutory purposes or objectives – that is, the purpose or objectives of a Member's legislature and government as a whole – to the extent that they are given *objective* expression in the statute itself, are not pertinent. To the contrary, as we also stated in *Japan – Alcoholic Beverages*:
> >
> > Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the *design*, the *architecture*, and the revealing *structure* of a measure. (emphasis added)'[5]
>
> The reasons cited by the Appellate Body in support of its view do not appear to be specific to the provisions of Article III:2, second sentence, of the GATT 1994. Hence, these reasons apply with equal force in the context of Article 2(b) of the *RO Agreement*. Accordingly, in applying Article 2(b), we will follow the above-quoted statement by the Appellate Body."[6]

(iii) An incidental trade effect should not be inferred as a trade objective

5. In addressing India's claim that that Section 405 of the United States Trade and Development Act of 2000 is being used to pursue the trade objective of favouring imports from the European Communities over imports from other countries, and particularly imports from developing countries such as India, the Panel on *US – Textiles Rules of Origin* ruled that an incidental effect should not be inferred as a trade objective:

> "[W]e note, finally, that even if section 405 had the practical effect of favouring goods imported from the European Communities over competitive goods imported from other Members, that effect might be incidental

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[2] Panel Report on *US – Textiles Rules of Origin*, paras. 6.23–6.25.
[3] Panel Report on *US – Textiles Rules of Origin*, paras. 6.43. See also para. 6.84.
[4] Panel Report on *US – Textiles Rules of Origin*, para. 6.36.
[5] (*footnote original*) Appellate Body Report, *Chile – Taxes on Alcoholic Beverages* ("*Chile – Alcoholic Beverages*"), WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281, para. 62 (footnotes omitted).
[6] Panel Report on *US – Textiles Rules of Origin*, paras. 6.37–6. 38.

rather than intentional. In other words, we do not think that the mere effect of favouring European Communities imports over imports from other Members would in itself justify the inference that creating such an effect is an objective pursued by the United States."[7]

3. Article 2(c), first sentence

(a) "themselves"

6. The Panel on *US – Textiles Rules of Origin* interpreted several terms used in the first sentence of Article 2(c), and considered that the term "themselves" specifically relates to a Member's rules of origin as opposed to something like a commercial policy. The Panel discussed the term "themselves" as follows:

> "[W]e consider that, in the first sentence of Article 2(c), the pronoun 'themselves' is used mainly to emphasise the preceding term 'rules of origin'. By emphasising the term 'rules of origin', the pronoun 'themselves' brings out very clearly that the first sentence of Article 2(c) is concerned with a Member's rules of origin, as distinct from something other than rules of origin, and that it is rules of origin, as opposed to something other than rules of origin, that must not 'create restrictive, distorting, or disruptive effects on international trade'.
>
> . . .
>
> [T]he term 'themselves' is meant to highlight that, although there may be commercial policy measures which create restrictive, distorting, or disruptive effects on international trade, the rules of origin used to implement and support these commercial policy measures must not create restrictive, distorting, or disruptive effects on international trade additional to those which may be caused by the underlying commercial policy measures.[8] Similarly, in cases where an underlying commercial policy measure does not cause any restrictive, distorting, or disruptive effects on international trade, the word 'themselves' would serve to underscore that rules of origin must not create any new restrictive, distorting, or disruptive effects on international trade."[9]

(b) "create"

7. The Panel on *US – Textiles Rules of Origin* continued exploring the interpretation of terms used in Article 2(c) first sentence, and explained that the term "create" ensures that there should be a "causal link" between a certain rule of origin and a prohibited trade effect for that rule of origin to be considered inconsistent with the first sentence of Article 2(c):

> "The next element of the text of the first sentence of Article 2(c) to be considered is the term 'create'. The ordinary meaning of the term 'create' is to 'cause, occasion, produce, give rise to'.[10] Thus, it is implicit in the term 'create' that a Member's rules of origin only contravene the first sentence of Article 2(c) if there is a causal link between those rules and the prohibited effects specified in the first sentence.[11]"[12]

(c) "restrictive, distorting or disruptive effects"

8. The Panel on *US – Textiles Rules of Origin* explained that the prohibited trade effects "restrictive, distorting or disruptive effects" listed in the first sentence of Article 2(c) form "alternative bases" for a claim:

> "Turning to the prohibited effects – *i.e.*, 'restrictive, distorting, or disruptive effects' – the Panel notes that these effects constitute alternative bases for a claim under the first sentence of Article 2(c), as is confirmed by the use of the disjunctive 'or'. Accordingly, independent meaning and effect should be given to the concepts of 'restriction', 'distortion' and 'disruption'. In this regard, we note that the ordinary meaning of the term 'restrict' is to 'limit, bound, confine'; that of the term 'distort' is to 'alter to an unnatural shape by twisting'; and that of the term to 'disrupt' is to 'interrupt the normal continuity of'.[13] Thus, the first sentence of Article 2(c) prohibits rules of origin which create the effect of limiting the level of international trade ('restrictive' effects); of interfering with the natural pattern of international trade ('distorting' effects); or of interrupting the normal continuity of international trade ('disruptive' effects)."[14]

(d) "effects on international trade"

9. The Panel on *US – Textiles Rules of Origin* determined that the term "effects on international trade" could not be interpreted as covering adverse effects on trade in different goods:

> "[W]e cannot assume that Members intended to bring adverse effects on different types of goods within the ambit of the prohibition set out in the first sentence of Article 2(c). Indeed, as the Appellate Body has said in a different context, '[t]o sustain such an assumption and to warrant such a far-reaching interpretation, treaty

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[7] Panel Report on *US – Textiles Rules of Origin*, para. 6.117.

[8] (*footnote original*) It is worth noting in this context that Article 3.2 of the *Agreement on Import Licensing Procedures* on non-automatic licensing contains provisions along these lines. Specifically, it states that "[n]on-automatic licensing shall not have trade-restrictive or -distortive effects on imports *additional* to those caused by the imposition of the restriction" (emphasis added).

[9] Panel Report on *US – Textiles Rules of Origin*, paras. 6.136–6.137.

[10] (*footnote original*) *The New Shorter Oxford English Dictionary*, L. Brown, ed., Clarendon Press, 1993, Vol. I, p. 198.

[11] (*footnote original*) It is relevant to point out here that the Appellate Body has given a similar interpretation to the previously mentioned Article 3.2 of the *Agreement on Import Licensing Procedures*. Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products* ("*EC – Poultry*"), WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031, paras. 126–127.

[12] Panel Report on *US – Textiles Rules of Origin*, para. 6.140.

[13] (*footnote original*) *The New Shorter Oxford English Dictionary*, L. Brown, ed., Clarendon Press, 1993, Vol. II, p. 2569; Vol. I, pp. 707 and 702, respectively.

[14] Panel Report on *US – Textiles Rules of Origin*, para. 6.141.

language far more specific [. . .] would be necessary'.[15] We consider that the same could be said of Article 2(c), first sentence.[16]

Therefore, we consider that it would not be appropriate to interpret the phrase 'effects on international trade' as covering adverse effects on trade in different (but closely similar) types of finished goods. We construe the phrase 'effects on international trade' to cover trade in the goods to which the relevant rule of origin is applied (*e.g.*, cotton bed linen)"[17]

4. Article 2(c), second sentence

(a) "unduly strict requirements"

10. In *US – Textiles Rules of Origin*, the Panel explained the meaning of the phrase "unduly strict requirement" in the context of India's claim that the United States' measures at issue imposed strict requirements that did not assist the United States in determining the country with which the product had the most significant economic link. The Panel explored the meaning of the sentence examining each term:

"First, we need to examine what kind of 'requirements' are covered by the obligation that Members must ensure that their rules of origin not 'pose unduly strict requirements'. In this regard, we note the view of the United States that the clause 'as a prerequisite for the determination of the country of origin' qualifies also the phrase '[rules of origin] shall not pose unduly strict requirements'. While the English version of Article 2(c) may be susceptible of such an interpretation, the equally authentic French version is not.[18] Nevertheless, the clause 'as a prerequisite for the determination of the country of origin' is part of the immediate context of the term 'requirements'. Considered as relevant context, the clause at issue lends force to the argument that the 'requirements' which must not be unduly strict include the kind of requirements which must be fulfilled as a prerequisite for the determination of the country of origin. Article 2(a) of the *RO Agreement* provides further contextual support for such an interpretation. The first sentence of that provision states that the 'requirements to be fulfilled' must be clearly defined. It is clear to us that these requirements include the substantive requirements which must be met for a good to be determined to originate in a particular country. For these reasons, we read the term 'requirements' in the second sentence of Article 2(c) as encompassing the substantive origin requirements[19] that must be met for a good to obtain origin status.[20]

Another issue presented by the phrase 'unduly strict requirements' is the interpretation to be given to the adjective 'strict'. The most pertinent dictionary definitions of the term 'strict' are 'exacting'[21] and 'rigorous'[22]. Thus, a 'strict' requirement is an exacting or rigorous requirement. In the specific context of Article 2 of the *RO Agreement*, and also bearing in mind our interpretation of the term 'requirements', 'strict' requirements are, therefore, those requirements which make the conferral of origin conditional on conformity with an exacting or rigorous (technical) standard.[23]

The second sentence of Article 2(c) only precludes Members from imposing requirements which are 'unduly' strict. The dictionary meaning of the adverb 'unduly' is 'more than is warranted or natural; excessively, dispro-

[15] (*footnote original*) Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("*EC – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 165.

[16] (*footnote original*) In response to a question from the Panel, India argues that the plural in Article 2(c) means that that provision applies both to an individual rule of origin as well as to a Member's system of rules of origin. India's reply to Panel question No. 48. Since India, in developing its claim, does not rely on this interpretation of the text of Article 2(c), it is sufficient to note that we understand the plural in Article 2(c), first sentence, to refer to a Member's "rules of origin" taken individually, *i.e.*, to individual rules of origin as they apply to individual goods. Indeed, provisions like the second sentence of Article 2(c), the first clause of Article 2(d), Article 2(f) and Article 3(a) of the *RO Agreement* cannot reasonably be read to lay down disciplines for anything other than individual rules of origin.

[17] Panel Report on *US – Textiles Rules of Origin*, paras. 6.1466.147. See also para. 6.172.

[18] (*footnote original*) The French version of Article 2(c), second sentence, reads as follows:

"[Les règles d'origine] n'imposeront pas de prescriptions indûment rigoureuses ni n'exigeront, comme condition préalable à la détermination du pays d'origine, le respect d'une certaine condition non liée à la fabrication ou à l'ouvraison."

The Spanish text of Article 2(c), second sentence, seems to track the French version rather than the English version. It reads:

"[Las normas de origen] [n]o impondrán condiciones indebidamente estrictas ni exigirán el cumplimiento de una determinada condición no relacionada con la fabricación o elaboración como requisito previo para la determinación del país de origen."

[19] (*footnote original*) For the purposes of this dispute, we need not decide whether the "requirements" mentioned in the second sentence of Article 2(c) would also encompass the formal, or administrative, requirements which may be imposed in order to assess compliance with rules of origin (e.g., documentation requirements).

[20] (*footnote original*) The negotiating history of the *RO Agreement* tends to confirm that the term "requirements" refers to the substantive origin requirements that must be met for a good to obtain origin status. The first clause of Article 2(c), second sentence, appears to originate in two provisions proposed by Japan. The first of these proposed provisions states that "the *requirements to be fulfilled in the determination of origin* shall be clearly defined. [. . .] Rules of origin which state only what does not confer origin [. . .] or state only abstract conditions or *unduly strict conditions* shall be prohibited". MTN.GNG/NG2/W/52, p. 5 (emphasis added). The other provision proposed by Japan states that "[t]echnically excessive requirements as a prerequisite for the determination of country of origin shall be prohibited". *Ibid.*

[21] (*footnote original*) *Black's Law Dictionary*, B. A. Garner (ed.), West Group, 1999, p. 1434.

[22] (*footnote original*) *Merriam-Webster OnLine Thesaurus*, http://www.m-w.com (March 2003). We note that the French version of the second sentence of Article 2(c) also uses the adjective "rigoureux".

[23] (*footnote original*) In other words, we think that the "strictness" of requirements is to be assessed from the perspective of countries wanting to obtain origin status, rather than from the perspective of countries wanting to lose origin status.

portionately'.[24] Accordingly, an origin requirement can be considered to be 'unduly' strict if it is excessively strict."[25]

(i) "fulfilment of a certain condition not related to manufacturing or processing"

11. In *US – Textiles Rules of Origin*, the Panel noted that the sentence "fulfilment of a certain condition not related to manufacturing or processing" requires Members to ensure that the conditions that their rules of origin impose as a prerequisite for the conferral of origin do not include a condition unrelated to the manufacturing or processing:

> "[W]e consider that the ordinary meaning of the second clause is clear. It requires Members to ensure that the conditions their rules of origin impose as a prerequisite for the conferral of origin not include a condition which is unrelated to manufacturing or processing.[26] We note the example offered by the United States that a rule of origin would not conform to this requirement if it stated that a good can only be ascribed the origin of a country if the good has been certified by several authorities through a time-consuming process in the exporting country."[27]

5. Article 2(d)

(a) Scope of application of non-discrimination rule

12. In *US – Textiles Rules of Origin*, India argued that rules of origin violate Article 2(d) if they result in unjustifiably differential treatment of "closely related (Indian and European Communities) products". The Panel rejected India's claim and explained that India's argument was partly based on the erroneous assumption that Members should apply "the same rule of origin, or at least equally advantageous rules, to 'closely related' products imported from different Members". The Panel then determined that Article 2(d) does not intend to preclude discrimination across different (but closely related) goods imported from different Members:

> "[W]e recall that the second clause of Article 2(d) states that rules of origin 'shall not discriminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned'. It does not state that rules of origin 'shall not discriminate between closely related goods of other Members [. . .]'. Thus, the plain terms of the second clause do not support India's reading.
>
> Moreover, the expression 'the good concerned' in the singular indicates that the second clause of Article 2(d) is not concerned with discrimination across different (but closely related) goods. Were it otherwise, the second clause would arguably have referred to 'the goods concerned' in the plural. In our view, the use of the singular suggests that, for the purposes of assessing whether there is discrimination 'between Members', a comparison should be made between the rule of origin applicable to a particular good when imported from one or more Members and the rule(s) of origin applicable to the same good – 'the good concerned' – when imported from one or more other Members.
>
> If the second clause of Article 2(c) were intended to preclude discrimination across different (but closely related) goods, we consider it likely that the drafters would have provided some textual guidance as to the product scope of the prohibition set forth in the second clause. Indeed, we note that other WTO non-discrimination provisions, such as Articles I, III and IX of the GATT 1994, do specify the product scope of the prohibitions they contain.[28]
>
> Finally, our reading of the second clause of Article 2(d) is consistent with the objective of that clause. In our view, the principal objective of the second clause of Article 2(d) is to ensure that, for a given good, the strictness of the requirements that must be satisfied for that good to be accorded the origin of a particular Member is the same, regardless of the provenance of the good in question (*i.e.*, Member from which the good is imported, affiliation of the manufacturers of the good, etc.).[29]"[30]

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3
Disciplines after the Transition Period

Taking into account the aim of all Members to achieve, as a result of the harmonization work programme set out in Part IV, the establishment of harmonized rules of origin, Members shall ensure, upon the implementation of the results of the harmonization work programme, that:

(a) they apply rules of origin equally for all purposes as set out in Article 1;

(b) under their rules of origin, the country to be determined as the origin of a particular good is either the country where the good has been wholly obtained or, when more than one country is concerned in the

[24] (*footnote original*) *The New Shorter Oxford English Dictionary*, L. Brown (ed.), Clarendon Press, 1993, Vol. 2, p. 3480.
[25] Panel Report on *US – Textiles Rules of Origin*, paras. 6.204–6.206.
[26] (*footnote original*) We are aware that the third sentence of Article 2(c) states that "costs not directly related to manufacturing or processing may be included for the purposes of the application of an ad valorem percentage criterion consistent with subparagraph (a)". But the third sentence opens with the word "however", which implies a contrast between the second and third sentences.
[27] Panel Report on *US – Textiles Rules of Origin*, para. 6.208.
[28] (*footnote original*) For instance, Article I of the GATT 1994 prohibits discrimination as between "like" products only.
[29] (*footnote original*) The Panel notes that this is consistent with its view that Article 2 is intended to leave Members a considerable measure of discretion in designing and applying their rules of origin. *Supra*, para. 6.25.
[30] Panel Report on *US – Textiles Rules of Origin*, paras. 6.245–6.248.

production of the good, the country where the last substantial transformation has been carried out;

(c) the rules of origin that they apply to imports and exports are not more stringent than the rules of origin they apply to determine whether or not a good is domestic and shall not discriminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned;

(d) the rules of origin are administered in a consistent, uniform, impartial and reasonable manner;

(e) their laws, regulations, judicial decisions and administrative rulings of general application relating to rules of origin are published as if they were subject to, and in accordance with, the provisions of paragraph 1 of Article X of GATT 1994;

(f) upon the request of an exporter, importer or any person with a justifiable cause, assessments of the origin they would accord to a good are issued as soon as possible but no later than 150 days after a request for such an assessment provided that all necessary elements have been submitted. Requests for such assessments shall be accepted before trade in the good concerned begins and may be accepted at any later point in time. Such assessments shall remain valid for three years provided that the facts and conditions, including the rules of origin, under which they have been made remain comparable. Provided that the parties concerned are informed in advance, such assessments will no longer be valid when a decision contrary to the assessment is made in a review as referred to in subparagraph (h). Such assessments shall be made publicly available subject to the provisions of subparagraph (i);

(g) when introducing changes to their rules of origin or new rules of origin, they shall not apply such changes retroactively as defined in, and without prejudice to, their laws or regulations;

(h) any administrative action which they take in relation to the determination of origin is reviewable promptly by judicial, arbitral or administrative tribunals or procedures, independent of the authority issuing the determination, which can effect the modification or reversal of the determination;

(i) all information which is by nature confidential or which is provided on a confidential basis for the purpose of the application of rules of origin is treated as strictly confidential by the authorities concerned, which shall not disclose it without the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

No jurisprudence or decision of a competent WTO body.

PART III
PROCEDURAL ARRANGEMENTS ON NOTIFICATION, REVIEW, CONSULTATION AND DISPUTE SETTLEMENT

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4
Institutions

1. There is hereby established a Committee on Rules of Origin (referred to in this Agreement as "the Committee") composed of the representatives from each of the Members. The Committee shall elect its own Chairman and shall meet as necessary, but not less than once a year, for the purpose of affording Members the opportunity to consult on matters relating to the operation of Parts I, II, III and IV or the furtherance of the objectives set out in these Parts and to carry out such other responsibilities assigned to it under this Agreement or by the Council for Trade in Goods. Where appropriate, the Committee shall request information and advice from the Technical Committee referred to in paragraph 2 on matters related to this Agreement. The Committee may also request such other work from the Technical Committee as it considers appropriate for the furtherance of the above-mentioned objectives of this Agreement. The WTO Secretariat shall act as the secretariat to the Committee.

2. There shall be established a Technical Committee on Rules of Origin (referred to in this Agreement as "the Technical Committee") under the auspices of the Customs Co-operation Council (CCC) as set out in Annex I.[31] The Technical Committee shall carry out the technical work called for in Part IV and prescribed in Annex I. Where appropriate, the Technical Committee shall request information and advice from the Committee on matters related to this Agreement. The Technical Committee may also request such other work from the Committee as it considers appropriate for the furtherance of the above-mentioned objectives of the Agreement. The CCC Secretariat shall act as the secretariat to the Technical Committee.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

1. Observers

13. At its meeting on 4 April 1995, the Committee on Rules of Origin agreed that governments granted

[31] See Section XI.

observer status by the WTO General Council would be allowed to attend meetings of the Committee as observers, without prejudice to the possibility of holding closed sessions without observers.[32]

2. Rules of procedure

14. At its meeting of 16 November 1995, the Committee on Rules of Origin adopted its Rules of Procedure[33], which were subsequently approved by the Council for Trade in Goods at its meeting of 1 December 1995.[34]

15. The Committee on Rules of Origin reports to the Council for Trade in Goods on an annual basis.[35]

3. Drafting Group on Rules of Origin

16. At its meeting on 27 June 1995, the Committee on Rules of Origin set up a Drafting Group to elaborate a definition of the term "country" for the purposes of the *Agreement on Rules of Origin*.[36] At its meeting on 16 November 1995, the Committee on Rules of Origin agreed to adopt the following recommendation from the Drafting Group:

> "[T]he Committee requests the Technical Committee to fully proceed with its Harmonization Work Programme in the absence of an abstractly constructed definition of the term 'country'; and to forward to it unresolved issues relating to the definition of the term 'country', for a final determination; and
>
> the Committee may request the Drafting Group to address particular issues relating to the definition of the term 'country' and, in that connection, to offer clarification that may enhance the work of the Technical Committee;"[37]

4. Working Group

17. At its meeting on 16 November 1995, the Committee on Rules of Origin agreed, as concerned the process of reviewing the reports submitted to the Committee by the Technical Committee on Rules of Origin in Brussels, to establish an open-ended Working Group to deal with bracketed interpretations and opinions of the Technical Committee, and consequently forward appropriate recommendations to the Committee on Rules of Origin for final consideration and decision.[38]

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5
Information and Procedures for Modification and Introduction of New Rules of Origin

1. Each Member shall provide to the Secretariat, within 90 days after the date of entry into force of the WTO Agreement for it, its rules of origin, judicial decisions, and administrative rulings of general application relating to rules of origin in effect on that date. If by inadvertence a rule of origin has not been provided, the Member concerned shall provide it immediately after this fact becomes known. Lists of information received and available with the Secretariat shall be circulated to the Members by the Secretariat.

2. During the period referred to in Article 2, Members introducing modifications, other than *de minimis* modifications, to their rules of origin or introducing new rules of origin, which, for the purpose of this Article, shall include any rule of origin referred to in paragraph 1 and not provided to the Secretariat, shall publish a notice to that effect at least 60 days before the entry into force of the modified or new rule in such a manner as to enable interested parties to become acquainted with the intention to modify a rule of origin or to introduce a new rule of origin, unless exceptional circumstances arise or threaten to arise for a Member. In these exceptional cases, the Member shall publish the modified or new rule as soon as possible.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. Notification procedures

18. At its meeting of 4 April 1995, the Committee on Rules of Origin agreed that, if a notification under Article 5.1 and paragraph 4 of Annex II were to be made in a language other than one of the WTO working languages, such notification should be accompanied by a summary in one of the WTO working languages.[39]

19. As of 31 December 2004, 84 Members have made notifications of non-preferential rules of origin and 89 Members have made notifications of preferential rules of origin pursuant to Article 5 and paragraph 4 of Annex II.[40]

20. At its meeting of 1 February 1996, the Committee on Rules of Origin adopted a procedure to deal with queries by Members in respect of national legislation;

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[32] G/RO/M/1, para. 11. In addition, Representatives of the ACP, EFTA, IADB, IMF, ITCB, OECD, UNCTAD, WCO and the World Bank were invited to attend meetings of the Committee on Rules of Origin in 2000 in an observer capacity. See G/L/413, para. 1.
[33] G/RO/M/3. The adopted rules of procedure can be found in G/L/149.
[34] G/C/M/7.
[35] The reports are contained in documents G/L/36, 36/Corr.1, 119, 210, 271, 326, 413, 656 and 704.
[36] G/RO/M/2, paras. 10–16.
[37] G/RO/M/3, paras. 3.1–3.2.
[38] The terms of reference of the Working Group can be found in G/RO/M/3, para. 4.3.
[39] G/RO/M/1, para. 44. For details on Members' notifications relating to preferential and non-preferential rules of origin, see G/RO/47. para. 5 and Annex.
[40] G/L/656.

such queries should be communicated to the Secretariat ten working days in advance of the meeting at which they are to be raised.[41]

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6
Review

1. The Committee shall review annually the implementation and operation of Parts II and III of this Agreement having regard to its objectives. The Committee shall annually inform the Council for Trade in Goods of developments during the period covered by such reviews.

2. The Committee shall review the provisions of Parts I, II and III and propose amendments as necessary to reflect the results of the harmonization work programme.

3. The Committee, in cooperation with the Technical Committee, shall set up a mechanism to consider and propose amendments to the results of the harmonization work programme, taking into account the objectives and principles set out in Article 9. This may include instances where the rules need to be made more operational or need to be updated to take into account new production processes as affected by any technological change.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

1. Article 6.1

21. As of 31 December 2004, the Committee on Rules of Origin has conducted ten reviews of the implementation and operation of the Agreement.[42]

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7
Consultation

The provisions of Article XXII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, are applicable to this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

No jurisprudence or decision of a competent WTO body.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8
Dispute Settlement

The provisions of Article XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, are applicable to this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

22. The following table lists the dispute in which the panel report has been adopted where the provisions of the *Agreement on Rules of Origin* were invoked:

	Case Name	Case Number	Invoked Articles
1	*US – Textiles Rules of Origin*	WT/DS165	Article 2

PART IV
HARMONIZATION OF RULES OF ORIGIN

X. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9
Objectives and Principles

1. With the objectives of harmonizing rules of origin and, *inter alia*, providing more certainty in the conduct of world trade, the Ministerial Conference shall undertake the work programme set out below in conjunction with the CCC, on the basis of the following principles:

(a) rules of origin should be applied equally for all purposes as set out in Article 1;

(b) rules of origin should provide for the country to be determined as the origin of a particular good to be either the country where the good has been wholly obtained or, when more than one country is concerned in the production of the good, the country where the last substantial transformation has been carried out;

(c) rules of origin should be objective, understandable and predictable;

(d) notwithstanding the measure or instrument to which they may be linked, rules of origin should not be used as instruments to pursue trade objectives directly or indirectly. They should not themselves create restrictive, distorting or dis-

[41] G/RO/M/5, para. 1.3.
[42] See G/RO/3, G/RO/12, G/RO/21, G/RO/28, G/RO/43, G/RO/47, G/RO/50 and G/RO/55.

ruptive effects on international trade. They should not pose unduly strict requirements or require the fulfilment of a certain condition not relating to manufacturing or processing as a prerequisite for the determination of the country of origin. However, costs not directly related to manufacturing or processing may be included for purposes of the application of an ad valorem percentage criterion;

(e) rules of origin should be administrable in a consistent, uniform, impartial and reasonable manner;

(f) rules of origin should be coherent;

(g) rules of origin should be based on a positive standard. Negative standards may be used to clarify a positive standard.

Work Programme

2. (a) The work programme shall be initiated as soon after the entry into force of the WTO Agreement as possible and will be completed within three years of initiation.

(b) The Committee and the Technical Committee provided for in Article 4 shall be the appropriate bodies to conduct this work.

(c) To provide for detailed input by the CCC, the Committee shall request the Technical Committee to provide its interpretations and opinions resulting from the work described below on the basis of the principles listed in paragraph 1. To ensure timely completion of the work programme for harmonization, such work shall be conducted on a product sector basis, as represented by various chapters or sections of the Harmonized System (HS) nomenclature.

(i) *Wholly Obtained and Minimal Operations or Processes*

The Technical Committee shall develop harmonized definitions of:

- the goods that are to be considered as being wholly obtained in one country. This work shall be as detailed as possible;
- minimal operations or processes that do not by themselves confer origin to a good.

The results of this work shall be submitted to the Committee within three months of receipt of the request from the Committee.

(ii) *Substantial Transformation – Change in Tariff Classification*

- The Technical Committee shall consider and elaborate upon, on the basis of the criterion of substantial transformation, the use of change in tariff subheading or heading when developing rules of origin for particular products or a product sector and, if appropriate, the minimum change within the nomenclature that meets this criterion.
- The Technical Committee shall divide the above work on a product basis taking into account the chapters or sections of the HS nomenclature, so as to submit results of its work to the Committee at least on a quarterly basis. The Technical Committee shall complete the above work within one year and three months from receipt of the request of the Committee.

(iii) *Substantial Transformation – Supplementary Criteria*

Upon completion of the work under subparagraph (ii) for each product sector or individual product category where the exclusive use of the HS nomenclature does not allow for the expression of substantial transformation, the Technical Committee:

- shall consider and elaborate upon, on the basis of the criterion of substantial transformation, the use, in a supplementary or exclusive manner, of other requirements, including ad valorem percentages[4] and/or manufacturing or processing operations[5], when developing rules of origin for particular products or a product sector;
- may provide explanations for its proposals;
- shall divide the above work on a product basis taking into account the chapters or sections of the HS nomenclature, so as to submit results of its work to the Committee at least on a quarterly basis. The Technical Committee shall complete the above work within two years and three months of receipt of the request from the Committee.

(*footnote original*) [4] If the ad valorem criterion is prescribed, the method for calculating this percentage shall also be indicated in the rules of origin.

(*footnote original*) [5] If the criterion of manufacturing or processing operation is prescribed, the operation that confers origin on the product concerned shall be precisely specified.

Role of the Committee

3. On the basis of the principles listed in paragraph 1:

(a) the Committee shall consider the interpretations and opinions of the Technical Committee periodically in accordance with the time-frames provided in subparagraphs (i), (ii) and (iii) of paragraph 2(c) with a view to endorsing such interpretations and opinions. The Committee

may request the Technical Committee to refine or elaborate its work and/or to develop new approaches. To assist the Technical Committee, the Committee should provide its reasons for requests for additional work and, as appropriate, suggest alternative approaches;

(b) upon completion of all the work identified in subparagraphs (i), (ii) and (iii) of paragraph 2(c), the Committee shall consider the results in terms of their overall coherence.

Results of the Harmonization Work Programme and Subsequent Work

4. The Ministerial Conference shall establish the results of the harmonization work programme in an annex as an integral part of this Agreement.[6] The Ministerial Conference shall establish a time-frame for the entry into force of this annex.

(*footnote original*) [6] At the same time, consideration shall be given to arrangements concerning the settlement of disputes relating to customs classification.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

23. The Committee on Rules of Origin has pursued work on the harmonization of non-preferential rules of origin.[43] At its meeting of 10 May 1996, the Committee on Rules of Origin decided to establish an Integrated Negotiating Text for the Harmonization Work Programme.[44]

24. At its meeting of 15 December 2000, with respect to implementation-related issues and concerns, the General Council made a decision relating to several WTO Agreements.[45] Specifically, with respect to the *Agreement on Rules of Origin*, the General Council decided:

"Members undertake to expedite the remaining work on the harmonization of non-preferential rules of origin, so as to complete it by the time of the Fourth Ministerial Conference, or by the end of 2001 at the latest. The Chairman of the Committee on Rules of Origin shall report regularly, on his own responsibility, to the General Council on the progress being made. The first such report would be submitted to the Council at its first regular meeting in 2001, and subsequently at each regular meeting until the completion of the work programme."[46]

25. The Chairman of the Committee on Rules of Origin submitted a progress report on the harmonization work programme to the General Council in December 2001.[47] Following the discussion on the report, the General Council agreed that the Committee on Rules of Origin would hold two additional sessions in the first half of 2002 to resolve remaining issues, so that it might identify a limited number of core policy-level issues that in its view needed to be reported to the General Council for discussion and decision at that level. It also agreed that the outcome of the Committee on Rules of Origin's further work would be reported by the Chairman of the Committee, on his own responsibility, to the General Council at its first regular meeting after the end of June 2002, at which point the matter would be in the hands of the General Council, and that the deadline for completion of the harmonization work programme would be extended to the end of 2002.[48]

26. At its meeting in July 2002, the General Council took note of a report by the Chairman of the Committee on Rules of Origin and of the recommendations contained therein[49], and agreed to hold a first meeting on the 12 core policy-level issues identified in paragraph 5.1 of that report.[50]

27. At its meeting in December 2002, the General Council considered a report from its Chairman and the Chairman of the Committee on Rules of Origin on the progress to date. Following the discussion, and taking into account the importance of the issues to be resolved and the implications to be considered, and in the full knowledge of the consequences of a failure to meet another new deadline, the General Council agreed to extend, to July 2003, the deadline for completion of negotiations on the core policy issues identified in the Committee on Rules of Origin Chair's report to the General Council of 15 July 2002. The General Council also agreed that following resolution of these core policy issues, the Committee on Rules of Origin complete its remaining technical work, including the work referred to in Article 9.3(b) of the Agreement on Rules of Origin, by 31 December 2003.[51]

[43] The General Council adopted to date recommendations by the Committee on Rules of Origin to continue its work on this matter, in July 1998 (WT/GC/M/29, Section 4(a)) and October 2000 (WT/GC/M/59, Section 1(e)).
[44] G/RO/M/6, para.1 The Integrated Negotiating Text can be found in G/RO/W/13. The text with the latest update can be found in G/RO/45.
[45] WT/GC/M/62, para. 17. The text of the decision can be found in WT/L/384. *See also* Chapter on *WTO Agreement*, Section X.B on the powers of the General Council more generally.
[46] WT/L/384, para. 5.
[47] G/RO/49.
[48] WT/GC/M/72.
[49] G/RO/52.
[50] WT/GC/M/75.
[51] WT/GC/M/77.

XI. ANNEX I

A. TEXT OF ANNEX I

ANNEX I
TECHNICAL COMMITTEE ON RULES OF ORIGIN

Responsibilities

1. The ongoing responsibilities of the Technical Committee shall include the following:

(a) at the request of any member of the Technical Committee, to examine specific technical problems arising in the day-to-day administration of the rules of origin of Members and to give advisory opinions on appropriate solutions based upon the facts presented;

(b) to furnish information and advice on any matters concerning the origin determination of goods as may be requested by any Member or the Committee;

(c) to prepare and circulate periodic reports on the technical aspects of the operation and status of this Agreement; and

(d) to review annually the technical aspects of the implementation and operation of Parts II and III.

2. The Technical Committee shall exercise such other responsibilities as the Committee may request of it.

3. The Technical Committee shall attempt to conclude its work on specific matters, especially those referred to it by Members or the Committee, in a reasonably short period of time.

Representation

4. Each Member shall have the right to be represented on the Technical Committee. Each Member may nominate one delegate and one or more alternates to be its representatives on the Technical Committee. Such a Member so represented on the Technical Committee is hereinafter referred to as a "member" of the Technical Committee. Representatives of members of the Technical Committee may be assisted by advisers at meetings of the Technical Committee. The WTO Secretariat may also attend such meetings with observer status.

5. Members of the CCC which are not Members of the WTO may be represented at meetings of the Technical Committee by one delegate and one or more alternates. Such representatives shall attend meetings of the Technical Committee as observers.

6. Subject to the approval of the Chairman of the Technical Committee, the Secretary-General of the CCC (referred to in this Annex as "the Secretary-General") may invite representatives of governments which are neither Members of the WTO nor members of the CCC and representatives of international governmental and trade organizations to attend meetings of the Technical Committee as observers.

7. Nominations of delegates, alternates and advisers to meetings of the Technical Committee shall be made to the Secretary-General.

Meetings

8. The Technical Committee shall meet as necessary, but not less than once a year.

Procedures

9. The Technical Committee shall elect its own Chairman and shall establish its own procedures.

B. INTERPRETATION AND APPLICATION OF ANNEX I

No jurisprudence or decision of a competent WTO body.

XII. ANNEX II

A. TEXT OF ANNEX II

ANNEX II
COMMON DECLARATION WITH REGARD TO PREFERENTIAL RULES OF ORIGIN

1. Recognizing that some Members apply preferential rules of origin, distinct from non-preferential rules of origin, the Members hereby *agree* as follows.

2. For the purposes of this Common Declaration, preferential rules of origin shall be defined as those laws, regulations and administrative determinations of general application applied by any Member to determine whether goods qualify for preferential treatment under contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article I of GATT 1994.

3. The Members *agree* to ensure that:

(a) when they issue administrative determinations of general application, the requirements to be fulfilled are clearly defined. In particular:

(i) in cases where the criterion of change of tariff classification is applied, such a preferential rule of origin, and any exceptions to the rule, must clearly specify the subheadings or headings within the tariff nomenclature that are addressed by the rule;

(ii) in cases where the ad valorem percentage criterion is applied, the method for calculating this percentage shall also be indicated in the preferential rules of origin;

(iii) in cases where the criterion of manufacturing or processing operation is prescribed, the operation that confers

preferential origin shall be precisely specified;

(b) their preferential rules of origin are based on a positive standard. Preferential rules of origin that state what does not confer preferential origin (negative standard) are permissible as part of a clarification of a positive standard or in individual cases where a positive determination of preferential origin is not necessary;

(c) their laws, regulations, judicial decisions and administrative rulings of general application relating to preferential rules of origin are published as if they were subject to, and in accordance with, the provisions of paragraph 1 of Article X of GATT 1994;

(d) upon request of an exporter, importer or any person with a justifiable cause, assessments of the preferential origin they would accord to a good are issued as soon as possible but no later than 150 days[7] after a request for such an assessment provided that all necessary elements have been submitted. Requests for such assessments shall be accepted before trade in the good concerned begins and may be accepted at any later point in time. Such assessments shall remain valid for three years provided that the facts and conditions, including the preferential rules of origin, under which they have been made remain comparable. Provided that the parties concerned are informed in advance, such assessments will no longer be valid when a decision contrary to the assessment is made in a review as referred to in subparagraph (f). Such assessments shall be made publicly available subject to the provisions of subparagraph (g);

(*footnote original*) [7] In respect of requests made during the first year from entry into force of the WTO Agreement, Members shall only be required to issue these assessments as soon as possible.

(e) when introducing changes to their preferential rules of origin or new preferential rules of origin, they shall not apply such changes retroactively as defined in, and without prejudice to, their laws or regulations;

(f) any administrative action which they take in relation to the determination of preferential origin is reviewable promptly by judicial, arbitral or administrative tribunals or procedures, independent of the authority issuing the determination, which can effect the modification or reversal of the determination;

(g) all information that is by nature confidential or that is provided on a confidential basis for the purpose of the application of preferential rules of origin is treated as strictly confidential by the authorities concerned, which shall not disclose it without the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

4. Members *agree* to provide to the Secretariat promptly their preferential rules of origin, including a listing of the preferential arrangements to which they apply, judicial decisions, and administrative rulings of general application relating to their preferential rules of origin in effect on the date of entry into force of the WTO Agreement for the Member concerned. Furthermore, Members agree to provide any modifications to their preferential rules of origin or new preferential rules of origin as soon as possible to the Secretariat. Lists of information received and available with the Secretariat shall be circulated to the Members by the Secretariat.

B. INTERPRETATION AND APPLICATION OF ANNEX II

28. With respect to implementation of paragraph 4 of Annex II, see paragraph 19 above.

Agreement on Import Licensing Procedures

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Having regard to the Multilateral Trade Negotiations;

Desiring to further the objectives of GATT 1994;

Taking into account the particular trade, development and financial needs of developing country Members;

Recognizing the usefulness of automatic import licensing for certain purposes and that such licensing should not be used to restrict trade;

Recognizing that import licensing may be employed to administer measures such as those adopted pursuant to the relevant provisions of GATT 1994;

Recognizing the provisions of GATT 1994 as they apply to import licensing procedures;

Desiring to ensure that import licensing procedures are not utilized in a manner contrary to the principles and obligations of GATT 1994;

Recognizing that the flow of international trade could be impeded by the inappropriate use of import licensing procedures;

Convinced that import licensing, particularly non-automatic import licensing, should be implemented in a transparent and predictable manner;

Recognizing that non-automatic licensing procedures should be no more administratively burdensome than absolutely necessary to administer the relevant measure;

Desiring to simplify, and bring transparency to, the administrative procedures and practices used in international trade, and to ensure the fair and equitable application and administration of such procedures and practices;

Desiring to provide for a consultative mechanism and the speedy, effective and equitable resolution of disputes arising under this Agreement;

Hereby *agree* as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

1. In *EC – Poultry*, Brazil argued before the Appellate Body that Articles 1.2 and 3.2 of the *Licensing Agreement* were not applicable to over-quota trade. In addressing these issues, the Appellate Body referred to the Preamble of the *Licensing Agreement*:

> "The preamble to the *Licensing Agreement* stresses that the Agreement aims at ensuring that import licensing procedures 'are not utilized in a manner contrary to the principles and obligations of GATT 1994' and are 'implemented in a transparent and predictable manner'."[1]

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1
General Provisions

1. For the purpose of this Agreement, import licensing is defined as administrative procedures[1] used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member.

(*footnote original*) [1] Those procedures referred to as "licensing" as well as other similar administrative procedures.

2. Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols, as interpreted by this Agreement, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures, taking into account the economic development purposes and financial and trade needs of developing country Members.[2]

(*footnote original*) [2] Nothing in this Agreement shall be taken as implying that the basis, scope or duration of a measure being implemented by a licensing procedure is subject to question under this Agreement.

3. The rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner.

4. (a) The rules and all information concerning procedures for the submission of applications, including the eligibility of persons, firms and institutions to make such applications, the administrative body(ies) to be approached, and the lists of products subject to the licensing requirement shall be published, in the sources notified to the Committee on Import Licensing provided for in Article 4 (referred to in this Agreement as "the Committee"), in such a manner as to enable governments[3] and traders to become acquainted with them. Such publication shall take place, whenever practicable, 21 days prior to the effective date of the requirement but in all events not later than such effective date. Any exception, derogations or changes in or from the rules concerning licensing procedures or the list of products subject to import licensing shall also be published in the same manner and within the same time periods as specified above. Copies of these publications shall also be made available to the Secretariat.

(*footnote original*) [3] For the purpose of this Agreement, the term "governments" is deemed to include the competent authorities of the European Communities.

(b) Members which wish to make comments in writing shall be provided the opportunity to discuss these comments upon request. The concerned Member shall give due consideration to these comments and results of discussion.

5. Application forms and, where applicable, renewal forms shall be as simple as possible. Such documents and information as are considered strictly necessary for the proper functioning of the licensing regime may be required on application.

6. Application procedures and, where applicable, renewal procedures shall be as simple as possible. Applicants shall be allowed a reasonable period for the submission of licence applications. Where there is a closing date, this period should be at least 21 days with provision for extension in circumstances where insufficient applications have been received within this period. Applicants shall have to approach only one administrative body in connection with an application. Where it is strictly indispensable to approach more than one administrative body, applicants shall not need to approach more than three administrative bodies.

7. No application shall be refused for minor documentation errors which do not alter basic data contained

[1] Appellate Body Report on *EC – Poultry*, para. 121.

therein. No penalty greater than necessary to serve merely as a warning shall be imposed in respect of any omission or mistake in documentation or procedures which is obviously made without fraudulent intent or gross negligence.

8. Licensed imports shall not be refused for minor variations in value, quantity or weight from the amount designated on the licence due to differences occurring during shipment, differences incidental to bulk loading and other minor differences consistent with normal commercial practice.

9. The foreign exchange necessary to pay for licensed imports shall be made available to licence holders on the same basis as to importers of goods not requiring import licences.

10. With regard to security exceptions, the provisions of Article XXI of GATT 1994 apply.

11. The provisions of this Agreement shall not require any Member to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. Article 1

(a) Scope of the Licensing Agreement

(i) Tariff quotas procedures

2. In *EC – Bananas III*, the Appellate Body considered that the European Communities licensing procedures for tariff quotas were within the scope of the *Licensing Agreement*. After quoting the definition of "import licensing" set out in Article 1.1, the Appellate Body concluded that licensing procedures for tariff quotas fell under the provisions of the *Licensing Agreement*:

> "Although the precise terms of Article 1.1 do not say explicitly that licensing procedures for tariff quotas are within the scope of the *Licensing Agreement*, a careful reading of that provision leads inescapably to that conclusion. The EC import licensing procedures require 'the submission of an application' for import licences as 'a prior condition for importation' of a product at the lower, in-quota tariff rate. The fact that the importation of that product is possible at a high out-of-quota tariff rate without a licence does not alter the fact that a licence is required for importation at the lower in-quota tariff rate.
>
> We note that Article 3.2 of the *Licensing Agreement* provides that:
>
> > 'Non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of *the restriction*.' (emphasis added)
>
> We note also that Article 3.3 of the *Licensing Agreement* reads:
>
> > 'In the case of licensing requirements for purposes *other than the implementation of quantitative restrictions,* Members shall publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences.' (emphasis added)
>
> We see no reason to exclude import licensing procedures for the administration of tariff quotas from the scope of the *Licensing Agreement* on the basis of the use of the term 'restriction' in Article 3.2. We agree with the Panel that, in the light of the language of Article 3.3 of the *Licensing Agreement* and the introductory words of Article XI of the GATT 1994, the term 'restriction' as used in Article 3.2 should not be interpreted to encompass only quantitative restrictions, but should be read also to include tariff quotas.
>
> For these reasons, we agree with the Panel that import licensing procedures for tariff quotas are within the scope of the *Licensing Agreement*."[2]

(ii) Licensing procedures for over-quota trade

3. In *EC – Poultry*, the European Communities regulation at issue applied, by its terms, only to in-quota trade in frozen poultry meat. The Panel had found that "the *Licensing Agreement*, as applied to this particular case, only relates to in-quota trade".[3] Brazil claimed that nothing in the text or context of Articles 1.2 and 3.2 of the *Licensing Agreement* limits to in-quota trade the requirement in Article 1.2 that licensing systems be implemented "with a view to preventing trade distortions" or the prohibition in Article 3.2 of additional trade-restrictive or trade-distortive effects. The Appellate Body stated as follows:

> "The preamble to the *Licensing Agreement* stresses that the Agreement aims at ensuring that import licensing procedures 'are not utilized in a manner contrary to the principles and obligations of GATT 1994' and are 'implemented in a transparent and predictable manner'. Moreover, Articles 1.2 and 3.2 make it clear that the *Licensing Agreement* is also concerned, with, among other things, preventing trade distortions that may be caused by licensing procedures. It follows that wherever an import licensing regime is applied, these requirements must be observed. The requirement to prevent trade distortion found in Articles 1.2 and 3.2 of the *Licensing Agreement* refers to *any* trade distortion that may be caused by the introduction or operation of licensing procedures, and is not necessarily limited to that part of trade to which the

[2] Appellate Body Report on *EC – Bananas III*, paras. 193–195.
[3] Panel Report on *EC – Poultry*, para. 249.

licensing procedures themselves apply. There may be situations where the operation of licensing procedures, in fact, have restrictive or distortive effects on that part of trade that is not strictly subject to those procedures.

In the case before us, the licensing procedure established in Article 1 of Regulation 1431/94 applies, by its terms, only to in-quota trade in frozen poultry meat. No licensing is required by Regulation 1431/94 for out-of-quota trade in frozen poultry meat. To the extent that the Panel intended merely to reflect the fairly obvious fact that this licensing procedure applies only to in-quota trade, we uphold the finding of the Panel that '[t]he Licensing Agreement, as applied to this particular case, only relates to in-quota trade'."[4]

(iii) Licensing "rules"

4. In *EC – Bananas III*, the Appellate Body reversed the Panel's finding that Article 1.3 of the *Licensing Agreement* "preclude[s] the imposition of one system of import licensing procedures in respect of a product originating in certain Members and a different system of import licensing procedures on the same product originating in other Members".[5] In doing so, the Appellate Body drew a distinction between licensing rules *per se*, on the one hand, and their application and administration, on the other:

"By its very terms, Article 1.3 of the *Licensing Agreement* clearly applies to the *application* and *administration* of import licensing procedures, and requires that this application and administration be 'neutral . . . fair and equitable'. Article 1.3 of the *Licensing Agreement* does not require the import licensing *rules*, as such, to be neutral, fair and equitable. Furthermore, the context of Article 1.3 – including the preamble, Article 1.1 and, in particular, Article 1.2 of the *Licensing Agreement* – supports the conclusion that Article 1.3 does not apply to import licensing *rules*. Article 1.2 provides, in relevant part, as follows:

> 'Members shall ensure that the administrative procedures used to implement import licensing régimes are in conformity with the relevant provisions of GATT 1994 . . . as interpreted by this Agreement, . . .'

As a matter of fact, none of the provisions of the *Licensing Agreement* concerns import licensing *rules*, *per se*. As is made clear by the title of the *Licensing Agreement*, it concerns import licensing *procedures*. The preamble of the *Licensing Agreement* indicates clearly that this agreement relates to import licensing procedures and their administration, not to import licensing rules. Article 1.1 of the *Licensing Agreement* defines its scope as the *administrative procedures* used for the operation of import licensing regimes.

We conclude, therefore, that the Panel erred in finding that Article 1.3 of the *Licensing Agreement* precludes the imposition of different import licensing systems on like products when imported from different Members."[6]

5. In *Korea – Various Measures on Beef*, the Panel followed the distinction between licensing rules *per se* and their administration, set out in the finding of the Appellate Body referenced in paragraph 4 above. The Panel examined the United States' claim that Korea's regulatory regime was inconsistent with Article 3.2 of the *Licensing Agreement* by granting exclusive authority to the LPMO and the SBS system to import beef, holding:

"[T]he Panel notes that many of the US claims regarding alleged violations of the *Licensing Agreement* are concerned with the substantive provisions of Korea's import (and distribution) regime (by the LPMO or SBS supergroups). It has been said repeatedly that such substantive matters are of no relevance to the *Licensing Agreement* which is concerned with the administrative rules of import licensing systems.[7]

For these reasons, the Panel does not reach any general conclusion on the compatibility of Korea's import licensing system with the WTO Agreement."[8]

6. With respect to the distinction between licensing rules *per se* and their administration, see also paragraph 13 below.

2. Article 1.2

(a) Interpretation

7. The Panel on *EC – Bananas III* addressed the issue of whether Article 1.2 in itself creates obligations additional to those arising from GATT. The Panel considered the historical developments of the GATT/WTO rules on licensing and concluded that, except for a reference to developing Members, "Article 1.2 of the WTO Licensing Agreement has become largely duplicative of the obligations already provided for in GATT" and "Article 1.2 . . . has lost most of its legal significance":

"[Article 1.2] derives from the 1979 Tokyo Round Agreement on Import Licensing Procedures which was negotiated as a self-standing agreement without a formal legal link to GATT 1947. Accordingly, membership was open not only to GATT contracting parties and the European Communities, but also to any other government.[9] Therefore, provisions of GATT 1947 applied between the signatories of the 1979 Licensing Agreement, by virtue of that agreement, only to the extent that they had been explicitly referred to and incorporated into the 1979 Licensing Agreement. In this context, Articles 1.10 and 4.2 of the 1979 Licensing Agreement mention, *inter alia*,

[4] Appellate Body Report on *EC – Poultry*, paras. 121–122.
[5] Panel Report on *EC – Bananas III*, para. 7.261.
[6] Appellate Body Report on *EC – Bananas III*, paras. 197–198.
[7] (*footnote original*) Appellate Body Report on *EC – Bananas III*, para. 197.
[8] Panel Report on *Korea – Various Measures on Beef*, paras. 784–785.
[9] (*footnote original*) 1979 Licensing Agreement, Article 5.

Articles XXI, XXII and XXIII of GATT 1947. Accordingly, the general rule that administrative procedures used to implement import licensing regimes had to conform with the relevant GATT provisions in fact added only to the obligations which any non-GATT contracting parties among the signatories of the 1979 Licensing Agreement would have been subject to.

The wording of Article 1.2 remained unchanged in the Uruguay Round. Given that the Agreement Establishing the WTO and all the agreements listed in Annexes 1 through 3 thereto constitute a single undertaking, however, Article 1.2 of the WTO Licensing Agreement has become largely duplicative of the obligations already provided for in GATT, except for the reference to developing country Members. Given this context, Article 1.2 of the WTO Licensing Agreement has lost most of its legal significance."[10]

8. Despite its finding that Article 1.2 of the *Licensing Agreement* merely duplicates already existing obligations, the Panel recalled the principle of effective treaty interpretation:

"However, the Appellate Body has endorsed the principle of effective treaty interpretation by stating that 'an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'.[11] In light of this, we have to give effect and meaning to Article 1.2 of the Licensing Agreement.

For this reason, to the extent that we find that specific aspects of the EC licensing procedures are not in conformity with Articles I, III or X of GATT, we necessarily also find an inconsistency with the requirements of Article 1.2 of the Licensing Agreement."[12]

9. The Panel on *EC – Bananas III* also addressed the legal significance of the reference in Article 1.2 to developing country Members:

"With respect to Article 1.2's requirement that account should be taken of 'economic development purposes and financial and trade needs of developing country Members', the Licensing Agreement does not give guidance as to how that obligation should be applied in specific cases. We believe that this provision could be interpreted as a recognition of the difficulties that might arise for developing country Members, in imposing licensing procedures, to comply fully with the provisions of GATT and the Licensing Agreement. In the alternative, Article 1.2 could also be read to authorize, but not to require, developed country Members to apply preferential licensing procedures to imports from developing country Members. In any event, even if we accept the latter interpretation, we have not been presented with evidence suggesting that, in its licensing procedures, there were factors that the EC should have but did not take into account under Article 1.2.

Therefore, we do not make a finding on whether the EC failed to take into account the needs of developing countries in a manner inconsistent with the requirements of Article 1.2 of the Licensing Agreement."[13]

10. In *EC – Poultry*, Brazil argued that the European Communities had violated the prohibition of trade distortion contained in Articles 1.2 and 3.2 of the *Licensing Agreement*. The Panel had rejected Brazil's claim. On appeal, Brazil argued that the Panel had failed to address or examine properly certain evidence, including evidence concerning Brazil's falling share of the poultry market in the European Communities, and had examined whether this falling market share was caused by the introduction of the European Communities licensing procedures for the tariff-rate quota for frozen poultry meat. The Appellate Body found that Brazil had failed to establish a causal link between the decline in market share and other indicators, on the one hand, and the licensing requirements at issue, on the other:

"Under Regulation 1431/94, Brazil's share in the EC tariff-rate quota for frozen poultry meat is 7,100 tonnes out of the total tariff-rate quota of 15,500 tonnes. This share is equal to approximately 45 per cent of the tariff-rate quota. This is the same as Brazil's percentage share of the total exports of frozen poultry meat to the European Communities during the reference period of the preceding three years. In addition, the Panel noted, licences issued by the European Communities for imports of frozen poultry meat from Brazil have been fully utilized. This means that Brazil's percentage share in the tariff-rate quota has remained at the same level as Brazil's share in the total trade over the relevant period. Moreover, the absolute volume of exports of frozen poultry meat by Brazil in the total exports of this product to the European Communities has been rising since the imposition of the tariff-rate quota for frozen poultry meat.

Brazil has not, in our view, clearly explained, either before the Panel or before us, how the licensing procedure *caused* the decline in market share. Brazil has not offered any persuasive evidence that its falling market share could, in this particular case – with a constant percentage share of the tariff-rate quota, full utilization of the tariff-rate quota and a growing total volume of exports – be viewed as constituting trade distortion attributable to the licensing procedure. In other words, Brazil has not proven a violation of the prohibition of trade distortion in Articles 1.2 and 3.2 of the *Licensing Agreement* by the European Communities.

Brazil argues that the Panel did not consider a number of other arguments in its examination of the existence

[10] Panel Report on *EC – Bananas III*, paras. 7.268–7.269.
[11] (*footnote original*) Appellate Body Report on *US – Gasoline*, p. 23.
[12] Panel Report on *EC – Bananas III*, paras. 7.270–7.271.
[13] Panel Report on *EC – Bananas III*, paras. 7.272–7.273.

> of trade distortion: that licences have been apportioned in non-economic quantities; that there have been frequent changes to the licensing rules; that licence entitlement has been based on export performance; and that there has been speculation in licences. These arguments, however, do not address the problem of establishing a causal relationship between imposition of the EC licensing procedure and the claimed trade distortion. Even if conceded *arguendo*, these arguments do not provide proof of the essential element of causation.
>
> For these reasons, we uphold the finding of the Panel that Brazil has not established that the European Communities has acted inconsistently with either Article 1.2 or Article 3.2 of the *Licensing Agreement*."[14]

11. With respect to the legal implication of Article 1.2 for interpreting the scope of the *Licensing Agreement*, see also the excerpt referenced in paragraph 3 above.

(b) Relationship with GATT provisions

12. With respect to the relationship between Article 1.2 and provisions of the *GATT 1994*, see paragraph 7 above.

3. Article 1.3

(a) Import licensing on the basis of export performance

13. In *EC – Poultry*, the Panel, in a finding not reviewed by the Appellate Body, examined Brazil's claim that the European Communities allocation of import licences on the basis of export performance was inconsistent with Articles 1.3 and 3.5(j) of the *Licensing Agreement*:

> "The requirement of export performance for the issuance of import licences on its face does seem unusual. However, Brazil has not elaborated on how the export performance requirement was administered and how it has affected the in-quota exports of poultry products from Brazil.
>
> We also note that the Appellate Body in the *Banana III* case made the following observation:
>
> > 'By its very terms, Article 1.3 of the Licensing Agreement clearly applies to the *application* and *administration* of import licensing procedures, and requires that this application and administration be 'neutral . . . fair and equitable'. Article 1.3 of the Licensing Agreement does not require the import licensing *rules*, as such, to be neutral, fair and equitable. Furthermore, the context of Article 1.3 – including the preamble, Article 1.1 and, in particular, Article 1.2 of the Licensing Agreement – supports the conclusion that Article 1.3 does not apply to import licensing *rules*.'[15]
>
> In our view, the issue of licence entitlement based on export performance is clearly that of rules, not that of application or administration of import licensing procedures. Thus, Article 1.3 is not applicable on this specific issue."[16]

14. With respect to the distinction between licensing rules *per se* and their application, see also paragraph 4 above.

4. Article 1.4(a)

(a) General

15. In *EC – Poultry*, the Panel examined the claim that the European Communities had failed to notify the necessary information regarding the poultry tariff quotas to the Committee on Import Licensing under Article 1.4(a) of the *Licensing Agreement*. The European Communities responded that it had not made a notification because it was unclear, prior to the Appellate Body report in the *Banana III* case, whether the *Licensing Agreement* applied to tariff rate quotas ("TRQs"). The Panel rejected the European Communities defence:

> "While we note the EC's explanation for non-notification, we find this omission to be inconsistent with Article 1.4(a) of the Licensing Agreement. The fact that all the relevant information is published and that the administration of all agricultural TRQs in the EC has been notified to the WTO Committee on Agriculture does not in our view excuse the EC from notifying the sources of publication pursuant to this subparagraph."[17]

16. Further, the Panel on *EC – Poultry*, in a finding not addressed by the Appellate Body, rejected the claim by Brazil that frequent changes to the licensing rules and procedures regarding the poultry TRQ had made it difficult for governments and traders to become familiar with the rules, contrary to the provisions of Articles 1.4, 3.3, 3.5(b), 3.5(c) and 3.5(d):

> "We note that the transparency requirement under the cited provisions is limited to publication of rules and other relevant information. While we have sympathy for Brazil regarding the difficulties caused by frequent changes to the rules, we find that changes in rules *per se* do not constitute a violation of Article 1.4, 3.3, 3.5(b), 3.5(c) or 3.5(d)."[18]

(b) Procedures for notification and review

17. At its meeting of 12 October 1995, the Committee on Import Licensing agreed on procedures for

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[14] Appellate Body Report on *EC – Poultry*, paras. 125–128.
[15] (*footnote original*) Appellate Body Report on *EC – Bananas III*, para. 197.
[16] Panel Report on *EC – Poultry*, paras. 253–254.
[17] Panel Report on *EC – Poultry*, para. 244.
[18] Panel Report on *EC – Poultry*, para. 246.

notification and review under the *Licensing Agreement.*[19]

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2
Automatic Import Licensing[4]

(*footnote original*) [4] Those import licensing procedures requiring a security which have no restrictive effects on imports are to be considered as falling within the scope of paragraphs 1 and 2.

1. Automatic import licensing is defined as import licensing where approval of the application is granted in all cases, and which is in accordance with the requirements of paragraph 2(a).

2. The following provisions,[5] in addition to those in paragraphs 1 through 11 of Article 1 and paragraph 1 of this Article, shall apply to automatic import licensing procedures:

(*footnote original*) [5] A developing country Member, other than a developing country Member which was a Party to the Agreement on Import Licensing Procedures done on 12 April 1979, which has specific difficulties with the requirements of subparagraphs (a)(ii) and (a)(iii) may, upon notification to the Committee, delay the application of these subparagraphs by not more than two years from the date of entry into force of the WTO Agreement for such Member.

(a) automatic licensing procedures shall not be administered in such a manner as to have restricting effects on imports subject to automatic licensing. Automatic licensing procedures shall be deemed to have trade-restricting effects unless, *inter alia*:

  (i) any person, firm or institution which fulfils the legal requirements of the importing Member for engaging in import operations involving products subject to automatic licensing is equally eligible to apply for and to obtain import licences;

  (ii) applications for licences may be submitted on any working day prior to the customs clearance of the goods;

  (iii) applications for licences when submitted in appropriate and complete form are approved immediately on receipt, to the extent administratively feasible, but within a maximum of 10 working days;

(b) Members recognize that automatic import licensing may be necessary whenever other appropriate procedures are not available. Automatic import licensing may be maintained as long as the circumstances which gave rise to its introduction prevail and as long as its underlying administrative purposes cannot be achieved in a more appropriate way.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. General

(a) Application of Article 2 to developing country Members

18. The following developing country Members invoked the provisions for delayed application under footnote 5 to Article 2.2 of the Agreement on Import Licensing Procedures: Bangladesh (1 January 1995), Bolivia (13 September 1995), Brazil (1 January 1995), Burkina Faso (3 June 1995), Cameroon (13 December 1995), Colombia (30 April 1995), Costa Rica (1 January 1995), Côte d'Ivoire (1 January 1995), Dominican Republic (9 March 1995), El Salvador (7 May 1995), Gabon (1 January 1995), Guatemala (21 June 1995), Honduras (1 January 1995), Indonesia (1 January 1995), Kenya (1 January 1995), Malaysia (1 January 1995), Myanmar (1 January 1995), Sri Lanka (1 January 1995), Thailand (1 January 1995), Tunisia (29 March 1995), Turkey (26 March 1995), United Arab Emirates (10 April 1996), Uruguay (1 January 1995) and Venezuela (1 January 1995).[20]

19. In its annual report for 1998, with reference to the delay in application, the Committee on Import Licensing stated the following:

> "It was noted that the two-year period of delay allowed under the Agreement had expired for all these Members, and accordingly the obligations of Article 2.2(a)(ii) and (a)(iii) apply to all current WTO Members. It was recalled that the invocation of the above provisions did not exempt the Members concerned from the obligation to notify under the Agreement. The mandatory notifications included publications and legislation relevant to import licensing, and replies to the Questionnaire on Import Licensing Procedures by 30 September each year. Those Members that had not yet made the necessary notifications under the Agreement were urged to do so at the earliest opportunity."[21]

[19] G/LIC/M/2, paras. 8–9, and 21–23. The text of the agreed procedures for notifications and review can be found in G/LIC/3, para. (1). Also, notifications filed under Article 1.4(a) and (Article 8.2(b)) are numbered G/LIC/N/1/-.

[20] G/LIC/1, and its addenda 1–3. The date in brackets indicates the date of entry into force of the *WTO Agreement* for the Member concerned. In this regard, with respect to the "date of entry into force of the WTO Agreement", see Chapter on *WTO Agreement*, Section XV.B.2.

[21] G/L/264, para. 8.

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3
Non-Automatic Import Licensing

1. The following provisions, in addition to those in paragraphs 1 through 11 of Article 1, shall apply to non-automatic import licensing procedures. Non-automatic import licensing procedures are defined as import licensing not falling within the definition contained in paragraph 1 of Article 2.

2. Non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction. Non-automatic licensing procedures shall correspond in scope and duration to the measure they are used to implement, and shall be no more administratively burdensome than absolutely necessary to administer the measure.

3. In the case of licensing requirements for purposes other than the implementation of quantitative restrictions, Members shall publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences.

4. Where a Member provides the possibility for persons, firms or institutions to request exceptions or derogations from a licensing requirement, it shall include this fact in the information published under paragraph 4 of Article 1 as well as information on how to make such a request and, to the extent possible, an indication of the circumstances under which requests would be considered.

5. (a) Members shall provide, upon the request of any Member having an interest in the trade in the product concerned, all relevant information concerning:

(i) the administration of the restrictions;

(ii) the import licences granted over a recent period;

(iii) the distribution of such licences among supplying countries;

(iv) where practicable, import statistics (i.e. value and/or volume) with respect to the products subject to import licensing. Developing country Members would not be expected to take additional administrative or financial burdens on this account;

(b) Members administering quotas by means of licensing shall publish the overall amount of quotas to be applied by quantity and/or value, the opening and closing dates of quotas, and any change thereof, within the time periods specified in paragraph 4 of Article 1 and in such a manner as to enable governments and traders to become acquainted with them;

(c) in the case of quotas allocated among supplying countries, the Member applying the restrictions shall promptly inform all other Members having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall publish this information within the time periods specified in paragraph 4 of Article 1 and in such a manner as to enable governments and traders to become acquainted with them;

(d) where situations arise which make it necessary to provide for an early opening date of quotas, the information referred to in paragraph 4 of Article 1 should be published within the time-periods specified in paragraph 4 of Article 1 and in such a manner as to enable governments and traders to become acquainted with them;

(e) any person, firm or institution which fulfils the legal and administrative requirements of the importing Member shall be equally eligible to apply and to be considered for a licence. If the licence application is not approved, the applicant shall, on request, be given the reason therefor and shall have a right of appeal or review in accordance with the domestic legislation or procedures of the importing Member;

(f) the period for processing applications shall, except when not possible for reasons outside the control of the Member, not be longer than 30 days if applications are considered as and when received, i.e. on a first-come first-served basis, and no longer than 60 days if all applications are considered simultaneously. In the latter case, the period for processing applications shall be considered to begin on the day following the closing date of the announced application period;

(g) the period of licence validity shall be of reasonable duration and not be so short as to preclude imports. The period of licence validity shall not preclude imports from distant sources, except in special cases where imports are necessary to meet unforeseen short-term requirements;

(h) when administering quotas, Members shall not prevent importation from being effected in accordance with the issued licences, and shall not discourage the full utilization of quotas;

(i) when issuing licences, Members shall take into account the desirability of issuing licences for products in economic quantities;

(j) in allocating licences, the Member should consider the import performance of the applicant. In this regard, consideration should be given as to whether licences issued to applicants in the past have been fully utilized during a recent representative period. In cases where licences have not been fully utilized, the Member shall examine the reasons for this and take these reasons into consideration when allocating new licences. Consideration shall also be given to ensuring a reasonable distribution of licences to new importers, taking into

account the desirability of issuing licences for products in economic quantities. In this regard, special consideration should be given to those importers importing products originating in developing country Members and, in particular, the least-developed country Members;

(k) in the case of quotas administered through licences which are not allocated among supplying countries, licence holders[6] shall be free to choose the sources of imports. In the case of quotas allocated among supplying countries, the licence shall clearly stipulate the country or countries;

(*footnote original*) [6] Sometimes referred to as "quota holders".

(l) in applying paragraph 8 of Article 1, compensating adjustments may be made in future licence allocations where imports exceeded a previous licence level.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. Article 3.1

(a) Scope of Article 3

20. With respect to the scope of Article 3, see paragraphs 2, 3 and 5 above.

2. Article 3.2

21. Regarding the application of Article 3.2, see paragraph 10 above.

22. With respect to the legal implication of Article 3.2 for the scope of the *Licensing Agreement*, see paragraph 3 above.

3. Article 3.3

23. Concerning the issue of whether frequent changes in licensing procedures are inconsistent with Article 3.3, see paragraph 16 above.

4. Article 3.5(a)

24. In *EC – Poultry*, Brazil argued on appeal that the Panel had erred in restricting Brazil's "comprehensive claim in relation to a violation of the general principle of transparency underlying the Licensing Agreement" to an analysis of Article 3.5(a) of the *Licensing Agreement*. The contention of Brazil was that "the administration of import licences in such a way that the exporter does not know what trade rules apply is a breach of the fundamental objective of the Licensing Agreement". The Appellate Body, however, upheld the Panel's approach and the Panel's finding that the European Communities measure was not inconsistent with Article 3.5(a) of the *Licensing Agreement*:

> "Brazil's notice of appeal contained no reference to a general issue of transparency in relation to the *Licensing Agreement*. However, Brazil argued in its appellant's submission that the Panel erred in restricting Brazil's 'comprehensive claim in relation to a violation of the general principle of transparency underlying the Licensing Agreement' to an analysis of Article 3.5(a) of the *Licensing Agreement*. The contention of Brazil is that 'the administration of import licenses in such a way that the exporter does not know what trade rules apply is a breach of the fundamental objective of the Licensing Agreement'.
>
> Brazil argued before the Panel that 'underlying the Licensing Agreement was the principle of transparency.' Brazil submitted, in particular, that the European Communities was obliged under either Article 3.5(a)(iii) or (iv) of the *Licensing Agreement* to provide complete and relevant information on the distribution of licences among supplying countries and statistics on volumes and values. According to Brazil, the European Communities failed to fulfil this obligation. The Panel found that Brazil had not demonstrated that the European Communities had violated either Article 3.5(a)(iii) or (iv) of the *Licensing Agreement*.[22] In the light of the existence of express provisions in Article 3.5(a) of the *Licensing Agreement* relating to transparency on which the Panel did in fact make findings, we do not believe that the Panel erred by refraining from examining Brazil's 'comprehensive' claim relating to a general principle of transparency purportedly underlying the *Licensing Agreement*."[23]

5. Article 3.5(b)

25. With respect to the issue of whether frequent changes in licensing procedures are consistent with Article 3.5(b), see paragraph 16 above.

6. Article 3.5(c)

26. Regarding the issue of whether frequent changes in licensing procedures are consistent with Article 3.5(c), see paragraph 16 above.

7. Article 3.5(d)

27. Concerning the issue of whether frequent changes in licensing procedures are consistent with Article 3.5(d), see paragraph 16 above.

8. Article 3.5(h)

28. In *EC – Poultry*, Brazil claimed that speculation in licences discouraged full utilization of the poultry TRQ in violation of Articles 3.5(h) and 3.5(j). The European Communities responded that licences awarded under the regulation at issue were non-transferable, so as to avoid such speculation. The Panel, in a finding not reviewed by the Appellate Body, rejected Brazil's claim:

> "While it may be true that Brazilian exporters have had additional difficulties in exporting to the EC market due

[22] (*footnote original*) Panel Report on *EC – Poultry*, para. 265.
[23] Appellate Body Report on *EC – Poultry*, paras. 129–130.

to the speculation in licences, we note that the licences allocated to imports from Brazil have been fully utilized. In other words, the speculation in licences has not discouraged the full utilization of the TRQ. Thus, we do not find that the EC has acted inconsistently with Articles 3.5(h) or 3.5(j) of the Licensing Agreement in this regard."[24]

9. Article 3.5(i)

29. In *EC – Poultry*, Brazil claimed that the allocation of licences where each applicant received a licence allowing imports of about 5 tonnes was inconsistent with Article 3.5(i) regarding issuance of licences in economic quantities. As a related matter, Brazil claimed that the absence of a newcomer provision in the regulation regarding the operation of the poultry TRQ was inconsistent with Article 3.5(j) of the *Licensing Agreement*. The European Communities responded that licences for the quantity of about 5 tonnes were indeed being issued to newcomers and that the allocation of licences in small quantities was made in response to an ever increasing number of importers. The Panel, in a finding not reviewed by the Appellate Body, responded:

"We note Brazil's argument that its exporters are facing difficulties in dealing with licences for small quantities, which is echoed in Thailand's third-party submission also. While the decline in the average quantity per licence may cause problems for traders, we note at the same time that the total TRQ has been fully utilized. The very fact that the licences have been fully utilized suggests to us that the quantities involved are still 'economic', particularly in combination with the significant amount of the over-quota trade."[25]

10. Article 3.5(j)

30. The Panel on *EC – Poultry* examined Brazil's claim that the European Communities allocation of import licences on the basis of export performance was inconsistent with Articles 1.3 and 3.5(j) of the *Licensing Agreement*. While the Panel opined that "the requirement of export performance for the issuance of import licences on its face does seem unusual", it nevertheless held:

"[T]he provision of Article 3.5(j) in this regard is hortatory and does not necessarily prohibit the consideration of other factors than import performance."[26]

31. Also, the Panel addressed Brazil's claim that the absence of a newcomer provision in the regulation was inconsistent with Article 3.5(j) of the *Licensing Agreement*. See the excerpt referenced in paragraph 29 above.

32. With respect to the issue of speculation in licences, see paragraph 28 above.

C. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. GATT 1994

33. In *Canada – Dairy*, the Panel addressed the United States' claim that Canada was in violation of Article II of the *GATT 1994* and Article 3 of the *Licensing Agreement* because it restricted access to tariff quotas to certain cross-border imports by Canadians. Having found that the restriction was inconsistent with Article II:1(b) of the *GATT 1994*, the Panel did not find it necessary to examine whether in so doing Canada also violated Article 3 of the *Licensing Agreement*.[27]

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4
Institutions

There is hereby established a Committee on Import Licensing composed of representatives from each of the Members. The Committee shall elect its own Chairman and Vice-Chairman and shall meet as necessary for the purpose of affording Members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

1. Rules of procedure

34. At its meeting of 1 December 1995, the Council for Trade in Goods approved the rules of procedure for meetings of the Committee on Import Licensing, where the Committee follows, *mutatis mutandis*, the rules of procedure for meetings of the General Council with certain exceptions.[28]

35. The Committee on Import Licensing held 16 meetings from 1 January 1995 to 31 December 2002.[29] The Committee reported to the Council for Trade in Goods on an annual basis.[30]

2. Procedures for the review of notifications

36. At its meeting on 23 October 1996, the Committee on Import Licensing adopted the Understanding on Procedures for the Review of Notifications Submitted

[24] Panel Report on *EC – Poultry*, para. 259.
[25] Panel Report on *EC – Poultry*, para. 262.
[26] Panel Report on *EC – Poultry*, para. 255.
[27] Panel Report on *Canada – Dairy*, para. 7.157.
[28] G/C/M/7, para. 2.2. The text of the adopted rules of procedure can be found in G/L/147.
[29] The minutes are contained in documents G/LIC/M/1–16.
[30] The reports are contained in documents G/L/29, 127, 203, 264, 336, 403, 493, 573, 652 and 715.

under the Agreement on Import Licensing Procedures.[31]

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5
Notification

1. Members which institute licensing procedures or changes in these procedures shall notify the Committee of such within 60 days of publication.

2. Notifications of the institution of import licensing procedures shall include the following information:

(a) list of products subject to licensing procedures;

(b) contact point for information on eligibility;

(c) administrative body(ies) for submission of applications;

(d) date and name of publication where licensing procedures are published;

(e) indication of whether the licensing procedure is automatic or non-automatic according to definitions contained in Articles 2 and 3;

(f) in the case of automatic import licensing procedures, their administrative purpose;

(g) in the case of non-automatic import licensing procedures, indication of the measure being implemented through the licensing procedure; and

(h) expected duration of the licensing procedure if this can be estimated with some probability, and if not, reason why this information cannot be provided.

3. Notifications of changes in import licensing procedures shall indicate the elements mentioned above, if changes in such occur.

4. Members shall notify the Committee of the publication(s) in which the information required in paragraph 4 of Article 1 will be published.

5. Any interested Member which considers that another Member has not notified the institution of a licensing procedure or changes therein in accordance with the provisions of paragraphs 1 through 3 may bring the matter to the attention of such other Member. If notification is not made promptly thereafter, such Member may itself notify the licensing procedure or changes therein, including all relevant and available information.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. General

37. Since the entry into force of the *WTO Agreement*, the Committee on Import Licensing has received notifications from 26 Members pursuant to Article 5 of the Agreement.[32]

2. Duplication or overlapping of notifications

38. On the question of possible duplication or overlapping of notifications, i.e. whether import licensing aspects associated with the administration of tariff quotas resulting from "tariffication" in agriculture should be notified to the Committee on Import Licensing or to the Committee on Agriculture, at its meeting of 12 October 1995, the Committee on Import Licensing agreed as follows:

> "[A]ll import licensing procedures, including those dealing with the administration of tariff quotas in agriculture, should be notified to the Committee on Import Licensing. Any problem that might arise relating to duplication or overlapping of notifications, as well as related questions of simplification, could be taken up as necessary, at the appropriate body, i.e. the Working Group on Notification Obligations and Procedures."[33]

39. In its report to the Council for Trade in Goods, dated 21 August 1996, the Working Group on Notification Obligations and Procedures concluded that efforts to remove the possible duplication were not warranted.[34]

40. At its meeting of 19 February 1998, the General Council adopted the following decision pursuant to the recommendation of the Council for Trade in Goods:

> "The notification obligations resulting from the Decision of the CONTRACTING PARTIES to the GATT 1947 taken at their twenty-eighth Session in November 1972 (SR.28/6, item 3) to adopt the report of the Committee on Trade in Industrial Products, including the Committee's proposal regarding notification obligations on licensing systems (L/3756, paragraph 76),[35] are hereby eliminated."[36]

41. With regard to Procedures for the Review of Notifications, see the excerpt referenced in paragraph 36 above.

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[31] G/LIC/M/4, para. 5. The text of the adopted Understanding can be found in G/LIC/4. Questions and replies circulated under these procedures are numbered G/LIC/Q/-.

[32] The notifications may be found in document series G/LIC/N/2.

[33] G/LIC/M/2, paras. 21–23. With respect to the Working Group on Notification Obligations and Procedures, see the Chapter on the *WTO Agreement*, Section V.B.6.

[34] G/NOP/W/16/Rev.1, paras. 25–28.

[35] (*footnote original*) The paragraph reads as follows: "In addition, it [the Committee on Trade in Industrial Products] proposes to the Council that contracting parties should notify changes of licensing systems at the same time as notifications are made on import restrictions, i.e. 30 September of each year."

[36] WT/L/261.

3. Counter-notifications

42. With reference to Paragraph 5 of Article 5 of the *Licensing Agreement* addressing the issue of so-called counter-notifications, in its fourth biennial review, the Committee on Import Licensing noted that so far, the Committee has not received any notifications under this provision.[37]

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6
Consultation and Dispute Settlement

Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall be subject to the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

43. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the *Licensing Agreement* were invoked:

	Case Name	Case Number	Invoked Articles
1	*EC – Bananas III*	WT/DS27	Articles 1.2, 1.3, 3.2 and 3.5
2	*EC – Poultry*	WT/DS69	Articles 1.2, 1.3, 1.4, 3.2 and 3.5
3	*India – Quantitative Restrictions*	WT/DS90	Article 3[38]
4	*Canada – Dairy*	WT/DS103, WT/DS113	Article 3
5	*Korea – Various Measures on Beef*	WT/DS161, WT/DS169	Articles 1 and 3

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7
Review

1. The Committee shall review as necessary, but at least once every two years, the implementation and operation of this Agreement, taking into account the objectives thereof, and the rights and obligations contained therein.

2. As a basis for the Committee review, the Secretariat shall prepare a factual report based on information provided under Article 5, responses to the annual questionnaire on import licensing procedures[39] and other relevant reliable information which is available to it. This report shall provide a synopsis of the aforementioned information, in particular indicating any changes or developments during the period under review, and including any other information as agreed by the Committee.

3. Members undertake to complete the annual questionnaire on import licensing procedures promptly and in full.

4. The Committee shall inform the Council for Trade in Goods of developments during the period covered by such reviews.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. Article 7.1

44. At its meeting on 12 October 1995, the Committee on Import Licensing agreed on procedures for review under Article 7.1 of the *Licensing Agreement*.[40] At its meeting on 23 October 1996, the Committee concluded its first biennial review under Article 7.1 of the *Licensing Agreement*.[41] At its meetings on 20 October 1998,[42] 11 October 2000[43] and 24 September 2002,[44] the Committee concluded its second, third and fourth biennial reviews.

2. Article 7.3

45. At its meeting on 12 October 1995, the Committee on Import Licensing agreed on procedures for notification under Article 7.3 of the *Licensing Agreement*.[45] Article 7.3 of the Agreement requires all Members to provide replies to the Questionnaire on Import Licensing Procedures[46] by 30 September each year. Since the entry into force of the WTO Agreement, 84 Members[47] have made notifications under this provision. This

[37] G/LIC/9/Rev.1, para.15.
[38] The Panel stated:

> "A claim of violation of Article 3 of the Import Licensing Agreement is contained in the United States' request for establishment of a panel and thus, in our terms of reference. The United States, however, did not develop any legal arguments relating to such claim at any point of the proceedings, nor did it request a finding on the basis of that provision. We therefore do not address that claim."

Panel Report on *India – Quantitative Restrictions*, para. 5.16.
[39] (*footnote original*) Originally circulated as GATT 1947 document L/3515 of 23 March 1971.
[40] G/LIC/M/2, paras. 34. The agreed rules are codified in G/LIC/3, para. 2.
[41] G/LIC/M/4, paras. 46–49; see also G/LIC/5.
[42] G/LIC/M/8, para. 4; see also G/LIC/6.
[43] G/LIC/M/12, para. 5; see also G/LIC/7.
[44] G/LIC/M/16, para. 5; see also G/LIC/9/Rev.1.
[45] G/LIC/M/2, paras. 18–19. The agreed rules are codified in G/LIC/3, para. 3.
[46] Annexed to document G/LIC/3.
[47] The European Communities and its member States counted as one Member.

includes replies to the Questionnaire from 11 Members in 1995, 22 Members in 1996, 25 Members in 1997, 26 Members in 1998, 20 Members in 1999, 32 Members in 2000, 23 Members in 2001, 41 Members in 2002, 25 Members in 2003 and 16 Members in 2004.[48] At the same meeting, the Committee agreed on the standard form of the annual questionnaire which Members are required to complete under Article 7.3.[49]

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8
Final Provisions

Reservations

1. Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

Domestic Legislation

2. (a) Each Member shall ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement.

(b) Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

1. Procedures for notification and review

46. At its meeting on 12 October 1995, the Committee on Import Licensing agreed on procedures for notification under Article 8.2(b) of the *Licensing Agreement*.[50]

47. With regard to Procedures for the Review of Notifications, see paragraph 36 above.

[48] These notifications may be found in document series G/LIC/N/3/-.

[49] G/LIC/M/2, paras. 17–18. The form of the annual questionnaire can be found in G/LIC/2. Notifications submitted under Article 7.3 are numbered G/LIC/N/3/-.

[50] G/LIC/M/2, paras. 6–16. The agreed rules are set out in G/LIC/3, para. 4. Notifications filed under Article 8.2(b) (and Article 1.4(a)) are numbered G/LIC/N/1/-.

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PART I: GENERAL PROVISIONS

I. ARTICLE 1

A. TEXT OF ARTICLE 1

Members hereby *agree* as follows:

Article 1
Definition of a Subsidy

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);[1]

(*footnote original*) [1] In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. Article 1

(a) General

(i) "mandatory/discretionary subsidization"

1. As regards the relevance of the mandatory/discretionary distinction[1] when challenging subsidy programmes as such, see paragraphs 56–64 below. As regards

[1] For information on the latest jurisprudence departing from the mandatory/discretionary distinction, see Section VI.B.3(c)(ii) of the Chapter on the *DSU*.

this distinction in general, see Section VI.B.3(c)(ii) of the Chapter on the *DSU*. Concerning the mandatory/discretionary distinction in the context of an affirmative defence under paragraph 2 of item (k) of the Illustrative List of Export Subsidies, see paragraphs 478–479 below.

2. Article 1.1

(a) General

(i) Object and purpose of Article 1.1

2. In *US – Softwood Lumber III*, the Panel stated that "[t]he object and purpose of Article 1.1 SCM Agreement is to provide a definition of a subsidy for the purposes of the SCM Agreement".[2]

(ii) Distinction between "financial contribution" and "benefit"

3. In *Brazil – Aircraft*, the Appellate Body indicated that it considers "a 'financial contribution' and a 'benefit' as two separate legal elements in Article 1.1 of the *SCM Agreement*, which *together* determine whether a subsidy *exists*".[3]

4. In *Brazil – Aircraft (Article 21.5 – Canada II)* the Panel first examined whether the measure at stake constituted a "subsidy", as defined in Article 1.1. To this effect, the Panel examined whether both elements in the definition of a subsidy can be found: (i) a "financial contribution" by a government; and (ii) a "benefit" is thereby conferred. The Panel examined each element in turn and stated:

> "Article 1.1 of the *SCM Agreement* sets out a general definition of a subsidy. It provides that a subsidy is deemed to exist, *inter alia*, if there is 'a financial contribution by a government' and 'a benefit is thereby conferred'."[4]

5. This approach was followed by the Panel on *US – Export Restraints*, where the Panel stated:

> "Article 1.1 makes clear that the definition of a subsidy has two distinct elements (i) a financial contribution (or income or price support), (ii) which confers a benefit. The Appellate Body emphasised this point in *Brazil – Aircraft*, stating that financial contribution and benefit are 'separate legal elements in Article 1.1 . . . which *together* determine whether a "subsidy" exists',[5] which the panel in that case had erroneously blended together by importing the concept of benefit into the definition of financial contribution."[6]

6. This was further recalled in *Canada – Aircraft Credits and Guarantee* where the Panel considered that Article 1.1 of the *SCM Agreement* makes clear that the definition of a subsidy has two distinct elements: (i) a financial contribution, (ii) which confers a benefit. In this instance the Panel considered that the complainant must demonstrate that the measures under consideration mandate (i) a financial contribution, (ii) which confers a benefit, and a subsidy therefore exists, and (iii) that subsidy is contingent upon export performance. The Panel stated:

> "[In] this case, Brazil would have to demonstrate that the legal instruments governing the establishment and operation of the programmes at issue are mandatory in respect of the alleged violation, i. e., the grant of prohibited export subsidies. In other words, Brazil would have to demonstrate that the legal instruments mandate (i) a financial contribution; (ii) which confers a benefit, and a subsidy therefore exists, and (iii) that subsidy is contingent upon export performance."[7]

7. The Panel on *Canada – Aircraft Credits and Guarantees* further distinguished the two elements and concluded that to demonstrate the existence of a "benefit", a complaining party must do more than establish the existence of a "financial contribution."[8]

3. Article 1.1(a)(1): "financial contribution"

(a) General

8. In *US – Export Restraints*, the Panel considered the negotiating history of Article 1 and found that the inclusion of "financial contribution" in the text of the provision was meant to guarantee that not all government measures that confer benefits would be considered to be subsidies and to avoid the countervailing of benefits from government measures by restricting the kinds of such measures that would constitute subsidies if they conferred benefits:

> "The negotiating history of Article 1 confirms our interpretation of the term 'financial contribution'. This negotiating history demonstrates, in the first place, that the requirement of a financial contribution from the outset was intended by its proponents precisely to ensure that not all government measures that conferred benefits could be deemed to be subsidies. This point was extensively discussed during the negotiations, with many participants consistently maintaining that only government actions constituting financial contributions should be subject to the multilateral rules on subsidies and countervailing measures.

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[2] Panel Report on *US – Softwood Lumber III*, para. 7.24. Concerning the object and purpose of the *SCM Agreement*, see paras. 496–497 below.
[3] Appellate Body Report on *Brazil – Aircraft*, para. 157.
[4] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 5.18.
[5] (*footnote original*) Appellate Body Report on *Brazil – Aircraft*, para. 157 (emphasis in original).
[6] Panel Report on *US – Exports Restraints*, para. 8.20.
[7] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.65.
[8] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.396. Also see paras. 7.64–7.65.

> [T]he negotiating history confirms that the introduction of the two-part definition of subsidy, consisting of 'financial contribution' and 'benefit', was intended specifically to prevent the countervailing of *benefits* from any sort of (formal, enforceable) government measures, by restricting to a finite list the *kinds* of government measures that would, if they conferred benefits, constitute subsidies. The negotiating history confirms that items (i)–(iii) of that list limit these kinds of measures to the transfer of economic resources from a government to a private entity. Under subparagraphs (i)–(iii), the government acting on its own behalf is effecting that transfer by directly providing something of value – either money, goods, or services – to a private entity. Subparagraph (iv) ensures that the same kinds of *government* transfers of economic resources, when undertaken through explicit *delegation of those* functions to a private entity, do not thereby escape disciplines."[9]

(b) Concept of "financial contribution"

9. The Panel on *US – Softwood Lumber III* described the concept of "financial contribution" under Article 1.1(a)(1) of the *SCM Agreement* in general terms:

> "Article 1.1(a)(1) SCM Agreement provides that the first element of a subsidy is a 'financial contribution by the government'. Subparagraphs (i) through (iv) then explain that a financial contribution can exist in a wide variety of circumstances including, of course, the direct transfer of funds. But subparagraphs (ii) and (iii) show that a financial contribution will also exist if the government does not collect the revenue which it is entitled to or when it gives something or does something for an enterprise or purchases something from an enterprise or a group of enterprises. Subparagraph (iv) ensures that government directed transfers effected through a private entity do not thereby cease to be government transfers. In other words, Article 1.1(a)(1) SCM Agreement provides that a *financial* contribution can exist not only when there is an act or an omission involving the transfer of money, but also in case goods or certain services are provided by the government."[10]

10. The Panel on *US – Export Restraints* considered that the principal significance of the concept of financial contribution was foreclosing "the possibility of the treatment of *any* government action that resulted in a benefit as a subsidy":

> "[B]y introducing the notion of financial contribution, the drafters foreclosed the possibility of the treatment of *any* government action that resulted in a benefit as a subsidy. Indeed, this is arguably the principal significance of the concept of financial contribution, which can be characterised as one of the 'gateways' to the SCM Agreement, along with the concepts of benefit and specificity. To hold that the concept of financial contribution is about the effects, rather than the nature, of a government action would be effectively to write it out of the Agreement, leaving the concepts of benefit and specificity as the sole determinants of the scope of the Agreement."[11]

4. Article 1.1(a)(1)(i): transfer of funds

(a) "Direct transfer of funds"

11. In *Canada – Aircraft Credits and Guarantees*, the parties agreed that some of the programmes at issue were direct transfers of funds within the meaning of Article 1.1(a)(1)(i).[12]

12. The Panel on *Brazil – Aircraft (Article 21.5 – Canada II)* considered that certain payments made in the form of bonds constituted direct transfers of funds under Article 1.1(a)(1)(i) of the *SCM Agreement*.[13]

13. In *Canada – Aircraft*, the Panel concluded that TPC (Technology Partners Canada) contributions constituted direct transfers of funds by the Government of Canada in the sense of Article 1.1(a)(1)(i).[14]

14. With regard to the granting of subsidies for the purpose of Article 27.4 of the *SCM Agreement*, see paragraphs 353–354 below.

(b) "Potential direct transfers of funds"

15. In *Brazil – Aircraft*, the Panel had found that "a 'potential direct transfer of funds' exists only where the action in question gives rise to a benefit and thus confers a subsidy irrespective of whether any payment occurs", and that "the existence of a 'potential direct transfer of funds' does not depend upon the probability that a payment will subsequently occur".[15] The Appellate Body however considered that the Panel did not have to determine whether the export subsidies at issue constituted a "direct transfer of funds" or a "potential direct transfer of funds", within the meaning of Article 1.1(a)(i), in order to determine when the subsidies are "granted" for the purposes of Article 27.4 and thus this analysis was not relevant.[16]

16. In *Canada – Aircraft Credits and Guarantees*, the parties agreed that the so-called *IQ* equity guarantees were "potential direct transfers of funds" within the meaning of Article 1.1(a)(1)(i).[17]

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[9] Panel Report on *US – Exports Restraints*, paras. 8.65 and 8.73.
[10] Panel Report on *US – Softwood Lumber III*, para. 7.24.
[11] Panel Report on *US – Exports Restraints*, para. 8.38.
[12] Panel Report on *Canada – Aircraft Credits and Guarantees*, paras. 7.141–7.142, 7.187 and 7.393.
[13] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 5.22.
[14] Panel Report on *Canada – Aircraft*, para. 9.306.
[15] Panel Report on *Brazil – Aircraft*, paras. 7.68 and 7.70.
[16] Appellate Body Report on *Brazil – Aircraft*, para. 157.
[17] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.320.

(c) Timing of the transfer

17. The Panel on *Brazil – Aircraft*, in a finding subsequently not addressed by the Appellate Body, rejected the argument that a subsidy exists only when the transfer of funds has actually been effectuated:

> "[A]ccording to Article 1:1(i) a subsidy exists if a government practice involves a direct transfer of funds or a potential direct transfer of funds and not only when a government actually effectuates such a transfer or potential transfer (otherwise the text of (i) would read: 'a government directly transfers funds . . . or engages in potential direct transfers of funds or liabilities') . . . As soon as there is such a practice, a subsidy exists, and the question whether the practice involves a direct transfer of funds or a potential direct transfer of funds is not relevant to the existence of a subsidy. One or the other is sufficient. If subsidies were deemed to exist only once a direct or potential direct transfer of funds had actually been effectuated, the Agreement would be rendered totally ineffective and even the typical WTO remedy (i.e. the cessation of the violation) would not be possible."[18]

5. Article 1.1(a)(1)(ii): "government revenue otherwise due is foregone or not collected"

(a) General

18. The Appellate Body on *US – FSC (Article 21.5 – EC)*, considered the legal standard for "foregoing revenue" that is "otherwise due" and emphasized certain principles based on the understanding that: (i) "a financial contribution" does not arise simply because a government does not raise revenue which it could have raised; and (ii) the term "otherwise due" implies a comparison with a "defined normative benchmark":

> "[U]nder Article 1.1(a)(1)(ii), a 'financial contribution' does not arise simply because a government does not raise revenue which it could have raised. It is true that, from a *fiscal* perspective, where a government chooses not to tax certain income, no revenue is 'due' on that income. However, although a government might, in a sense, be said to 'forego' revenue in this situation, this alone gives no indication as to whether the revenue foregone was 'otherwise due'. In other words, the mere fact that revenues are not 'due' from a fiscal perspective does not determine that the revenues are or are not 'otherwise due' within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*."[19]

19. The Panel on *US – FSC (Article 21.5 – EC)*, in findings not reviewed by the Appellate Body, considered that the examination whether there is revenue foregone that is "otherwise due" must be based on actual substantive realities and not be restricted to a formalistic approach. Otherwise it would have the effect of reducing paragraph (ii) of Article 1.1(a)(1) of the *SCM Agreement* to "redundancy and inutility":

> "To give due meaning and effect to Article 1.1 of the *SCM Agreement*, our examination as to whether there is revenue foregone that is 'otherwise due' must be based on actual substantive realities and not be restricted to pure formalism.
>
> . . .
>
> [A] government could opt to bestow financial contributions in the form of fiscal incentives simply by modulating the 'outer boundary' of its 'tax jurisdiction' or by manipulating the definition of the tax base to accommodate any 'exclusion' or 'exemption' or 'exception' it desired, so that there could *never* be a foregoing of revenue 'otherwise due'. This would have the effect of reducing paragraph (ii) of Article 1.1(a)(1) of the *SCM Agreement* to 'redundancy and inutility' and cannot be the appropriate implication to draw from the stipulation as to what constitutes one of the enumerated forms of 'financial contribution' under Article 1.1 of the *SCM Agreement*. Furthermore, the consequences of this reasoning would also entirely undermine Article 3.1(a) of the *SCM Agreement*, as there could never be, in this situation, a subsidy contingent upon export in the form of a financial contribution involving a foregoing of revenue that is otherwise due. As such, it is inherently contradictory to what may be viewed as the object and purpose of the *SCM Agreement* in terms of disciplining trade-distorting subsidies in a way that provides legally binding security of expectations to Members. . . . In short, such an approach would eviscerate the subsidies disciplines in the *SCM Agreement*."[20]

(b) "Categories of revenue"

20. The Appellate Body on *US – FSC* referred on several occasions to the concept of "categories of revenue" and indicated that a Member is free not to tax any particular category of revenues:

> "A Member, in principle, has the sovereign authority to tax any particular categories of revenue it wishes. It is also free *not* to tax any particular categories of revenues. But, in both instances, the Member must respect its WTO obligations. What is 'otherwise due', therefore, depends on the rules of taxation that each Member, by its own choice, establishes for itself.
>
> . . .
>
> Members of the WTO are *not* obliged, by WTO rules, to tax *any* categories of income, whether foreign- or domestic-source income."[21]

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[18] Panel Report on *Brazil – Aircraft*, para. 7.13.
[19] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 88.
[20] Panel Report on *US – FSC (Article 21.5 – EC)*, paras. 8.37 and 8.39.
[21] Appellate Body Report on *US – FSC*, paras. 90 and 98.

21. Considering the operation of the arm's length principle when a Member chooses whether to tax or not certain categories of revenues, the Appellate Body in *US – FSC* considered:

> "[T]he arm's length principle operates when a Member chooses not to tax, or to tax less, certain categories of foreign-source income. However, the operation of the arm's length principle is unaffected by the choice a Member makes as to *which* categories of foreign-source income, if any, it will not tax, or will tax less. Likewise, the operation of the arm's length principle is unaffected by the choice a Member might make to grant exemptions from the generally applicable rules of taxation of foreign-source income that it has selected for itself. In short, the requirement to use the arm's length principle does not address the issue that arises here, nor does it authorize the type of export contingent tax exemption that we have just described. Thus, this sentence of footnote 59 does not mean that the FSC subsidies are not export subsidies within the meaning of Article 3.1(a) of the *SCM Agreement*."[22]

22. In findings not reviewed by the Appellate Body, the Panel on *US – FSC (Article 21.5 – EC)*, noting that the concept of "categories of revenue" is not actual treaty language, followed the Appellate Body's interpretation in *US – FSC* and rejected the argument that foreign-source income is a "category" of income that may be excluded from taxation consistently with the *SCM Agreement*:

> "We turn now to whether utilization of the term 'category' would in any way alter the nature of our analysis to this point. However, before considering these issues, we first observe that the concept of 'categories' of revenue to which the Appellate Body referred is not actual treaty language. We further note that the Appellate Body also emphasized that, regardless of any 'category' of revenue that may be under consideration, a Member is bound at all times to respect its WTO obligations.
>
> . . .
>
> [E]ven if one applies the term of 'category' to the measure at issue, this linguistic or formal distinction in no way alters the underlying substance of the actual relationship between the measure at issue and the default tax regime as outlined above. Employment of the terminology in no way substantively modifies that relationship. Nor does it introduce any new elements or rationale to the measure at issue that change its essential character."[23]

(c) Members' tax rules as normative benchmark

23. In *US – FSC*, the Appellate Body, interpreting the phrase "foregoing of revenue otherwise due", partly agreed with the Panel's interpretation that the term "otherwise" referred to a "normative benchmark" as established by the tax rules applied by the Member in question. The Appellate Body rejected the use of a benchmark other than the tax rules of the Member in question, holding that to do otherwise would be contrary to a Member's sovereignty of taxation:

> "In our view, the '*foregoing*' of revenue '*otherwise* due' implies that less revenue has been raised by the government than would have been raised in a different situation, or, that is, 'otherwise'. Moreover, the word 'foregone' suggests that the government has given up an entitlement to raise revenue that it could 'otherwise' have raised. This cannot, however, be an entitlement in the abstract, because governments, in theory, could tax *all* revenues. There must, therefore, be some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the revenue that would have been raised 'otherwise'. We, therefore, agree with the Panel that the term 'otherwise due' implies some kind of comparison between the revenues due under the contested measure and revenues that would be due in some other situation. We also agree with the Panel that the basis of comparison must be the tax rules applied by the Member in question. To accept the argument of the United States that the comparator in determining what is 'otherwise due' should be something other than the prevailing domestic standard of the Member in question would be to imply that WTO obligations somehow compel Members to choose a particular kind of tax system; this is not so. A Member, in principle, has the sovereign authority to tax any particular categories of revenue it wishes. It is also free *not* to tax any particular categories of revenues. But, in both instances, the Member must respect its WTO obligations.[24] What is 'otherwise due', therefore, depends on the rules of taxation that each Member, by its own choice, establishes for itself."[25]

24. The Appellate Body on *US – FSC (Article 21.5 – EC)* stated that Article 1.1(a)(1)(ii) does not require panels to identify a "general" rule of taxation and "exceptions" to that "general" rule. Rather, they should compare the domestic fiscal treatment of "legitimately comparable income" to ascertain whether the measure under consideration involves the foregoing of revenue that is "otherwise due". The Appellate Body further

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[22] Appellate Body Report on *US – FSC*, para. 99.

[23] Panel Report on *US – FSC (Article 21.5 – EC)*, paras. 8.32 and 8.41.

[24] (*footnote original*) See Appellate Body Reports on *Japan – Alcoholic Beverages II*, p. 16; and *Chile – Alcoholic Beverages*, paras. 59 and 60.

[25] Appellate Body Report on *US – FSC*, para. 90. In *Canada – Autos*, the Appellate Body applied these same principles to decide "whether government revenue that is otherwise due is foregone". Appellate Body Report on *Canada – Autos*, para. 91.

considered that the comparison ought to be made with respect to taxpayers in "comparable situations":[26]

> "[T]he treaty phrase 'otherwise due' implies a comparison with a 'defined, normative benchmark'. The purpose of this comparison is to distinguish between situations where revenue foregone *is* 'otherwise due' and situations where such revenue is *not* 'otherwise due'. As Members, in principle, have the sovereign authority to determine their own rules of taxation, the comparison under Article 1.1(a)(1)(ii) of the *SCM Agreement* must necessarily be between the rules of taxation contained in the contested measure and other rules of taxation of the Member in question. Such a comparison enables panels and the Appellate Body to reach an objective conclusion, on the basis of the rules of taxation established by a Member, by its own choice, as to whether the contested measure involves the foregoing of revenue that would be due in some other situation or, in the words of the *SCM Agreement*, 'otherwise due'.
>
> In our Report in *US – FSC*, we recognized that it may be difficult to identify the appropriate normative benchmark for comparison under Article 1.1(a)(1)(ii) because domestic rules of taxation are varied and complex. In identifying the appropriate benchmark for comparison, panels must obviously ensure that they identify and examine fiscal situations which it is legitimate to compare. In other words, there must be a rational basis for comparing the fiscal treatment of the income subject to the contested measure and the fiscal treatment of certain other income. In general terms, in this comparison, like will be compared with like. For instance, if the measure at issue involves income earned in sales transactions, it might not be appropriate to compare the treatment of this income with employment income.
>
> As we said earlier, under Article 1.1(a)(1)(ii) of the *SCM Agreement*, the normative benchmark for determining whether revenue foregone is otherwise due must allow a comparison of the fiscal treatment of comparable income, in the hands of taxpayers in similar situations. . . . In other words, our inquiry under Article 1.1(a)(1)(ii) is not simply ended at this stage of analysis because the measure involves an allocation of income between domestic- and foreign-source income. Rather, we must compare the way the United States taxes the portion of the income covered by the measure, which it treats as foreign-source, with the way it taxes other foreign-source income under its own rules of taxation."[27]

(d) "But for" test

25. The Appellate Body on *US – FSC* expressed some reservations about the Panel's "but for" test. The Panel had interpreted the term "otherwise due" as referring to the situation that would prevail "but for" the United States' tax measures under consideration. The Panel held that it would determine whether, absent these measures, there would be a higher tax liability, meaning that it would examine the situation "that would exist but for the measure in question".[28] The Appellate Body noted that this "but for" test established by the Panel was not actual treaty language and cautioned that the test may "not work in other cases":[29]

> "The Panel found that the term 'otherwise due' establishes a 'but for' test, in terms of which the appropriate

[26] Bearing in mind the Appellate Body's findings on the word "foregone", the Panel in *US – FSC (Article 21.5 – EC)* found that the key to determine whether a revenue is otherwise due is to apply critical judgement to the facts of the matter, using the tax rules applied by the Member in question as the "basis". See Panel Report on *US – FSC (Article 21.5 – EC)*, paras. 8.17–8.19:

> "[O]ne cannot simply assert that revenue is otherwise due in the abstract. It cannot be presumed. The key is to apply critical judgment to the facts of the matter. In so doing, we follow the reasoning of the Appellate Body *viz* that the comparison to be made involves revenues due under the contested measure and those that would be due in some other situation and that the basis of the comparison must be the tax rules applied by the Member in question.
>
> In following this reasoning, we underline that while the inquiry cannot be inherently presumptive or speculative, neither can it be so exacting or confining that it is necessary to attain the level of establishing a mathematical deductive relationship between the contested measure and the default situation. To interpret the *SCM Agreement* in the latter manner would expose a panel to precisely the manifestly absurd consequence referred to in paragraph 8.15 above. The key point is that the tax rules applied by the Member in question are the *basis* for the comparison. Thus, any finding that revenue has been foregone must be securely grounded on that foundation.
>
> That, in our view, provides a sound basis for exercising reasonable judgment as to whether or not a defending Member's assertion that no revenue was due in the first place is, in fact, valid or whether the contested measure in effect masks the substance of what is actually the foregoing of revenue that is otherwise due."

[27] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 89–90 and 98.

[28] Panel Report on *US – FSC*, para. 7.45.

[29] The Appellate Body on *US – FSC (Article 21.5 – EC)* reiterated its reservations on the "but for test". See Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 91–92:

> "In identifying the normative benchmark, there may be situations where the measure at issue might be described as an 'exception' to a 'general' rule of taxation. In such situations, it may be possible to apply a 'but for' test to examine the fiscal treatment of income absent the contested measure. We do not, however, consider that Article 1.1(a)(1)(ii) always *requires* panels to identify, with respect to any particular income, the 'general' rule of taxation prevailing in a Member. Given the variety and complexity of domestic tax systems, it will usually be very difficult to isolate a 'general' rule of taxation and 'exceptions' to that 'general' rule. Instead, we believe that panels should seek to compare the fiscal treatment of legitimately comparable income to determine whether the contested measure involves the foregoing of revenue which is 'otherwise due', in relation to the income in question.
>
> In addition, it is important to ensure that the examination under Article 1.1(a)(1)(ii) involves a comparison of the fiscal treatment of the relevant income for taxpayers in comparable situations. For instance, if the measure at issue is concerned with the taxation of foreign-source income in the hands of a domestic corporation, it might not be appropriate to compare the measure with the fiscal treatment of such income in the hands of a foreign corporation."

basis of comparison for determining whether revenues are 'otherwise due' is 'the situation that would prevail but for the measures in question'.[30] In the present case, this legal standard provides a sound basis for comparison because it is not difficult to establish in what way the foreign-source income of an FSC would be taxed 'but for' the contested measure. However, we have certain abiding reservations about applying any legal standard, such as this 'but for' test, in the place of the actual treaty language. Moreover, we would have particular misgivings about using a 'but for' test if its application were limited to situations where there actually existed an alternative measure, under which the revenues in question would be taxed, absent the contested measure. It would, we believe, not be difficult to circumvent such a test by designing a tax regime under which there would be *no* general rule that applied formally to the revenues in question, absent the contested measures. We observe, therefore, that, although the Panel's 'but for' test works in this case, it may not work in other cases. We note, however, that, in this dispute, the European Communities does not contest either the Panel's interpretation of the term 'otherwise due' or the Panel's application of that term to the facts of this case. The United States also accepts the Panel's interpretation of that term as a general proposition."[31]

(e) Tax exclusion of extraterritorial income as revenue foregone

26. The Panel on *US – FSC (Article 21.5 – EC)* considered, in a finding upheld by the Appellate Body,[32] whether the exclusion of extraterritorial income constitutes the foregoing of revenue. The Panel considered that income provided by the United States regulations at issue through the tax "exclusion" of the United States foregoes revenue that is otherwise due within the meaning of Article 1.1(a)(1)(ii), and therefore a "financial contribution" exists. The Panel indicated that in order to assess the nature of the relationship between the measure at issue and the party's overall tax regime, it had looked at the "essential shape and the rationale that is exhibited":

> "For instance – and without prejudice to what the status of such a measure might be under the *SCM Agreement* – the Act manifestly does not represent a coherent approach to corporate earnings derived from offshore activities only. The conditionality is such that the eligibility is, in fact, circumscribed carefully to render it only effective, for example, with respect to goods, only with respect to *certain* goods – i.e. *certain* 'qualifying foreign trade property' – produced within or outside the United States, where those goods are for 'use outside the United States' and where those goods fulfill the foreign articles/labor limitation included in the definition of qualifying foreign trade property. In short, one is left with the perspective simply of certain carve-outs being provided for in relation to what would otherwise be the prevailing regime of revenue liability in respect of the income concerned.
>
> We add that while, in our view, the terms of the *SCM Agreement* are clear enough, their application to the facts of the multiplicity of Members' regimes will not necessarily be self-evident. Indeed, discerning what might be described as "the prevailing domestic standard" for a particular tax regime may be a particularly exacting exercise. In more common usage, it might be rather difficult to discern what is the exception, as it were, and what is the rule. But the terms of the *SCM Agreement* are clearly of general application: there is nothing which states that they are only to be applied when the results are self-evident. Be that as it may, we are not, in this dispute, presented with a situation of such complexity. This dispute does not involve a debatable call as to whether the glass is half-full or half-empty. As outlined above, we have looked at the essential shape and the rationale that is exhibited. In examining that, we have weighed such considerations as the degree of conditionality, the range of limitations and the manner in which the measure at issue relates to the overall regime. Taken together, they enable us to assess the nature of the relationship of the measure at issue and the overall regime. That is precisely how one is in a position to arrive at the judgment required by the terms of the *SCM Agreement*.
>
> In light of these considerations, we are of the view that, through the tax 'exclusion' provided by the Act, the United States government foregoes revenue that is otherwise due within the meaning of Article 1.1(a)(1)(ii). In our view, a 'financial contribution' thereby arises within the meaning of Article 1.1 *SCM Agreement*."[33]

(f) Footnote 1 to Article 1.1(a)(1)(ii)

27. The measure at issue in *Canada – Autos* consisted of the exemption of import duties for motor vehicles imported into Canada by Canadian car manufacturers who fulfilled certain conditions. The Appellate Body rejected the argument that the Canadian measure was "'analogous' to the situation described in footnote 1".[34] The Appellate Body stated: "Footnote 1 . . . deals with duty and tax exemptions or remissions for *exported* products. The measure at issue applies, in contrast, to *imports*. . . . For this reason, we do not consider that footnote 1 bears upon the import duty exemption at issue in this case."[35]

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[30] (*footnote original*) Panel Report on *US – FSC*, para. 7.45.
[31] Appellate Body Report on *US – FSC*, para. 91.
[32] The Appellate Body upheld the Panel' s findings at issue although under a different focus partly because, on appeal, the thrust of the United States' arguments had been directed towards the role of the measure in allocating income as either domestic- or foreign-source. See Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 106.
[33] Panel Report on *US – FSC (Article 21.5 – EC)*, paras. 8.28–8.30.
[34] Appellate Body Report on *Canada – Autos*, para. 92.
[35] Appellate Body Report on *Canada – Autos*, para. 92.

6. Article 1.1(a)(1)(iii): government provision of goods or services

(a) General

28. In *US – Softwood Lumber IV*, the Appellate Body, after noting that "[a]n evaluation of the existence of a financial contribution involves consideration of the nature of the transaction through which something of economic value is transferred by a government",[36] explained that this provision foresees two types of transaction, and made the following general remarks on the scope of Article 1(a)(1)(iii) in this regard:

> "As such, the Article contemplates two distinct types of transaction. The first is where a government provides goods or services other than general infrastructure. Such transactions have the potential to lower artificially the cost of producing a product by providing, to an enterprise, inputs having a financial value. The second type of transaction falling within Article 1.1(a)(1)(iii) is where a government purchases goods from an enterprise. This type of transaction has the potential to increase artificially the revenues gained from selling the product."[37]

(b) "provides"

29. In *US – Softwood Lumber III*, the Panel addressed the issue of whether a government that allows the exercise of harvesting rights to a company is actually providing goods within the meaning of Article 1.1(a)(1)(iii). The Panel considered that when a government does allow this, it is "providing" timber to the harvesting companies. For the Panel, "from the tenure holder's point of view, there is no difference between receiving from the government the right to harvest standing timber and the actual supply by the government of standing timber through the tenure holder's exercise of this right".[38] The Panel stated:

> "In sum, and in the context of Article 1.1(a) (1)(iii) SCM Agreement, we are of the view that where a government allows the exercise of harvesting rights, it is providing standing timber to the harvesting companies. From the perspective of the harvesting company the situation is clear: most forest land is Crown land, and if the company wants to cut the trees for processing or sale, it will need to enter into a stumpage contract with the provincial government, under which it will have to take on a number of obligations in addition to paying a stumpage fee for the trees actually harvested. We thus view the service and maintenance obligations, the obligations to undertake various forestry management, conservation and other measures, combined with the stumpage fees required by the stumpage agreements, as the price the tenure holder has to pay for obtaining and exercising its harvesting rights."[39]

(c) "goods"

(i) Concept of "goods"

30. The Panel on *US – Softwood Lumber III*, addressing the issue whether standing timber is a "good" in the sense of Article 1.1(a)(1)(iii), concluded that it was after considering the ordinary meaning of the term "goods" in its context and in the light of the object and purpose of the provision at issue. For this purpose, the Panel at the outset referred to several dictionary definitions and opined that "[t]he ordinary meaning of the word 'goods' is ... very broad and in and of itself does not seem to place any limits on the kinds of 'tangible or movable personal property, other than money' that could be considered a 'good'".[40]

31. The Panel on *US – Softwood Lumber III* drew further support for its conclusions from the context in which the term "goods" is used in Article 1.1(a)(1)(iii):

> "In Article 1.1(a)(1)(iii) SCM Agreement, 'goods' is used in the context of 'goods or services other than general infrastructure'. We consider that the context in which the term 'goods' is used in Article 1.1(a)(1)(iii) SCM Agreement confirms the broad ordinary meaning of 'goods' as tangible or movable personal property, other than money. In our view, the sentence 'goods or services other than general infrastructure' refers to a very broad spectrum of things a government may provide. The fact that the only exception provided for in subparagraph (iii) is general infrastructure reinforces our view concerning the unqualified meaning of the term goods as used in this provision."[41]

32. The Panel on *US – Softwood Lumber III* further considered that the word "goods" in the context of "goods or services" is intended to ensure that the term "financial contribution" is not interpreted to mean only a money-transferring action, but encompasses as well an in-kind transfer of resources, with the exception of general infrastructure.[42]

33. In addition, the Panel on *US – Softwood Lumber III* rejected the argument that "goods" are limited to products with an actual or potential tariff line:

> "[A]lthough in many cases the general word 'good' may indeed be used as an equivalent of the term 'products', this does not imply that this necessarily is always so, precisely because 'goods' is a term with a broad and general meaning . . . Although 'goods' in Article 1.1(a)(1)(iii) SCM Agreement certainly includes tradable products,

[36] Appellate Body Report on *US – Softwood Lumber IV*, para. 52.
[37] Appellate Body Report on *US – Softwood Lumber IV*, para. 53.
[38] Panel Report on *US – Softwood Lumber III*, para. 7.16.
[39] Panel Report on *US – Softwood Lumber III*, para. 7.18.
[40] Panel Report on *US – Softwood Lumber III*, para. 7.22.
[41] Panel Report on *US – Softwood Lumber III*, para. 7.23.
[42] Panel Report on *US – Softwood Lumber III*, para. 7.24.

there is no reason to limit its meaning to only such products, particularly where the immediate context in which the term is used does not suggest such a limitation. In particular, this provision states that when the government provides 'goods or services', this constitutes a financial contribution. The 'goods' in question are not imported or exported, simply provided by the government, and nothing suggests therefore that the goods in question need to be tradeable products with a potential or actual tariff line. Goods in this context are distinguished from services, and in our view the two cover the full spectrum of in-kind transfers the government may undertake by providing resources to an enterprise. Our view is reinforced by the fact that there is only one exception among all possible goods and services that could be provided by the government – general infrastructure – which is explicitly defined as not constituting a financial contribution. We thus find that there is no basis in the text of the SCM Agreement to conclude that 'goods' in Article 1.1 is limited to products with an actual or potential tariff line."[43]

(ii) Exception

34. Following a similar approach, the Panel and the Appellate Body on *US – Softwood Lumber IV* reached the same conclusion that standing timber is a "good" in the sense of Article 1.1(a)(1)(iii). In doing so, the Appellate Body agreed with the Panel that "the ordinary meaning of the term 'goods', as used in Article 1.1(a)(1)(iii), includes items that are tangible and capable of being possessed", although it cautioned about the usage of dictionary definitions of a term:

"We note, however, as we have done on previous occasions, that dictionary definitions have their limitations in revealing the ordinary meaning of a term. This is especially true where the meanings of terms used in the different authentic texts of the *WTO Agreement* are susceptible to differences in scope. . . . As we have observed previously, in accordance with the customary rule of treaty interpretation reflected in Article 33(3) of the *Vienna Convention on the Law of Treaties* (the '*Vienna Convention*'), the terms of a treaty authenticated in more than one language – like the *WTO Agreement* – are presumed to have the same meaning in each authentic text. It follows that the treaty interpreter should seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language. With this in mind, we find that the ordinary meaning of the term "goods" in the English version of Article 1.1(a)(1)(iii) of the *SCM Agreement* should not be read so as to exclude tangible items of property, like trees, that are severable from land."[44]

35. In the same vein, the Panel on *US – Softwood Lumber III*, rejecting Canada's argument, considered that the text of the *SCM Agreement* provides no exception for "*harvesting right*s" mentioned in a working paper from the Uruguay Round negotiations, which, in the Panel's view, at any rate, "has little if any probative value":[45]

"Canada argues that rights to exploit *in situ* natural resources are not covered by Article 1.1(a)(1)(iii) SCM Agreement. Canada can not point to any provision in particular in the Agreement in support of this view, but instead reaches this conclusion on the basis of a working paper from the time of the Uruguay Round negotiations which explicitly mentioned *harvesting rights* separately from goods or services.

We note that the text of the SCM Agreement does not in any way provide an exception for the right to exploit natural resources. The only exception from the term 'goods or services' provided for in Article 1.1(a)(1)(iii) SCM Agreement is general infrastructure, not natural resources."[46]

36. The Appellate Body on *US – Softwood Lumber IV* further agreed with the Panel that the context of the term "goods" supports this interpretation and emphasized that "[i]n the context of Article 1.1(a)(1)(iii), all goods that might be used by an enterprise to its benefit – including even goods that might be considered *infrastructure* – are to be considered "goods" within the meaning of the provision, unless they are infrastructure of a *general* nature".[47]

7. Article 1.1(a)(1)(iv): funding mechanism, private bodies

(a) Purpose of Article 1.1(a)(1)(iv)

37. The Panel on *US – Export Restraints* considered that the purpose of subparagraph (iv) of Article 1.1(a)(i) to the *SCM Agreement* is to avoid circumvention of subparagraphs (i)–(iii) of the same Article by a government operating through a private body:

"[W]e find no support in the text of the Agreement for the US reading of the word 'type'. Rather, in our view, the phrase 'type of functions' refers to the physical functions identified in subparagraphs (i)–(iii). In this regard, we believe that the intention of subparagraph (iv) is to avoid circumvention of subparagraphs (i)–(iii) by a government simply by acting through a private body. Thus, ultimately, the scope of the actions (the physical functions) covered by subparagraph (iv) must be the same as those covered by subparagraphs (i)–(iii). That is, the difference between subparagraphs (i)–(iii) on the one hand, and subparagraph (iv) on the other, has to do with the identity of the *actor*, and not with the nature of the *action*. The phrase 'type of functions' ensures that this is

[43] Panel Report on *US – Softwood Lumber III*, para. 7.28.
[44] Appellate Body Report on *US – Softwood Lumber IV*, para. 59.
[45] Panel Report on *US – Softwood Lumber III*, para. 7.26.
[46] Panel Report on *US – Softwood Lumber III*, paras. 7.25–7.26.
[47] Appellate Body Report on *US – Softwood Lumber IV*, para. 60.

the case, that is, that Article 1 covers the types of functions identified in subparagraphs (i)–(iii) whether those functions are performed by the government itself or are delegated to a private body by the government."[48]

(b) Requirement for the existence of a financial contribution under Article 1.1(a)(1)(iv)

38. In *US – Export Restraints*, the Panel examined the text and context of Article 1.1(a)(1)(iv) and noted that it contains five requirements in order for a financial contribution to exist:

> "The definition of financial contribution in Article 1.1(a)(1)(iv)contains five requirements:
>
> (i) a government 'entrusts or directs'
>
> (ii) 'a private body'
>
> (iii) 'to carry out one or more of the type of functions illustrated in' subparagraphs (i)–(iii) of Article 1.1(a)(1) (in this case the provision of goods)
>
> (iv) 'which would normally be vested in the government' and
>
> (v) 'the practice, in no real sense, differs from practices normally followed by governments'[49]

(i) Government-entrusted or government-directed provision of goods

39. The Panel on *US – Export Restraints* addressed the issue of whether an export restraint could constitute a financial contribution in the sense of Article 1.1(a)(1)(iv). In considering whether export restraints involve government "entrustment" or "direction", the Panel stated that this requirement refers "to the situation in which the government executes a particular policy by operating through a private body". Following dictionary definitions of these terms, the Panel stated that the action taken by the government must contemplate the concept of "delegation", and must include three separate elements: (i) "an explicit and affirmative action, be it delegation or command"; (ii) "addressed to a particular party"; and (iii) "the objective of which is a particular task or duty". The Panel concluded that "an export restraint as defined in this dispute cannot constitute government-entrusted or government-directed provision of goods in the sense of subparagraph (iv) and hence does not constitute a financial contribution in the sense of Article 1.1(a) of the SCM Agreement."[50]

> "In our view, the requirement of 'entrustment' or 'direction' in subparagraph (iv) refers to the situation in which the government executes a particular policy by operating through a private body.
>
> It follows from the ordinary meanings of the two words 'entrust' and 'direct' that the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction). To our minds, both the act of entrusting and that of directing therefore necessarily carry with them the following three elements: (i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which action is a particular task or duty. In other words, the ordinary meanings of the verbs 'entrust' and 'direct' comprise these elements – *something* is necessarily delegated, and it is necessarily delegated *to someone*; and, by the same token, *someone* is necessarily commanded, and he is necessarily commanded *to do something*. We therefore do not believe that either entrustment or direction could be said to have occurred until all of these three elements are present.
>
> Having said that, it is clearly the first element – an explicit and affirmative action of delegation or command – that is determinative. The second and third elements – addressed to a particular party and of a particular task – are *aspects* of the first."[51]

40. The Panel on *US – Export Restraints* concluded that the meaning of the words "entrusts" and "directs" requires an "explicit and affirmative action of delegation or command", and that an export restraint in the sense that the term is used in this dispute cannot fulfil the "entrusts or directs" standard of subparagraph (iv) of Article 1.1(a)(1) of the *SCM Agreement*. The Panel stated:

> "[T]he ordinary meanings of the words 'entrusts' and 'directs' require an explicit and affirmative action of delegation or command. Moreover, we find that the 'effects' test (i.e., a proximate causal relationship) advanced by the United States as the definition of 'entrusts or directs' has implications which in our view would be contrary to the intended scope and coverage of the SCM Agreement, in that it would effectively read out of the text of Article 1 the financial contribution requirement. Thus, we find that an export restraint in the sense that the term is used in this dispute cannot satisfy the 'entrusts or directs' standard of subparagraph (iv)."[52]

(ii) "Private body"

41. As to the requirement that there be a "private body" that is "entrusted or directed", the Panel on *US – Export Restraints* stated that the term "private body" is used in Article 1.1(a)(1)(iv) as a counterpoint to the terms "government" or "any public body" as used in Article 1.1. The Panel concluded that the companies or other entities affected by or reacting to an export restraint could be "private bodies" in this sense. The Panel stated:

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[48] Panel Report on *US – Exports Restraints*, para. 8.53.
[49] Panel Report on *US – Exports Restraints*, para. 8.25.
[50] Panel Report on *US – Exports Restraints*, para. 8.75.
[51] Panel Report on *US – Exports Restraints*, paras. 8.28–8.30.
[52] Panel Report on *US – Exports Restraints*, para. 8.44.

"We believe that the term 'private body' is used in Article 1.1(a)(1)(iv) as a counterpoint to 'government' or 'any public body' as the actor. That is, any entity that is neither a government nor a public body would be a private body. Under this reading of the term 'private body', there is no room for circumvention in subparagraph (iv). As it is a government or a public body that would have to entrust or direct under subparagraph (iv), any entity other than a government or a public body could receive the entrustment or direction and could constitute a 'private body'."[53]

(iii) "Type of functions"

42. The Panel on *US – Export Restraints* took the view that the scope of the functions covered by subparagraph (iv) is the same as those in subparagraphs (i) to (iii). In the Panel's view, the differences between subparagraphs (i) to (iii) and (iv) have to do with the identity of the actions:

"In this regard, we believe that the intention of subparagraph (iv) is to avoid circumvention of subparagraphs (i)–(iii) by a government simply by acting through a private body. Thus, ultimately, the scope of the actions (the physical functions) covered by subparagraph (iv) must be the same as those covered by subparagraphs (i)–(iii). That is, the difference between subparagraphs (i)–(iii) on the one hand, and subparagraph (iv) on the other, has to do with the identity of the *actor*, and not with the nature of the *action*. The phrase 'type of functions' ensures that this is the case, that is, that Article 1 covers the types of functions identified in subparagraphs (i)–(iii) whether those functions are performed by the government itself or are delegated to a private body by the government."[54]

43. With regard to the word "type", the Panel on *US – Export Restraints* further clarified that this word refers to the fact that each subparagraph (i)–(iii) constitutes by itself a general "type of functions" encompassing one or more categories of behaviour:

"The subsequent phrase 'illustrated in (i) to (iii) above' confirms this. In particular, subparagraphs (i)–(iii) each refer to *multiple* government actions and provide examples thereof. Subparagraph (i), for instance, refers to three general categories (direct transfers of funds; potential direct transfers of funds; and potential direct transfers of liabilities) of the 'type of function' of transfers of funds and liabilities.

We therefore find that the phrase 'type of functions' refers to the physical functions encompassed by subparagraphs (i)–(iii), and does not expand the scope of subparagraph (iv) beyond these, to encompass other kinds of 'government mechanisms'."[55]

(c) Relationship with Article 1.1(b)

44. With respect to the relationship with Article 1.1(b), see paragraph 15 above ("potential direct transfer of funds") and paragraphs 46 and 72 below ("ordinary meaning of 'benefit'").

8. Article 1.1(b): "benefit is thereby conferred"

(a) "benefit"

45. In *Canada – Aircraft*, the Appellate Body quoted approvingly the Panel's focus on the recipient of the subsidy in its interpretation of the term "benefit" under Article 1.1(b):[56]

"[T]he ordinary meaning of 'benefit' clearly encompasses some form of advantage. . . . In order to determine whether a financial contribution (in the sense of Article 1.1(a)(i)) confers a 'benefit', *i.e.*, an advantage, it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution. In our view, the only logical basis for determining the position the recipient would have been in absent the financial contribution is the market. Accordingly, a financial contribution will only confer a 'benefit', *i.e.*, an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market."[57]

46. The Appellate Body on *Canada – Aircraft* agreed with the Panel's findings rejecting an interpretation of benefit based on whether there was a "net cost" to the government and focusing rather on the recipient of the subsidy. The Panel added that interpreting the term "benefit" with a view to the granting government – rather than with a view to the recipient – was not consistent with the object and purpose of the *SCM Agreement*.[58] In so doing, it first considered the dictionary meaning of the term "benefit":

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[53] Panel Report on *US – Exports Restraints*, para. 8.49.
[54] Panel Report on *US – Exports Restraints*, para. 8.53.
[55] Panel Report on *US – Exports Restraints*, paras. 8.54–8.55.
[56] Appellate Body Report on *Canada – Aircraft*, para. 161.
[57] Appellate Body Report on *Canada – Aircraft*, para. 149.
[58] Panel Report on *Canada – Aircraft*, paras. 9.119 – (referring to Canada's first submission) – and 9.120:

"[W]e note that the SCM Agreement does not contain any express statement of its object and purpose. We therefore consider it unwise to attach undue importance to arguments concerning the object and purpose of the SCM Agreement. In our view, however, the avoidance of net cost to government is not the object and purpose of the multilateral disciplines contained in the SCM Agreement. Rather, . . . we consider that the object and purpose of the SCM Agreement could more appropriately be summarised as the establishment of multilateral disciplines 'on the premise that some forms of government intervention distort international trade, [or] have the potential to distort [international trade]'.

[L]eaving aside situations of alleged 'income or price supports' within the meaning of Article 1.1(a)(2), we consider that a 'financial contribution' by a government or public body confers a 'benefit', and therefore constitutes a 'subsidy' within the meaning of Article 1 of the SCM Agreement, when it confers an advantage on the recipient relative to applicable commercial benchmarks, *i.e.*, when it is provided on terms that are more advantageous than those that would be available to the recipient on the market."

"The dictionary meaning of 'benefit' is 'advantage', 'good', 'gift', 'profit', or, more generally, 'a favourable or helpful factor or circumstance'. Each of these alternative words or phrases gives flavour to the term 'benefit' and helps to convey some of the essence of that term. These definitions also confirm that the Panel correctly stated that 'the ordinary meaning of "benefit" clearly encompasses some form of advantage.' Clearly, however, dictionary meanings leave many interpretive questions open."[59]

47. The Appellate Body on *Canada – Aircraft* then confirmed the Panel's focus on the recipient of a subsidy in determining the existence of a benefit:

"A 'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a 'benefit' can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term 'benefit', therefore, implies that there must be a recipient. This provides textual support for the view that the focus of the inquiry under Article 1.1(b) of the *SCM Agreement* should be on the recipient and not on the granting authority. The ordinary meaning of the word 'confer', as used in Article 1.1(b), bears this out. 'Confer' means, *inter alia*, 'give', 'grant' or 'bestow'. The use of the past participle 'conferred' in the passive form, in conjunction with the word 'thereby', naturally calls for an inquiry into *what was conferred on the recipient*. Accordingly, we believe that Canada's argument that 'cost to government' is one way of conceiving of 'benefit' is at odds with the ordinary meaning of Article 1.1(b), which focuses on the *recipient* and not on the *government* providing the 'financial contribution'."[60]

48. The Appellate Body on *Canada – Aircraft* finally held that a determination whether a benefit exists for the recipient of a subsidy implies a comparison with market conditions:

"We also believe that the word 'benefit', as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."[61]

49. The Panel on *US – Lead and Bismuth II*, in its interpretation of the term "benefit" – subsequently upheld by the Appellate Body[62] – considered that the existence or lack of benefits rests on whether the potential recipient or beneficiary has received a financial contribution on more favourable terms. The Panel further indicated that consideration should also be given to Articles VI:3 of the *GATT 1994* and footnote 36 to Article 10 of the *SCM Agreement*:

"[T]he existence or non-existence of 'benefit' rests on whether the potential recipient or beneficiary, which 'logically' must be a legal or natural person, or group of persons, has received a 'financial contribution' on terms more favourable than those available to the potential recipient or beneficiary in the market. Moreover, in the particular context of countervailing duties, we believe that consideration should also be given to Article VI:3 of the GATT 1994, and footnote 36 to Article 10 of the SCM Agreement.

Article VI:3 of the GATT 1994 provides in relevant part:

'The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.'

Footnote 36 to Article 10 of the SCM Agreement provides that:

'The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.'

These provisions state that countervailing duties levied on imported products are intended to offset (countervailable) subsidies found to have been bestowed on *inter alia* the production of such imported products. The notion of 'subsidy' comprises two elements: (1) 'financial contribution', and (2) 'benefit'. As noted above, 'benefit' is determined by reference to the terms on which a 'financial contribution' would have been made available to a particular legal or natural person, or group of persons, in the market. Full consideration of Article VI:3 of the GATT 1994 and footnote 36 to Article 10 of the SCM Agreement leads us to conclude that, in the context of countervailing duty investigations, the existence of a 'benefit' should be determined by reference to the market terms on which a 'financial contribution' bestowed directly or indirectly upon the production of any merchandise would have been made available to the producer of that merchandise."[63]

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[59] Appellate Body Report on *Canada – Aircraft*, para. 153.
[60] Appellate Body Report on *Canada – Aircraft*, para. 154.
[61] Appellate Body Report on *Canada – Aircraft*, para. 157. See also Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.343; Panel Report on *US – FSC (Article 21.5 – EC)* paras. 7.278–7.296.
[62] Appellate Body Report on *US – Lead and Bismuth II*, paras. 53–60.
[63] Panel Report on *US – Lead and Bismuth II*, paras. 6.66–6.69.

50. In *Brazil – Aircraft (Article 21.5 – Canada II)*, the Panel noted that under the programme at issue the borrower is free to select the lender that offers the best terms, and that payments under the programme allow that lender to offer better export credit terms than it could otherwise provide. As a result, the Panel concluded that from a theoretical standpoint, such payments may be expected to enable purchasers to obtain export credits on terms more favourable than those available to them in the commercial market, and thus may confer a benefit:

> "[T]hat the borrower is free to select the lender, whether Brazilian or otherwise, that offers him the best terms, and that PROEX III payments allow that lender to offer better export credit terms than he could otherwise provide . . .
>
> . . .
>
> We recognise the theoretical possibility that a *particular* purchaser of Brazilian regional aircraft might be able to obtain export credit financing at (or even below) CIRR rates in the commercial marketplace. Even if, as a result, PROEX III did not *always* confer a benefit on the buyer of Brazilian regional aircraft, it is important to bear in mind that this Panel's task is to review the PROEX III programme as such (insofar as it relates to exports of regional aircraft), not just specific situations which may arise under it. We are concerned, in this case, with *all* situations in which PROEX III may reasonably be expected to be involved. Thus, to the extent that PROEX III required Brazil, in *some* situations, to make PROEX III payments that *would* result in a benefit being conferred in respect of regional aircraft, the PROEX III programme would be mandatory legislation (in respect of the conferral of a benefit) and thus a subsidy potentially inconsistent with the *SCM Agreement*."[64]

51. The Panel on *Canada – Aircraft Credits and Guarantees* considered whether the repayment terms and interest rate spread offered by the programme under consideration conferred a "benefit" and rejected Brazil's argument that a repayment term of more than ten years is in itself positive evidence of a "benefit" within the meaning of Article 1.1(b) of the *SCM Agreement*. The Panel considered evidence demonstrating that repayment terms of up to 18.25 years were available in the market. Thus, for the Panel, the fact that a given repayment term may exceed the ten-year term provided for in the regulation under consideration does not mean *ipso facto* that financing is provided on terms more favourable than those available to the recipient on the market.[65]

(b) "recipient of a benefit"

52. In *Brazil – Aircraft (Article 21.5 – Canada II)*, the Panel considered that, although the text of Article 1.1(b) does not define which participant in a subsidized transaction is a recipient of a benefit, that in itself does not mean that a benefit can be found to be provided to *any* participant to a transaction that receives a financial contribution:[66]

> "In considering whether PROEX III payments confer a benefit, the Panel notes that the financial contribution in this case is in the form of a (non-refundable) payment, rather than in the form of a loan. As a usual matter, of course, a non-refundable payment will confer a benefit. Thus, there would be no need for complex benefit analysis if PROEX III payments were made directly to producers or to purchasers of Brazilian regional aircraft. In this case, however, the payment is not provided to a producer of regional aircraft. Rather, PROEX III payments are provided *to a lender* in support of an export credit transaction relating to Brazilian regional aircraft. Thus, while there can be no doubt that PROEX III payments confer a benefit, we consider that the question remains whether PROEX III payments confer a benefit to *producers of regional aircraft*.
>
> . . . whether the financial contribution has conferred a benefit to producers of regional aircraft – as opposed merely to a benefit to suppliers of financial services – depends upon the impact of PROEX III payments on the terms and conditions of the export credit financing available to purchasers of Brazilian regional aircraft."[67]

53. In *Canada – Aircraft Credits and Guarantees*, the Panel considered whether a "benefit" is conferred on a company by virtue of a "benefit" being conferred on the *customer* purchasing the product of such company:

> "In examining Brazil's claims in this case, we shall consider whether or not a 'benefit' is conferred on Bombardier by virtue of a 'benefit' being conferred on the airline customer purchasing Bombardier aircraft. . . . In our view, the fact that Bombardier may arrange financing in the form of government support does not necessarily confer a "benefit" simply because Bombardier is 'reliev[ed] . . . of the necessity of providing or arranging its own financing'. If that were the case, a 'benefit' would be conferred whenever Bombardier arranged external financing – even through commercial banks – since any external financing would 'reliev[e] it of the necessity of providing or arranging its own financing'. We find it difficult to accept that the existence of 'benefit' (in the context of financing) is determined on the basis of whether or not Bombardier provides internal or external financing. The existence of 'benefit' (in the

[64] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.32 and 5.37.
[65] Panel Report on *Canada – Aircraft Credits and Guarantees*, paras. 7.234–7.236.
[66] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 4.4.
[67] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.27–5.28.

context of financing) is determined by reference to the terms at which similar financing is available to the airline customer in the market."[68]

(c) "is . . . conferred"

(i) General

54. In *US – Lead and Bismuth II*, the United States argued that the present tense of the verb "is conferred" in Article 1.1 of the *SCM Agreement* shows that an investigating authority must demonstrate the existence of "benefit" only at the time the "financial contribution" was made.[69] The consequence of this argument was that an investigating authority would not be required to make a finding of benefit in a (subsequent) *review* of the countervailing measure. The Appellate Body on *US – Lead and Bismuth II* rejected this, holding that "Article 1.1 does not address the *time* at which the 'financial contribution' and/or the 'benefit' must be shown to exist."[70]

55. As regards the timing of the transfer of goods, see paragraph 17 above.

(ii) Mandatory/discretionary conferral of a benefit

Challenging subsidy programmes "as such"

Relevance of the mandatory/discretionary distinction

56. In *Canada – Aircraft Credits and Guarantees*, Brazil claimed that certain Canadian programmes were "as such" prohibited export subsidies contrary to Article 3.1(a) of the *SCM Agreement*. The Panel considered that, as Brazil's claims regarded programmes as such, the mandatory/discretionary distinction[71] "would traditionally apply", i.e., that only legislation that *requires* a violation of GATT/WTO rules could be found to be inconsistent with those rules:

> "We recall that Brazil claims that the EDC Canada and Corporate Accounts and *IQ* are 'as such' prohibited export subsidies contrary to Article 3.1(a) of the SCM Agreement. Given that Brazil's claims are in respect of the programmes as such, the mandatory/discretionary distinction would traditionally apply. Under that distinction – employed in both GATT and WTO cases over the years[72] – only legislation that requires a violation of GATT/WTO rules could be found to be inconsistent with those rules.
>
> In this regard, we recall that the panel in *United States – Export Restraints* stated:
>
> > There is a considerable body of dispute settlement practice under both GATT and WTO standing for the principle that only legislation that *mandates* a violation of GATT/WTO obligations can be found as such to be inconsistent with those obligations. This principle was recently noted and applied by the Appellate Body in *United States – Anti-Dumping Act of 1916* ('*1916 Act*'):
> >
> > [T]he concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's *GATT 1947* obligations.
> >
> > . . .
> >
> > [P]anels developed the concept that mandatory and discretionary legislation should be distinguished from each other, reasoning that only legislation that mandates a violation of GATT obligations can be found as such to be inconsistent with those obligations.[73]"[74]

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[68] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.229.

[69] Appellate Body Report on *US – Lead and Bismuth II*, para. 12.

[70] Appellate Body Report on *US – Lead and Bismuth II*, para. 60.

[71] As regards the mandatory/discretionary distinction, see Section VI.B.3(c)(ii) of the Chapter on the *DSU*. As regards the mandatory/discretionary distinction in the context of an affirmative defence under paragraph 2 of item (K) of the Illustrative List of Export Subsidies, see paras. 478–479 below.

[72] (*footnote original*) *See United States – Anti-Dumping Act of 1916*, Report of the Panel, WT/DS136/R-WT/DS162/R, and Report of the Appellate Body, WT/DS136/AB/R-WT/DS162/AB/R, adopted 26 September 2000, *United States – Measures Affecting the Importation, Internal Sale, and Use of Tobacco*, Report of the Panel, BISD 41S/131, adopted 4 October 1994, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the Panel, BISD 37S/200, adopted 7 November 1990, *European Economic Community – Regulation on Imports of Parts and Components*, Report of the Panel, BISD 37S/132, adopted 16 May 1990, *United States – Taxes on Petroleum and Certain Imported Substances (Superfund)*, Report of the Panel, BISD 34S/136, adopted 17 June 1987.

We also note the statement of the Appellate Body in *US – Hot-Rolled Steel* that "[t]he captive production provision does not, by itself, *require* an exclusive focus on the merchant market, nor does it *compel* a selective approach to the analysis of the merchant market that *excludes* an equivalent examination of the captive market. The provision also does not itself *mandate* that particular weight be accorded to data pertaining to the merchant market. Rather, as explained above, the provision allows the USITC to examine the merchant market *and* the captive market, with the same degree of care and attention, as part of a broader examination of the domestic industry as a whole . . . Accordingly, if and to the extent that it is interpreted in a manner consistent with our reasoning, as set forth in paragraphs 203 to 208 of this Report, we see no necessary inconsistency between the captive production provision, *on its face*, and the *Anti-Dumping Agreement*" (*United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*United States – Hot-Rolled Steel*"), Report of the Appellate Body, WT/DS184/AB/R, adopted 23 August 2001, para. 208) (footnote omitted, emphasis in original).

[73] (*footnote original*) *United States – Measures Treating Export Restraints as Subsidies* ("*United States – Export Restraints*") Report of the Panel, WT/DS194/R, adopted 23 August 2001, para. 8.4 (footnotes omitted).

[74] Panel Report on *Canada – Aircraft Credits and Guarantees*, paras. 7.56–7.57.

Order of analysis when applying the mandatory/discretionary distinction

57. The Panel on *Canada – Aircraft Credits and Guarantees* further explained that it would examine each of the programmes at issue to see if they mandated a benefit within the meaning of Article 1, and, if so, it would then examine whether that subsidy was contingent upon export performance:[75]

> "[W]e shall apply the mandatory/discretionary distinction in this dispute in determining whether the Canadian programmes at issue are as such inconsistent with WTO obligations, i. e., whether the legal texts governing the establishment and operation of these programmes are mandatory in respect of the violations alleged by Brazil. In other words, to assess Brazil's claim against the EDC as such, we must determine whether the EDC programme mandates the grant of prohibited export subsidies in a manner inconsistent with Article 3.1(a) of the SCM Agreement."[76]

"Substantive context" in the application of the mandatory/discretionary distinction

58. In *Canada – Aircraft Credits and Guarantees*, Brazil argued that the mandatory/discretionary distinction should be applied in the "substantive context" of the Canadian programme at issue further to the Panel report in *US – Export Restraints*.[77] The Panel disagreed with Brazil's interpretation of the Panel report in that case and considered that the relevant "substantive context" in applying the mandatory/discretionary distinction would be the obligations set forth in Article 3.1(a) of the *SCM Agreement*, and not the programmes under review:

> "We note, . . ., that the Panel in [*United States – Export Restraints*] was primarily addressing the issue of whether the mandatory/discretionary distinction had to be addressed by a panel as a threshold matter as argued by the United States in that case, or whether a panel could address this distinction after considering the legal requirements of the applicable provisions of the WTO Agreement. In other words, the phrase 'substantive context' refers to Articles 1 and 3 of the SCM Agreement,[78] and not the measure under review. The point made by the panel in *United States – Export Restraints* is simply that it may be difficult to determine whether non-conforming conduct is mandated, without first determining what the obligations are against which conformity is measured. In the present case, the relevant 'substantive context' in applying the mandatory/discretionary distinction would be the obligations set forth in Article 3.1(a) of the SCM Agreement, and not the programmes under review.
>
> We shall therefore apply the mandatory/discretionary distinction in light of Article 3.1(a) of the SCM Agreement. In other words, the question we must address is whether the EDC – the EDC Canada Account and the EDC Corporate Account – or *IQ* requires Canada to provide subsidies contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement."[79]

Extent of the complainant's burden of proof

59. The Panel on *Canada – Aircraft Credits and Guarantees* considered that, to prove that a given programme "as such" provides export subsidies, the complainant must establish, on the basis of the pertinent legal instruments, that the programmes at issue "mandate subsidisation, in particular, the conferral of a benefit":

> "Whatever the reason for the existence of export credit agencies, to prove that the EDC as such provides export subsidies, Brazil would have to establish that to be the case on the basis of the various legal texts regarding the establishment and operation of the EDC (i. e., both its Canada and its Corporate Accounts).
>
> We consider that, despite the fact that Brazil has the burden of proof, it has not pointed to any specific provision in those legal texts that suggests that these programmes mandate subsidisation, in particular, the conferral of a benefit within the meaning of Article 1 of the SCM Agreement. We have nonetheless examined the various legal texts submitted by Brazil and found nothing that points to mandatory subsidisation on the part of the EDC."[80]

60. The Panel on *Canada – Aircraft Credits and Guarantees* clarified that "[t]o satisfy the 'benefit' element of

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[75] Panel Report on *Canada – Aircraft Credits and Guarantees*, paras. 7.56–7.59 and 7.68

[76] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.59.

[77] Brazil cited paragraph 8.11 of the Panel Report on *US – Export Restraints* which reads:

> "We are not aware of any GATT/WTO precedent that would require a panel to consider whether legislation is mandatory or discretionary *before* examining the substance of the provisions at issue. To the contrary, we note that a number of panels, in disputes concerning the consistency of legislation, have *not* considered the mandatory/discretionary question in the abstract and as a necessarily threshold issue. Rather, the panels in those cases first resolved any controversy as to the requirements of the GATT/WTO obligations at issue, and only then considered *in light of those findings* whether the defending party had demonstrated adequately that it had sufficient discretion to conform with those rules. That is, the mandatory/discretionary distinction was applied *in a given substantive context*."

[78] (*footnote original*) The Panel in *United States – Export Restraints* stated: "[I]dentifying and addressing the relevant WTO obligations first will facilitate our assessment of the manner in which the legislation addresses those obligations, and whether any violation is involved. That is, it is after we have considered both the substance of the claims in respect of WTO provisions and the relevant provisions of the legislation at issue that we will be in the best position to determine whether the legislation requires a treatment of export restraints that violates those provisions."(*United States – Export Restraints*, para. 8.12).

[79] Panel Report on *Canada – Aircraft Credits and Guarantees*, paras. 7.61–7.62.

[80] Panel Report on *Canada – Aircraft Credits and Guarantees*, paras. 7.76–7.77.

Article 1.1 of the SCM Agreement for purposes of a challenge to [the programme at issue] as such, [the complainant] must show that the programme requires conferral of a benefit, not that it could be used to do so, or even that it is used to do so".[81]

Fiscal advantages

61. The Panel on *Canada – Aircraft Credits and Guarantees* clarified that the granting of fiscal advantages *per se* does not prove that the entity is required to pass on those advantages to its clients in the form of Article 1 subsidies and that even if the programme may have provided subsidies in the past, it does not then follow that the programme under consideration is *required* to provide such subsidies:

> "Brazil submits that ECAs benefit from a competitive advantage over their private sector competitors (because ECAs do not pay taxes, for example), and this enables them to offer more favourable terms than those available in the private sector. According to Brazil, 'not paying taxes is illustrative of, and an essential prerequisite to, an ECA's capability to perform its normal mission – to provide export subsidies'.[82] Brazil also implies that there would be no need for the EDC if it did not provide support on terms more favourable than those available on the market.[83] Whether or not these arguments are factually correct, however, we do not see how they establish mandatory subsidization. That an entity enjoys certain fiscal advantages does not in and of itself prove that that entity is required to pass on those advantages to its clients in the form of subsidies within the meaning of Article 1 of the SCM Agreement.[84]
>
> In our opinion, the fact that ECAs may have a competitive advantage that allows them to undercut private sector competitors does not mean that they are necessarily required to do so. Furthermore, although the EDC may have provided subsidies in the form of loan guarantees, financial services or debt financing in specific transactions,[85] it does not follow from this that the EDC is required to provide such subsidies."[86]

Compliance with the OECD Arrangement

62. The Panel on *Canada – Aircraft Credits and Guarantees* further considered that "[w]hile it may be true that even when a programme complies with the OECD Arrangement, it may – pursuant to the findings of the panel in *Canada – Aircraft (Article 21.5 – Brazil)* – involve the grant of prohibited export subsidies contrary to Article 3.1(a) of the SCM Agreement, that is not necessarily the case."[87]

Provision of services not available in the market

63. The Panel on *Canada – Aircraft Credits and Guarantees* rejected the complainant's argument that the programme provided a subsidy by providing services that were not available on the market and clarified that, even if the particular programme had the potential to offer such other services, that fact did not necessarily mean that it was *required* to do so:

> "Even assuming that the provision of services not available on the market necessarily confers a benefit, the fact that the EDC Corporate Account has the 'ability' to provide such services does not necessarily mean that it is required to do so. As noted above, to satisfy the 'benefit' element of Article 1.1 of the SCM Agreement for purposes of a challenge to the EDC Corporate Account as such, Brazil would have to show that the program requires conferral of a benefit, not that it could be used to do so, or even that it is used to do so.[88]"[89]

Challenging subsidy programmes "as applied"

64. The Panel on *Canada – Aircraft Credits and Guarantees* considered it inappropriate to make a finding on the subsidies programmes under consideration "as applied" because the complainant's "as applied" claims were based on evidence from specific transactions, and these claims were not independent from claims regarding specific transactions for which the Panel did make findings. The Panel considered that "findings regarding a programme 'as applied' would undermine the utility of the mandatory/discretionary distinction":

> "In our view, there are a number of reasons why it would not be appropriate for us to make separate findings regarding the EDC and *IQ* programmes 'as applied'. *First*,

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[81] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.107. See also paras. 7.123–7.125 and Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.43 and 5.50.

[82] (*footnote original*) Second Written Submission of Brazil, para. 47 (Annex A-10).

[83] (*footnote original*) *See* Exhibit BRA-54.

[84] (*footnote original*) Further, to the extent that Brazil might be implying that all ECAs grant prohibited export subsidies, we consider that such an argument blurs the distinction between financial contribution and benefit. That an ECA provides export credits demonstrates the existence of a financial contribution, not the conferral of a benefit thereby.

[85] (*footnote original*) We are making no findings, however, in this respect at this juncture.

[86] Panel Report on *Canada – Aircraft Credits and Guarantees*, paras. 7.80–7.81.

[87] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.93.

[88] (*footnote original*) This is not a case where EDC Corporate Account support necessarily confers a benefit, and where the only discretion available is that of not providing the support at all. We do not express a view as to whether our approach in this case would be equally applicable in such factual circumstances. Rather, this is a case where Canada has discretion to operate the EDC Corporate Account in such a manner that it does not confer a benefit. Further, we note that the facts before us are unlike those before the Appellate Body in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*. In that case, the Appellate Body was reviewing mandatory legislation. (*See Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, Report of the Appellate Body, WT/DS56/AB/R, adopted 22 April 1998, paras. 49 and 54.)

[89] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.111.

> we do not consider that Brazil's 'as applied' claims are independent of its claims regarding 'specific transactions'. Indeed, Brazil itself acknowledges that '[i]n order for Brazil to prevail on its "as applied" claims, the Panel must find that the challenged programmes have been *applied in specific transactions* in a manner that is inconsistent with the SCM Agreement'. Since Brazil's 'as applied' claims are not independent of its claims against 'specific transactions', and since we make findings regarding 'specific transactions', we see no practical purpose in making 'as applied' findings.
>
> . . . [W]e recall our earlier remarks regarding the application of the mandatory / discretionary distinction. Further, we recall the statement of the panel in *United States – Export Restraints* that 'the distinction between mandatory and discretionary legislation has a rational objective in ensuring predictability of conditions for trade. It allows parties to challenge measures that will necessarily result in action inconsistent with GATT/WTO obligations, *before* such action is actually taken.'[90] The conclusion by a panel that a programme is discretionary and therefore is not inconsistent with the WTO Agreement and a subsequent conclusion, by the same panel, that the programme 'as applied' (i.e., the manner in which the discretion inherent in that programme has been applied) is inconsistent with the WTO Agreement would be of little value. In our view, findings regarding a programme 'as applied' would undermine the utility of the mandatory / discretionary distinction."[91]

(d) Passing the benefit through

65. In *US – Lead and Bismuth II*, the European Communities challenged the administrative review of the imposition of countervailing duties by United States' authorities. The United States' investigating authorities had imposed countervailing duties on products of a company which had received subsidized equity infusions from the United Kingdom Government while still under state control, but for which a fair market value price had been paid in a subsequent privatization by the buyers. Both the equity infusion and the privatization had occurred prior to the initiation of the investigation of the United States' authorities. The applicable United States' statutory provisions contained an "'irrebuttable presumption that nonrecurring subsidies benefit merchandise produced by the recipient over time', without requiring any re-evaluation of those subsidies based on the use or effect of those subsidies or subsequent events in the marketplace".[92] As a consequence, the competent United States' authority examined whether "potentially allocable subsidies . . . could have travelled with the productive unit" following a change in ownership and concluded that a benefit indeed still existed, accruing to the new owners of the privatized corporation. In its report, the Panel first found that, in general, there could not be an irrebuttable presumption that a benefit "continues to flow from untied, non-recurring 'financial contributions', even after changes in ownership".[93] The Panel then stated that it also failed to see how, in the specific case at hand, the new owners of the producing facility could be deemed to have obtained a benefit by previous subsidies bestowed upon the enterprise, if a fair market value had been paid for all productive assets in the course of the privatization.[94] Upon appeal, the Appellate Body held that it saw "no error in the Panel's conclusion".[95]

66. Discussing the payment of value by owners of companies, rather than the companies themselves, the Panel on *US – Lead and Bismuth II*, in a statement not addressed by the Appellate Body, held that "[i]n the context of privatizations negotiated at arm's length, for fair market value, and consistent with commercial principles, the distinction between a company and its owners is redundant for the purpose of establishing 'benefit'".[96]

67. In *US – Softwood Lumber III,* the Panel, basing itself on the findings of the Appellate Body in *US – Lead and Bismuth II*,[97] examined whether, considering the facts of this case, the Member conducting a countervailing duty investigation was required to examine if the alleged benefit to the *tenure holders* from the stumpage programmes were "passed through" to the *softwood lumber producer*s.[98] In the Panel's view, an authority "may not assume that a subsidy provided to producers of the 'upstream' input product automatically benefits unrelated producers of downstream products, especially if there is evidence on the record of arm's-length transactions between the two". For the Panel, in such circumstances the investigating authority should "examine whether and to what extent the subsidies bestowed on the upstream producers benefited the downstream producers".[99]

68. The Panel on *US – Softwood Lumber III* concluded that where there is "complete identity between the tenure holder/logger and the lumber producer, no pass-through analysis is required". The Panel found that "where a downstream producer of subject merchandise is unrelated to the allegedly subsidized upstream producer of the input, an authority is not allowed to simply

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[90] (*footnote original*) *United States – Export Restraints*, Report of the Panel, footnote, *supra*, para. 8.9 (emphasis in original).
[91] Panel Report on *Canada – Aircraft Credits and Guarantees*, paras. 7.130 and 7.132.
[92] Panel Report on *US – Lead and Bismuth II*, para. 6.59, quoting from the United States' submission.
[93] Panel Report on *US – Lead and Bismuth II*, para. 6.71.
[94] Panel Report on *US – Lead and Bismuth II*, para. 6.81.
[95] Appellate Body on *US – Lead and Bismuth II*, para. 68.
[96] Panel Report on *US – Lead and Bismuth II*, para. 6.82.
[97] Appellate Body Report on *US – Lead and Bismuth II*, para. 68.
[98] Panel Report on *US – Softwood Lumber III*, paras. 7.68–7.69.
[99] Panel Report on *US – Softwood Lumber III*, para. 7.71.

assume that a benefit has passed through". The Panel concluded that by "not examining whether the independent lumber producers 'paid arm's-length prices' for the logs that they purchased", the Member defined the benefit to the producers of the subject merchandise inconsistently with the SCM Agreement.[100]

69. The Appellate Body on *US – Softwood Lumber IV* explained that "pass-through" issues concern situations where the activities of harvesting standing timber, processing logs into softwood lumber, and further processing lumber into remanufactured lumber products "are not carried out by vertically integrated enterprises". In other words, the appeal concerned "only arm's length sales of logs and lumber by tenured common ownership or in any other way".[101] Furthermore, the Appellate Body rejected the United States' argument that no pass-through analysis was required, because the tenured harvester/sawmill processes *some* logs into softwood *lumber* in its own sawmill, and is thus a producer of the product subject to the investigation. In this regard, the Appellate Body did "not see why the mere fact that a tenured harvesters owns – or does not own – a sawmill, should affect whether a pass-through analysis is necessary with respect to logs sold at arm's length".

(e) Rebuttal of a prima facie case of benefit

70. Considering whether a party has rebutted a prima facie case of subsidization established against it, the Panel on *Canada – Aircraft* stated:

> "In order to rebut the *prima facie* case of 'benefit', we consider that Canada must do more than simply demonstrate that the amount of specific 'benefit' estimated by Brazil may be incorrect, or that TPC's rate of return covers Canada's cost of funds. Rather, Canada must demonstrate that no 'benefit' is conferred, in the sense that the terms of the contribution provide for a commercial rate of return."[102]

71. In *Canada – Aircraft Credits and Guarantees*, the Panel noted the statements made by a Member's government official that the programme financing under consideration would be at a "better rate" than loans available commercially. For the Panel, these statements were an *indication* that the financing confers a "benefit":

> "We recall that a 'benefit' is conferred when a recipient receives a 'financial contribution' on terms more favourable than those available to the recipient in the market. In our view, Minister Tobin's statements indicate that the Canada Account financing to Air Wisconsin, which will take the form of a loan, will confer a 'benefit' because it will be on terms more favourable than those available to the recipient in the market. This is confirmed by the fact that, in these proceedings, Canada itself initially considered the terms of the Canada Account financing to Air Wisconsin to be more favourable than those available in the market."[103]

(f) Relationship with Article 1.1(a)(1)

72. The Appellate Body on *Canada – Aircraft* found Article 1.1(a)(1) a relevant context for interpreting the term "benefit" in Article 1.1(b):

> "The structure of Article 1.1 as a whole confirms our view that Article 1.1(b) is concerned with the 'benefit' to the recipient, and not with the 'cost to government'. The definition of 'subsidy' in Article 1.1 has two discrete elements: 'a financial contribution by a government or any public body' and 'a benefit is thereby conferred'. The first element of this definition is concerned with whether the *government* made a 'financial contribution', as that term is defined in Article 1.1(a). The focus of the first element is on the action of the government in making the 'financial contribution'. That being so, it seems to us logical that the second element in Article 1.1 is concerned with the 'benefit . . . conferred' on the *recipient* by that governmental action. Thus, subparagraphs (a) and (b) of Article 1.1 define a 'subsidy' by reference, first, to the action of the granting authority and, second, to what was conferred on the recipient. Therefore, Canada's argument that 'cost to *government*' is relevant to the question of whether there is a 'benefit' to the *recipient* under Article 1.1(b) disregards the overall structure of Article 1.1."[104]

(g) Relationship with other Articles

(i) Article 14

73. Both the Panel and the Appellate Body in *Canada – Aircraft* held that Article 14 was relevant context for interpretation of the term "benefit". The Appellate Body considered the explicit reference to Article 1.1 contained in Article 14:

> "Although the opening words of Article 14 state that the guidelines it establishes apply '[f]or the purposes of Part V' of the *SCM Agreement*, which relates to 'countervailing measures', our view is that Article 14, nonetheless, constitutes relevant context for the interpretation of 'benefit' in Article 1.1(b). The guidelines set forth in Article 14 apply to the calculation of the 'benefit *to the recipient* conferred *pursuant to paragraph 1 of Article 1*'. (emphasis added) This explicit textual reference to Article 1.1 in Article 14 indicates to us that 'benefit' is used in the same sense in Article 14 as it is in Article 1.1. Therefore, the reference to 'benefit *to the recipient*' in Article 14 also implies that the word 'benefit', *as used in Article 1.1*, is concerned with the

[100] Panel Report on *US – Softwood Lumber III*, paras. 7.72 and 7.74.
[101] Appellate Body Report on *US – Softwood Lumber IV*, para. 124.
[102] Panel Report on *Canada – Aircraft*, para. 9.312.
[103] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.144.
[104] Appellate Body Report on *Canada – Aircraft*, para. 156.

'benefit *to the recipient*' and not with the 'cost to government' . . . .

. . .

Article 14, which we have said is relevant context in interpreting Article 1.1(b), supports our view that the marketplace is an appropriate basis for comparison. The guidelines set forth in Article 14 relate to equity investments, loans, loan guarantees, the provision of goods or services by a government, and the purchase of goods by a government. A 'benefit' arises under each of the guidelines if the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."[105]

(ii) Article 14(c)

74. With regard to establishing the existence of a benefit relating to equity guarantees in the framework of the *SCM Agreement*, the Panel on *Canada – Aircraft Credits and Guarantees* noted the relevance of Article 14(c). Accordingly, it considered that a "benefit" could arise if there is a difference between the cost of equity with and without an equity guarantee programme, provided that such difference is not topped by the fees charged by the programme for providing the equity guarantee.[106]

(iii) Article 14(d)

75. With regard to the existence of a benefit in *US – Softwood Lumber III*, the Panel considered that the text of Article 14(d) clarifies that the prevailing market conditions to be used as a benchmark are those in the country of provision of the goods. The Panel therefore found that the ordinary meaning of this provision "excludes an analysis based on market conditions other than those in the country of provision of the goods". Therefore, the Panel concluded that a Member's stumpage prices cannot be considered to constitute "prevailing market conditions" in the other Member's territory.[107] (See paragraphs 262–264 below.)

(iv) Annex I, item (k)

76. The Panel on *Canada – Aircraft* rejected the use of item (k) in the interpretation of the term "benefit". The Panel noted:

"[W]e are unable to accept . . . [the] argument that item (k) of the Illustrative List of Annex I of the SCM Agreement constitutes contextual guidance for determining the existence of 'benefit' in the specific context of government credit under Article 1. In our view, item (k) of the Illustrative List applies in determining whether or not a prohibited export subsidy exists. We do not consider . . . that item (k) determines whether or not a 'subsidy' exists within the meaning of Article 1 of the SCM Agreement."[108]

77. In *Brazil – Aircraft*, the Appellate Body rejected the Panel's interpretation of the "material advantage" clause in item (k) of the Illustrative List of Export Subsidies as effectively the same interpretation of the term "benefit" in Article 1.1(b) adopted by the Panel on *Canada – Aircraft*.[109] (See paragraphs 443–444 below.)

(v) Annex IV

78. The Appellate Body on *Canada – Aircraft* agreed with the Panel "that Annex IV is not useful context for interpreting Article 1.1(b)",[110] stating:

"We fail to see the relevance of this provision to the interpretation of 'benefit' in Article 1.1(b) of the *SCM Agreement*. Annex IV provides a method for calculating the total *ad valorem* subsidization of a product under the 'serious prejudice' provisions of Article 6 of the *SCM Agreement*, with a view to determining whether a subsidy is used in such a manner as to have 'adverse effects'. Annex IV, therefore, has nothing to do with whether a '*benefit*' has been conferred, nor with whether a measure constitutes a subsidy within the meaning of Article 1.1."[111]

9. Relationship of Article 1.1 with other Articles

(i) Article 14

79. The Panel on *US – Softwood Lumber III* found that because the United States had included its own data in the examination of the claimant's stumpage prices, it had acted inconsistently with Article 14 and 14(d) and "therefore also acted inconsistently with Article 1.1 of the SCM Agreement in determining the existence of a subsidy".[112]

(ii) Footnote 1 and Footnote 59

80. The Appellate Body on *US – FSC* rejected the argument that footnote 59 to the *SCM Agreement*, rather than Article 1.1, was the "controlling legal provision" for the definition of the term "subsidy". In doing so, the Appellate Body distinguished between the general definition of the term "subsidy" under Article 1.1 and the specific regime which footnote 59 establishes with respect to a certain type of *export* subsidies:

"Article 1.1 sets forth the general definition of the term 'subsidy' which applies 'for the purpose of this Agreement'. This definition, therefore, applies wherever the

[105] Appellate Body Report on *Canada – Aircraft*, paras. 155 and 158.
[106] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.345.
[107] Panel Report on *US – Softwood Lumber III*, para. 7.5.
[108] Panel Report on *Canada – Aircraft*, para. 9.117.
[109] Appellate Body Report on *Brazil – Aircraft*, para. 179.
[110] Appellate Body Report on *Canada – Aircraft*, para. 159.
[111] Appellate Body Report on *Canada – Aircraft*, para. 159.
[112] Panel Report on *US – Softwood Lumber III*, para. 7.59.

word 'subsidy' occurs throughout the *SCM Agreement* and conditions the application of the provisions of that Agreement regarding *prohibited* subsidies in Part II, *actionable* subsidies in Part III, *non-actionable* subsidies in Part IV and countervailing measures in Part V. By contrast, footnote 59 relates to one item in the Illustrative List of Export Subsidies. Even if footnote 59 means – as the United States also argues – that a measure, such as the FSC measure, is *not* a prohibited *export* subsidy, footnote 59 does not purport to establish an exception to the general definition of a '*subsidy*' otherwise applicable throughout the entire *SCM Agreement*. Under footnote 5 of the *SCM Agreement*, where the Illustrative List indicates that a measure is not a prohibited *export* subsidy, that measure is *not* deemed, for that reason alone, not to be a 'subsidy'. Rather, the measure is simply *not prohibited* under the Agreement. Other provisions of the *SCM Agreement* may, however, still apply to such a 'subsidy'."[113]

81. After distinguishing between the general definition of a subsidy under Article 1.1 and the special regime applicable to a *particular type* of *export* subsidy pursuant to footnote 59, the Appellate Body in *US – FSC* opined that footnote 1 of the *SCM Agreement* was equally not relevant in the case at hand, given that the United States' measure at issue provided for exemptions from *corporate income* taxes:

"We note, moreover, that, under footnote 1 of the *SCM Agreement*, 'the exemption of an exported *product* from duties or taxes *borne by the like product* when destined for domestic consumption . . . shall not be deemed to be a subsidy'. (emphasis added) The tax measures identified in footnote 1 as not constituting a '*subsidy*' involve the exemption of exported *products* from *product-based* consumption taxes. The tax exemptions under the FSC measure relate to the taxation of *corporations* and not *products*. Footnote 1, therefore, does *not* cover measures such as the FSC measure."[114]

10. Relationship with other WTO Agreements

(a) Article XVI of the WTO Agreement

82. The Appellate Body on *US – FSC* upheld the Panel's finding on whether the term "otherwise due" must be interpreted in accordance with the 1981 Understanding adopted by the GATT Council in conjunction with four panel reports on tax legislation, but modified the reasoning.[115] First, the Appellate Body examined and confirmed the Panel's finding that the 1981 Council action is not part of the *GATT 1994*; in so doing, the Appellate Body considered whether the Council action is "another decision" within the meaning of paragraph 1(b)(iv) of the language incorporating the *GATT 1994* into the *WTO Agreement*. The Appellate Body rejected this claim, recalling its holding in *Japan – Alcoholic Beverages* that GATT Panel reports are only binding as between the parties to the dispute; nevertheless, in the specific case at hand, it noted a certain ambiguity in this regard:

"The opening clause of the 1981 Council action states: 'The Council adopts *these reports* on the understanding that *with respect to these cases, and in general* . . .'. The 1981 Council action is, therefore, somewhat equivocal in tenor. On the one hand, it is clear from the text that the 1981 Council action relates specifically to the *Tax Legislation Cases* and is an integral part of the resolution of those disputes. This would suggest that, consistently with our Report in *Japan – Alcoholic Beverages*, the Council action is binding only on the parties to those disputes, and only for the purposes of those disputes.

On the other hand, we note that the opening clause of the 1981 Council action also prefaces the substance of the statement with the words '*in general*'. The United States argues that these words indicate that the 1981 Council action was an 'authoritative interpretation' of Article XVI:4 of the GATT 1947 that has 'general' application and that, therefore, bound all the contracting parties . . .

. . .

[However,] [w]hen the 1981 Council action was adopted, the Chairman of the GATT 1947 Council stated, *inter alia*, that 'the adoption of these reports together with the understanding *does not affect the rights and obligations of contracting parties under the General Agreement*.' In our view, if the contracting parties had intended to make an *authoritative* interpretation of Article XVI:4 of the GATT 1947, binding on all contracting parties, they would have said so in reasonably recognizable terms . . . Thus, we are of the view that the statement of the GATT 1947 Council Chairman is consistent with a reading of the 1981 Council action which views that action as an integral part of the resolution of the *Tax Legislation Cases*, binding only the parties to those disputes."[116]

83. After upholding the Panel's finding that the 1981 Council action did not represent another decision within the meaning of Article 1(b)(iv) of the language

[113] Appellate Body Report on *US – FSC*, para. 93.
[114] Appellate Body Report on *US – FSC*, para. 93.
[115] Panel Report on *US – FSC*, para. 7.85. The Panel rejected the argument that the Understanding made clear that the exemption of foreign source income from taxation did not constitute the foregoing of revenue that is "otherwise due" and that the Understanding adopted by the GATT Council in conjunction with four panel reports on tax legislation had been incorporated into *GATT 1994* or, in the alternative, constituted "subsequent practice" in the application of *GATT 1947* within the meaning of the *Vienna Convention*. The Panel gave as their reason that although the 1981 Understanding was a "decision" within the meaning of Article XVI:1 of the *WTO Agreement*, it could not "provide guidance in understanding detailed provisions of the SCM Agreement which did not exist at the time the understanding was adopted".
[116] Appellate Body Report on *US – FSC*, paras. 109–110 and 112.

incorporating GATT 1994 into the WTO Agreements, the Appellate Body in *US – FSC* proceeded to examine the status of the 1981 Council action as a "decision" within the meaning of Article XVI:1 of the WTO Agreement. In doing so, the Appellate Body addressed the relationship between Article XVI:4 of the *GATT 1994* and Articles 1.1(a)(1) and 3.1(a) of the *SCM Agreement*:

> "We recognize that, as 'decisions' within the meaning of Article XVI:1 of the *WTO Agreement*, the adopted panel reports in the *Tax Legislation Cases*, together with the 1981 Council action, could provide 'guidance' to the WTO. . . .
>
> . . .
>
> [T]he provisions of the *SCM Agreement* do not provide explicit assistance as to the relationship between the export subsidy provisions of the *SCM Agreement* and Article XVI:4 of the GATT 1994. In the absence of any such specific textual guidance, we must determine the relationship between Articles 1.1(a)(1) and 3.1(a) of the *SCM Agreement* and Article XVI:4 of the GATT 1994 on the basis of the texts of the relevant provisions as a whole. It is clear from even a cursory examination of Article XVI:4 of the GATT 1994 that it differs very substantially from the subsidy provisions of the *SCM Agreement*, and, in particular, from the export subsidy provisions of both the *SCM Agreement* and the *Agreement on Agriculture*. First of all, the *SCM Agreement* contains an express definition of the term 'subsidy' which is not contained in Article XVI:4. In fact, as we have observed previously, the *SCM Agreement* contains a broad package of new export subsidy disciplines that 'go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the GATT 1947'.[117] Next, Article XVI:4 prohibits export subsidies only when they result in the export sale of a product at a price lower than the 'comparable price charged for the like product to buyers in the domestic market.' In contrast, the *SCM Agreement* establishes a much broader prohibition against *any* subsidy which is 'contingent upon export performance'. To say the least, the rule contained in Article 3.1(a) of the *SCM Agreement* that all subsidies which are 'contingent upon export performance' are prohibited is significantly different from a rule that prohibits only those subsidies which result in a lower price for the exported product than the comparable price for that product when sold in the domestic market. Thus, whether or not a measure is an export subsidy under Article XVI:4 of the GATT 1947 provides no guidance in determining whether that measure is a prohibited export subsidy under Article 3.1(a) of the *SCM Agreement*. Also, and significantly, Article XVI:4 of the GATT 1994 does not apply to 'primary products', which include agricultural products. Unquestionably, the explicit export subsidy disciplines, relating to agricultural products, contained in Articles 3, 8, 9 and 10 of the *Agreement on Agriculture* must clearly take precedence over the *exemption* of primary products from export subsidy disciplines in Article XVI:4 of the GATT 1994.
>
> Furthermore, as the Panel observed, the text of the 1981 Council action itself contains reference only to Article XVI:4, and the Chairman of the GATT 1947 Council stated expressly that the 1981 Council action did *not* affect the *Tokyo Round Subsidies Code*. We share the Panel's view that, in these circumstances, it would be incongruous to extend the scope of the action, beyond that intended, to the *SCM Agreement*. If the 1981 Council action did not affect the *Tokyo Round Subsidies Code*, which existed in 1981, it is difficult to see how that action could be seen to affect the *SCM Agreement*, which did not."[118]

II. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2
Specificity

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[2] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(*footnote original*) [2] Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain

[117] (*footnote original*) Appellate Body Report on *Brazil – Desiccated Coconut*, fn. 50.
[118] Appellate Body Report on *US – FSC*, paras. 115 and 117–118.

enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[3] In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

(*footnote original*) [3] In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. Article 2.1(c)

(a) General

84. In *US – Softwood Lumber IV*, Canada argued that a subsidy is "specific" only when the government "deliberately limits" access to certain enterprises. This argument was rejected by the Panel on the grounds that Article 2 of the *SCM Agreement* is concerned with the distortion that is created by a subsidy which, either in law or in fact, is not broadly available. Furthermore, in the view of the Panel, there is:

> "[N]o basis in the text of Article 2, and 2.1 (c) SCM Agreement in particular, for Canada's argument that if the inherent characteristics of the good provided limit the possible use of the subsidy to a certain industry, the subsidy will not be specific unless access to this subsidy is limited to a sub-set of this industry, i.e. to certain enterprises within the potential users of the subsidy engaged in the manufacture of similar products."[119]

(b) "other factors may be considered"

85. On the argument by Canada that an investigating authority is required to examine all four factors mentioned in Article 2.1(c) in order to determine *de facto* specificity, the Panel on *US – Softwood Lumber IV* stated that Article 2.1(c) provides that if there are reasons to believe that the subsidy may in fact be specific, other factors "may" be considered. In the view of the Panel, the use of the verb "may", rather than "shall" indicates that if there are reasons to believe that the subsidy may in fact be specific, an authority *may* want to look at any of the four factors or indicators of specificity.[120]

(c) "account be taken of"

86. Finally, the Panel on *US – Softwood Lumber IV* found that the Department of Commerce had satisfied the requirement that "account be taken of" the extent of economic diversification by noting that the vast majority of companies and industries in Canada did not receive benefits under the programmes at issue. This indicated to the Panel that the Department of Commerce showed that it had taken account of the publicly known fact that the Canadian economy and the Canadian provincial economies in particular were diversified economies.[121]

2. Article 2.3: subsidies falling under Article 3 deemed to be specific

87. The Panel on *Indonesia – Autos* was called upon to decide whether the Indonesian subsidies contingent upon the use of domestic over imported goods were specific:

> "As with any analysis under the SCM Agreement, the first issue to be resolved is whether the measures in question are subsidies within the meaning of Article 1 that are specific to an enterprise or industry or group of enterprises or industries within the meaning of Article 2 . . . In this case, the European Communities, the United States and Indonesia agree that these measures are specific subsidies within the meaning of those articles . . . Further, the European Communities, the United States and Indonesia agree that these subsidies are contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b), and that they are therefore deemed to be specific pursuant to Article 2.3 of the Agreement. In light of the views of the parties, and given that nothing in the record would compel a different conclusion, we find that the measures in question are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement."[122]

[119] Panel Report on *US – Softwood Lumber IV*, para. 7.116.
[120] Panel Report on *US – Softwood Lumber IV*, para. 7.123.
[121] Panel Report on *US – Softwood Lumber IV*, para. 7.124.
[122] Panel Report on *Indonesia – Autos*, para. 14.155.

PART II: PROHIBITED SUBSIDIES

III. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3
Prohibition

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact,[4] whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;[5]

(*footnote original*) [4] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.
(*footnote original*) [5] Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. Article 3.1(a)

(a) General

88. In *Canada – Aircraft Credits and Guarantees*, the Panel first recalled the text of Article 3.1(a) of the *SCM Agreement* and found that to "prove the existence of an export subsidy within the meaning of this provision, a Member must . . . establish (i) the existence of a subsidy within the meaning of Article 1 of the SCM and (ii) contingency of that subsidy upon export performance".[123]

89. The Appellate Body on *US – FSC (Article 21.5 – EC)* noted that Article 3.1(a) provides that "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance" are prohibited. The Appellate Body referred also to its statement in *Canada – Aircraft* that "contingent" means "conditional" or "dependent for its existence on something else" and said that the grant of the subsidy must be conditional or dependent upon export performance.[124] The Appellate Body provided:

> "We start with the text of Article 3.1(a) of the *SCM Agreement*, which provides that 'subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance' are prohibited. We have considered this provision in several previous appeals.[125] In *Canada – Aircraft*, we said that the key word in Article 3.1(a) is 'contingent', which means 'conditional' or 'dependent for its existence on something else'.[126] The grant of the subsidy must be conditional or dependent upon export performance. Footnote 4 of the *SCM Agreement*, attached to Article 3.1(a), describes the relationship of contingency by stating that the grant of a subsidy must be 'tied to' export performance. Article 3.1(a) further provides that such export contingency may be the 'sole []' condition governing the grant of a prohibited subsidy or it may be 'one of several other conditions'."[127]

(b) "contingent in law . . . upon export performance"

90. In *Canada – Autos*, the Appellate Body addressed the precise distinction between a *de jure* and a *de facto* subsidy with reference to the wording of a particular measure:

> "In our view, a subsidy is contingent 'in law' upon export performance when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure. The simplest, and hence,

[123] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.16.

[124] Panel Report on *US – FSC (Article 21.5 – EC)*, paras. 8.54–8.55. On this issue, the Panel on *US – FSC (Article 21.5 – EC)* recalled that:

> "[T]he meaning of 'contingent' in that provision is 'conditional' or 'dependent for its existence upon'. We further recall that the legal standard expressed by the word 'contingent' is the same for both *de jure* or *de facto* contingency. There is a difference, however, in what evidence may be employed to establish that a subsidy is export-contingent.
>
> We recall the Appellate Body's [*Canada – Autos*] statement that '*de jure* export contingency' is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument, as opposed to the 'total configuration of the facts constituting and surrounding the grant of the subsidy.' The Appellate Body [in *Canada – Autos*] has also recently stated,
>
> 'that a subsidy is also properly held to be *de jure* export contingent where the condition to export is clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be *de jure* export contingent, the underlying legal instrument does not always have to provide *expressis verbis* that the subsidy is available only upon fulfilment of the condition of export performance. Such conditionality can also be derived by necessary implication from the words actually used in the measure.'" [See Appellate Body Report on *Canada – Autos*, para. 118].

[125] (*footnote original*) Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*"), WT/DS70/AB/R, adopted 20 August 1999, paras. 162–180; Appellate Body Report, *US – FSC, supra*, footnote 3 paras. 96–121; Appellate Body Report, *Canada – Autos*, *supra*, footnote 56, paras. 95–117; Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, *supra*, footnote 62, paras. 25–52.

[126] (*footnote original*) Appellate Body Report, *supra*, footnote 86, para. 166.

[127] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 111.

perhaps, the uncommon, case is one in which the condition of exportation is set out expressly, in so many words, on the face of the law, regulation or other legal instrument. We believe, however, that a subsidy is also properly held to be *de jure* export contingent where the condition to export is clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be *de jure* export contingent, the underlying legal instrument does not always have to provide *expressis verbis* that the subsidy is available only upon fulfillment of the condition of export performance. Such conditionality can also be derived by necessary implication from the words actually used in the measure."[128]

91. The Appellate Body on *Canada – Autos* concluded that "as the import duty exemption is simply not available to a manufacturer unless it exports motor vehicles, the import duty exemption is clearly conditional, or dependent upon, exportation and, therefore, is contrary to Article 3.1(a) . . .".[129]

92. Before the Panel on *Canada – Aircraft*, Canada stated that the mandate of one of its agencies was "to offer a full range of risk management services and financing products 'for the purpose of supporting and developing, directly or indirectly, Canada's export trade'".[130] Basing itself on this statement by Canada, the Panel held that "export credits granted 'for the purpose of supporting and developing, directly or indirectly, Canada's export trade' are expressly contingent in law on export performance".[131]

93. In examining whether a subsidy is contingent "in law" upon export performance, the Appellate Body in *Canada – Autos* noted that "footnote 4 . . . uses the words 'tied to' as a synonym for 'contingent' or 'conditional'. As the legal standard is the same for *de facto* and *de jure* export contingency, we believe that a 'tie', amounting to the relationship of contingency, between the granting of the subsidy and actual or anticipated exportation meets the legal standard of 'contingent' in Article 3.1(a) . . . ."[132]

(c) "contingent . . . in fact . . . upon export performance"

(i) De facto contingency

94. Regarding the interpretation of the term "contingent . . . in fact", the Panel on *Australia – Automotive Leather II* established a standard of "close connection" between the grant or maintenance of a subsidy and export performance. It added that a subsidy, in order to be export contingent in fact, must be "conditioned" upon export performance:

> "An inquiry into the meaning of the term 'contingent . . . in fact' in Article 3.1(a) of the SCM Agreement must, therefore, begin with an examination of the ordinary meaning of the word 'contingent'. The ordinary meaning of 'contingent' is 'dependent for its existence on something else', 'conditional; dependent on, upon'. The text of Article 3.1(a) also includes footnote 4, which states that the standard of 'in fact' contingency is met if the facts demonstrate that the subsidy is 'in fact tied to actual or anticipated exportation or export earnings'. The ordinary meaning of 'tied to' is 'restrain or constrain to or from an action; limit or restrict as to behaviour, location, conditions, etc.'. Both of the terms used – 'contingent . . . in fact' and 'in fact tied to' – suggest an interpretation that requires a close connection between the grant or maintenance of a subsidy and export performance."[133]

95. In *Canada – Aircraft*, the Panel also considered the "tied to" language of footnote 4 to be equivalent to a relationship of "conditionality" between the grant of a subsidy and export performance.[134] The Appellate Body agreed with the term "conditioned" and linked it to the concept of contingency under Article 3.1(a):

> "The ordinary meaning of 'tied to' confirms the linkage of 'contingency' with 'conditionality' in Article 3.1(a). Among the many meanings of the verb 'tie', we believe that, in this instance, because the word 'tie' is immediately followed by the word 'to' in footnote 4, the relevant ordinary meaning of 'tie' must be to 'limit or restrict as to . . . conditions'. This element of the standard set forth in footnote 4, therefore, emphasizes that a relationship of conditionality or dependence must be demonstrated. The second substantive element is at the very heart of the legal standard in footnote 4 and cannot be overlooked. In any given case, the facts must 'demonstrate' that the granting of a subsidy is *tied to* or *contingent upon* actual or anticipated exports. It does *not* suffice to demonstrate solely that a government granting a subsidy *anticipated* that exports would result. The prohibition in Article 3.1(a) applies to subsidies that are *contingent* upon export performance."[135]

96. While the Appellate Body in *Canada – Aircraft* largely agreed with the findings of the Panel on the interpretation of the term "contingency", it nevertheless criticized the "but for" test established by the Panel on the basis of the term "tied to":

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[128] Appellate Body Report on *Canada – Autos*, para. 100. See also Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.365 and Panel Report on *US – FSC (Article 21.5 – EC)*, paras. 8.54–8.56.

[129] Appellate Body Report on *Canada – Autos*, para. 104. See also Appellate Body Report on *Canada – Autos*, para. 100.

[130] Panel Report on *Canada – Aircraft*, para. 6.52.

[131] Panel Report on *Canada – Aircraft*, para. 9.230.

[132] Appellate Body Report on *Canada – Autos*, para. 107. See also Panel Report on *Canada – Aircraft Credits and Guarantees*, paras. 7.365 and 7.367–7.368.

[133] Panel Report on *Australia – Automotive Leather II*, para. 9.55.

[134] Panel Report on *Canada – Aircraft*, para. 9.331.

[135] Appellate Body Report on *Canada – Aircraft*, para. 171.

> "We note that the Panel considered that the most effective means of demonstrating whether a subsidy is contingent in fact upon export performance is to examine whether the subsidy would have been granted *but for* the anticipated exportation or export earnings. . . . While we consider that the Panel did not err in its overall approach to *de facto* export contingency, we, and panels as well, must interpret and apply the language actually used in the treaty."[136]

97. The Appellate Body on *Canada – Aircraft* provided its own reasoning with respect to the ordinary meaning of the text "contingent . . . in fact . . . on export performance". In doing so, it first emphasized the term "contingent" as a "key word", held that the legal standard encapsulated by this term is the same for both *de jure* or *de facto* contingency and framed the distinction between these two types of contingency in terms of the evidence upon which such determination would rest:

> "In our view, the key word in Article 3.1(a) is 'contingent'. As the Panel observed, the ordinary connotation of 'contingent' is 'conditional' or 'dependent for its existence on something else'. This common understanding of the word 'contingent' is borne out by the text of Article 3.1(a), which makes an explicit link between 'contingency' and 'conditionality' in stating that export contingency can be the sole or 'one of several other *conditions*'.
>
> . . . In our view, the legal standard expressed by the word 'contingent' is the same for both *de jure* or *de facto* contingency. There is a difference, however, in what evidence may be employed to prove that a subsidy is export contingent. *De jure* export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument. Proving *de facto* export contingency is a much more difficult task. There is no single legal document which will demonstrate, on its face, that a subsidy is 'contingent . . . in fact . . . upon export performance'. Instead, the existence of the relationship of contingency, between the subsidy and export performance, must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case."[137]

98. The Appellate Body on *Canada – Aircraft* examined footnote 4 more closely as "a standard . . . for determining when a subsidy is 'contingent . . . in fact . . . upon export performance'". It identified three elements, i.e. "granting of a subsidy", "tied to" and "anticipated":

> "We note that satisfaction of the standard for determining *de facto* export contingency set out in footnote 4 requires proof of three different substantive elements: first, the '*granting* of a subsidy'; second, 'is . . . *tied to* . . .'; and, third, 'actual or anticipated exportation or export earnings'. (emphasis added) . . . .
>
> The first element of the standard for determining *de facto* export contingency is the '*granting* of a subsidy'. In our view, the initial inquiry must be on whether the *granting authority* imposed a condition based on export performance in providing the subsidy. In the words of Article 3.2 and footnote 4, the prohibition is on the '*granting* of a subsidy', and not on receiving it. The treaty obligation is imposed on the *granting* Member, and not on the recipient. Consequently, we do not agree . . . that an analysis of 'contingent . . . in fact . . . upon export performance' should focus on the reasonable knowledge of the recipient.[138]
>
> The second substantive element in footnote 4 is 'tied to'. The ordinary meaning of 'tied to' confirms the linkage of 'contingency' with 'conditionality' in Article 3.1(a). Among the many meanings of the verb 'tie', we believe that, in this instance, because the word 'tie' is immediately followed by the word 'to' in footnote 4, the relevant ordinary meaning of 'tie' must be to 'limit or restrict as to . . . conditions'. This element of the standard set forth in footnote 4, therefore, emphasizes that a relationship of conditionality or dependence must be demonstrated. The second substantive element is at the very heart of the legal standard in footnote 4 and cannot be overlooked. In any given case, the facts must 'demonstrate' that the granting of a subsidy is *tied to* or *contingent upon* actual or anticipated exports. It does *not* suffice to demonstrate solely that a government granting a subsidy *anticipated* that exports would result. The prohibition in Article 3.1(a) applies to subsidies that are *contingent* upon export performance.
>
> We turn now to the third substantive element provided in footnote 4. The dictionary meaning of the word 'anticipated' is 'expected'. The use of this word, however, does *not* transform the standard for 'contingent . . . in fact' into a standard merely for ascertaining 'expectations' of exports on the part of the granting authority. Whether exports were anticipated or 'expected' is to be gleaned from an examination of objective evidence. This examination is quite separate from, *and should not be confused with*, the examination of whether a subsidy is 'tied to' actual or anticipated exports. A subsidy may well be granted in the knowledge, or with the anticipation, that exports will result. Yet, that alone is not sufficient, because that alone is not proof that the granting of the subsidy is *tied to* the anticipation of exportation."[139]

99. The Panel on *Canada – Aircraft*, in a statement not specifically addressed by the Appellate Body, also noted that "the nature of the required conditionality [is]

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[136] Appellate Body Report on *Canada – Aircraft*, para. 171, footnote 102.

[137] Appellate Body Report on *Canada – Aircraft*, paras. 166–167.

[138] (*footnote original*) In finding that the knowledge of the recipient is not part of the legal standard of *de facto* export contingency, we do not suggest that relevant objective evidence relating to the recipient can never be considered by a panel.

[139] Appellate Body Report on *Canada – Aircraft*, paras. 169–172.

that 'one of the *conditions* for the grant of the subsidy is the *expectation* that exports will flow thereby'".[140] In the case at hand, the Panel came to the conclusion that "the facts available demonstrate that one of the conditions of the grant of ... contributions to the ... industry is indeed such an expectation, in the form of projected export sales anticipated to 'flow' directly from these contributions".[141]

100. The Panel on *Canada – Aircraft Credits and Guarantees* considered that a Member's awareness that its domestic market is too small to absorb its domestic production of a subsidized product "may indicate" that the subsidy is granted upon export performance (see paragraph 107 below). However, after referring to statements by the Appellate Body in *Canada – Aircraft*,[142] the Panel clarified that even if a Member was to anticipate that exports would result from the grant of a subsidy, such anticipation "alone is not proof that the granting of the subsidy is *tied to* the anticipation of exportation" within the meaning of the footnote 4 to Article 3.1(a).[143]

(ii) Treatment of facts in the determination of de facto export contingency

Case-by-case approach

101. The Panel on *Australia – Automotive Leather II* held that the language of footnote 4 of the SCM Agreement required it "to examine all the facts concerning the grant or maintenance of the challenged subsidy", emphasizing that the Panel was not precluded from considering any particular fact. The Panel also held that the specific facts to be considered will vary on a case-by-case basis:

> "In our view, the concept of 'contingent ... in fact ... upon export performance', and the language of footnote 4 of the SCM Agreement, require us to examine all of the facts that actually surround the granting or maintenance of the subsidy in question, including the terms and structure of the subsidy, and the circumstances under which it was granted or maintained. A determination whether a subsidy is in fact contingent upon export performance cannot, in our view, be limited to an examination of the terms of the legal instruments or the administrative arrangements providing for the granting or maintenance of the subsidy in question. Such a determination would leave wide open the possibility of evasion of the prohibition of Article 3.1(a), and render meaningless the distinction between 'in fact' and 'in law' contingency. Moreover, while the second sentence of footnote 4 makes clear that the mere fact that a subsidy is granted to enterprises which export cannot be the sole basis for concluding that a subsidy is 'in fact' contingent upon export performance, it does not preclude the consideration of that fact in a panel's analysis. Nor does it preclude consideration of the level of a particular company's exports. This suggests to us that factors other than the specific legal or administrative arrangements governing the granting or maintenance of the subsidy in question must be considered in determining whether a subsidy is 'in fact' contingent upon export performance.
>
> Based on the explicit language of Article 3.1(a) and footnote 4 of the SCM Agreement, in our view the determination of whether a subsidy is 'contingent ... in fact' upon export performance requires us to examine all the facts concerning the grant or maintenance of the challenged subsidy, including the nature of the subsidy, its structure and operation, and the circumstances in which it was provided. In this context, Article 11 of the DSU requires a panel to make an objective assessment of the facts of the case. Obviously, the facts to be considered will depend on the specific circumstances of the subsidy in question, and will vary from case to case. In our view, all facts surrounding the grant and/or maintenance of the subsidy in question may be taken into consideration in the analysis. However, taken together, the facts considered must demonstrate that the grant or maintenance of the subsidy is conditioned upon actual or anticipated exportation or export earnings. The outcome of this analysis will obviously turn on the specific facts relating to each subsidy examined."[144]

102. The Panel on *Australia – Automotive Leather II* drew a temporal limit to this broad standard of factual analysis. It opined that "the pertinent consideration is the facts at the time the conditions for the grant payments were established, and not possible subsequent developments".[145]

103. The Panel on *Canada – Aircraft*, in a finding expressly endorsed by the Appellate Body,[146] confirmed this broad and case-by-case approach to the factual analysis of the Panel on *Australia – Automotive Leather II*. While it also emphasized that no factual considerations should prevail over others, it pointed out that its finding that a broad range of facts should be considered as relevant did not mean that "the *de facto* export contingency standard is easily met":

> "In our view, no fact should automatically be rejected when considering whether the facts demonstrate that a subsidy would not have been granted but for anticipated exportation or export earnings. We note that footnote 4 provides that the 'facts' must demonstrate *de facto* export contingency. Footnote 4 therefore refers to 'facts'

[140] Panel Report on *Canada – Aircraft*, para. 9.326.
[141] Panel Report on *Canada – Aircraft*, para. 9.346.
[142] Appellate Body Report on *Canada – Aircraft*, paras. 169–173. See paragraph 96 above.
[143] Panel Report on *Canada – Aircraft Credits and Guarantees*, paras. 7.370–7.376.
[144] Panel Report on *Australia – Automotive Leather II*, paras. 9.56–9.57.
[145] Panel Report on *Australia – Automotive Leather II*, para. 9.70.
[146] Appellate Body Report on *Canada – Aircraft*, para. 169.

> in general, without any suggestion that certain factual considerations should prevail over others. In our opinion, it is clear from the ordinary meaning of footnote 4 that any fact could be relevant, provided it 'demonstrates' (either individually or in conjunction with other facts) whether or not a subsidy would have been granted but for anticipated exportation or export earnings. We consider that this is true of the export-orientation of the recipient, or of the reason for the grant of the subsidy, just as it is true of a host of other facts potentially surrounding the grant of the subsidy in question. In any given case, the relative importance of each fact can only be determined in the context of that case, and not on the basis of generalities.
>
> We would emphasise, however, that our finding that a broad range of facts could be relevant in this context does not mean that the *de facto* export contingency standard is easily met. On the contrary, footnote 4 of the SCM Agreement makes it clear that the facts must "demonstrate" *de facto* export contingency. That is, *de facto* export contingency must be demonstrable on the basis of the factual evidence adduced.[147]

104. The Appellate Body on *Canada – Aircraft* approved and strengthened the finding of the Panel on the fact that a subsidy is granted to enterprises which export may be considered in a determination whether or not a subsidy is *de facto* export contingent, but that this "does not mean that export-orientation alone can necessarily be determinative":[148]

> "There is a logical relationship between the second sentence of footnote 4 and the 'tied to' requirement set forth in the first sentence of that footnote. The second sentence of footnote 4 precludes a panel from making a finding of *de facto* export contingency for the sole reason that the subsidy is 'granted to enterprises which export'. In our view, merely knowing that a recipient's sales are export-oriented does not demonstrate, without more, that the granting of a subsidy is tied to actual or anticipated exports. The second sentence of footnote 4 is, therefore, a specific expression of the requirement in the first sentence to demonstrate the 'tied to' requirement. We agree with the Panel that, under the second sentence of footnote 4, the export orientation of a recipient may be taken into account as *a* relevant fact, provided that it is one of several facts which are considered and is not the only fact supporting a finding."[149]

Which facts to consider

105. The Panel on *Australia – Automotive Leather II* held that "the fact of expectation cannot be the sole determinative fact on the evaluation".[150] The Panel also considered the extent to which circumstances surrounding a loan contract can be facts on the basis of which the determination of an export contingent subsidy can be made:

> "[T]he mere fact that one possible source of funds to pay off the loan is potential export earnings is insufficient to conclude that the loan was contingent in fact upon anticipated exportation or export earnings. . . . We recognize that other facts are relevant to our consideration of the nature of the loan contract. Included among these is the significance of exports in Howe's business, and the fact that the loan was part of the overall 'assistance package' given to Howe, which Australia acknowledged would probably not have occurred if Howe had not been removed from eligibility under the . . . programmes. . . . Moreover, there is nothing in the terms of the loan contract itself which suggests a specific link to actual or anticipated exportation or export earnings . . . These factors persuade us that there is not a sufficiently close tie between the loan and anticipated exportation or export earnings."[151]

106. While the Panel on *Canada – Aircraft* found that no one factual consideration should prevail over others in the determination of *de facto* export contingency, it nevertheless held that "the closer a subsidy brings a product to sale on the export market, the greater the possibility that the facts may demonstrate that the subsidy would not have been granted but for anticipated exportation or export earnings". In this respect, the Panel noted that subsidies for "pure research" or "for general purposes such as improving efficiency or adopting new technology" would be less likely to give rise to *de facto* export contingency than "subsidies that directly assist companies in bringing specific products to the (export) market".[152] The Appellate Body did not object to the consideration of this factor by the Panel, but cautioned that "the mere presence . . . of this factor" will not create "a presumption that a subsidy is '*de facto* contingent upon export performance':

> "We recall that the Panel added that 'the further removed a subsidy is from sales on the export market, *the less the possibility* that the facts may demonstrate that the subsidy is 'contingent . . . in fact . . . upon export performance'. (emphasis added) By these statements, the Panel appears to us to apply what could be read to be a legal presumption. While we agree that this nearness-to-the-export-market factor *may*, in certain circumstances, be a relevant fact, we do not believe that it should be regarded as a legal presumption. It is, for instance, no '*less . . . possible*' that the facts, taken together, may demonstrate that a pre-production subsidy for research and development is 'contingent . . . in fact . . . upon export performance'. If a panel takes this factor into account, it should treat it with considerable

[147] Panel Report on *Canada – Aircraft*, paras. 9.337–9.338.
[148] Panel Report on *Canada – Aircraft*, para. 9.336.
[149] Appellate Body Report on *Canada – Aircraft*, para. 173.
[150] Panel Report on *Australia – Automotive Leather II*, para. 9.66.
[151] Panel Report on *Australia – Automotive Leather II*, para. 9.75.
[152] Panel Report on *Canada – Aircraft*, paras. 9.337–9.339.

caution. In our opinion, the mere presence or absence of this factor in any given case does not give rise to a presumption that a subsidy is or is not *de facto* contingent upon export performance. The legal standard to be applied remains the same: it is necessary to establish each of the three substantive elements in footnote 4."[153]

Relevance of the size of the domestic industry

107. The Panel on *Canada – Aircraft Credits and Guarantees* referred to the findings of the Panel on *Australia – Automotive Leather II*[154] (see paragraphs 101 and 105) and noted that a Member's awareness that its domestic market is too small to absorb the domestic production of a subsidized product may "indicate", although not prove (see paragraph 100 above), that the subsidy is granted on the condition that it be exported:

"In addressing Brazil's de facto export contingency claim, we shall be guided by note 4 to Article 3.1(a) of the SCM Agreement, whereby a subsidy is 'contingent . . . in fact . . . upon export performance' when

> the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

. . . a Member's awareness that its domestic market is too small to absorb domestic production of a subsidised product may indicate that the subsidy is granted on the condition that it be exported."[155]

(d) "Export performance"

(i) General

108. The Panel on *Canada – Aircraft (Article 21.5 – Brazil)*, in a finding not specifically addressed by the Appellate Body, drew a distinction between "general technological or economic benefits" on the one hand and "export performance" on the other:

"Thus, whereas TPC assistance is conditional on a project having certain technological or net economic benefits . . ., in our view this simply cannot be assumed to be synonymous with export performance, and therefore it does not mean *ipso facto* that such assistance is contingent on export performance. This remains true even though TPC administrators know that fulfilment of net economic benefits in certain cases may be likely to result in increased exports. The fact that they will have no concrete quantifiable information on exports in our view will act in practical terms to limit their discretion to select projects on the basis of export performance."[156]

109. The Panel on *Canada – Aircraft* rejected the argument that the subsidy programme at issue was not conditional on exports taking place on the grounds that "there are no penalties if export sales are not realised".[157] The Panel supported its rejection with the following statement:

"While this argument may be relevant in determining whether a subsidy would not have been granted but for actual exportation or export earnings, we find this argument insufficient to rebut a *prima facie* case that a subsidy would not have been granted but for anticipated exportation or export earnings."[158]

(ii) "produced within or outside the Member"

110. The Appellate Body on *US – FSC (Article 21.5 – EC)*, upholding the findings of the Panel, observed that there are two different factual situations, one involving property produced *within* the Member and the other involving property produced *outside* it, which are subject to distinct conditions for receipt of the subsidy. The Appellate Body considered it appropriate to examine these two situations separately:

"In respect of property produced within the United States, the taxpayer can obtain the subsidy only by satisfying the conditions in the measure relating to this property and, for this property, the measure provides only one set of conditions governing the grant of subsidy. The conditions for the grant of subsidy with respect to property produced *outside* the United States are distinct from those governing the grant of subsidy in respect of property produced *within* the United States.

In our view, it is hence appropriate, indeed necessary, under Article 3.1(a) of the *SCM Agreement*, to examine separately the conditions pertaining to the grant of the subsidy in the two different situations addressed by the measure."[159]

111. Examining the measure with respect to property produced *within* the Member, the Appellate Body in *US – FSC (Article 21.5 – EC)*, noted that in order to obtain the subsidy, the goods must be sold, leased or rented for direct use, consumption or disposition "outside the United States". Thus for the Appellate Body to be eligible for the subsidy, "the property must be exported". In this way, the requirement of use outside the Member state makes the subsidy contingent upon export. Accordingly, the Appellate Body held that since property produced within the United States must be exported to satisfy this condition, "then, the require-

[153] Appellate Body Report on *Canada – Aircraft*, para. 174.
[154] Panel Report on *Australia – Leather II*, para. 9.67.
[155] Panel Report on *Canada – Aircraft Credits and Guarantees*, paras. 7.370 and 7.372.
[156] Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.33.
[157] Panel Report on *Canada – Aircraft*, para. 9.343.
[158] Panel Report on *Canada – Aircraft*, para. 9.343.
[159] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 114–115.

ment of use outside the United States makes the grant of the tax benefit contingent upon export".[160]

112. The Appellate Body on *US – FSC (Article 21.5 – EC)* noted that its conclusion was not affected by the fact that the subsidy could also be obtained through production abroad, and that there was no export contingency in this second situation.[161] The Appellate Body recalled:

> "[T]he measure at issue in the original proceedings in *US – FSC* contained an almost identical condition relating to 'direct use . . . outside the United States' for property produced in the United States. In that appeal, we upheld the panel's finding that the combination of the requirements to produce property in the United States and use it outside the United States gave rise to export contingency under Article 3.1(a) of the *SCM Agreement*. We see no reason, in this appeal, to reach a conclusion different from our conclusion in the original proceedings, namely that there is export contingency, under Article 3.1(a), where the grant of a subsidy is conditioned upon a requirement that property produced in the United States be used outside the United States.
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> We recall that the ETI measure grants a tax exemption in two different sets of circumstances: (a) where property is produced *within* the United States and held for use *outside* the United States; and (b) where property is produced *outside* the United States and held for use outside the United States. Our conclusion that the ETI measure grants subsidies that are export contingent in the first set of circumstances is not affected by the fact that the subsidy can also be obtained in the second set of circumstances. The fact that the subsidies granted in the second set of circumstances *might* not be export contingent does not dissolve the export contingency arising in the first set of circumstances. Conversely, the export contingency arising in these circumstances has no bearing on whether there is an export contingent subsidy in the second set of circumstances. Where a United States taxpayer is simultaneously producing property within and outside the United States, for direct use outside the United States, subsidies may be granted under the ETI measure in respect of both sets of property. The subsidy granted with respect to the property produced within the United States, and exported from there, is export contingent within the meaning of Article 3.1(a) of the *SCM Agreement*, irrespective of whether the subsidy given in respect of property produced outside the United States is also export contingent."

(e) Relationship with other Articles

(i) Article 4.7

113. In *Canada – Dairy (Article 21.5 – New Zealand and US)*, the Panel noted that a finding of violation with respect to Article 3.1 of the *SCM Agreement* would affect the specificity of the recommendation to be made by the Panel, due to the more precise implementation requirements under Article 4.7 of the *SCM Agreement*, providing that an export subsidy be withdrawn without delay. However, the Panel observed that because of the context of the case, it would *not* be able to recommend that Canada "withdraw" measures constituting an export subsidy exclusively in respect of agricultural products. The Panel stated:

> "Since the Panel, in case it would make an affirmative finding in respect of Article 3.1 of the *SCM Agreement*, would not be able to make the withdrawal recommendation provided for in the first sentence of Article 4.7 of the *SCM Agreement*, the Panel does not need to consider the first sentence of Article 4.7 to determine whether or not it should exercise judicial economy. Having found that it would not be able make a recommendation to withdraw the subsidy, in accordance with the first sentence of Article 4.7, the Panel considers that, *a fortiori*, it would not be able to specify a *time-period for* withdrawal, in accordance with the second sentence of Article 4.7."[162]

(ii) Article 27

114. The Panel on *Brazil – Aircraft* addressed the relationship between Articles 3.1(a), 27.2(b) and 27.4. More specifically, the Panel was called upon to determine the allocation of burden of proof applicable to the special provision of Article 27.2, which establishes that the

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[160] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 117.

[161] See also Panel Report on *US – FSC (Article 21.5 – EC)*, paras. 8.64 and 8.72. Citing the Report of the Appellate Body in *Canada – Aircraft*, the Panel in *US – FSC (Article 21.5 – EC)* found that the fact that the measures at stake also involve subsidies with respect to goods produced *outside* the Member does not "vitiate" the export contingency with respect to *Member-produced* goods.

> "We do not believe that it is necessary that the Act involves exclusively subsidies that are export-dependent in order to make a finding that the Act involves a defined segment of subsidies. . . . The fact that the Act also involves subsidies with respect to goods produced outside the United States . . . does not, in our view, vitiate the export-contingency of the Act that we find in respect of US-produced goods. We find support for our view that export-contingent subsidies may exist in the context of a broader subsidies scheme in the reasoning of the Appellate Body in *Canada – Aircraft*. [para 179] and
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> . . .
>
> [I]n our view, a way to cure export-contingency in this case would be to eliminate the conditionality on export by making the subsidy available irrespective of whether a product of national origin is sold in the domestic market or abroad. It is the differential treatment provided for in the Act – that is, if US-produced goods are exported, the subsidy is available, while if they are sold in the domestic market, it is not – that renders the Act contingent upon export performance within the meaning of Article 3.1(a). The addition of other circumstances or products in respect of which the subsidy may be available – i.e. foreign-produced goods – does not eliminate the conditionality of the subsidy upon export, and thus does not cure the inconsistency with Article 3.1(a) of the *SCM Agreement*."

[162] Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 6.100.

prohibition contained in Article 3.1(a) shall not apply to developing country Members, provided that the requirements of Article 27.4 are met. The Panel in a finding upheld by the Appellate Body considered that "until non-compliance with the conditions set out in Article 27.4 is demonstrated, there is also, on the part of a developing country Member within the meaning of Article 27.2(b), no inconsistency with Article 3.1(a)".[163]

115. The Appellate Body on *Brazil – Aircraft* emphasized that "the conditions set forth in paragraph 4 are positive obligations for developing country Members, not affirmative defenses. If a developing country Member complies with the obligations in Article 27.4, the prohibition on export subsidies in Article 3.1(a) simply does not apply."[164]

116. The Appellate Body on *Brazil – Aircraft* agreed with the Panel "that the burden [of proof] is on the complaining party (*in casu* Canada) to demonstrate that the developing country Member (*in casu* Brazil) is not in compliance with at least one of the elements set forth in Article 27.4. If such non-compliance is demonstrated, then, and only then, does the prohibition of Article 3.1(a) *apply* to that developing country Member."[165]

117. As regards the extension of the Article 27.4 transition period for developing and least-developed countries of the export subsidy prohibition, see paragraphs 341 and 366–373 below. With regard to the graduation methodology from Annex VII(b), see paragraphs 491–495 below.

(iii) Footnote 59

118. In *US – FSC*, the Appellate Body addressed the United States' claim that footnote 59 exempts a measure from being an export subsidy within the meaning of Article 3.1(a) and that the 1981 Council Action serves as a confirmation for this exemption. In rejecting this argument, the Appellate Body proceeded to examine footnote 59 sentence by sentence:

> "The first sentence of footnote 59 is specifically related to the statement in item (e) of the Illustrative List that the 'full or partial exemption remission, or deferral specifically related to exports, of direct taxes' is an export subsidy. The first sentence of footnote 59 qualifies this by stating that 'deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected.' Since the FSC measure does not involve the *deferral* of direct taxes, we do not believe that this sentence of footnote 59 bears upon the characterization of the FSC measure as constituting, or not, an 'export subsidy'.
>
> The second sentence of footnote 59 'reaffirms' that, in allocating export sales revenues, for tax purposes, between exporting enterprises and controlled foreign buyers, the price for the goods shall be determined according to the 'arm's length' principle to which that sentence of the footnote refers. Like the Panel, we are willing to accept, for the sake of argument, the United States' position that it is 'implicit' in the requirement to use the arm's length principle that Members of the WTO are not obliged to tax foreign-source income, and also that Members may tax such income less than they tax domestic-source income. We would add that, even in the absence of footnote 59, Members of the WTO are *not* obliged, by WTO rules, to tax *any* categories of income, whether foreign- or domestic-source income. The United States argues that, since there is no requirement to tax export-related foreign-source income, a government cannot be said to have 'foregone' revenue if it elects not to tax that income. It seems to us that, taken to its logical conclusion, this argument by the United States would mean that there could *never* be a foregoing of revenue 'otherwise due' because, in principle, under WTO law generally, *no* revenues are ever due and *no* revenue would, in this view, ever be 'foregone'. That cannot be the appropriate implication to draw from the requirement to use the arm's length principle."[166]

119. The Appellate Body further found that the arm's-length principle contained in the second sentence of footnote 59 could not shed light on the issue before the Panel, namely whether the United States' tax measure was a prohibited export subsidy:

> "Furthermore, we do not believe that the requirement to use the arm's length principle resolves the issue that arises here. That issue is *not*, as the United States suggests, whether a Member is or is not obliged to tax a particular category of foreign-source income. As we have said, a Member is not, in general, under any such obligation. Rather, the issue in dispute is whether, *having decided to tax a particular category of foreign-source income*, namely foreign-source income that is 'effectively connected with a trade or business within the United States', the United States is *permitted to carve out an export contingent exemption from the category of foreign-source income that is taxed under its other rules of taxation*. Unlike the United States, we do not believe that the second sentence of footnote 59 addresses this question. It plainly does not do so expressly; neither, as far as we can see, does it do so by necessary implication. As the United States indicates, the arm's length principle operates when a Member chooses not to tax, or to tax less, certain categories of foreign-source income. However, the operation of the arm's length principle is unaffected by the choice a Member makes as to *which* categories of foreign-source income, if any, it will not tax, or will tax less. Likewise, the oper-

[163] Panel Report on *Brazil – Aircraft*, para. 7.56.
[164] Appellate Body Report on *Brazil – Aircraft*, para. 140.
[165] Appellate Body Report on *Brazil – Aircraft*, para. 141.
[166] Appellate Body Report on *US – FSC*, paras. 97–98.

ation of the arm's length principle is unaffected by the choice a Member might make to grant exemptions from the generally applicable rules of taxation of foreign-source income that it has selected for itself. In short, the requirement to use the arm's length principle does not address the issue that arises here, nor does it authorize the type of export contingent tax exemption that we have just described. Thus, this sentence of footnote 59 does not mean that the FSC subsidies are not export subsidies within the meaning of Article 3.1(a) of the *SCM Agreement*.

The third and fourth sentences of footnote 59 set forth rules that relate to remedies. In our view, these rules have no bearing on the substantive obligations of Members under Articles 1.1 and 3.1 of the *SCM Agreement*."[167]

120. The Appellate Body on *US – FSC* then declined to examine the United States' claim under the fifth sentence of footnote 59, namely that the United States' measure was one taken to avoid double taxation of foreign-source income. The Appellate Body noted that the issue had not been properly litigated before the Panel and therefore declined to address the United States' claim.[168]

(f) Annex VII(b)

121. With regard to the graduation methodology from Annex VII(b), see paragraphs 491–495 below.

(g) Footnote 4

122. With respect to the relationship between "tied to" in footnote 4 and "contingent . . . in law", see paragraphs 93–95 above.

123. With respect to the three substantive elements in footnote 4 as identified by the Appellate Body in *Canada – Aircraft*, see paragraph 98 above.

124. With respect to the requirement to examine all facts concerning the grant or maintenance of a subsidy, see paragraph 101 above. As regards the significance of the phrase "enterprises which export" within the *de facto* export contingency analysis, see paragraphs 101, 104 and 107 above.

2. Relationship with other WTO Agreements

(a) GATT 1994

125. In *Canada – Autos*, the Panel, after finding violations of Article III:4 of the *GATT 1994* and Article XVII of the *GATS*, exercised judicial economy with respect to alternative claims under Article 3.1(a). The Appellate Body upheld this exercise of judicial economy:

"In our view, it was not necessary for the Panel to make a determination on the . . . *alternative* claim relating to the CVA requirements under Article 3.1(a) . . . in order 'to secure a positive solution' to this dispute. The Panel had already found that the CVA requirements violated both Article III:4 of the GATT 1994 and Article XVII of the GATS. Having made these findings, the Panel, in our view, exercising the discretion implicit in the principle of judicial economy, could properly decide not to examine the *alternative* claim . . . that the CVA requirements are inconsistent with Article 3.1(a) of the *SCM Agreement*."[169]

(b) Agreement on Agriculture

126. In *Canada – Dairy (Article 21.5 – New Zealand and US)*, the Panel considered that Article 9.1 of the *Agreement on Agriculture* and Articles 1.1 and 3.1 of the *SCM Agreement* can be said to be "closely related" and "part of a logical continuum". Thus, the Panel considered that its reasoning regarding the claims made under Article 10.1 of the *Agreement on Agriculture* was equally relevant for the claims made under Articles 1.1 and 3.1 of the *SCM Agreement*. The Panel noted that:

"[T]he facts underlying the Article 9.1(c) and Article 10.1 claims are, in this case, fully co-extensive. The Panel believes that this conclusion also applies to the facts underlying the claims made under the *Agreement on Agriculture*, on the one hand, and those made under Articles 1.1 and 3.1 of the *SCM Agreement*, on the other. In addition, the Panel considers that Article 9.1 of the *Agreement on Agriculture* and Articles 1.1 and 3.1 of the *SCM Agreement* can be said to be 'closely related' and 'part of a logical continuum'. Thus, the Panel's reasoning set forth *supra* regarding the claims made under Article 10.1 of the *Agreement on Agriculture* is equally relevant for the claims made under Articles 1.1 and 3.1 of the *SCM Agreement*."[170]

127. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* noted that with regard to agricultural products, the WTO-consistency of an export subsidy has to be determined, in the first place, under the Agriculture Agreement. In this case, the Appellate Body recalled that it was unable to determine whether the measures at issue "conform[] fully" to Articles 9.1(c) or 10.1 of the *Agreement on Agriculture*. Therefore, the Appellate Body "decline[d] to examine" the claim under Article 3.1(a) of the *SCM Agreement*.[171] The Appellate Body held:

[167] Appellate Body Report on *US – FSC*, paras. 99–100.
[168] Appellate Body Report on *US – FSC*, paras. 101 and 103.
[169] Appellate Body Report on *Canada – Autos*, para. 116.
[170] Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 6.92.
[171] See also Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 6.101. where the Panel exercised judicial economy on the claims made under Articles 1.1 and 3.1 of the *SCM Agreement* after having made an affirmative finding regarding the claim made under Article 9.1(c) of the *Agreement on Agriculture*.

"The relationship between the *Agreement on Agriculture and the* SCM Agreement is defined, in part, by Article 3.1 of the *SCM Agreement*, which states that certain subsidies are 'prohibited' '[e]xcept as provided in the Agreement on Agriculture'. This clause, therefore, indicates that the WTO-consistency of an export subsidy for agricultural products has to be examined, in the first place, under the *Agreement on Agriculture*.

This is borne out by Article 13(c)(ii) of the *Agreement on Agriculture*, which provides that 'export subsidies that conform fully to the [export subsidy] provisions of Part V' of the *Agreement on Agriculture*, 'as reflected in each Member's Schedule, shall be . . . exempt from actions based on Article XVI of GATT 1994 or Articles 3, 5 and 6 of the Subsidies Agreement.'

In this appeal, we are unable to determine whether the measure at issue 'conforms fully' to Articles 9.1(c) or 10.1 of Part V of the *Agreement on Agriculture*. In these circumstances, we decline to examine the claim made by the United States that the measure is inconsistent with Article 3.1 of the *SCM Agreement*."[172]

128. In *Canada – Dairy (Article 21.5 – New Zealand and US)*, the Panel considered that when a Member exceeded its quantity commitment levels, the Panel could only recommend that the Member bring its measures into conformity with its obligations under the *Agreement on Agriculture*, and it could not require "withdrawal". Alternatively, assuming for the sake of argument, that it could make a recommendation to the Member to "withdraw" the export subsidy, the Panel considered that, pursuant to Article 21.1 of the *Agreement on Agriculture* and Article 3.1 of the *SCM Agreement*, the Panel could only do so with respect to that portion of the subsidized exports that exceeded the Member's reduction commitment levels under the *Agreement on Agriculture*.[173]

3. Article 3.1(b)

(a) "subsidies contingent . . . upon the use of domestic over imported goods"

(i) Contingency

129. Referring to its Report on *Canada – Aircraft* where it had held that "the ordinary connotation of 'contingent' is 'conditional' or 'dependent for its existence on something else'",[174] the Appellate Body in *Canada – Autos* opined that "this legal standard applies not only to 'contingency' under Article 3.1(a), but also to 'contingency' under Article 3.1(b)".[175]

(ii) De facto contingency

130. In *Canada – Autos*, the Panel had found that "contingency" under Article 3.1(b) extended only to *de jure* contingency and not also to *de facto* contingency. In making this finding, the Panel relied on the fact that Article 3.1(a) referred explicitly to both subsidies contingent "in law or in fact", while Article 3.1(b) did not contain such an explicit reference.[176] The Appellate Body reversed this finding and held that "contingency" under Article 3.1(b) includes *both* contingency in law and contingency in fact. In its analysis, the Appellate Body first agreed with the Panel that an omission (of an express provision) must have some meaning, but emphasized that the significance of such omission can vary from one case to another:

"In examining this issue, the Panel appears to have taken the view that the terms of Article 3.1(b), on their own, do not answer the question, and, therefore, it turned to the context provided by Article 3.1(a). In this respect, the Panel relied on the fact that, in Article 3.1(a), there is explicit language applying to subsidies contingent 'in law or in fact' while in Article 3.1(b) there is not. In the view of the Panel, the absence of such an explicit reference in the adjacent and closely-related provision of Article 3.1(b) indicates that the drafters intended Article 3.1(b) to apply only to those subsidies which are contingent 'in law' upon the use of domestic over imported goods.

In our view, the Panel's analysis was incomplete. As we have said, and as the Panel recalled, 'omission must have some meaning.' Yet omissions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive. Moreover, while the Panel rightly looked to Article 3.1(a) as relevant context in interpreting Article 3.1(b), the Panel failed to examine other contextual elements for Article 3.1(b) and to consider the object and purpose of the *SCM Agreement*."[177]

131. Having found that the omission of an explicit reference to *de facto* contingency in Article 3.1(b) was not dispositive of the question whether Article 3.1(b) actually extended to *de facto* contingency, the Appellate Body in *Canada – Autos* then considered the ordinary meaning and the context of this provision. While the Appellate Body agreed with the Panel that Article 3.1(a) was relevant context for Article 3.1(b), it held that "other contextual aspects should also be examined":

"We look first to the text of Article 3.1(b). In doing so, we observe that the ordinary meaning of the phrase 'contingent . . . upon the use of domestic over imported goods' is not conclusive as to whether Article 3.1(b) covers both subsidies contingent 'in law' and subsidies

[172] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 123–125.
[173] Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 6.101.
[174] Appellate Body Report on *Canada – Aircraft*, para. 166. See para. 90 of this Chapter.
[175] Appellate Body Report on *Canada – Autos*, para. 123.
[176] Panel Report on *Canada – Autos*, paras. 10.220–10.222.
[177] Appellate Body Report on *Canada – Autos*, paras. 137–138.

contingent 'in fact' upon the use of domestic over imported goods. Just as there is nothing in the language of Article 3.1(b) that specifically *includes* subsidies contingent 'in fact', so, too, is there nothing in that language that specifically *excludes* subsidies contingent 'in fact' from the scope of coverage of this provision. As the text of the provision is not conclusive on this point, we must turn to additional means of interpretation. Accordingly, we look for guidance to the relevant context of the provision.

Although we agree with the Panel that Article 3.1(a) is relevant context, we believe that other contextual aspects should also be examined. First, we note that Article III:4 of the GATT 1994 also addresses measures that favour the use of domestic over imported goods, albeit with different legal terms and with a different scope. Nevertheless, both Article III:4 of the GATT 1994 and Article 3.1(b) of the *SCM Agreement* apply to measures that require the use of domestic goods over imports. Article III:4 of the GATT 1994 covers both *de jure* and *de facto* inconsistency. Thus, it would be most surprising if a similar provision in the *SCM Agreement* applied only to situations involving *de jure* inconsistency.

. . . The fact that Article 3.1(a) refers to 'in law or in fact', while those words are absent from Article 3.1(b), does not necessarily mean that Article 3.1(b) extends only to *de jure* contingency.

Finally, we believe that a finding that Article 3.1(b) extends only to contingency 'in law' upon the use of domestic over imported goods would be contrary to the object and purpose of the *SCM Agreement* because it would make circumvention of obligations by Members too easy.

. . .

For all these reasons, we believe that the Panel erred in finding that Article 3.1(b) does not extend to subsidies contingent 'in fact' upon the use of domestic over imported goods. We, therefore, reverse the Panel's broad conclusion that 'Article 3.1(b) extends only to contingency in law.'"[178]

(b) Relationship with other Articles

(i) Article 3.1(a)

132. As regards the use of Article 3.1(a) as context for the interpretation of Article 3.1(b), see paragraphs 130–131 above.

(ii) Article 27

133. As regards the transition period exemptions for developing and least developed countries, see paragraph 347 below.

4. Article 3.2

(a) "grant"

134. As the *Canada – Aircraft* dispute illustrates, under the *SCM Agreement* a Member may challenge a subsidy programme of another Member "as such" or, alternatively, "as applied". In addressing Brazil's challenge of certain Canadian subsidies "as such", the Panel on *Canada – Aircraft* recalled the distinction between mandatory and discretionary legislation. In so doing, the Panel invoked what it considered consistent GATT/WTO practice and emphasized that it "must first determine whether the . . . programme *per se* mandates the grant of prohibited export subsidies in a manner inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement".[179] The Panel continued as follows:

"In this regard, we recall the distinction that GATT/WTO panels have consistently drawn between discretionary legislation and mandatory legislation. For example, in *United States – Tobacco* the panel 'recalled that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority . . . to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge'."[180]

135. In applying this standard to the facts of the case before it, the Panel on *Canada – Aircraft* concluded that "a mandate to support and develop Canada's export trade does not amount to a mandate to grant subsidies, since such support and development could be provided in a broad variety of ways".[181] As a consequence, the Panel on *Canada – Aircraft* held that it "may not make any findings on the EDC programme *per se*".[182]

136. The Panel on *Brazil – Aircraft* was called upon to decide whether Brazil had increased its level of export subsidies within the meaning of Article 27.4; because footnote 55 to Article 27.4 refers to the "grant" of export subsidies, the Panel addressed the question concerning at which particular point in time Brazil had actually been "granting" the disputed subsidies. Under the part of the Brazilian PROEX programme relating to interest equalization payments, the Brazilian Government would first approve a particular export transaction (between the Brazilian manufacturer and a foreign buyer) and issue a "letter of commitment" to the manufacturer; this letter would commit the Government to

[178] Appellate Body Report on *Canada – Autos*, paras. 139–143.
[179] Panel Report on *Canada – Aircraft*, para. 9.124.
[180] Panel Report on *Canada – Aircraft*, para. 9.124.
[181] Panel Report on *Canada – Aircraft*, para. 9.127.
[182] Panel Report on *Canada – Aircraft*, para. 9.129.

providing support, on the condition that the contract would indeed be concluded under the terms previously approved by the Government and entered into within a specific period of time. If these conditions were not fulfilled, the letter of commitment would expire. The actual interest equalization payments began after the aircraft had been exported and paid for under the relevant contract. The Brazilian Government, acting through the Brazilian National Treasury, would then issue bonds in the name of the bank financing the transaction; the bonds could be redeemed on a semi-annual basis for the duration of financing or sold for a discount in the securities market. In its analysis, the Panel began by comparing the term "grant" under Articles 3.2 and 27.4:

> "We note that Article 3.2 and Article 27.4 are provisions of the same Agreement. Further, both provisions relate to the prohibition on export subsidies set out under that Agreement. We do not perceive any basis to attribute to the term 'grant' as used in Article 3.2 of the *SCM Agreement* a meaning different from that attributed to that term by this Panel and the Appellate Body as used in Article 27.4 of the *SCM Agreement*."[183]

137. The Panel on *Brazil – Aircraft*, in a finding subsequently upheld by the Appellate Body,[184] then found that the "granting" of the subsidy at issue occurred when the bonds were issued by the Brazilian National Treasury to the bank financing the export transaction:

> "It is clear to us, however, that PROEX payments have not yet been 'granted' at the time a letter of commitment is issued. We note that the issuance of a letter of commitment, even if legally binding on the Government of Brazil in the event certain conditions are fulfilled, provides no assurance that PROEX payments will actually be made . . . [T]he right to receive the PROEX payments only arises after the conditions relating to receipt of PROEX payments, and specifically the condition that the product in question actually be exported, has been fulfilled . . .
>
> The question remains whether PROEX payments are 'granted' when the bonds are issued or whether they are granted only when the bonds are redeemed on a semi-annual basis. In our view, PROEX payments should be considered to be 'granted' when bonds are issued and title to those bonds is transferred to the lender financial institution . . . [W]e note that, while the bonds cannot be immediately redeemed, they are freely negotiable. The parties agree that lenders may exercise their right to sell these bonds – albeit at a discount as determined by the market – to other entities rather than waiting until maturity to redeem the bonds themselves. Thus, at the point that title to the bonds is passed to the lenders, those lenders are the holders of a property right with a market value which is immediately realisable. Accordingly, we conclude that PROEX payments are 'granted' at that point, and we will calculate Brazil's PROEX expenditures on that basis."[185]

138. In *Brazil – Aircraft*, while agreeing with the Panel on *when* the subsidy in question was granted, the Appellate Body criticized the Panel for making findings on *whether* a subsidy *existed*. More specifically, the Appellate Body held that in the case at hand, the Panel, in its findings on Article 27.4, did not have to make findings on the existence of a subsidy within the meaning of Article 1 of the *SCM Agreement*, because the export subsidies in that case were already deemed to "exist".[186]

139. The Panel on *Brazil – Aircraft (Article 21.5 – Canada II)* built on this distinction made by the Appellate Body in *Brazil – Aircraft* between the question of the *existence* of a subsidy and the question of the precise moment of the "granting" of such subsidy and held that this distinction, drawn by the Appellate Body in the context of Article 27.4, applied equally with respect to Article 3.2 of the *SCM Agreement*:

> "We recognize that the distinction made by the Appellate Body was between the existence of a subsidy and when a subsidy is granted related to when a subsidy is granted *for the purposes of Article 27.4* of the *SCM Agreement*, and not when it was granted *for the purposes of Article 3.2*. As a matter of logic, however, we cannot perceive . . . any basis for us to conclude that, while the existence of a subsidy is a legally distinct issue from when it is granted for the purposes of Article 27.4, it is *not* a legally distinct issue from when it is granted for the purposes of Article 3.2. In other words, if the issue of when a subsidy is 'granted' *for the purposes of Article 27.4* is legally distinct from when it 'exists' for the purposes of Article 1, then it follows that the issue of when a subsidy is granted *for the purposes of Article 3.2* is also legally distinct from the issue when it exists for the purposes of Article 1."[187]

(b) Relationship with other Articles

(i) Article 3.1

140. In *US – FSC (Article 21.5 – EC)*, the Panel concluded that by maintaining prohibited export subsidies, the defendant also acted inconsistently with Article 3.2 of the *SCM Agreement*. The Panel stated:

> "We therefore view this claim as wholly dependent upon our resolution of the claims under Article 3.1 of the *SCM Agreement*. Recalling our finding that the Act involves prohibited export subsidies in breach of Article 3.1(a) of

[183] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 6.11.
[184] Appellate Body Report on *Brazil – Aircraft*, para. 159.
[185] Panel Report on *Brazil – Aircraft*, paras. 7.71–7.72.
[186] Appellate Body Report on *Brazil – Aircraft*, paras. 156–157.
[187] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 6.14.

the *SCM Agreement* by reason of the requirement of 'use outside the United States', we find that by maintaining the subsidies under the Act, the United States has acted inconsistently with its obligation under Article 3.2 of the *SCM Agreement* not to maintain subsidies referred to in paragraph 1 of Article 3 of the *SCM Agreement*."[188]

(ii) Article 27.4

141. With respect to the relationship with Article 27.4, see paragraphs 136–138 above.

IV. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4
Remedies

4.1 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member.

4.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

4.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

4.4 If no mutually agreed solution has been reached within 30 days[6] of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

(*footnote original*) [6] Any time-periods mentioned in this Article may be extended by mutual agreement.

4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts[7] (referred to in this Agreement as the "PGE") with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE's conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

(*footnote original*) [7] As established in Article 24.

4.6 The panel shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 90 days of the date of the composition and the establishment of the panel's terms of reference.

4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

4.8 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[8]

(*footnote original*) [8] If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

4.10 In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate[9] countermeasures, unless the DSB decides by consensus to reject the request.

(*footnote original*) [9] This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("DSU"), the arbitrator shall determine whether the countermeasures are appropriate.[10]

(*footnote original*) [10] This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

4.12 For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein.

[188] Panel Report on *US – FSC (Article 21.5 – EC)*, para. 8.110.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

1. General

(a) Accelerated procedure and the deadline for the submission of new evidence, allegations and affirmative defences

142. The Panel on *Canada – Aircraft* rejected the request for a preliminary ruling that the complaining party may not adduce new evidence or allegations after the end of the first substantive meeting of the panel with the parties. Canada had argued that given the accelerated procedure under Article 4 of the *SCM Agreement*, the late submission of allegations or evidence by Brazil, the other party in the dispute, would be prejudicial to Canada's position, as Canada would effectively be denied an adequate opportunity to respond to these allegations or evidence.[189] The Panel referred to the Appellate Body's finding in *Argentina – Textiles and Apparel* that "neither Article 11 of the DSU, nor the Working Procedures in Appendix 3 of the DSU, establish precise deadlines for the presentation of evidence by parties to a dispute",[190] and concluded that "[t]here is nothing in the DSU, or in the Appendix 3 Working Procedures, to suggest that a different approach should be taken in 'fast-track' cases under Article 4 of the SCM Agreement".[191]

143. The Panel on *Canada – Aircraft* followed the reasoning set out in the previous paragraph regarding the submission of new allegations and stated that "[w]e can see nothing in the DSU, or in the Appendix 3 Working Procedures, that would require the submission of new allegations to be treated any differently than the submission of new evidence".[192]

144. In the Panel proceedings in *Canada – Aircraft*, Brazil requested the Panel not to accept any affirmative defences by Canada, the responding party, which had not been submitted prior to the end of the first substantive meeting,[193] on the basis that "this is particularly important in this fast-track proceeding".[194] The Panel stated that "there is nothing in the DSU, or in Appendix 3 Working Procedures, to prevent a party submitting new evidence or allegations after the first substantive meeting. We can see no basis in the DSU to treat the submission of affirmative defences after the first substantive meeting any differently."[195] However, the Panel added that "Brazil's due process rights would not be respected if Canada were able to submit an affirmative defence ... after the second substantive meeting with the Panel."[196]

145. The Panel on *US – FSC* had found that the European Communities' request for consultations under Article 4.1 of the *SCM Agreement* contained a sufficient statement of available evidence within the meaning of Article 4.2, and, consequently, rejected the United States' request that the Panel dismiss the European Communities' claim as not properly before it as a result of the alleged insufficiency of the statement of available evidence. Upon appeal, the Appellate Body rejected the United States' appeal with respect to the second point and, as a result, declined to rule on the United States' appeal on the first point, i.e. whether the European Communities had given a sufficient statement of available evidence within the meaning of Article 4.2. In its analysis, the Appellate Body distinguished between the requirements imposed on the complaining party under Article 4.4 of the *DSU* and Article 4.2 of the *SCM Agreement* and held that the Panel had not differentiated between these requirements carefully enough:

> "Article 1.2 of the DSU states that 'the rules and procedures of the DSU shall apply subject to the special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding'. Article 4.2 of the *SCM Agreement* is listed as a 'special or additional rule or procedure' in Appendix 2 to the DSU. In our Report in *Guatemala – Cement*, we said that 'the rules and procedures of the DSU apply *together with* the special or additional provisions of the covered agreement' except that, 'in the case of a *conflict* between them', the special or additional provision prevails.[197] Article 4.4 of the DSU requires that all requests for consultations, under the covered agreements, 'give reasons for the request, including *identification of the measures at issue* and an *indication of the legal basis for the complaint*.' (emphasis added) It is clear to us that Article 4.4 of the DSU and Article 4.2 of the *SCM Agreement* can and should be read and applied together, so that a request for consultations relating to a prohibited subsidy claim under the *SCM Agreement* must satisfy the requirements of both provisions.
>
> Article 4 of the *SCM Agreement* provides for accelerated dispute settlement procedures for claims involving prohibited subsidies under Article 3 of the *SCM Agreement*. The determination of whether a prohibited subsidy is being granted or maintained under Article 3 of the *SCM Agreement* raises complex factual questions, particularly in the case of subsidies that are claimed to be *de facto* contingent upon export performance. Also, Article 4.5

[189] Panel Report on *Canada – Aircraft*, para. 9.70.
[190] Panel Report on *Canada – Aircraft*, para. 9.72.
[191] Panel Report on *Canada – Aircraft*, para. 9.72.
[192] Panel Report on *Canada – Aircraft*, para. 9.74.
[193] Panel Report on *Canada – Aircraft*, para. 9.75.
[194] Panel Report on *Canada – Aircraft*, para. 9.75.
[195] Panel Report on *Canada – Aircraft*, para. 9.77.
[196] Panel Report on *Canada – Aircraft*, para. 9.78.
[197] (*footnote original*) Appellate Body Report on *Guatemala – Cement*, fn. 55.

of the *SCM Agreement* allows a panel to request the assistance of the Permanent Group of Experts on whether the measure is a prohibited subsidy. Given the accelerated timeframes for disputes involving claims of prohibited subsidies, and given that the issue of whether a measure is a prohibited subsidy often requires a detailed examination of facts, it is important to stress the requirement of Article 4.2 that there be 'a statement of available evidence with regard to the existence and nature of the subsidy in question' at the consultation stage in a dispute.

We emphasize that this additional requirement of 'a statement of available evidence' under Article 4.2 of the *SCM Agreement* is distinct from – and not satisfied by compliance with – the requirements of Article 4.4 of the DSU. Thus, as well as giving the reasons for the request for consultations and identifying the measure and the legal basis for the complaint under Article 4.4 of the DSU, a complaining Member must also indicate, in its request for consultations, the evidence that it has available to it, at that time, 'with regard to the existence and nature of the subsidy in question'. In this respect, it is available evidence of the character of the measure as a 'subsidy' that must be indicated, and not merely evidence of the existence of the measure. We would have preferred that the panel give less relaxed treatment to this important distinction."[198]

2. Article 4.2

(a) "include a statement of available evidence"

(i) Concept of statement of available evidence

146. The Panel on *US – FSC*, in a finding confirmed by the Appellate Body,[199] considered the ordinary meaning of the terms "statement of available evidence" and indicated that a complainant must identify but need not annex available evidence to its request for consultations. It also considered that there is no need to use explicitly the words "statement of available evidence" provided that the relevant evidence is itself referred to. The Panel considered:

"We note that the word 'evidence' has been defined as 'available facts, circumstances, etc., supporting or otherwise a belief, proposition, etc.', the word 'available' has been defined as 'at one's disposal', and the word 'statement' has been defined as 'expression in words'.[200] Thus, in its ordinary meaning Article 4.2 requires that a Member include in its request for consultations an expression in words of the facts at its disposal at the time it requests consultations in support of its view that it has, in the words of Article 4.1, 'reason to believe that a prohibited subsidy is being granted or maintained'. On the basis of the ordinary meaning of Article 4.2, it is evident that a complainant must identify, but need not annex, available evidence to its request for consultations.

. . . Although the European Communities did not recite the formulation 'statement of available evidence' when referring to these materials, we do not consider that the explicit use of that descriptive term is necessary provided that the relevant evidence is itself referred to. It is true, of course, that the European Communities in its first submission referred to a variety of additional materials, primarily in the form of secondary sources,[201] and that these additional materials were not identified in the request for consultations. Even assuming that these materials represent "evidence" and that a Member is required to identify *all* available evidence in its request for consultations, we are not in a position to determine whether as a factual matter these materials were at the disposal of the European Communities at the time it made its request for consultations and that the European Communities knew at that time that it would rely on those materials. In short, it may well be that the European Communities' request for consultations does contain a statement of available evidence."[202]

147. In *US – FSC*, the Appellate Body rejected the United States' argument that a complaint should be dismissed because the complainant failed to "include a statement of available evidence" in its request for consultations. The Appellate Body pointed out a variety of facts, for example, that "[f]ollowing the European Communities' request for consultations, the United States and the European Communities held three separate sets of consultations over a period of nearly five months".[203] The Appellate Body also invoked Article 3.10 of the *DSU* and the principle of good faith:

"Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures 'in good faith in an effort to resolve the dispute'. This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law.[204] This pervasive principle requires both

[198] Appellate Body Report on *US – FSC*, paras. 159–161. See discussion of adverse inferences in the Chapter on the *DSU*, Section XI.B.3(c).

[199] Appellate Body Report on *US – FSC*, paras. 155–166.

[200] (*footnote original*) Concise Oxford Dictionary, Ninth edition, 1995.

[201] (*footnote original*) The materials in questions were comprised of testimony before the US Congress, reports and other descriptive materials relating to the FSC prepared by US government officials, articles in tax, legal and business publications about the FSC, copies of the requests for consultations and establishment of a panel in this dispute, and excerpts from OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*. All of these materials are explanatory of the FSC except for the OECD *Guidelines*, which were submitted in support of the European Communities' view of the meaning of the concept of the "arm's length" principle referred to in footnote 59 to the SCM Agreement.

[202] Panel Report on *US – FSC*, paras. 7.5–7.6.

[203] Appellate Body Report on *US – FSC*, para. 162.

[204] (*footnote original*) Appellate Body Report on *US – Shrimp*, fn, 99. In that report, we addressed the issue of good faith in the context of the chapeau of Article XX of the GATT 1994.

complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[205]

148. Rejecting the argument that Article 4.2 "imposes an obligation on the complainant to disclose in its request for consultations, not only facts, but also the argumentation why such facts lead the complainant to believe there is a violation of Article 3.1",[206] the Panel on *Australia – Automotive Leather II* (a case which was not appealed) stated that "[t]he ordinary meaning of the phrase 'include a statement of available evidence' does not, on its face, require disclosure of arguments in the request for consultations. Nothing in the context or object and purpose of Article 4.2 . . . suggests a different conclusion."[207] The Panel on *Australia – Automotive Leather II* then addressed the claim that Article 4.2 requires the disclosure of all facts and evidence upon which the complaining Member intends to rely in the course of the dispute settlement proceedings:

"Turning to the question of what is required as a 'statement of available evidence', we note that Australia reads this to require disclosure of all facts and evidence on which the complaining Member will rely in the course of the dispute. Indeed, Australia asserts that any exhibits should have been provided at the time consultations were requested. The ordinary meaning of the phrase 'statement of available evidence' does not support Australia's position. The word 'evidence' is defined as 'available facts, circumstances, etc., supporting or otherwise a belief, proposition, etc.' 'Available' is defined as 'at one's disposal', and 'statement' is defined as 'expression in words'. Thus, based on the ordinary meaning of the terms, Article 4.2 requires a complaining Member to include in the request for consultations an expression in words of the facts at its disposal at the time it requests consultations in support of the conclusion that it has, in the words of Article 4.1, 'reason to believe that a prohibited subsidy is being granted or maintained'. . . .

Moreover, nothing in the context or object and purpose of Article 4.2 suggests to us that the statement of available evidence must be as comprehensive as Australia would require. The mere fact that proceedings under Article 4 of the SCM Agreement are accelerated by comparison to dispute settlement proceedings under the DSU does not, in our view, require us to read into Article 4.2 a requirement that the complainant disclose all facts and arguments in its request for consultations. . . . To the extent that the additional requirement of Article 4.2 can be linked to the expedited nature of the proceedings, the additional requirement of a statement of available evidence satisfies the need adequately to apprise the responding Member of the information upon which the complaining Member bases its request for consultations, and serves in addition to inform the resulting consultations."[208]

149. The Panel on *Australia – Automotive Leather II* also rejected the arguments that "the requirement of Article 4.2, that a request for consultations 'include a statement of available evidence', in conjunction with the expedited nature of the proceedings, [requires] a panel to limit the complaining Member to using the evidence and arguments set forth in the request for consultations",[209] and "that to allow a complainant to come forward with additional facts and arguments in its first submission is inconsistent with Article 4 of the SCM Agreement".[210] In so holding, the Panel referred to its obligation under Article 11 of the *DSU* to conduct an objective assessment of the matter before it; specifically, the Panel held that "a decision to limit the facts and arguments that the United States may present during the course of this proceeding to those set forth in the request for consultations would make it difficult, if not impossible, for us to fulfill our obligation to conduct an 'objective assessment' of the matter before us".[211]

150. In rejecting Australia's claim that in the light of the requirement under Article 4.2 to make a "statement of available evidence", a complainant was disallowed from coming forward with additional facts and arguments in its first submission, the Panel did not rely exclusively on Article 11 of the *DSU* (see paragraph 149 above). The Panel on *Australia – Automotive Leather II* also referred to the right of panels, under Article 13.2 of the *DSU*, to seek information from any relevant source, a right which, in the opinion of the Panel, is in no way curtailed by Article 4 of the *SCM Agreement*. Finally, the Panel also considered the requirements with respect to the request for consultations:

"Article 4.2 does contain a requirement, not present in the DSU, that a complainant include a 'statement of available evidence' in its request for consultations. How-

[205] Appellate Body Report on *US – FSC*, para. 166.
[206] Panel Report on *Australia – Automotive Leather II*, para. 9.17.
[207] Panel Report on *Australia – Automotive Leather II*, para. 9.18.
[208] Panel Report on *Australia – Automotive Leather II*, paras. 9.19–9.20.
[209] Panel Report on *Australia – Automotive Leather II*, para. 9.24.
[210] Panel Report on *Australia – Automotive Leather II*, para. 9.24.
[211] Panel Report on *Australia – Automotive Leather II*, para. 9.25.

ever, we do not consider that the scope of the evidence that a panel may consider is limited in any way by such a statement of available evidence. In this respect, we note Article 4.3 of the SCM Agreement, which explicitly states that one of the purposes of consultations 'shall be to *clarify the facts of the situation*. . .'. (emphasis added) This provision implies that additional facts or evidence will be developed during consultations. Moreover, the Appellate Body has recognized that consultations play a significant role in developing the facts in a dispute settlement proceeding. For example, in *India – Patents*, the Appellate Body observed that 'the claims that are made *and the facts that are established during consultations* do much to shape the substance and the scope of subsequent panel proceedings'. (emphasis added) This is consistent with the view that a central purpose of consultations in general, and of consultations under Article 4 of the SCM Agreement in particular, is to clarify and develop the facts of the situation.

Moreover, we note that panels have, under Article 13.2 of the DSU, a general right to seek information 'from any relevant source'. Indeed, it is a common feature of panel proceedings for panelists to question parties about the facts and arguments underlying their positions. There is nothing in Article 4 of the SCM Agreement to suggest that this right is somehow limited by the expedited nature of dispute settlement proceedings conducted under that provision. If Australia's position were correct, a panel might be constrained from seeking out replacement information from the party . . . that was limited to reliance on the facts set forth in its request for consultations. Similarly, under Australia's view, the defending party might introduce information during the panel proceedings, which the complaining party . . . would not be able to rebut, as it would be limited to reliance on the facts set forth in its request for consultations. We do not believe Article 4.2 requires this result."[212]

151. Finally, the Panel on *Australia – Automotive Leather II* pointed out that a complaining Member is not required to include facts and arguments in its request for the establishment of a panel, noting that such request comes considerably later in the dispute settlement process than the request for consultations.[213]

(ii) Relation with request for establishment of a Panel

152. Evaluating the suggestion that "any impact on Canada's due process rights caused by the alleged absence of specificity in Brazil's request for establishment is compounded in an accelerated timetable",[214] the Panel on *Canada – Aircraft*, in a statement subsequently not addressed by the Appellate Body, noted that "although Article 4.2 of the SCM Agreement requires the Member requesting consultations to provide a 'statement of available evidence', there is nothing in either the DSU or the *SCM Agreement* to suggest that requests for establishment of panels for 'fast-track' cases should be any more precise than requests for establishment of panels in 'standard' WTO dispute settlement cases."[215]

(b) Relationship with other WTO Agreements

(i) DSU

153. With respect to the different evidence to be submitted in the course of consultations under Article 4.4 of the *DSU* and Article 4.2 of the *SCM Agreement*, respectively, see paragraph 145 above.

3. Article 4.3

(a) "shall be to clarify the facts of the situation"

154. With respect to this phrase, see paragraph 150 above.

4. Article 4.4

(a) Relationship between the matter before a panel as defined by its terms of reference and the matter consulted upon

155. In *Brazil – Aircraft*, the Panel was presented with the issue regarding "the relationship between the matter before a panel as defined by its terms of reference and the matter consulted upon."[216] Specifically, the Panel had to consider "whether and to what extent a panel is limited in its consideration of the matter identified in its terms of reference by the scope of the matter with respect to which consultations were held".[217] The Appellate Body agreed with the Panel's finding in this regard and stated as follows:

"In our view, Articles 4 and 6 of the DSU, as well as paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel. Under Article 4.3 of the *SCM Agreement*, moreover, the purpose of consultations is 'to clarify the facts of the situation and to arrive at a mutually agreed solution.'

We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."[218]

[212] Panel Report on *Australia – Automotive Leather II*, para. 9.29.
[213] Panel Report on *Australia – Automotive Leather II*, para. 9.29.
[214] Panel Report on *Canada – Aircraft*, para. 9.29.
[215] Panel Report on *Canada – Aircraft*, para. 9.29.
[216] Panel Report on *Brazil – Aircraft*, para. 7.6.
[217] Panel Report on *Brazil – Aircraft*, para. 7.6.
[218] Appellate Body Report on *Brazil – Aircraft*, paras. 131–132. See also Panel Report on *Brazil – Aircraft*, paras. 7.9–7.11.

156. The Panel on *Canada – Aircraft* adopted a very similar approach to the relationship between a panel's terms of reference and the matter consulted upon:

> "In our view, a panel's terms of reference would only fail to be determinative of a panel's jurisdiction if, in light of Article 4.1 – 4.4 of the SCM Agreement applied together with Article 4.2 – 4.7 of the DSU, the complaining party's request for establishment were found to cover a 'dispute' that had not been the subject of a request for consultations. Article 4.4 of the SCM Agreement permits a Member to refer a 'matter' to the DSB if 'no mutually agreed solution' is reached during consultations. In our view, this provision complements Article 4.7 of the DSU, which allows a Member to refer a 'matter' to the DSB if 'consultations fail to settle a dispute'. Read together, these provisions prevent a Member from requesting the establishment of a panel with regard to a 'dispute' on which no consultations were requested. In our view, this approach seeks to preserve due process while also recognising that the 'matter' on which consultations are requested will not necessarily be identical to the 'matter' identified in the request for establishment of a panel. The two 'matters' may not be identical because, as noted by the Appellate Body in *India – Patents*, 'the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings'."[219]

(b) Relationship with other WTO Agreements

157. With respect to the relationship between Article 4 of the *SCM Agreement* on the one hand and Articles 4 and 6 of the *DSU* on the other, see paragraphs 155–156 above. Concerning differences between the request for consultations and the establishment of a panel, see Section VI.B.3(d) in the Chapter on the *DSU*.

5. Article 4.5

(a) Relationship with other Articles

158. As regards the establishment of the Permanent Group of Experts by Article 24.3, see paragraph 325 below.

6. Article 4.7

(a) "withdraw the subsidy"

159. The Appellate Body on *Brazil – Aircraft (Article 21.5 – Canada)* analysed the meaning of the word "withdraw": "[W]e observe first that this word has been defined as 'remove', or 'take away', and as 'to take away what has been enjoyed; to take from.' This definition suggests that 'withdrawal' of a subsidy, under Article 4.7 of the *SCM Agreement*, refers to the 'removal' or 'taking away' of that subsidy."[220] Applied to the facts of the dispute, the Appellate Body stated: "In our view, to continue to make payments under an export subsidy measure found to be prohibited is not consistent with the obligation to 'withdraw' prohibited export subsidies, in the sense of 'removing' or 'taking away'."[221]

160. The Appellate Body on *Brazil – Aircraft (Article 21.5 – Canada)* considered the argument by Brazil that Brazil had a contractual obligation under domestic law to issue PROEX bonds pursuant to commitments that had already been made, and that Brazil could be liable for damages for breach of contract under Brazilian law if it failed to respect its contractual obligations. The Appellate Body considered that these issues were not relevant to the "issue of whether the DSB's recommendation to 'withdraw' the prohibited export subsidies permitted the continued issuance of NTN-I bonds under letters of commitment issued before [the date set by the Panel for the withdrawal of the prohibited subsidies]".[222]

161. In contrast to the findings of the Panel on *Brazil – Aircraft (Article 21.5 – Canada)*, the Panel on *Australia – Automotive Leather II (Article 21.5 – US)* did not limit its findings to a situation in which a Member *continues* to grant a prohibited subsidy. Rather, the Panel addressed the issue whether the term "withdraw the subsidy" is limited to a recommendation with purely prospective effect, or whether it also encompasses repayment:

> "Turning first to the ordinary meaning of the term, the word 'withdraw' has been defined as: 'pull aside or back . . .; take away, remove . . .; retract . . .' This definition does not suggest that 'withdraw the subsidy' necessarily requires only some prospective action. To the contrary, it suggests that the ordinary meaning of 'withdraw the subsidy' may encompass 'taking away' or 'removing' the financial contribution found to give rise to a prohibited subsidy. Consequently, an interpretation of 'withdraw the subsidy' that encompasses repayment of the prohibited subsidy seems a straightforward reading of the text of the provision.
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> . . . In the case of 'actionable' subsidies, Members whose trade interests are adversely affected may, under Part III of the SCM Agreement, pursue multilateral dispute settlement in order to establish whether the subsidy in question has resulted in adverse effects to the interests of the complaining Member. If such a finding is made, the subsidizing Member 'shall take appropriate steps to remove the adverse effects *or shall withdraw the subsidy*'. Alternatively, a Member whose domestic industry

[219] Panel Report on *Canada – Aircraft*, para. 9.12.
[220] Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45.
[221] Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45. See also Panel Report on *US – FSC (Article 21.5 – EC)*, para. 8.170.
[222] Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45.

> is injured by subsidized imports may impose a countervailing measure under Part V of the SCM Agreement, '*unless the subsidy or subsidies are withdrawn*'. In both cases, withdrawal of the subsidy is an alternative, available to the subsidizing Member, to some other action. Repayment of the subsidy would certainly effectuate withdrawal of the subsidy by a subsidizing Member so as to allow it to avoid action by the complaining Member. . . . Thus, the use of the term 'withdraw' elsewhere in the SCM Agreement further supports the suggestion that it may encompass repayment. (original emphasis)
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> . . .
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> . . . An interpretation of Article 4.7 of the SCM Agreement which would allow exclusively 'prospective' action would make the recommendation to 'withdraw the subsidy' under Article 4.7 indistinguishable from the recommendation to 'bring the measure into conformity' under Article 19.1 of the DSU, thus rendering Article 4.7 redundant."[223]

162. After rejecting the argument that the phrase "withdraw the subsidy" under Article 4.7 of the *SCM Agreement* refers to a recommendation with exclusively "prospective effect",[224] the Panel on *Australia – Automotive Leather II (Article 21.5 – US)* also rejected the notion that a repayment of portions of a subsidy which are deemed allocated over future periods of time should be considered a "prospective" remedy:

> "[W]e do not find meaningful the distinction proposed . . . between repayment of 'prospective' and 'retrospective' portions of past subsidies in the context of Article 4.7 of the SCM Agreement. We do not agree that it is possible to conclude that repayment of the 'prospective portion' of prohibited subsidies paid in the past is a remedy having only prospective effect. In our view, where any repayment of any amount of a past subsidy is required or made, this by its very nature is *not* a purely prospective remedy. No theoretical construct allocating the subsidy over time can alter this fact. In our view, if the term 'withdraw the subsidy' can properly be understood to encompass repayment of *any* portion of a prohibited subsidy, 'retroactive effect' exists."[225]

163. The Panel on *Brazil – Aircraft (Article 21.5 – Canada)* rejected Brazil's contention that requiring Brazil to cease issuing bonds pursuant to commitments made prior to the withdrawal date amounted to a retroactive remedy. Rather, the Panel opined that "the obligation to cease performing illegal acts in the future is a fundamentally prospective remedy".[226]

164. Addressing the question whether partial repayment can be sufficient, if repayment is necessary to "withdraw the subsidy", the Panel on *Australia – Automotive Leather II (Article 21.5 – US)* stated: "Having concluded that Article 4.7 of the SCM Agreement encompasses repayment, we can find no basis for concluding that anything less than full repayment would suffice to satisfy the requirement to 'withdraw the subsidy' in a case where repayment is necessary."[227] The Panel, however, rejected the inclusion of interest in the repayment of prohibited subsidies, opining that the remedy under Article 4.7 was not designed to fully restore the *status quo ante* nor was it a remedy intended to provide for reparation or compensation.[228]

(b) Time-period for withdrawal of measures

165. The Panel on *Brazil – Aircraft* determined that "taking into account the nature of the measures and the procedures which may be required to implement our recommendation, on the one hand, and the requirement that Brazil withdraw its subsidies 'without delay' on the other, we conclude that Brazil shall withdraw the subsidies within 90 days".[229] Agreeing with the Panel's conclusion and recommendation, the Appellate Body in *Brazil – Aircraft* noted that "there is a significant difference between the relevant rules and procedures of the DSU and the special or additional rules and procedures set forth in Article 4.7 of the *SCM Agreement*. Therefore, the provisions of Article 21.3 of the DSU are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of Part II of the *SCM Agreement*."[230] See paragraph 171 below.

166. In *Australia – Automotive Leather II*, Australia suggested seven and a half months (half of what Australia considered the "normal" period of time for implementation of panel decisions) as the time-period for withdrawal under Article 4.7. The Panel disagreed:

> "Even assuming Australia is correct in its consideration of fifteen months as the 'normal' period of time for implementation of panel decisions, a question we do not reach, we do not agree that one-half of that period is appropriate in a dispute involving export subsidies. In the first place, Article 4.12 specifically provides that 'except

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[223] Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, paras. 6.27–6.28 and 6.31.
[224] Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.20.
[225] Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.22.
[226] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 6.15.
[227] Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.45.
[228] Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.49. With respect to the issue of repayment of anti-dumping duties, see Panel Report on *Guatemala – Cement II*, paras. 9.4–9.7.
[229] Panel Report on *Brazil – Aircraft*, para. 8.5. See also Panel Report on *Canada – Aircraft*, para. 10.4.
[230] Appellate Body Report on *Brazil – Aircraft*, para. 192.

> for time periods specifically prescribed in this Article' the time periods otherwise provided for in the DSU should be halved in export subsidy disputes. Article 4.7, which provides that the subsidy shall be withdrawn 'without delay', and that the panel shall specify the time-period for withdrawal of the measure in its recommendation, in our view establishes that the time-period for withdrawal is 'specifically prescribed in this Article', that is, in Article 4 of the SCM Agreement itself. Moreover, we do not, as a factual matter, believe that a period of seven and one-half months can reasonably be described as corresponding to the requirement that the measure must be withdrawn 'without delay'."[231]

167. In *US – FSC (Article 21.5 – EC)*, the Appellate Body clarified that the text of Article 4.7 requires withdrawal "without delay". The Appellate Body considered there was "no basis" for extending the time-period prescribed for withdrawal: (1) either to protect the contractual interests of private parties, or (2) to ensure an orderly transition to the regime of the new measure. The Appellate Body recalled that it had rejected similar arguments in *Brazil – Aircraft (Article 21.5 – Canada)*, because the obligation to withdraw prohibited subsidies "without delay" is "unaffected by contractual obligations that the Member itself may have assumed under municipal law". The Appellate Body stated:

> "Article 4.7 of the *SCM Agreement* requires prohibited subsidies to be withdrawn 'without delay', and provides that a time-period for such withdrawal shall be specified by the panel. We can see no basis in Article 4.7 of the *SCM Agreement* for extending the time-period prescribed for withdrawal of prohibited subsidies for the reasons cited by the United States. In that respect, we recall that, in *Brazil – Aircraft (Article 21.5 – Canada)*, Brazil made a similar argument to the one made by the United States in these proceedings. Brazil argued that, after the expiration of the time period for withdrawal of the prohibited export subsidies, it should be permitted to continue to grant certain of these subsidies because it had assumed contractual obligations, under municipal law, to do so.[232] We rejected this argument, and observed that:
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> > . . . to continue to make payments under an export subsidy measure found to be prohibited is not consistent with the obligation to 'withdraw' prohibited export subsidies, in the sense of 'removing' or 'taking away'.[233]
>
> [A] Member's obligation under Article 4.7 of the *SCM Agreement* to withdraw prohibited subsidies "without delay" is unaffected by contractual obligations that the Member itself may have assumed under municipal law. Likewise, a Member's obligation to withdraw prohibited export subsidies, under Article 4.7 of the *SCM Agreement*, cannot be affected by contractual obligations which private parties may have assumed *inter se* in reliance on laws conferring prohibited export subsidies. Accordingly, we see no legal basis for extending the time-period for the United States to withdraw fully the prohibited FSC subsidies."[234]

168. In the same vein, with regard to the concept of "without delay" in Article 4.7, the Panel on *Canada – Aircraft Credits and Guarantees* took the view that because it "[is] required to make the recommendation provided for in Article 4.7 of the SCM Agreement, . . . [it] recommend[s] that Canada withdraw the subsidies identified above without delay"[235] and further clarified that Article 4.7

> "[P]rovides that 'the panel shall specify in its recommendation the time-period within which the measure must be withdrawn'. In other words, we are required to specify what period would represent withdrawal 'without delay'. Taking into account the procedures that may be required to implement our recommendation on the one hand, and the requirement that Canada withdraw its subsidies "without delay" on the other, we conclude that Canada shall withdraw the subsidies identified in sub-paragraphs (e), (f), and (g) of paragraph within 90 days."[236]

(c) Relationship with other Articles

(i) Article 7.8

169. The Panel on *Australia – Automotive Leather II (Article 21.5 – US)* referred to Article 7.8 in support of its finding in relation to the phrase "withdraw the subsidy" under Article 4.7. The Panel noted the wording of Article 7.8 that in case of a finding of adverse effects to the interests of another Member within the meaning of Article 5 of the *SCM Agreement*, the subsidizing Member "shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy". The Panel drew the conclusion that "withdrawal of the subsidy is an alternative, available to the subsidizing Member, to some other action. Repayment of the subsidy would certainly effectuate withdrawal of the subsidy by a subsidizing Member so as to allow it to avoid action by the complaining Member."[237]

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[231] Panel Report on *Australia – Automotive Leather II*, para. 10.6.
[232] (*footnote original*) Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, *supra*, footnote 86, para. 46.
[233] (*footnote original*) Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45.
[234] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 229–230.
[235] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 8.3.
[236] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 8.4.
[237] Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.28.

(ii) Article 19.1

170. The Panel on *Australia – Automotive Leather II (Article 21.5 – US)*, in the context of considering whether Article 4.7 allowed "retroactive" remedies, rejected the argument that "Article 19.1 of the DSU, even in conjunction with Article 3.7 of the DSU, requires the limitation of the specific remedy provided for in Article 4.7 of the SCM Agreement to purely prospective action. An interpretation of Article 4.7 of the SCM Agreement which would allow exclusively 'prospective' action would make the recommendation to 'withdraw the subsidy' under Article 4.7 indistinguishable from the recommendation to 'bring the measure into conformity' under Article 19.1 of the DSU, thus rendering Article 4.7 redundant."[238]

(d) Relationship with other WTO Agreements

(i) DSU

171. In *Brazil – Aircraft*, the Appellate Body noted that "the provisions of Article 21.3 of the DSU are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of Part II of the SCM Agreement". See paragraph 165 above.

172. The Panel on *US – FSC (Article 21.5 – EC)* found that since the Member failed to comply with the required recommendations under Article 4.7 of the SCM Agreement, it had also "failed to comply with Article 21 of the DSU". The Panel stated:

> "Having found that the United States has not fully withdrawn the FSC subsidies as required by the recommendations and rulings of the DSB made pursuant to Article 4.7 *SCM Agreement*, we do not believe that it is necessary to also determine whether the United States 'failed to comply with the DSB recommendations and rulings within the period of time specified by the DSB and has therefore also failed to comply with Article 21 *DSU*'."[239]

(ii) Agreement on Agriculture

173. Regarding the relationship between the *Agreement on Agriculture* and Article 4.7 of the *SCM Agreement*, see paragraph 113 above.

7. Article 4.10

(a) "appropriate countermeasures"

(i) Countermeasure

174. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators looked at the word "countermeasure" as context for finding a meaning for the word "appropriate". The Arbitrators disregarded the dictionary meaning of the word and preferred to refer to its general meaning in international law and to the work of the International Law Commission on state responsibility:

> "While the parties have referred to dictionary definitions for the term 'countermeasures', we find it more appropriate to refer to its meaning in general international law[240] and to the work of the International Law Commission (ILC) on state responsibility, which addresses the notion of countermeasures.[241] We note that the ILC work is based on relevant state practice as well as on judicial decisions and doctrinal writings, which constitute recognized sources of international law.[242] When considering the definition of 'countermeasures' in Article 47 of the Draft Articles,[243] we note that countermeasures are meant to 'induce [the State which has committed an internationally wrongful act] to comply with its obligations under articles 41 to 46'. We note in this respect that the Article 22.6 arbitrators in the EC – Bananas (1999) arbitration made a similar statement.[244] We conclude that a countermeasure is 'appropriate' inter alia if it effectively induces compliance."[245]

175. In *US – FSC (Article 22.6 – US)*, the Arbitrators looked into the ordinary meaning of the word "countermeasure":

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[238] Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.31.

[239] Panel Report on *US – FSC (Article 21.5 – EC)*, para. 8.171.

[240] (*footnote original*) See, e.g., the *Naulilaa* arbitral award (1928), UN Reports of International Arbitral Awards, Vol. II, p. 1028 and *Case Concerning the Air Services Agreement of 27 March 1946 (France v. United States of America)* (1978) International Law Reports, Vol. 54 (1979), p. 338. See also, *inter alia*, the Draft Articles on State Responsibility With Commentaries Thereto Adopted by the International Law Commission on First Reading (January 1997), hereinafter the "Draft Articles" and the draft articles provisionally adopted by the Drafting Committee on second reading, A/CN.4/L 600, 11 August 2000. Even though the latter modify a number of provisions of the Draft Articles, they do not affect the terms to which we refer in this report.

[241] (*footnote original*) We also note that, on the basis of the definition of "countermeasures" in the Draft Articles, the notion of "appropriate countermeasures" would be more general than the term "equivalent to the level of nullification or impairment". It would basically include it. Limiting its meaning to that given to the term "equivalent to the level of nullification or impairment" would be contrary to the principle of effectiveness in interpretation of treaties.

[242] (*footnote original*) See Article 38 of the Statute of the ICJ.

[243] (*footnote original*) We note that Canada objects to us using the Draft Articles in this interpretation process. Canada argues that the Draft Articles are not "relevant rules of international law applicable to the relations between the parties" within the meaning of Article 31.3(c) of the Vienna Convention. As already mentioned, we use the Draft Articles as an indication of the agreed meaning of certain terms in general international law.

[244] (*footnote original*) *Op. cit.*, para. 6.3. In that case, the arbitrators had to determine the level of nullification or impairment. Since the Article 22.6 arbitrators in the *EC – Bananas* case considered that measures equivalent to the level of nullification or impairment can induce compliance, it could be argued that in the present case too, countermeasures equivalent to the level of nullification or impairment should be sufficient to induce compliance. However, the arbitrators in *EC – Bananas* were instructed by Article 22.7 to determine whether the proposed measures were equivalent to the level of nullification or impairment.

[245] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.44.

"Dictionary definitions of 'countermeasure' suggest that a countermeasure is essentially defined by reference to the wrongful action to which it is intended to respond. The New Oxford Dictionary defines 'countermeasure' as 'an action taken to counteract a danger, threat, etc'.[246] The meaning of 'counteract' is to 'hinder or defeat by contrary action; neutralize the action or effect of'.[247] Likewise, the term 'counter' used as a prefix is defined *inter alia* as: 'opposing, retaliatory'.[248] The ordinary meaning of the term thus suggests that a countermeasure bears a relationship with the action to be counteracted, or with its effects (cf. 'hinder or defeat by contrary action; neutralize the action or effect of').[249]

In the context of Article 4 of the *SCM Agreement*, the term 'countermeasures' is used to define temporary measures which a prevailing Member may be authorized to take in response to a persisting violation of Article 3 of the *SCM Agreement*, pending full compliance with the DSB's recommendations. This use of the term is in line with its ordinary dictionary meaning as described above: these measures are authorized to counteract, in this context, a wrongful action in the form of an export subsidy that is prohibited *per se,* or the effects thereof.

It would be consistent with a reading of the plain meaning of the concept of countermeasure to say that it can be directed either at countering the measure at issue (in this case, at effectively neutralizing the export subsidy) or at counteracting its effects on the affected party, or both.

We need, however, to broaden our textual analysis in order to see whether we can find more precision in how countermeasures are to be construed in this context. We thus turn to an examination of the expression '*appropriate*' countermeasures with a view to clarifying what level of countermeasures may be legitimately authorized."[250]

(ii) "appropriate"

176. In *Brazil – Aircraft (Article 22.6 – Brazil)*, Canada had proposed adopting countermeasures based on the amount of subsidy per aircraft granted by Brazil instead of basing them on the level of nullification or impairment suffered. The Arbitrators examined the meaning of the term appropriate and concluded that "a countermeasure is 'appropriate' *inter alia* if it *effectively* induces compliance":

"In accordance with Article 3.2 of the DSU, we proceed with an analysis of the meaning of the term 'appropriate' based on Article 31 of the Vienna Convention.

Examining only the ordinary meaning of the term 'appropriate' does not allow us to reply to the question before us, since dictionary definitions are insufficiently specific. Indeed, the relevant dictionary definitions of the word 'appropriate' are 'specially suitable; proper'.[251] However, they point in the direction of meeting a particular objective.

The first context of the term 'appropriate' is the word 'countermeasures', of which it is an adjective. While the parties have referred to dictionary definitions for the term 'countermeasures', we find it more appropriate to refer to its meaning in general international law[252] and to the work of the International Law Commission (ILC) on state responsibility, which addresses the notion of countermeasures.[253] We note that the ILC work is based on relevant state practice as well as on judicial decisions and doctrinal writings, which constitute recognized sources of international law.[254] When considering the definition of 'countermeasures' in Article 47 of the Draft Articles,[255] we note that countermeasures are meant to 'induce [the State which has committed an internationally wrongful act] to comply with its obligations under articles 41 to 46'. We note in this respect that the Article 22.6 arbitrators in the *EC – Bananas (1999)* arbitration made a similar statement.[256] We conclude that a

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[246] (*footnote original*) The New Shorter Oxford English Dictionary (1993).

[247] (*footnote original*) Ibid.

[248] (*footnote original*) Webster's New Encyclopedic Dictionary (1994).

[249] (*footnote original*) The New Shorter Oxford English Dictionary (1993).

[250] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, paras. 5.4–5.7.

[251] (*footnote original*) The New Shorter Oxford English Dictionary (1993), p. 103; Webster's New Encyclopedic Dictionary (1994), p. 48.

[252] (*footnote original*) See, e.g., the *Naulilaa* arbitral award (1928), UN Reports of International Arbitral Awards, Vol. II, p. 1028 and *Case Concerning the Air Services Agreement of 27 March 1946 (France v. United States of America)* (1978) International Law Reports, Vol. 54 (1979), p. 338. See also, *inter alia*, the Draft Articles on State Responsibility With Commentaries Thereto Adopted by the International Law Commission on First Reading (January 1997), hereinafter the "Draft Articles" and the draft articles provisionally adopted by the Drafting Committee on second reading, A/CN.4/L 600, 11 August 2000. Even though the latter modify a number of provisions of the Draft Articles, they do not affect the terms to which we refer in this report.

[253] (*footnote original*) We also note that, on the basis of the definition of "countermeasures" in the Draft Articles, the notion of "appropriate countermeasures" would be more general than the term "equivalent to the level of nullification or impairment". It would basically include it. Limiting its meaning to that given to the term "equivalent to the level of nullification or impairment" would be contrary to the principle of effectiveness in interpretation of treaties.

[254] (*footnote original*) See Article 38 of the Statute of the ICJ.

[255] (*footnote original*) We note that Canada objects to us using the Draft Articles in this interpretation process. Canada argues that the Draft Articles are not "relevant rules of international law applicable to the relations between the parties" within the meaning of Article 31.3(c) of the Vienna Convention. As already mentioned, we use the Draft Articles as an indication of the agreed meaning of certain terms in general international law.

[256] (*footnote original*) *Op. cit.*, para. 6.3. In that case, the arbitrators had to determine the level of nullification or impairment. Since the Article 22.6 arbitrators in the *EC – Bananas* case considered that measures equivalent to the level of nullification or impairment can induce compliance, it could be argued that in the present case too, countermeasures equivalent to the level of nullification or impairment should be sufficient to induce compliance. However, the arbitrators in *EC – Bananas* were instructed by Article 22.7 to determine whether the proposed measures were equivalent to the level of nullification or impairment.

countermeasure is 'appropriate' *inter alia* if it *effectively* induces compliance."[257]

177. Applying their general finding referenced in paragraph 176 above that a countermeasure is appropriate *inter alia* if it effectively induces compliance, the Arbitrators in *Brazil – Aircraft (Article 22.6 – Brazil)* found that in the case of Article 4.7 of the *SCM Agreement*, "inducing compliance" meant "inducing the withdrawal of the prohibited subsidy":

"In this respect, we recall that the measure in respect of which the right to take countermeasures has been requested is a prohibited export subsidy falling under Article 3.1(a) of the SCM Agreement. Article 4.7 of the SCM Agreement provides in this respect that if a measure is found to be a prohibited subsidy, it shall be withdrawn without delay. In such a case, effectively 'inducing compliance' means inducing the withdrawal of the prohibited subsidy.

In contrast, other illegal measures do not have to be withdrawn without delay. As specified in Article 3.8 of the DSU, if a measure violates a provision of a covered agreement, the measure is considered *prima facie* to cause nullification or impairment. However, if the defendant succeeds in rebutting the charge, no nullification or impairment will be found in spite of the violation. Such a rebuttal may be impossible to make in a number of cases. Yet, this does not change the fact that the concept of nullification or impairment is not found in Articles 3 and 4 of the SCM Agreement. The Arbitrators are of the view that meaning must be given to the fact that the negotiators did not include the concept of nullification or impairment in those articles, whilst it is expressly mentioned in Article 5 of the SCM Agreement, which deals with the adverse effects of actionable subsidies."[258]

178. The Arbitrators in *US – FSC (Article 22.6 – US)* considered the dictionary meaning of the word "appropriate" and concluded that, as far as the amount or level of countermeasures is concerned, the expression "appropriate" does not in and of itself predefine the precise and exhaustive conditions for the application of countermeasures.[259] According to them, Article 4.10 and 4.11 are not designed to lay down a precise formula or otherwise quantified benchmark or amount of countermeasures which might be legitimately authorized in each and every instance.[260] The Arbitrators indicated:

"Based on the plain meaning of the word, this means that countermeasures should be adapted to the particular case at hand. The term is consistent with an intent not to prejudge what the circumstances might be in the specific context of dispute settlement in a given case. To that extent, there is an element of flexibility, in the sense that there is thereby an eschewal of any rigid *a priori* quantitative formula. But it is also clear that there is, nevertheless, an objective relationship which must be absolutely respected: the countermeasures must be suitable or fitting by way of response to the case at hand."[261]

(iii) Footnote 9 of the SCM Agreement

179. In *US – FSC (Article 22.6 – US)*, the Arbitrators considered that the term "appropriate" countermeasures in Article 4.10 is informed by footnote 9, which provides guidance as to what the expression "appropriate" should be understood to mean. In the Arbitrators' view, "these two elements are part of a single assessment and . . . the meaning of the expression 'appropriate countermeasures' should result from a combined examination of these terms of the text in light of its footnote".[262] The Arbitrators thus concluded that "[t]his footnote effectively clarifies further how the term 'appropriate' is to be interpreted. We understand it to mean that countermeasures that would be 'disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited' could not be considered "appropriate" within the meaning of Article 4.10 of the SCM Agreement."[263] Further to analysing the dictionary meaning of the word "disproportionate" in footnote 9, the Arbitrators considered that footnote 9 "confirms that, while the notion of 'appropriate countermeasures' is intended to ensure sufficient flexibility of response to a particular case, it is a flexibility that is distinctly bounded" and that "[t]hose bounds are set by the relationship of appropriateness". In their view, "[t]hat appropriateness, in turn, entails an avoidance of disproportion between the proposed countermeasures and, as our analysis to this point has brought us, either the actual violating measure itself, the effects thereof on the affected Member, or both".[264]

180. In *US – FSC (Article 22.6 – US)*, the Arbitrators further looked at the text of the final part of footnote 9 and considered that this text directed them "to consider the 'appropriateness' of countermeasures under Article 4.10 from this perspective of countering a wrongful act and taking into account its essential nature as an upsetting of the rights and obligations as between

[257] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.42–3.44.
[258] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.45–3.46.
[259] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.10.
[260] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.11.
[261] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.12.
[262] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.8.
[263] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.16.
[264] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.19.

Members".[265] The Arbitrators further noted that "the negative formulation of the requirement under footnote 9 is consistent with a greater degree of latitude than a positive requirement may have entailed: footnote 9 clarifies that Article 4.10 is not intended to allow countermeasures that would be 'disproportionate'. It does not require strict proportionality.[266]"[267]

(b) Amount of subsidy as the basis for the calculation of countermeasures

(i) Exception to the requirement of equivalence to level of nullification or impairment

181. The Arbitrators in *Brazil – Aircraft (Article 22.6 – Brazil)* rejected Brazil's argument that the countermeasures must be equivalent to the level of nullification or impairment pursuant to Article 22.4 of the *DSU*, noting that the concept of nullification or impairment is not found in Articles 3 and 4 of the *SCM Agreement*. The Arbitrators explained:

> "A first approach would be to consider that the concept of nullification or impairment does not apply to Article 4 of the SCM Agreement. We note in this respect that, in relation to actionable subsidies, Article 5 refers to nullification or impairment as only one of the three categories of adverse effects. This could mean that another test than nullification or impairment could also apply in the context of Article 4 of the SCM Agreement.
>
> That said, we note that the Original Panel concluded that, since a violation had been found, a *prima facie* case of nullification or impairment had been made within the meaning of Article 3.8 of the DSU, which Brazil had not rebutted. In that context, we are more inclined to consider that no reference was expressly made to nullification or impairment in Article 4 of the SCM Agreement for the following reasons:
>
> (a) a violation of Article 3 of the SCM Agreement entails an irrebuttable presumption of nullification or impairment. It is therefore not necessary to refer to it;
>
> (b) the purpose of Article 4 is to achieve the *withdrawal* of the prohibited subsidy. In this respect, we consider that the requirement to withdraw a prohibited subsidy is of a different nature than removal of the specific nullification or impairment caused to a Member by the measure.[268] The former aims at removing a measure which is presumed under the WTO Agreement to cause negative trade effects, irrespective of who suffers those trade effects and to what extent. The latter aims at eliminating the effects of a measure on the trade of a given Member;
>
> (c) the fact that nullification or impairment is established with respect to a measure does not necessarily mean that, in the presence of an obligation to withdraw that measure, the level of appropriate countermeasures should be based only on the level of nullification or impairment suffered by the Member requesting the authorisation to take countermeasures."[269]

182. In their finding that the concept of nullification or impairment is not found in Articles 3 and 4 of the *SCM Agreement*, the Arbitrators in *Brazil – Aircraft (Article 22.6 – Brazil)* also noted that a different term than "appropriate countermeasures" was being used in a comparable context in Articles 7.9 and 10 of the *SCM Agreement*:

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[265] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.23.

[266] (*footnote original*) We note in this regard the view of the commentator, Sir James Crawford, on the relevant Article of the ILC text on State Responsibility, reflected in a resolution adopted on 12 December 2001 by the UN General Assembly (A/RES/56/83), which expresses – but only in positive terms – a requirement of proportionality for countermeasures:

> "the positive formulation of the proportionality requirement is adopted in Article 51. A negative formulation might allow too much latitude." (J. Crawford, The ILC's Articles on State Responsibility, Introduction, Text and Commentaries 2002, CUP, para. 5 on Article 51).

Article 51 of the ILC Articles on State responsibility (entitled "*Proportionality*") reads as follows:

> "countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question". (emphasis added)

We also note in this respect that, while that provision expressly refers – contrary to footnote 9 of the *SCM Agreement* – to the injury suffered, it also requires the gravity of the wrongful act and the right in question to be taken into account. This has been understood to entail a qualitative element to the assessment, even where commensurateness with the injury suffered is at stake. We note the view of Sir James Crawford on this point in his Commentaries to the ILC Articles:

> "Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely 'quantitative' element of the injury suffered, but also 'qualitative' factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but 'taking into account' two further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to 'the rights in question' has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration." (*op. cit.*, para. 6 of the commentaries on Article 51).

[267] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.27.

[268] (*footnote original*) We note that Article 3.7 of the DSU refers to the "withdrawal of the measures concerned" as a first objective. However, we also note that, contrary to Article 3.7 of the DSU, Article 4.7 of the SCM Agreement does not provide for any alternative than the withdrawal of the measure once it has been found to be a prohibited subsidy.

[269] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.47–3.48.

"We also note that, when the negotiators have intended to limit countermeasures to the effect caused by the subsidy on a Member's trade, they have used different terms than 'appropriate countermeasures'. Article 7.9 and 10, which is the provision equivalent for actionable subsidies to Article 4.9 and 10 for prohibited subsidies, uses the terms 'commensurate with the degree and nature of the adverse effects determined to exist'. In that context, we do not consider the arguments made by Brazil in its oral presentation and based on the central position of the notion of nullification in the GATT to be compelling. As we have seen above, the term 'appropriate countermeasures' does not impose similar constraints."[270]

183. Further, the Arbitrators in *Brazil – Aircraft (Article 22.6 – Brazil)* addressed the relevance of footnotes 9 and 10 to Article 4.10 and 4.11, respectively:

"We agree that, as those footnotes are drafted, it seems difficult to clearly identify how the second part of the sentence ('in light of the fact that the subsidies dealt with under these provisions are prohibited') relates to the first part of the sentence ('This expression is not meant to allow countermeasures that are disproportionate'). This is probably due to the use of the words 'in light of the fact that'. However, since the text of the treaty is supposed to be the most achieved expression of the intent of the parties, we should refrain from second guessing the negotiators at this point. We can nonetheless note that the reference to the fact that the subsidies dealt with are prohibited can most probably be considered more as an aggravating factor than as a mitigating factor. We also find the use of the word 'disproportionate' to be interesting in light of the term 'out of proportion' used in Article 49 of the Draft Articles. We do not draw any firm conclusions as to the meaning of footnotes 9 and 10. However, we note that footnotes 9 and 10 at least confirm that the term 'appropriate' in Articles 4.10 and 4.11 of the SCM Agreement should not be given the same meaning as the term 'equivalent' in Article 22 of the DSU.[271]"[272]

184. The Arbitrators in *US – FSC (Article 22.6 – US)* found that an assessment of the proposed countermeasures in relation to the initial violating measures was sufficient to conclude that the countermeasures were appropriate. In this regard, they compared Articles 7.9 and 9.4 of the *SCM Agreement* with Article 10 and concluded that the clear reference to trade effects in Article 7.9 "highlights" the lack of any such indication in Article 4.10. The Arbitrators then concluded that Article 4.10 does not "require" that trade effects be the standard by which "appropriateness" is determined. However, they found that Article 4.10 does not "preclude" a Member from adopting countermeasures that are "tailored" to offset adverse "trade effects":

"Recourse to countermeasures is foreseen in three provisions of the *SCM Agreement*: Article 4.10, which we are concerned with here, Article 7.9 and Article 9.[273] As regards actionable subsidies, Article 7.9 provides for authorization of countermeasures 'commensurate with the degree and nature of the adverse effects determined to exist . . .'. In a similar vein, Article 9.4 provides, in relation to non-actionable subsidies, for the authorization of countermeasures 'commensurate with the nature and degree of the effects determined to exist'. The explicit precision of these indications clearly highlights the lack of any analogous explicit textual indication in Article 4.10 and contrasts with the broader and more general test of 'appropriateness' found in Articles 4.10 and 4.11.

In short, as far as prohibited subsidies are concerned, there is no reference whatsoever in remedies foreseen under Article 4 to such concepts as 'trade effects', 'adverse effects' or 'trade impact'. Yet, by contrast, such a concept is to be found very clearly in the context of remedies under Article 7, through the notion of 'adverse effects'.

We believe that this difference must be given a meaning and that we should give due consideration to the fact that the drafters – who obviously could have used other terms in order to quantify precisely the permissible amount of countermeasures in the context of Article 4.10 – chose not to do so. It is not our task to read into the treaty text words that are not there.[274] We are also cognizant that the terms that do appear in the text of the treaty must be presumed to have meaning and must be read effectively.[275] The implications of the use of the term 'appropriate' must therefore be acknowledged and we must give this expression in Article 4.10 its full meaning.[276]

. . .

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[270] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.49.

[271] (*footnote original*) We are mindful of the fact that, from the point of view of a textual interpretation, "equivalent" and "appropriate" should not be given the same meaning. Interpreters are not permitted to assume such a thing. What we mean is that the term "appropriate", read in the light of footnotes 9 and 10, may allow for more leeway than the word "equivalent" in terms of assessing the appropriate level of countermeasures. A countermeasure remains "appropriate" as long as it is not *disproportionate*, having also regard to the fact that the measure at issue is a prohibited subsidy.

[272] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.51.

[273] (*footnote original*) We are aware of the provisions of Article 31 of the *SCM Agreement* and that Members took no action to extend the application of the provisions of Articles 8 and 9 of the Agreement concerning non-actionable subsidies beyond the period of five years from the date of entry into force of the *WTO Agreement*. However, these provisions can nevertheless be helpful, in our view, in understanding the overall architecture of the Agreement with respect to the different types of subsidies it sought and seeks to address.

[274] (*footnote original*) See for example the reports of the Appellate Body in *India – Quantitative Restrictions*, WT/DS90/AB/R, DSR 1999:IV, 1763, para 94; *EC – Hormones*, WT/DS26/AB/R, and WT/DS48/AB/R, DSR 1998:I, 135, para. 181; *India – Patents (US)*, WT/DS50/AB/R, DSR, 1998:I, 9, para. 45.

[275] (*footnote original*) See for example the reports of the Appellate Body on *US – Gasoline*, WT/DS2/AB/R, DSR 1996:I, 3, at 21 and *Korea – Dairy*, WT/DS98/AB/R, DSR 2000:I, 3, para. 81.

[276] (*footnote original*) See paras. 4.24–4.26 above.

> This reading of the text in its context confirms us in our view that, rather than there being any requirement to confine 'appropriate countermeasures' to offsetting the effects of the measure on the relevant Member, there is a clear rationale exhibited that reinforces our textual interpretation that the Member concerned is entitled to take countermeasures that are tailored to neutralizing the offending measure *qua* measure as a wrongful act. The expression 'appropriate countermeasures', in our view, would entitle the complaining Member to countermeasures which would at least counter the injurious effect of the persisting illegal measure on it. However, it does not *require* trade effects to be the effective standard by which the appropriateness of countermeasures should be ascertained. Nor can the relevant provisions be interpreted to *limit* the assessment to this standard. Members may take countermeasures that are not disproportionate in light of the gravity of the initial wrongful act and the objective of securing the withdrawal of a prohibited export subsidy, so as to restore the balance of rights and obligations upset by that wrongful act."[277]

185. In *US – FSC (Article 22.6 – US)*, the Arbitrators considered that, since Articles 4.10 and 4.11 of the *SCM Agreement* may prevail over those of the DSU, there can be no presumption that the drafters intended the standard under Article 4.10 to be necessarily coextensive with that under Article 22.4:

> "It should be recalled here that Articles 4.10 and 4.11 of the *SCM Agreement* are 'special or additional rules' under Appendix 2 of the *DSU*, and that in accordance with Article 1.2 of the *DSU*, it is possible for such rules or procedures to prevail over those of the *DSU*. There can be no presumption, therefore, that the drafters intended the standard under Article 4.10 to be necessarily coextensive with that under Article 22.4 so that the notion of 'appropriate countermeasures' under Article 4.10 would limit such countermeasures to an amount 'equivalent to the level of nullification or impairment' suffered by the complaining Member. Rather, Articles 4.10 and 4.11 of the *SCM Agreement* use distinct language and that difference must be given meaning.
>
> Indeed, reading the text of Article 4.10 in its context, one might reasonably observe that if the drafters had intended the provision to be construed in this way, they could certainly have made it clear. Indeed, relevant provisions both elsewhere in the *SCM Agreement* and in the *DSU* use distinct terms to convey precisely such a standard as described by the United States, in so many words. Yet the drafters chose terms for this provision in the *SCM Agreement* different from those found in Article 22.4 of the DSU. It would not be consistent with effective treaty interpretation to simply read away such differences in terminology.
>
> We therefore find no basis in the language itself or in the context of Article 4.10 of the *SCM Agreement* to conclude that it can or should be read as amounting to a 'trade effect-oriented' provision where explicitly alternative language is to be read away in order to conform it to a different wording to be found in Article 22.4 of the *DSU*.
>
> We would simply add that, while we consider that the precise difference in language must be given proper meaning, this goes no further than that. Our interpretation of Article 4.10 of the *SCM Agreement* as embodying a different rule from Article 22.4 of the *DSU* does not make the *DSU* otherwise inapplicable or redundant."[278]

186. Finally, the Arbitrators in *US – FSC (Article 22.6 – US)* considered that under Article 4.10, a Member is entitled to act with countermeasures that properly take into account the seriousness and nature of the breach. However, they warned that Article 4.10 "does not amount to a blank cheque". The Arbitrators concluded that from the perspective of the measures' trade effects on the part of the complainant there was no reason to reach a different conclusion from that already reached:[279]

> "Thus, as we interpret Article 4.10 of the *SCM Agreement*, a Member is entitled to act with countermeasures that properly take into account the gravity of the breach and the nature of the upset in the balance of rights and obligations in question. This cannot be reduced to a requirement that constrains countermeasures to trade effects, for the reasons we have set out above.
>
> At the same time, Article 4.10 of the *SCM Agreement* does not amount to a blank cheque. There is nothing in the text or in its context which suggests an entitlement to manifestly punitive measures. On the contrary, footnote 9 specifically guards us against such an unbounded interpretation by clarifying that the expression 'appropriate' cannot be understood to allow 'disproportionate' countermeasures. However, to read this indication as effectively reintroducing into that provision a quantitative limit equivalent to that found in other provisions of the *SCM Agreement* or Article 22.4 of the DSU would effectively read the specific language of Article 4.10 of the *SCM Agreement* out of the text. Countermeasures under Article 4.10 of the *SCM Agreement* are not even, strictly speaking, obliged to be 'proportionate' but not to be 'disproportionate'. Not only is a Member entitled to take countermeasures that are tailored to offset the original wrongful act and the upset of the balancing of rights and obligations which that wrongful act entails, but in assessing the 'appropriateness' of such countermeasures – in light of the gravity of the breach – a margin of appreciation is to be granted, due to the severity of that breach."[280]

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[277] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, paras 5.32–5.34 and 5.41.
[278] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, paras. 5.47–5.50.
[279] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, paras. 6.31 and 6.60.
[280] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, paras. 5.61–5.62.

(ii) Factors relevant for the calculation of countermeasures

187. Further, the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)* addressed Brazil's argument that certain sales should be excluded because competition was based upon factors other than price, or that there was no competition with the Canadian manufacturer:

> "Since we selected the amount of the subsidy as the basis for the countermeasures and not the level of nullification or impairment suffered by Canada, it is appropriate and logical to include in our calculation all the sales of subsidised aircraft, whether they compete or not with Bombardier's production. However, consistent with our approach on the burden of proof, we excluded all the sales where Brazil demonstrated that no PROEX interest rate equalization payments had been made and we assumed that future sales of the xxx xxxxxxx and xxx would not benefit from the PROEX interest rate equalization payments."[281]

188. The Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)* also rejected Brazil's argument that only sales of aircraft subsequent to the implementation period should be considered although they were delivered after that period:

> "We note that, in its report within the framework of the proceedings under Article 21.5 of the DSU, the Appellate Body made the following findings:
>
> > '[the Appellate Body] upholds the conclusion of the Article 21.5 Panel that as a result of the continued issuance by Brazil of NTN-I bonds, after 18 November 1999, pursuant to letters of commitment issued before 18 November 1999, Brazil has failed to implement the recommendation of the DSB that it withdraw the prohibited export subsidies under PROEX within 90 days'[282]
>
> We, therefore, consider that we have to include in the calculation of the appropriate countermeasures the firm sales for which PROEX letters of commitment were issued before 18 November 1999 and which had not yet been delivered (since the NTN-I bonds are issued at the time of the delivery of the aircraft).[283] We do not consider the arguments based on Brazil's contractual obligations to be compelling. Obligations under internal law are no justification for not performing international obligations.[284]"[285]

(b) Relationship with other Articles

189. With respect to the relationship with Article 7.9, see paragraph 184 above.

(c) Relationship with other WTO Agreements

(i) DSU

190. As regards the requirement of equivalence of the suspension of concessions to the level of nullification or impairment in Article 22.6 arbitrations, see Section XXII.B.9 of the Chapter on the *DSU*. See also paragraphs 197–198 below.

8. Article 4.11

(a) Task of the Arbitrators under Article 4.11

191. In *Brazil – Aircraft (Article 22.6 – Brazil)*, a case which dealt with Canada's request for authorization to take "appropriate countermeasures" under Article 4.10 of the *SCM Agreement*, the Arbitrators described their task under Article 4.11 of the *SCM Agreement* in the following terms:

> "As to our task, we follow the approach adopted by previous arbitrators under Article 22.6 of the DSU.[286] We will have not only to determine whether Canada's proposal constitutes 'appropriate countermeasures', but also to determine the level of countermeasures we consider to be appropriate in case we find that Canada's level of countermeasures is not appropriate, if necessary by applying our own methodology."[287]

(b) Article 4.11 provisions as special or additional rules

192. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators indicated that they read the provisions of Article 4.11 of the *SCM Agreement* as special or additional rules:

> "We read the provisions of Article 4.11 of the SCM Agreement as special or additional rules. In accordance with the reasoning of the Appellate Body in *Guatemala – Cement*,[288] we must read the provisions of the DSU and the special or additional rules in the SCM Agreement so as to give meaning to all of them, except if there is a conflict or a difference . . ."[289]

193. In *US – FSC (Article 22.6 – US)*, the Arbitrators recalled Article 30 of the *SCM Agreement* and concluded

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[281] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.62. xxx indicates confidential information.

[282] (*footnote original*) Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 82(a).

[283] (*footnote original*) This clarification is made in relation to the use by the Arbitrators of the delivery data provided by Brazil rather than on information relating specifically to the issuance of the NTN-I bonds. Our choice is consistent with the factual finding of the Original Panel (*op. cit.*, para. 7.71) and the Appellate Body report in the original proceedings (*op. cit.* para. 154).

[284] (*footnote original*) See Article 27 of the Vienna Convention:

> "A party may not invoke the provisions of its internal law as justification for the failure to perform a treaty. [. . .]"

[285] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.64–3.65.

[286] (*footnote original*) See Article 22.6 arbitrations in *EC – Hormones (Article 22.6 – EC)*, para. 12.

[287] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.18.

[288] (*footnote original*) *Op. cit.*, para. 65.

[289] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.57.

that Article 22.6 of the *DSU* applies to arbitrations pursuant to Article 4.11 of the *SCM Agreement* although this latter provision would prevail in case of conflict:

> "We also recall the terms of Article 30 of the *SCM Agreement*, which clarifies that the provisions of the *DSU* are applicable to proceedings concerning measures covered by the *SCM Agreement*. Article 22.6 of the *DSU* therefore remains relevant to arbitral proceedings under Article 4.11 of the *SCM Agreement*, as illustrated by the textual reference made to Article 22.6 of the *DSU* in that provision. However, the special or additional rules and procedures of the *SCM Agreement*, including Articles 4.10 and 4.11, would prevail to the extent of any difference between them.[290]"[291]

194. With respect to arbitration under Article 22.6 of the *DSU* in general, see Chapter on the *DSU*, Section XXII.B.8.

(c) Burden of proof

195. In *Brazil – Aircraft (Article 22.6 – Brazil)*, Canada requested that the DSB authorize it to take appropriate "countermeasures" pursuant to Article 4.10 of the *SCM Agreement*, and Article 22.2 of the *DSU*, in the amount of Can$700 million, in relation to Brazil's subsidy granted to its domestic producer of aircraft. In response to Brazil's request, the DSB referred the matter to an arbitrator in accordance with Article 22.6 of the *DSU*. With respect to the burden of proof, the Arbitrators held that it was up to Brazil to demonstrate that the countermeasures that Canada was proposing to take were not "appropriate":

> "In application of the well-established WTO practice on the burden of proof in dispute resolution, it is for the Member claiming that another has acted inconsistently with the WTO rules to prove that inconsistency.[292] In the present case, the action at issue is the Canadian proposal to suspend concessions and other obligations in the amount of C$700 million as 'appropriate countermeasures' within the meaning of Article 4.10 of the SCM Agreement.[293] Brazil challenges the conformity of this proposal with Article 22 of the DSU and Article 4.10 of the SCM Agreement. It is therefore up to Brazil to submit evidence sufficient to establish a *prima facie* case or 'presumption' that the countermeasures that Canada proposes to take are not 'appropriate'. Once Brazil has done so, it is for Canada to submit evidence sufficient to rebut that 'presumption'. Should the evidence remain in equipoise on a particular claim, the Arbitrators would conclude that the claim has not been established. Should all evidence remain in equipoise, Brazil, as the party bearing the original burden of proof, would lose the case.
>
> An issue to be distinguished from the question of who bears the burden of proof is that of the duty that rests on both parties to produce evidence and to collaborate in presenting evidence to the Arbitrators. This is why, even though Brazil bears the original burden of proof, we expected Canada to come forward with evidence explaining why its proposal constitutes appropriate countermeasures and we requested it to submit a 'methodology paper' describing how it arrived at the level of countermeasures it proposes.[294]"[295]

(d) Treatment of data supplied by private entities

196. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators evaluated the trustworthiness of data supplied by Brazil, and stated that they "could not treat statements from that company as [they] would have if [the statements] had originated from a subject of international law":

> "A related problem faced by the Arbitrators in this case was that, in many instances, the original data necessary for the calculations or assessments was solely in the hands of Brazil. When this information originated in the Brazilian government, we assumed good faith and accepted the information and the supporting evidence provided by Brazil to the extent Canada also accepted it or did not provide sufficient evidence to put in doubt the accuracy of Brazil's statements and/or evidence.
>
> However, since this case relates to subsidies granted for the purchase of aircraft produced by the Brazilian aircraft manufacturer, Embraer, a large number of data essential for the resolution of our task is only available to that company. We assumed that Embraer was independent from the Brazilian government and, for that reason, we could not treat statements from that company as we would have if they had originated from a subject of international law.[296] When Brazil only provided statements regarding information available solely to Embraer, we

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[290] (*footnote original*) On the notion of "difference", see Report of the Appellate Body on *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico ("Guatemala – Cement I")*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, paras. 65 and 66.

[291] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 2.6.

[292] (*footnote original*) See also how this issue is addressed in the decisions by the arbitrators in *EC – Hormones (Article 22.6 – EC)*, paras. 8 to 11.

[293] (*footnote original*) See WT/DS/46/16.

[294] (*footnote original*) This approach is similar to those followed in the arbitrators' decisions in *EC – Bananas (1999)* and *EC – Hormones (Article 22.6 – EC)*.

[295] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 2.8–2.9.

[296] (*footnote original*) See preceding paragraph, where we apply a presumption of good faith to statements and evidence originating in subjects of international law (on production and appraisal of evidence, see, *inter alia*, International Court of Justice ("ICJ") judgement of 9 April 1949 *Corfu Channel Case*, ICJ Reports 1949, p. 32; ICJ judgement of 11 September 1992 *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras, Nicaragua intervening)*, ICJ Reports 1992, p. 399, para. 63; ICJ judgement on merits *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, p. 40, para. 60).

requested that Brazil support those statements with materials usually regarded as evidence, such as articles or statements reproduced in the specialized press, company annual reports or any other certified information originating in Embraer or other reliable sources. When Brazil was not in a position to provide documentary evidence, we requested a detailed explanation of the reasons why such evidence was not available and expressed our willingness to consider written declarations from authorised Embraer officials, if duly certified. We then weighed this evidence against the evidence submitted by Canada."[297]

(e) Relationship with other WTO Agreements

(i) DSU

Article 22.4

197. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators addressed Canada's request for authorization to take "appropriate countermeasures" under Article 4.10 of the *SCM Agreement*. Referring to Article 22.4 of the *DSU*, Brazil argued that the "countermeasures" must be equivalent to the level of nullification or impairment (which argument was rejected by the Arbitrators as referenced in paragraph 178 above). The Arbitrators explained the relationship between Article 4.11 of the *SCM Agreement* and Article 22.4 of the *DSU* by characterizing Article 4.11 of the *SCM Agreement* as "special or additional rules" and held that the concept of "nullification or impairment" was absent from Articles 3 and 4 of the SCM Agreement and that the principle of effectiveness would be counteracted if the "appropriate countermeasures" had to be necessarily limited to the level of nullification or impairment:

> "We read the provisions of Article 4.11 of the SCM Agreement as special or additional rules. In accordance with the reasoning of the Appellate Body in *Guatemala – Cement*,[298] we must read the provisions of the DSU and the special or additional rules in the SCM Agreement so as to give meaning to all of them, except if there is a conflict or a difference. While we agree that in practice there may be situations where countermeasures equivalent to the level of nullification of impairment will be appropriate, we recall that the concept of nullification or impairment is absent from Articles 3 and 4 of the SCM Agreement. In that framework, there is no legal obligation that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment.
>
> On the contrary, requiring that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment would be contrary to the principle of effectiveness by significantly limiting the efficacy of countermeasures in the case of prohibited subsidies. Indeed, as shown in the present case,[299] other countermeasures than suspension of concessions or obligations may not always be feasible because of their potential effects on other Members. This would be the case of a counter-subsidy granted in a sector where other Members than the parties compete with the products of the parties. In such a case, the Member taking the countermeasure may not be in a position to induce compliance.
>
> We are mindful that our interpretation may, at a first glance, seem to cause some risk of disproportionality in case of multiple complainants. However, in such a case, the arbitrator could allocate the amount of appropriate countermeasures among the complainants in proportion to their trade in the product concerned. The 'inducing' effect would most probably be very similar."[300]

Article 22.6 and 22.7

198. With respect to the relationship with Article 22.6 of the *DSU*, see paragraphs 192–194 above. For more information on the suspension of concessions under the *DSU*, see Section XXII.B of the Chapter on the *DSU*.

PART III: ACTIONABLE SUBSIDIES

V. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5
Adverse Effects

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:

(a) injury to the domestic industry of another Member;[11]

(*footnote original*) [11] The term "injury to the domestic industry" is used here in the same sense as it is used in Part V.

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994, in particular the benefits of concessions bound under Article II of GATT 1994;[12]

(*footnote original*) [12] The term "nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

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[297] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 2.10–2.11.

[298] (*footnote original*) Appellate Body on *Guatemala – Cement I*, para. 65.

[299] (*footnote original*) Canada mentioned that it could have applied a counter-subsidy but refrained from doing so for a number of reasons.

[300] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.57–3.59.

(c) serious prejudice to the interests of another Member.[13]

(*footnote original*) [13] The term "serious prejudice to the interests of another Member" is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. General

199. In *US – Offset Act (Byrd Amendment)*, the Panel explained that "a measure constitutes an actionable subsidy if it is a subsidy, if it is "specific", and if its use causes "adverse effects".[301]

2. Article 5(b)

(a) "nullification or impairment"

(i) General

200. In *US – Offset Act (Byrd Amendment)*, with respect to "adverse effects", Mexico made arguments of both violation and non-violation nullification or impairment. In relation to claims of violation nullification or impairment, the Panel stated that any presumption arising under Article 3.8 of the *DSU* stemming from these violations would relate to nullification or impairment caused "*by the violation at issue*" (emphasis in original). The Panel rejected the argument by Mexico on the grounds that, for the purpose of Article 5(b) of the *SCM Agreement*, Mexico must demonstrate that "*the use of a subsidy*" caused nullification or impairment (emphasis in original).[302]

(ii) Application of a measure

201. In *US – Offset Act (Byrd Amendment)*, the Panel clarified that the drafters of Article 5 of the *SCM Agreement* had envisaged the possibility of nullification or impairment resulting from the "use" of a subsidy. Furthermore, the Panel noted that Article 7.1 of the *SCM Agreement* provides useful context by clarifying that the "use" of a subsidy is to be equated with the grant or maintaining of a subsidy. In this sense, the Panel stated "[e]ven if disbursements have not been granted under the [Offset Act], the maintenance of the [offset programme] constitutes 'application' of a measure for the purpose of a 'non-violation' nullification or impairment claim under SCM Article 5(b)".[303] The Panel went on to find that the existence of a subsidy programme, and the potential use of that subsidy programme, is sufficient for that programme to "apply".[304]

(iii) Existence of a benefit

202. The Panel on *US – Offset Act (Byrd Amendment)* explained that there was no reason why the Panel should not find that the requirement of existence of a benefit had been met, since the United States had not disputed that benefits resulting from the negotiated tariff concessions accrued to Mexico under Articles II and VI of the *GATT 1994*.[305]

(iv) Nullification or impairment of a benefit

203. The Panel on *US – Offset Act (Byrd Amendment)* recalled one adopted GATT panel report, namely *EEC – Oilseeds*, where the panel "considered that non-violation nullification or impairment would arise when the effect of a tariff concession is systematically offset or counteracted by a subsidy programme".[306] The Panel found the approach of the panel on *EEC – Oilseeds* to be reasonable.

3. Relationship with other Articles

(a) Article 6.3(c)

204. The Panel on *Indonesia – Autos* determined the existence of serious prejudice within the meaning of Article 5(c) upon finding a significant price undercutting under Article 6.3(c):

> "We note that under Article 6.3(c) serious prejudice may arise only where the price undercutting is 'significant.' Although the term 'significant' is not defined, the inclusion of this qualifier in Article 6.3(c) presumably was intended to ensure that margins of undercutting so small that they could not meaningfully affect suppliers of the imported product whose price was being undercut are not considered to give rise to serious prejudice. This clearly is not an issue here. To the contrary, it is our view that, even taking into account the possible effects of these physical differences on price comparability, the price undercutting by the Timor of the Optima and 306 cannot reasonably be deemed to be other than significant.
>
> For the foregoing reasons, we find that the effect of the subsidies to the Timor pursuant to the National Car programme is to cause serious prejudice to the interests of the European Communities in the sense of Article 5(c) of the SCM Agreement through a significant price undercutting as compared with the price of EC-origin like products in the Indonesian market."[307]

[301] Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.106.
[302] Panel Report on *US – Offset Act (Byrd Amendment)*, paras. 7.118–119.
[303] Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.122.
[304] Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.123.
[305] Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.124.
[306] Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.127.
[307] Panel Report on *Indonesia – Autos*, paras. 14.254–14.255.

(b) Article 7.1

205. See paragraph 201 above.

VI. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6
Serious Prejudice

6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of:

(a) the total ad valorem subsidization[14] of a product exceeding 5 per cent;[15]

(*footnote original*) [14] The total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV.
(*footnote original*) [15] Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft.

(b) subsidies to cover operating losses sustained by an industry;

(c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;

(d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.[16]

(*footnote original*) [16] Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph.

6.2 Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 3.

6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

(a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;

(c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;

(d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity[17] as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

(*footnote original*) [17] Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.

6.4 For the purpose of paragraph 3(b), the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). "Change in relative shares of the market" shall include any of the following situations: *(a)* there is an increase in the market share of the subsidized product; *(b)* the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; *(c)* the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.

6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist[18] during the relevant period:

(*footnote original*) [18] The fact that certain circumstances are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either GATT 1994 or this Agreement. These circumstances must not be isolated, sporadic or otherwise insignificant.

(a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;

(b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;

(c) natural disasters, strikes, transport disruptions or other *force majeure* substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;

(d) existence of arrangements limiting exports from the complaining Member;

(e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, *inter alia*, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets);

(f) failure to conform to standards and other regulatory requirements in the importing country.

6.8 In the absence of circumstances referred to in paragraph 7, the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel, including information submitted in accordance with the provisions of Annex V.

6.9 This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

1. Article 6.1

(a) Expiry of Article 6.1

206. This provision has lapsed pursuant to Article 31. In this respect, see paragraph 391 below.

(b) Relationship with other Articles

(i) Article 27

207. With regard to the relationship between Article 6.1 and Article 27, see paragraph 382 below.

(ii) Article 31

208. With regard to the relationship between Article 6.1 and Article 31, see paragraph 391 below.

2. Article 6.3

(a) "The effect of the subsidy"

209. The Panel on *Indonesia – Autos* rejected the argument that it was precluded from considering the effects of a subsidy programme which had expired when analysing whether the subsidies caused serious prejudice to the interests of the complainants.[308] The Panel stated:

> "[W]e must assess the 'effect of the subsidies' on the interests of another Member to determine whether serious prejudice exists, not the effect of 'subsidy programmers'. We note that at any given moment in time some payments of subsidies have occurred in the past while others have yet to occur in the future. If we were to consider that past subsidies were not relevant to our serious prejudice analysis as they were 'expired measures' while future measures could not yet have caused actual serious prejudice, it is hard to imagine any situation where a panel would be able to determine the existence of actual serious prejudice."[309]

(b) "like product"

210. See paragraphs 270–274 below. With respect to the burden of proof regarding the determination of "like product", see paragraph 382 below.

3. Article 6.3(a)

(a) Standing as claimant

211. The Panel on *Indonesia – Autos* considered whether "the United States may claim that it has suffered serious prejudice as a result of displacement/impedance or of price undercutting with respect to a product which does not originate in the United States solely on the basis that the producer of that product is a 'US company'".[310] The Panel drew a distinction between United States products and United States companies/producers and rejected the claim that the nationality of producers is relevant to establishing the existence of serious prejudice:

> "In our view, the text of Article XVI [of the GATT 1994] and of Part III of the SCM Agreement make clear that serious prejudice may arise where a Member's trade interests have been affected by subsidization. We see nothing in Article XVI or in Part III that would suggest that the United States may claim that it has suffered

[308] With respect to the treatment of expired measures in general, see Chapter on the *DSU*, Section VII.B.2.
[309] Panel Report on *Indonesia – Autos*, para. 14.206.
[310] Panel Report on *Indonesia – Autos*, para. 14.198.

adverse effects merely because it believes that the interests of US *companies* have been harmed where US *products* are not involved. The United States has cited no language in Article XVI:1 or Part III suggesting that the nationality of producers is relevant to establishing the existence of serious prejudice. Accordingly, given that serious prejudice may only arise in the case at hand where there is 'displacement or impedance of imports of a like product from another Member' or price undercutting 'as compared with the like product of another Member', we do not consider that the United States can convert such effects on products from the European Communities into serious prejudice to US interests merely by alleging that the products affected were produced by US companies."[311] (emphasis original)

(b) Demonstration of displacement or impedance

212. The Panel on *Indonesia – Autos* explored the meaning of the terms "displacement" and "impedance" and considered that:

> "[A] complainant need not demonstrate a decline in sales in order to demonstrate displacement or impedance. This is inherent in the ordinary meaning of those terms. Thus, displacement relates to a situation where sales volume has declined, while impedance relates to a situation where sales which otherwise would have occurred were impeded. . . ."[312]

(c) Relationship with other Articles

(i) Article 6.4

213. The Panel on *Indonesia – Autos* addressed the argument that "there is no reason why the type of analysis set forth in Article 6.4 should not be appropriate also in the case of claims of displacement and impedance of imports from the market of the subsidizing country".[313] The Panel rejected this argument, but nevertheless agreed that market share data may be "highly relevant" for an analysis pursuant to Article 6.3(a):

> "Article 6.4 is not relevant in this case. The drafting of the provision is unambiguous, and the specific reference to Article 6.3(b) creates a strong inference that an Article 6.4 type of analysis is *not* appropriate in the case of Article 6.3(a) claims. The complainants have identified nothing in the context of the provision or the object and purpose of the SCM Agreement that would suggest a different conclusion.
>
> Our conclusion does not of course mean that market share data are irrelevant to the analysis of displacement or impedance into a subsidizing Member's market. To the contrary, market share data may be highly relevant evidence for the analysis of such a claim. However, such data are no more than evidence of displacement and impedance caused by subsidization, and a demonstration that the market share of the subsidized product in the subsidizing Member has increased does not *ipso facto* satisfy the requirements of Article 6.3(a)."[314]

4. Article 6.3(c)

(a) Standing as claimant

214. With respect to what interest is necessary for standing as claimants under Article 6.3(c), see paragraph 211 above.

(b) "significant price undercutting"

215. The Panel on *Indonesia – Autos* stated the following on the use of the term 'significant' in connection with the term "price undercutting" in Article 6.3(c): "Although the term 'significant' is not defined, the inclusion of this qualifier in Article 6.3(c) presumably was intended to ensure that margins of undercutting so small that they could not meaningfully affect suppliers of the imported product whose price was being undercut are not considered to give rise to serious prejudice."[315]

(c) Relationship with other Articles

216. With respect to the relationship with Article 5(c), see paragraph 204 above.

5. Article 6.7

(a) "imports from the complaining Member" and "exports from the complaining Member"

217. The Panel on *Indonesia – Autos* addressed the question whether the *SCM Agreement* allows a Member to bring a claim that *another* Member has "suffered serious prejudice as a result of subsidization".[316] The Panel stated the following:

> "It is clear from Article 7.2 that the dispute settlement procedures set forth in Article 7 may only be invoked by a Member where that Member believes that it has itself suffered serious prejudice as a result of subsidization.
>
> Our view on these issues is confirmed by Article 6.4, which allows a subsidising Member to raise a defence to a displacement/impedance claim where "imports from the complaining Member" or "exports from the complaining Member" are affected by such factors as export prohibitions or restrictions, natural disasters, and arrangements limiting exports. These provisions or restrictions of Article 6.7 assume that the product subject to a claim of serious prejudice arising from displacement or impedance originates in the complaining Member."[317]

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[311] Panel Report on *Indonesia – Autos*, para. 14.201.
[312] Panel Report on *Indonesia – Autos*, para. 14.218.
[313] Panel Report on *Indonesia – Autos*, para. 14.208.
[314] Panel Report on *Indonesia – Autos*, paras. 14.210–14.211.
[315] Panel Report on *Indonesia – Autos*, para. 14.254.
[316] Panel Report on *Indonesia – Autos*, para. 14.202.
[317] Panel Report on *Indonesia – Autos*, paras. 14.202–14.203.

VII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7
Remedies

7.1 Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.

7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to (a) the existence and nature of the subsidy in question, and (b) the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice[19] caused to the interests of the Member requesting consultations.

(*footnote original*) [19] In the event that the request relates to a subsidy deemed to result in serious prejudice in terms of paragraph 1 of Article 6, the available evidence of serious prejudice may be limited to the available evidence as to whether the conditions of paragraph 1 of Article 6 have been met or not.

7.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

7.4 If consultations do not result in a mutually agreed solution within 60 days,[20] any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

(*footnote original*) [20] Any time-periods mentioned in this Article may be extended by mutual agreement.

7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the panel's terms of reference.

7.6 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB[21] unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

(*footnote original*) [21] If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[22]

(*footnote original*) [22] If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

7.9 In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

7.10 In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. Article 7.8

(a) General

218. The Panel on *Indonesia – Autos* referred in its conclusions and recommendations to the remedy in Article 7.8 as follows:

> "With respect to the conclusion of serious prejudice to the interests of the European Communities, Article 7.8 of the SCM Agreement provides that, '[W]here a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining the subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.'"[318]

[318] Panel Report on *Indonesia – Autos*, para. 15.3.

(b) Relationship with other Articles

(i) Article 4.7

219. In the context of its finding that the phrase "withdraw the subsidy" under Article 4.7 referred to retroactive remedies (repayment), the Panel on *Australia – Automotive Leather II (Article 21.5 – US)* considered Article 7.8 and the phrase "shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy" therein. See paragraph 161 above.

2. Article 7.9

(a) "commensurate with the degree and nature of the adverse effects determined to exist"

220. In the context of determining the meaning of the term "appropriate countermeasures" under Article 4.10 of the *SCM Agreement*, the Arbitrators in *Brazil – Aircraft (Article 22.6 – Brazil)* referred to Article 7.9 and the phrase "commensurate with the degree and nature of the adverse effects determined to exist". See paragraph 182 above.

221. The Arbitrators in *US – FSC (Article 22.6 – US)* also referred to this phrase in Article 7.9 (as well as to Article 9) as context for the interpretation of Article 4.10 and considered that "the explicit precision of these indications clearly highlights the lack of any analogous explicit textual indication in Article 4.10 and contrasts with the broader and more general test of 'appropriateness' found in Articles 4.10 and 4.11". For the Arbitrators, such a difference in the text "must be given a meaning".[319] See also paragraph 184 above.

(b) Relationship with other Articles

222. With respect to the relationship with Article 4.10, see paragraph 184 above.

PART IV: NON-ACTIONABLE SUBSIDIES

VIII. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8
Identification of Non-Actionable Subsidies

8.1 The following subsidies shall be considered as non-actionable:[23]

(*footnote original*) [23] It is recognized that government assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non-actionable treatment under the provisions of this Article does not in itself restrict the ability of Members to provide such assistance.

(a) subsidies which are not specific within the meaning of Article 2;

(b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.

8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non-actionable:

(a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if:[24,25,26]

(*footnote original*) [24] Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the provisions of this subparagraph do not apply to that product.
(*footnote original*) [25] Not later than 18 months after the date of entry into force of the WTO Agreement, the Committee on Subsidies and Countervailing Measures provided for in Article 24 (referred to in this Agreement as "the Committee") shall review the operation of the provisions of subparagraph 2(a) with a view to making all necessary modifications to improve the operation of these provisions. In its consideration of possible modifications, the Committee shall carefully review the definitions of the categories set forth in this subparagraph in the light of the experience of Members in the operation of research programmes and the work in other relevant international institutions.
(*footnote original*) [26] The provisions of this Agreement do not apply to fundamental research activities independently conducted by higher education or research establishments. The term "fundamental research" means an enlargement of general scientific and technical knowledge not linked to industrial or commercial objectives.

the assistance covers[27] not more than 75 per cent of the costs of industrial research[28] or 50 per cent of the costs of pre-competitive development activity;[29,30]

(*footnote original*) [27] The allowable levels of non-actionable assistance referred to in this subparagraph shall be established by reference to the total eligible costs incurred over the duration of an individual project.
(*footnote original*) [28] The term "industrial research" means planned search or critical investigation aimed at discovery of new knowledge, with the objective that such knowledge may be useful in developing new products, processes or services, or in bringing about a significant improvement to existing products, processes or services.
(*footnote original*) [29] The term "pre-competitive development activity" means the translation of industrial research findings into a plan, blueprint or design for new, modified or improved products, processes or services whether intended for sale or use, including the creation of a first prototype which would not be capable of commercial use. It may further include the conceptual formulation and design of products, processes or services alternatives and initial demonstration or pilot projects, provided that these same projects cannot be converted or used for industrial application or commercial exploitation. It does not

[319] Panel Report on *US – FSC (Article 22.6 – US)*, paras. 5.32–5.34.

include routine or periodic alterations to existing products, production lines, manufacturing processes, services, and other ongoing operations even though those alterations may represent improvements.

(*footnote original*) [30] In the case of programmes which span industrial research and pre-competitive development activity, the allowable level of non-actionable assistance shall not exceed the simple average of the allowable levels of non-actionable assistance applicable to the above two categories, calculated on the basis of all eligible costs as set forth in items (i) to (v) of this subparagraph.

and provided that such assistance is limited exclusively to:

(i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);

(ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;

(iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc.;

(iv) additional overhead costs incurred directly as a result of the research activity;

(v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

(b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development[31] and non-specific (within the meaning of Article 2) within eligible regions provided that:

(*footnote original*) [31] A "general framework of regional development" means that regional subsidy programmes are part of an internally consistent and generally applicable regional development policy and that regional development subsidies are not granted in isolated geographical points having no, or virtually no, influence on the development of a region.

(i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria,[32] indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;

(*footnote original*) [32] "Neutral and objective criteria" means criteria which do not favour certain regions beyond what is appropriate for the elimination or reduction of regional disparities within the framework of the regional development policy. In this regard, regional subsidy programmes shall include ceilings on the amount of assistance which can be granted to each subsidized project. Such ceilings must be differentiated according to the different levels of development of assisted regions and must be expressed in terms of investment costs or cost of job creation. Within such ceilings, the distribution of assistance shall be sufficiently broad and even to avoid the predominant use of a subsidy by, or the granting of disproportionately large amounts of subsidy to, certain enterprises as provided for in Article 2.

(iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:

- one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 per cent of the average for the territory concerned;
- unemployment rate, which must be at least 110 per cent of the average for the territory concerned;

as measured over a three-year period; such measurement, however, may be a composite one and may include other factors.

(c) assistance to promote adaptation of existing facilities[33] to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

(*footnote original*) [33] The term "existing facilities" means facilities which have been in operation for at least two years at the time when new environmental requirements are imposed.

(i) is a one-time non-recurring measure; and

(ii) is limited to 20 per cent of the cost of adaptation; and

(iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and

(iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

(v) is available to all firms which can adopt the new equipment and/or production processes.

8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with

the provisions of Part VII. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.[34]

(*footnote original*) [34] It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 and, where necessary, may require additional information from the subsidizing Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a view to determining whether the conditions and criteria laid down in paragraph 2 have not been met. The procedure provided for in this paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least two months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates referred to in paragraph 3.

8.5 Upon the request of a Member, the determination by the Committee referred to in paragraph 4, or a failure by the Committee to make such a determination, as well as the violation, in individual cases, of the conditions set out in a notified programme, shall be submitted to binding arbitration. The arbitration body shall present its conclusions to the Members within 120 days from the date when the matter was referred to the arbitration body. Except as otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

1. General

(a) Expiry of Article 8

223. This provision has lapsed pursuant to Article 31. In this regard, see paragraph 391 below.

(b) The Doha Round

224. Paragraph 10.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns[320] provides that the Doha Ministerial Conference take note of the proposal to treat certain measures by developing countries with a view to achieving legitimate development goals as non-actionable subsidies:

> "Takes note of the proposal to treat measures implemented by developing countries with a view to achieving legitimate development goals, such as regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production as non-actionable subsidies, and agrees that this issue be addressed in accordance with paragraph 13 below.[321] During the course of the negotiations, Members are urged to exercise due restraint with respect to challenging such measures."

2. Article 8.2

(a) Relationship with other Articles

(i) Article 8.3

225. Referring to the Format for Notifications under Article 8.3 of the Agreement on Subsidies and Countervailing Measures, issued by the SCM Committee,[322] the SCM Committee stated that "With regard to the questions in this standard format on arrangements which may exist for monitoring, auditing and evaluation of assistance under a notified programme, it should be stressed that this standard format does not add to or detract from the relevant legal requirements in Article 8.2 of the SCM Agreement."[323]

3. Article 8.3

(a) "notified"

226. At its meeting of 22 February 1995, the Committee on Subsidies and Countervailing Measures adopted a Format for Notifications under Article 8.3 of the Agreement on Subsidies and Countervailing Measures,[324] to "assist WTO Members in making notifications under the first sentence of Article 8.3".[325]

(b) "updates of . . . notifications"

227. At its meeting of 23 October 1997, the Committee on Subsidies and Countervailing Measures adopted a Format for Updates of Notifications under Article 8.3

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[320] WT/MIN(01)/17.

[321] (*footnote original*) Paragraph 13 of the Doha Ministerial Decision on Implementation reads as follows:

> "13. **Outstanding Implementation Issues** Agrees that outstanding implementation issues be addressed in accordance with paragraph 12 of the Ministerial Declaration (WT/MIN(01)/DEC/1)."

[322] G/SCM/14.

[323] G/SCM/14, para. 3.

[324] G/SCM/14.

[325] G/SCM/14, para. 1.

of the Agreement on Subsidies and Countervailing Measures,[326] which sets out the information which should be provided for each programme notified under Article 8.3.[327]

(c) Relationship with other Articles

228. With respect to the relationship with Article 8.2, see paragraph 225 above.

4. Article 8.5

(a) Procedures for arbitration

229. At its meeting of 2 June 1998, the SCM Committee adopted procedures for arbitration under Article 8.5 "with the aim of facilitating the operation of arbitration proceedings and enhancing transparency and predictability for all Members with respect to the Application of Article 8 of the Agreement".[328]

5. Relationship with other Articles

230. With respect to the relationship with Article 31, see paragraph 391 below.

IX. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9
Consultations and Authorized Remedies

9.1 If, in the course of implementation of a programme referred to in paragraph 2 of Article 8, notwithstanding the fact that the programme is consistent with the criteria laid down in that paragraph, a Member has reasons to believe that this programme has resulted in serious adverse effects to the domestic industry of that Member, such as to cause damage which would be difficult to repair, such Member may request consultations with the Member granting or maintaining the subsidy.

9.2 Upon request for consultations under paragraph 1, the Member granting or maintaining the subsidy programme in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

9.3 If no mutually acceptable solution has been reached in consultations under paragraph 2 within 60 days of the request for such consultations, the requesting Member may refer the matter to the Committee.

9.4 Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of the effects referred to in paragraph 1. If the Committee determines that such effects exist, it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects. The Committee shall present its conclusions within 120 days from the date when the matter is referred to it under paragraph 3. In the event the recommendation is not followed within six months, the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

1. Expiry of Article 9

231. This provision has lapsed pursuant to Article 31. See paragraph 391 below.

2. Relationship with other Articles

232. With respect to the relationship with Article 31, see paragraph 391 below.

PART V: COUNTERVAILING MEASURES

X. ARTICLE 10

A. TEXT OF ARTICLE 10

Article 10
Application of Article VI of GATT 1994[35]

(*footnote original*) [35] The provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available. The provisions of Parts III and V shall not be invoked regarding measures considered non-actionable in accordance with the provisions of Part IV. However, measures referred to in paragraph 1(a) of Article 8 may be investigated in order to determine whether or not they are specific within the meaning of Article 2. In addition, in the case of a subsidy referred to in paragraph 2 of Article 8 conferred pursuant to a programme which has not been notified in accordance with paragraph 3 of Article 8, the provisions of Part III or V may be invoked, but such subsidy shall be treated as non-actionable if it is found to conform to the standards set forth in paragraph 2 of Article 8.

Members shall take all necessary steps to ensure that the imposition of a countervailing duty[36] on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated[37] and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

[326] G/SCM/13.
[327] G/SCM/13, para. 1.
[328] Procedures for Arbitration under Article 8.5 of the *SCM Agreement*, G/SCM/19, para. 1.

(*footnote original*) [36] The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.
(*footnote original*) [37] The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

B. INTERPRETATION AND APPLICATION OF ARTICLE 10

1. The Doha review mandate

233. Paragraph 10.3 of the Doha Ministerial Decision on Implementation Related Issues and Concerns[329] mandates the SCM Committee to continue the review of the countervailing duty provision of the *SCM Agreement* and requests that the Committee report to the General Council by 31 July 2002:

> "Agrees that the Committee on Subsidies and Countervailing Measures shall continue its review of the provisions of the Agreement on Subsidies and Countervailing Measures regarding countervailing duty investigations and report to the General Council by 31 July 2002."

234. As regards the above requirement to report to the General Council, the Chairman of the SCM Committee submitted a report[330] on 30 July 2002. The General Council took note of the report at its meeting on 8 and 31 July 2002.[331]

2. Footnote 36

(a) "offsetting"

235. Discussing the premise that "no countervailing duty may be imposed absent (countervailable) subsidization",[332] the Panel on *US – Lead and Bismuth II* considered that this premise "underlies the very purpose of the countervailing measures envisaged by Part V of the SCM Agreement".[333] The Panel continued with the statement that "footnote 36 to Article 10 does not envisage the imposition of countervailing duties when no (countervailable) subsidy is found to exist, for in such cases there would be no (countervailable) subsidy to 'offset'".[334]

236. In *US – Countervailing Measures on Certain EC Products*, the Panel noted that Article VI:3 of the GATT and Article 10, footnote 36 of the *SCM Agreement* refer to countervailing duties as "special duties" levied for the purpose of "offsetting" a subsidy. Furthermore, the Panel found that countervailing duties are not designed to counteract all market distortions or resource misallocations which might have been caused by subsidization.[335]

(b) "any subsidy bestowed directly or indirectly upon the manufacture"

237. In *US – Softwood Lumber IV*, in examining the "pass-through" issue, the Appellate Body quoted *inter alia* Article 10, footnote 36 of the *SCM Agreement* as one of the relevant legal provisions. In the view of the Appellate Body, the claims under the *SCM Agreement* are "largely derivative" of those under Article VI:3 of the *GATT 1994*.[336] Furthermore, the Appellate Body stated that the phrase "subsid[ies] bestowed . . . *indirectly*", as used in Article VI:3 of the GATT 1994, implies "that financial contributions by the government to the production of *inputs* used in manufacturing products subject to an investigation are not, in principle, excluded from the amount of subsidies that may be offset through the imposition of countervailing duties on the *processed product*".[337] Moreover, the Appellate Body stated:

> "In our view, it would not be possible to determine whether countervailing duties levied on the processed product are *in excess* of the amount of the total subsidy accruing to that product, without establishing whether, and in what amount, subsidies bestowed on the producer of the input flowed through, downstream, to the producer of the product processed from that input. Because Article VI:3 permits *offsetting* through countervailing duties no more than the subsidy determined to have been granted . . . directly or indirectly, on the manufacture [or] production . . . of such *products*, it follows that Members must not impose duties to offset an amount of the input subsidy that has not passed through to the countervailed processed products. Rather, "[i]t is only the amount by which an indirect subsidy granted to producers of inputs flows through to the processed product, together with the amount of subsidy bestowed directly on producers of the processed product, that may be offset through the imposition of countervailing duties."[338]

3. Relationship with Article VI of the GATT 1994

238. In its analysis of the relationship between Article VI of the *GATT 1994* and the *SCM Agreement*, the Appellate Body on *Brazil – Desiccated Coconut* relied

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[329] WT/MIN(01)/17.
[330] G/SCM/45. See also relevant sections of prior Chairman's reports in G/SCM/36 and G/SCM/38.
[331] WT/GC/M/75, Item 16.
[332] Panel Report on *US – Lead and Bismuth II*, para. 6.56.
[333] Panel Report on *US – Lead and Bismuth II*, para. 6.56.
[334] Panel Report on *US – Lead and Bismuth II*, para. 6.56.
[335] Panel Report on *US – Countervailing Measures on Certain EC Products*, paras. 7.41–7.43.
[336] Appellate Body Report on *US – Softwood Lumber IV*, paras. 134–137.
[337] Appellate Body Report on *US – Softwood Lumber IV*, para. 140.
[338] Appellate Body Report on *US – Softwood Lumber IV*, para. 141.

primarily on Article 10 and stated that "From reading Article 10, it is clear that countervailing duties may only be imposed in accordance with Article VI of the *GATT 1994* and the *SCM Agreement*."[339] In this determination, the Appellate Body relied also on Articles 32.1 and 32.3 of the *SCM Agreement*; see paragraph 392 below for Article 32.1 and paragraphs 399–400 below for Article 32.3 below.

239. In *US – Softwood Lumber IV*, the Appellate Body concluded that "in cases where logs are sold by a harvester/sawmill in arm's-length transactions to unrelated sawmills, it may not be assumed that benefits attaching to the *logs* (non-subject products) automatically pass through to the *lumber* (the subject product) produced by the harvester/sawmill". Therefore, a pass-through analysis is required in such situations.[340] It was on this basis that the Appellate Body upheld the Panel's finding that the Department of Commerce's failure to conduct a pass-through analysis in respect of arm's length sales of *logs* by tenured harvesters/sawmills to unrelated sawmills is inconsistent with Articles 10 and 32.1 of the *SCM Agreement* and Article VI of the *GATT 1994*.[341]

240. Furthermore, in relation to the pass-through analysis in respect of arm's-length sales of *lumber* by tenured harvesters/sawmills to unrelated remanufacturers, the Appellate Body reversed the Panel's findings and stated that the Department of Commerce's failure to conduct such analysis is not inconsistent with Article 10 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*.[342]

241. For a further discussion on the relationship between Article VI of the *GATT 1994* and the *SCM Agreement*, see also paragraphs 412–414 below.

4. Relationship with other Articles

242. With respect to the relationship with Article 32.1 and 32.3, see paragraph 392 below.

XI. ARTICLE 11

A. TEXT OF ARTICLE 11

Article 11
Initiation and Subsequent Investigation

11.1 Except as provided in paragraph 6, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.

11.2 An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly subsidized product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) evidence with regard to the existence, amount and nature of the subsidy in question;

(iv) evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15.

11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[38] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[39]

[339] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 15.
[340] Appellate Body Report on *US – Softwood Lumber IV*, paras. 156–157.
[341] Appellate Body Report on *US – Softwood Lumber IV*, para. 159.
[342] Appellate Body Report on *US – Softwood Lumber IV*, para. 165.

The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

(*footnote original*) [38] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.
(*footnote original*) [39] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

11.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation.

11.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.

11.7 The evidence of both subsidy and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation and (b) thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

11.8 In cases where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the provisions of this Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the importing Member.

11.9 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is de minimis, or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be de minimis if the subsidy is less than 1 per cent ad valorem.

11.10 An investigation shall not hinder the procedures of customs clearance.

11.11 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

B. INTERPRETATION AND APPLICATION OF ARTICLE 11

1. Article 11.4

(a) "by or on behalf of the domestic industry"

(i) Requirement to make a determination

243. In *US – Offset Act (Byrd Amendment)*, the Appellate Body said that Article 11.4 of the *SCM Agreement* requires investigating authorities to "determine" whether an application for the initiation of an investigation has been "made by or on behalf of the domestic industry". If a sufficient number of domestic producers have "expressed support" and the thresholds set out in Article 11.4 of the *SCM Agreement* have therefore been met, the "application shall be considered to have been made by or on behalf of the domestic industry". In such circumstances, an investigation may be initiated. By contrast, there is no requirement that an investigating authority examine the motives of domestic producers that elect to support an investigation. Thus, an "examination" of the "degree" of support, and not the "nature" of support, is required. In other words, it is the "quantity", rather than the "quality", of support that is the issue.[343] The Appellate Body ruled:

> "A textual examination of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* reveals that those provisions contain no requirement that an investigating authority examine the motives of domestic producers that elect to support an investigation.[344] Nor do they contain any explicit requirement that support be based on certain motives, rather than on others. The use of the terms 'expressing support' and 'expressly supporting' clarify that Articles 5.4 and 11.4 require only that authorities 'determine' that support has been 'expressed' by a sufficient number of domestic producers. Thus, in our view, an 'examination' of the 'degree' of support, and not the 'nature' of support is required. In other words, it is the 'quantity', rather than the 'quality', of support that is the issue."[345]

244. In considering the "object and purpose" that had been identified by the Panel on *US – Offset Act (Byrd Amendment)*, the Appellate Body rejected the Panel's

[343] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, paras. 281–282.
[344] (*footnote original*) We note that the parties' submissions do not suggest otherwise.
[345] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 283.

analysis whereby it "appear[ed] to have found that the Offset Act defeat[ed] this 'object and purpose' because it implie[d] a return to the situation which existed before the introduction" of these provisions, in which an application could be "presumed" to have been made by or on behalf of the domestic industry. The Appellate Body, instead, said that Article 11.4 of the *SCM Agreement* does not permit investigating authorities to "presume" that industry support for an application exists. Rather, a sufficient number of domestic producers must have "expressed support" for an application. In this sense, the Appellate Body did not agree with the Panel that the Offset Act had "defeated" the object and purpose of Article 11.4 of the *SCM Agreement*, even if it were to have assumed that the Panel's understanding of the object and purpose was correct. In the same vein, the Appellate Body did not agree with the Panel that the Offset Act renders the quantitative threshold tests included in Article 11.4 of the *SCM Agreement* "irrelevant" and "completely meaningless" by saying:

> "[W]e do not agree with the Panel that the CDSOA has 'defeated' the object and purpose of Article 5.4 and 11.4, even if we were to assume that the Panel's understanding of such object and purpose was correct. For the same reason, we also do not agree with the Panel that the CDSOA renders the quantitative threshold test included in Articles 5.4 and 11.4 'irrelevant'[346] and 'completely meaningless'."[347, 348]

(ii) "evidence of industry-wide concern of injury"

245. In *US – Offset Act (Byrd Amendment)*, the Appellate Body said that while it agreed with the Panel that support expressed by domestic producers *may* be evidence of an "industry-wide concern of injury", it did not agree that such support on its own may be taken as evidence of such concern. The Appellate Body also noted that Article 11.4 of the *SCM Agreement* contains "no requirement for investigating authorities to examine the motives of producers that elect to support (or to oppose) an application".[349]

(iii) "the Act in effect mandates domestic producers to support the application"

246. The Appellate Body on *US – Offset Act (Byrd Amendment)* said that the Panel had no basis for stating that the Act in effect *mandates* domestic producers to support the application. That a measure provides an "incentive" to act in a certain way, said the Appellate Body, does not mean that it "in effect mandates" or "requires" a certain form of action.[350] It was on this basis that the Appellate Body reversed the Panel's finding that the Offset Act was inconsistent with Article 11.4 of the *SCM Agreement*.[351]

(b) "good faith"

247. In *US – Offset Act (Byrd Amendment)*, the Appellate Body considered the Panel's conclusion that the United States did not act in "good faith" with respect to its obligations under Article 11.4 of the *SCM Agreement*. The Appellate Body observed that Article 31(1) of the Vienna Convention on the Law of Treaties directs a treaty interpreter to interpret a treaty in *good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty's object and purpose. Furthermore, under Article 26 of the Vienna Convention on the Law of Treaties, performance of treaties is also governed by the principle of good faith. The Appellate Body has recognized the relevance of the principle of good faith in a number of cases, such as *US – Shrimp* and *US – Hot-Rolled Steel*. In *US – Offset Act (Byrd Amendment)*, the Appellate Body said that the evidence in the Panel record does not support the Panel's statement that the United States "may be regarded as not having acted in good faith". Therefore, the Appellate Body rejected the Panel's conclusion to this effect.[352] The Appellate Body said:

> "Nothing, however, in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion."[353]

(c) Relationship with Article 5.4 of the Anti-Dumping Agreement

248. In *US – Offset Act (Byrd Amendment)*, the Appellate Body, further to noting that both Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* are "identical" provisions, went on and analysed them together. See paragraph 243 above.

2. Article 11.9

(a) General

249. In *US – Carbon Steel*, the Panel noted that Article 11.9 sets out certain grounds for termination of countervailing duty proceedings. The Panel considered three

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[346] (*footnote original*) Panel Report, para. 7.63.
[347] (*footnote original*) *Ibid.*, para. 7.66.
[348] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 289.
[349] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 291.
[350] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 293.
[351] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 294.
[352] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 299.
[353] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 298.

bases for termination: (i) insufficient evidence of either subsidization or of injury; (ii) negligible volume of subsidized imports; and (iii) negligible injury. The Panel stated that these bases were grounded in the notion of, and sought to limit countervailing duty proceedings to cases of, injurious subsidization:

> "We note that Article 11.9 sets out certain other grounds for termination of CVD proceedings as well: (i) insufficient evidence of either subsidization or of injury; (ii) negligible volume of subsidized imports; and (iii) negligible injury. It would seem clear to us that all three bases for termination are fundamentally grounded in the notion of, and seek to limit CVD proceedings to cases of, injurious subsidization. We consider that all grounds for termination of CVD proceedings – including de minimis subsidization – link expressly with the purpose of CVDs and with the object and purpose of the SCM Agreement as set out in Article VI of the GATT 1994. The recurrent theme, in our view, is that CVD proceedings serve to counter injurious subsidization and therefore may not continue if injurious subsidization does not (or is not likely to) exist. The nature of the other bases set out in Article 11.9 for termination of CVD proceedings supports our view that the rationale for the de minimis standard is that relating to non-injurious subsidization."[354]

(b) Non-application of "de minimis" standard to sunset reviews

250. The Appellate Body on *US – Carbon Steel* reversed the Panel's finding that concluded that the 1 per cent *de minimis* standard contained in Article 11.9 of the *SCM Agreement* (which applies to countervailing duty investigations) could be "implied" in Article 21.3 of the *SCM Agreement* on sunset reviews of countervailing duty determinations. In doing so, the Appellate Body observed that all the subdivisions of Article 11 relate to the authorities' initiation and conduct of a countervailing duty *investigation*, and in particular reflect rules that are of "a mainly procedural and evidentiary nature".[355] The Appellate Body considered:

> "Although the terms of Article 11.9 are detailed as regards the obligations imposed on authorities thereunder, none of the words in Article 11.9 suggests that the *de minimis* standard that it contains is applicable *beyond* the investigation phase of a countervailing duty proceeding. In particular, Article 11.9 does *not* refer to Article 21.3, nor to reviews that may follow the imposition of a countervailing duty."[356]

251. The Appellate Body on *US – Carbon Steel* criticized on several grounds the Panel's approach to the *de minimis* standard in Article 21.3 and observed that it "centred" on the premise that the Article 11.9 *de minimis* standard represents a threshold below which subsidization is always non-injurious. While the Appellate Body recognized that it would be "unlikely" that very low levels of subsidization could be shown to cause "material" injury, it considered that the *SCM Agreement* does not *per se* preclude such a possibility.[357] In this regard, the Appellate Body noted:

> "[T]here is nothing in Article 11.9 to suggest that its *de minimis* standard was intended to create a special category of '*non-injurious*' subsidization, or that it reflects a concept that subsidization at less than a *de minimis* threshold *can never* cause injury. For us, the *de minimis* standard in Article 11.9 does no more than lay down an agreed rule that if *de minimis* subsidization is found to exist in an original investigation, authorities are obliged to terminate their investigation, with the result that no countervailing duty can be imposed in such cases."[358]

252. The Appellate Body on *US – Carbon Steel* then examined Article 11.9 and other paragraphs of Article 11 and found that most of these provisions set forth rules of "a mainly procedural and evidentiary nature" and that "none of the words in Article 11.9 suggests that the *de minimis* standard that it contains is applicable *beyond* the investigation phase of a countervailing duty proceeding. In particular, Article 11.9 does *not* refer to Article 21.3, nor to reviews that may follow the imposition of a countervailing duty."[359]

253. The Appellate Body on *US – Carbon Steel* noted in particular the absence of textual cross-referencing between Article 21.3 and Article 11.9 and observed that:

> "[T]he technique of cross-referencing is frequently used in the *SCM Agreement* . . . In the light of the many express cross-references made in the *SCM Agreement*, we attach significance to the absence of any textual link between Article 21.3 reviews and the *de minimis* standard set forth in Article 11.9. We consider this to be noteworthy, having regard to the fact that both the adoption of a *de minimis* standard for investigations, and the introduction of a "sunset" provision, were regarded as important additions to the Tokyo Round Subsidies Code for improving GATT disciplines on subsidies and countervailing duties."[360]

254. The Appellate Body on *US – Carbon Steel* drew attention to the reference to Article 12 in Article 21.4 and noted the lack of reference to Article 11, "as an indication that the drafters intended that the obligations in Article 12, but not those in Article 11, would apply to reviews carried out under Article 21.3".[361] The Appellate

[354] Panel Report on *US – Carbon Steel*, para. 8.63.
[355] Appellate Body Report on *US – Carbon Steel*, paras. 66–67.
[356] Appellate Body Report on *US – Carbon Steel*, para. 68.
[357] Appellate Body Report on *US – Carbon Steel*, paras. 77–82.
[358] Appellate Body Report on *US – Carbon Steel*, para. 83.
[359] Appellate Body Report on *US – Carbon Steel*, paras. 67–68.
[360] Appellate Body Report on *US – Carbon Steel*, para. 69.
[361] Appellate Body Report on *US – Carbon Steel*, para. 72.

Body found that "Part V of the Agreement is aimed at striking a balance between the right to impose countervailing duties to offset subsidization that is causing injury, and the obligations that Members must respect in order to do so. While we agree that Part V strikes such a balance, this alone does not assist us in the task of determining whether the 1 percent *de minimis* standard in Article 11.9 is intended to be applied in reviews carried out pursuant to Article 21.3."[362]

255. The Appellate Body on *US – Carbon Steel* further considered that the Panel's decision to "imply" the *de minimis* standard in Article 21.3 was based on the fact that the Article 11.9 *de minimis* standard draws a threshold below which subsidization is non-injurious. The Appellate Body considered the Panel's approach to be wrong and indicated, *inter alia*, that the Panel had not explained why it thought it appropriate to rely on a 1987 Note prepared by the Secretariat for the Uruguay Round Negotiating Group on Subsidies and Countervailing Measures.[363]

> "We observe, first, that in taking this approach, the Panel did not explain why it thought that it was appropriate to rely on the 1987 Note, but simply stated that "it is useful to consider the rationale for the application of a de minimis standard to investigations, as reflected in a Note by the Secretariat prepared in April 1987".[364] In any event, it seems to us that the 1987 Note does not support the Panel's conclusion that the "rationale" for the *de minimis* standard in Article 11.9 is that a *de minimis* subsidy is considered to be non-injurious. As the Panel itself recognized, the 1987 Note sets forth *two* rationales for *de minimis* standards, but does not suggest which of them is more compelling or preferable. Nor was any evidence adduced before the Panel suggesting that the negotiators of the *SCM Agreement* considered these or other rationales and expressed a preference for any of them. The Panel chose to base its interpretation of Article 11.9 on only one of these rationales. Even if it were appropriate to rely on the 1987 Note in interpreting the *SCM Agreement* in accordance with the rules of interpretation set forth in the *Vienna Convention*, selective reliance on such a document does not provide a proper basis for the conclusion reached by the Panel in this regard."[365]

256. Moreover, the Appellate Body in *US – Carbon Steel* considered that "Article 15 of the *SCM Agreement*, which deals with injury and how it is to be determined, refers, in its paragraph 3, to the *de minimis* standard in Article 11.9 only for the purpose of cumulation of imports. Moreover, footnote 45 to Article 15 indicates that, in the *SCM Agreement*, the term "injury" is, "unless otherwise specified", [to] be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of [Article 15]":[366]

> "In defining the concept of injury, footnote 45 does not make any reference to the amount of subsidy involved. The Appellate Body also highlighted that "Article 1 of the *SCM Agreement* sets out a definition of "subsidy" that applies to the whole of that Agreement. This definition includes *all* such subsidies, regardless of their amount. None of the provisions in the *SCM Agreement* that uses the term "subsidization" confines the meaning of "subsidization" to subsidization at a rate equal to or in excess of 1 percent *ad valorem*, or to any other *de minimis* threshold.[367] It is also worth noting that, under Part II of the *SCM Agreement*, prohibited subsidies are prohibited regardless of the amount of the subsidy.
>
> [I]n our view, the terms "subsidization" and "injury" each have an independent meaning in the *SCM Agreement* which is not derived by reference to the other. It is *unlikely* that very low levels of subsidization could be demonstrated to *cause* "material" injury. Yet such a possibility is not, *per se*, precluded by the Agreement itself, as injury is not defined in the *SCM Agreement* in relation to any specific level of subsidization."[368]

257. The Appellate Body on *US – Carbon Steel* then considered the negotiating history of the SCM Agreement and confirmed its view on the meaning of Article 21.3:

> "[R]ecourse to the negotiating history of the *SCM Agreement* tends to confirm our view as to the meaning of Article 21.3. We note that the two issues, namely the application of a specific *de minimis* standard in investigations, and the introduction of a time-bound limitation on the maintenance of countervailing duties, were considered to be highly important and were the subject of protracted negotiations. . . . The final texts of Article 11.9 and of Article 21.3 were the result of a carefully negotiated compromise that drew from a number of different proposals, reflecting divergent interests and views. We further note in this respect that none of the participants in this appeal pointed to any document indicating that the inclusion of a *de minimis* threshold was ever considered in the negotiations on sunset review provisions leading to the text of Article 21.3."[369]

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[362] Appellate Body Report on *US – Carbon Steel*, para. 74.
[363] Appellate Body Report on *US – Carbon Steel*, para. 77.
[364] (*footnote original*) Panel Report on *US – Carbon Steel*, para. 8.60. It is, for example, unclear to us whether the Panel considered the Note to form part of the preparatory work of the treaty and intended to use it as a supplementary means of treaty interpretation within the meaning of Article 32 of the *Vienna Convention*.
[365] Appellate Body Report on *US – Carbon Steel*, paras. 77–78.
[366] Appellate Body Report on *US – Carbon Steel*, para. 78.
[367] (*footnote original*) The term "subsidization" is used in the following Articles of the *SCM Agreement*: 6.1(a); 8.3; 11.9; 12.10; 15.3; 17.2; 18.2; 18.4; 19.4; 21.1; 21.2; 21.3; as well as in Annex IV.
[368] Appellate Body Report on *US – Carbon Steel*, paras. 80–81.
[369] Appellate Body Report on *US – Carbon Steel*, para. 90.

XII. ARTICLE 12

A. TEXT OF ARTICLE 12

Article 12
Evidence

12.1 Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply.[40] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

(*footnote original*) [40] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representatives of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

12.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested Member or interested party shall be made available promptly to other interested Members or interested parties participating in the investigation.

12.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 11 to the known exporters[41] and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the protection of confidential information, as provided for in paragraph 4.

(*footnote original*) [41] It being understood that where the number of exporters involved is particularly high, the full text of the application should instead be provided only to the authorities of the exporting Member or to the relevant trade association who then should forward copies to the exporters concerned.

12.2 Interested Members and interested parties also shall have the right, upon justification, to present information orally. Where such information is provided orally, the interested Members and interested parties subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation, due account having been given to the need to protect confidential information.

12.3 The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 4, and that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.

12.4 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[42]

(*footnote original*) [42] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

12.4.1 The authorities shall require interested Members or interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such Members or parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

12.4.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[43]

(*footnote original*) [43] Members agree that requests for confidentiality should not be arbitrarily rejected. Members further agree that the investigating authority may request the waiving

of confidentiality only regarding information relevant to the proceedings.

12.5 Except in circumstances provided for in paragraph 7, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.

12.6 The investigating authorities may carry out investigations in the territory of other Members as required, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if (a) the firm so agrees and (b) the Member in question is notified and does not object. The procedures set forth in Annex VI shall apply to investigations on the premises of a firm. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain and may make such results available to the applicants.

12.7 In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

12.8 The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

12.9 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and

(ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

12.10 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidization, injury and causality.

12.11 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

12.12 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 12

No jurisprudence or decision of a competent WTO body.

XIII. ARTICLE 13

A. TEXT OF ARTICLE 13

Article 13
Consultations

13.1 As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.

13.2 Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.[44]

(*footnote original*) [44] It is particularly important, in accordance with the provisions of this paragraph, that no affirmative determination whether preliminary or final be made without reasonable opportunity for consultations having been given. Such consultations may establish the basis for proceeding under the provisions of Part II, III or X.

13.3 Without prejudice to the obligation to afford reasonable opportunity for consultation, these provisions regarding consultations are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating the investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with the provisions of this Agreement.

13.4 The Member which intends to initiate any investigation or is conducting such an investigation shall permit, upon request, the Member or Members the

products of which are subject to such investigation access to non-confidential evidence, including the non-confidential summary of confidential data being used for initiating or conducting the investigation.

B. INTERPRETATION AND APPLICATION OF ARTICLE 13

No jurisprudence or decision of a competent WTO body.

XIV. ARTICLE 14

A. TEXT OF ARTICLE 14

Article 14
Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

(a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;

(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

B. INTERPRETATION AND APPLICATION OF ARTICLE 14

1. General

(a) "calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1"

(i) "benefit"

258. The Panel on *US – Lead and Bismuth II* rejected the argument that "benefit" should be determined by reference to the market practice prevailing at the time that each of the four types of "financial contribution [under Article 1.1] . . . is bestowed".[370] Instead, the Panel stated that "[n]othing in the text of Article 14 restricts the analysis envisaged in sub-paragraphs (a)–(d) . . . to the time at which the relevant 'financial contribution' was bestowed. . . . Article 14 does not . . . guide Members as to when th[e] calculation of 'benefit' should take place."[371]

259. As regards the concept of a benefit in Article 1.1, see paragraphs 45–72 above.

2. Article 14(c)

260. In *Canada – Aircraft Credits and Guarantees*, the Panel noted the relevance of Article 14(c) of the *SCM Agreement* for the purpose of establishing the existence of a "benefit" in the framework of equity guarantees. It noted that a "benefit" could arise if there was a difference between the cost of equity with and without an equity guarantee programme, to the extent that such difference was not covered by the fees charged by the programme for providing the equity guarantee. If it is established that the programme's fees were not market-based, the Panel said, such a cost difference would not be covered by the programme's fees:

> "[A]lthough Article 14(c) is expressly concerned with 'benefit' in the context of loan guarantees, there are perhaps sufficient similarities between the operation of loan guarantees and equity guarantees for it to be appropriate to rely on Article 14(c) for the purpose of establishing the existence of 'benefit' in the context of equity guarantees in certain circumstances. Thus, a 'benefit'

[370] Panel Report on *US – Lead and Bismuth II*, para. 6.74.
[371] Panel Report on *US – Lead and Bismuth II*, para. 6.74.

could arise if there is a difference between the cost of equity with and without an *IQ* equity guarantee, to the extent that such difference is not covered by the fees charged by *IQ* for providing the equity guarantee. In our opinion, it is safe to assume that such cost difference would not be covered by *IQ*'s fees if it is established that *IQ*'s fees are not market-based."[372]

261. Regarding the loan guarantee programmes under consideration, the Panel on *Canada – Aircraft Credits and Guarantees* also referred to the findings of the Panel and the Appellate Body in *Canada – Aircraft*[373] and considered that Article 14(c) of the *SCM Agreement* provided "contextual guidance for interpreting the term 'benefit' in the context of loan guarantees". On this basis, the Panel stated that there would be a "benefit" when the cost-saving for the company's customer for securing a loan with a loan guarantee programme is not offset by the programme's fees; for example, if it was established that the programme's fees were not market-based.[374] The Panel stated:

"In our view, and taking into account the contextual guidance afforded by Article 14(c), we consider that an *IQ* loan guarantee will confer a "benefit" when "there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by [*IQ*] and the amount that the firm would pay on a comparable commercial loan absent the [*IQ*] guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees."[375]

3. Article 14(d)

(a) General

262. In *US – Softwood Lumber III*, the Panel noted that "Article 14(d) is the relevant provision in the SCM Agreement for measuring the amount of benefit to the recipient by determining whether the government has provided a good or service, within the meaning of Article 1.1(a)(1)(iii) SCM Agreement, for less than adequate remuneration."[376]

263. Regarding Article 14(d) and the notion of benefit, the Panel on *US – Softwood Lumber III* further clarified that the prevailing market conditions for the good or service in question in the country of provision or purchase are determinant:

"Article 14(d) SCM Agreement thus provides that the provision of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than *adequate remuneration*. The adequacy of the remuneration charged by the government shall be determined '**in relation to the prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)**'. We find that the text of Article 14(d) SCM Agreement is very clear: the adequacy of remuneration is to be determined in relation to *prevailing market conditions* for the good or service in question *in the country of provision or purchase*."[377] (emphasis original)

264. The Panel on *US – Softwood Lumber III* further clarified the notion of prevailing market conditions in the country of provision of the goods under consideration in light of the language of Article 14(d). The Panel considered that the prevailing market conditions of Article 14(d) do not refer to a "theoretical market free of government interference". Rather, Article 14(d) provides that the "prevailing" market conditions in the country of provision of the goods are to form the basis for the comparison. For the Panel, the "ordinary meaning" of the term "prevailing" market conditions is the market conditions as "*as they exist*" or "*which are predominant*". (emphasis original)

"[T]here is no basis in the text of the SCM Agreement to conclude that the market conditions in the country of provision could mean anything else than the conditions prevailing in the market of that country, and not those prevailing in some other country. Article 14(d) SCM Agreement does not just refer to 'market conditions' in general, but explicitly to those prevailing 'in the country of provision' of the good. . . . the fact that a good may also be bought on a market outside the country of provision, does not, in our view, imply that the prices for those goods in that other country become part of the market conditions 'in the country of provision'. . . . In light of the clear language of Article 14(d) SCM Agreement, the 'availability' of the good, the 'conditions of purchase or sale', the 'price', are various aspects of the market conditions existing in the country of provision, and refer to the price for the good in that country, its availability in that country, the conditions of sale as they are prevailing in that country. In our view, the bracketed language in Article 14(d) SCM Agreement specifies what the market conditions referred to in the preceding sentence are, and, as is the case for the 'market conditions', they also all relate to the country of provision, and not some other country.

. . . The fact that in the different context of criteria for a similar measure to constitute a prohibited export subsidy there is an explicit requirement to look at commercially

[372] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.345.
[373] Appellate Body Report on *Canada – Aircraft*, para. 155, regarding the contextual relevance of Article 14 for the purpose of determining the existence of "benefit".
[374] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.397.
[375] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.398.
[376] Panel Report *US – Softwood Lumber III*, para. 7.43.
[377] Panel Report *US – Softwood Lumber III*, para. 7.44.

available world market prices, cannot mean that any reference to the 'market' in the SCM Agreement necessarily refers to the world market, or some portion thereof, particularly when the language in the provision clearly states otherwise. We note that the prices of *imported* goods in the market of provision can indeed form part of the prevailing market conditions in the sense of Article 14(d) SCM Agreement. But this is not the same as the price for those goods prevailing in the country of export. Nor does this imply that import prices necessarily can be the exclusive basis to determine prevailing market conditions.

In our view, however, the 'prevailing market conditions' of Article 14(d) SCM Agreement do not refer to a theoretical market free of government interference as the US seems to be suggesting. Article 14(d) SCM Agreement provides that the "prevailing" market conditions in the country of provision of the goods are to form the basis for the comparison. The ordinary meaning of the term "prevailing" market conditions is the market conditions '*as they exist*' or '*which are predominant*'. Considering that the only qualifier used to the "market conditions" in question is that they be 'prevailing', we are of the view that the text of Article 14(d) SCM Agreement does not in any way require the 'market' conditions to be those of a hypothetical undistorted or perfectly competitive market."[378]

265. The Panel concluded that the text of Article 14(d) does not require the "market" conditions to be those of a "hypothetical undistorted or perfectly competitive market":

"[T]he chapeau of Article 14 SCM Agreement clearly states that Article 14 SCM Agreement establishes guidelines for the calculation of "benefit" *to the recipient*.[379] . . . in order to calculate the benefit to the recipient, an authority is to compare the price the recipient paid the government with the prices prevailing in other market transactions. We do not consider that the goal of the examination of the benefit enjoyed by the recipient is to determine what the market price would have been absent the government's financial contribution . . . or to measure the trade distorting potential of the government's financial contribution. The text of Article 14 SCM Agreement does not require a general "*but for*" test to the prevailing market conditions. We are thus of the view that Article 14(d) SCM Agreement does not require that the authority construct a market price that could have existed but for the government's involvement, nor does it allow the authority to decline to use in-country prices because they may be affected by the government's financial contribution.

We consider that if the drafters of the SCM Agreement had wanted to exclude the use of market prices in case of price suppression due to the government's involvement, they would have explicitly provided so, but they have not. The opposite is the case. As we found above, when it comes to the market conditions, the only qualifier in the text of the Agreement is "prevailing". Thus, the market conditions are those that are actually existing in the country and are those faced by the recipient of the financial contribution. The reference prices are those that the producer would have had to pay if it had to buy the goods now provided by the government from a different and independent seller."[380]

266. The Panel on *US – Softwood Lumber III* clarified that the plain meaning of the text needed to be taken into account even in exceptional circumstances:

"[E]ven if in certain exceptional circumstances it may prove difficult in practice to apply Article 14(d) SCM Agreement, that would not justify reading words into the text of the Agreement that are not there or ignoring the plain meaning of the text. In our view, the text of Article 14 SCM Agreement leaves no choice to the investigating authority but to use as a benchmark the market, for the good (or service) in question, *as it exists* in the country of provision."[381]

267. The Panel on *US – Softwood Lumber III* noted moreover that with regard to domestic markets, each WTO Member has a different market with different qualitative requirements:

"[T]he domestic markets of the member countries of the WTO are not identical – nor are they expected to be – and there is nothing in the WTO or SCM Agreement indicating that, in order to qualify as such, markets must meet specific qualitative requirements . . . A contrary conclusion would lead to a result in which the importing country would have a very broad scope to choose another market, including its own, in order to determine benefit. Such a result would clearly distort the letter and purpose of Article 14(d) and vitiate its intended application."[382]

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[378] Panel Report *US – Softwood Lumber III*, paras. 7.46, 7.48 and 7.50.

[379] (*footnote original*) We note that the US agrees that "As stated in the chapeau to Article 14, and confirmed by the Appellate Body, the benefit for purposes of paragraph 1 of Article 1 is the benefit to the recipient." US Answers to Questions from the Panel after the First Meeting, para. 41. The Appellate Body in the *Canada – Measures Affecting the Export of Civilian Aircraft* case interpreted the term "benefit" in the SCM Agreement in the following manner:

> "157. We also believe that the word 'benefit', as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no 'benefit' to the recipient unless the 'financial contribution' *makes the recipient 'better off' than it would otherwise have been, absent that contribution.* In our view, the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' *on terms more favourable than those available to the recipient in the market*." (emphasis added) Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, para. 157.

[380] Panel Report *US – Softwood Lumber III*, paras. 7.51–7.52.

[381] Panel Report *US – Softwood Lumber III*, para. 7.53.

[382] Panel Report *US – Softwood Lumber III*, para. 7.58.

268. On this basis, the Panel found that the Member that had included its own data in the examination of the claimant's stumpage prices had acted inconsistently with Article 14 and 14(d) of the *SCM Agreement*.[383]

(b) Relationship with other Articles

269. With respect to the relationship with Article 1.1 and Article 1.1(b), see respectively paragraphs 79 and 73 above.

XV. ARTICLE 15

A. TEXT OF ARTICLE 15

Article 15
Determination of Injury[45]

(*footnote original*) [45] Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products[46] and (b) the consequent impact of these imports on the domestic producers of such products.

(*footnote original*) [46] Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

15.2 With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the amount of subsidization established in relation to the imports from each country is more than de minimis as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

15.4 The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

15.5 It must be demonstrated that the subsidized imports are, through the effects[47] of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, inter alia, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

(*footnote original*) [47] As set forth in paragraphs 2 and 4.

15.6 The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

15.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjec-

[383] Panel Report *US – Softwood Lumber III*, para. 7.59.

ture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, inter alia, such factors as:

(i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;

(ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;

(iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(v) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further subsidized exports are imminent and that, unless protective action is taken, material injury would occur.

15.8 With respect to cases where injury is threatened by subsidized imports, the application of countervailing measures shall be considered and decided with special care.

B. INTERPRETATION AND APPLICATION OF ARTICLE 15

1. Footnote 46

(a) "characteristics closely resembling"

270. In its "like product" analysis under footnote 46, the Panel on *Indonesia – Autos* emphasized the physical characteristics of the compared products and held that in its analysis, the Panel would also be guided by the "like product" analysis contained in the Appellate Body Report in *Korea – Alcoholic Beverages*:

> "In our view, the analysis as to which cars have 'characteristics closely resembling' those of the Timor logically must include as an important element the physical characteristics of the cars in question. This is especially the case because many of the other possible criteria identified by the parties are closely related to the physical characteristics of the cars in question. Thus, factors such as brand loyalty, brand image/reputation, status and resale value reflect, at least in part, an assessment by purchasers of the physical characteristics of the cars being purchased. Although it is possible that products that are physically very different can be put to the same uses, differences in uses generally arise out of, and assist in assessing the importance of, different physical characteristics of products. Similarly, the extent to which products are substitutable may also be determined in substantial part by their physical characteristics. Price differences also may (but will not necessarily) reflect physical differences in products. An analysis of tariff classification principles may be useful because it provides guidance as to which physical distinctions between products were considered significant by Customs experts. However, we do not see that the SCM Agreement precludes us from looking at criteria other than physical characteristics, where relevant to the like product analysis. The term 'characteristics closely resembling' in its ordinary meaning includes but is not limited to physical characteristics, and we see nothing in the context or object and purpose of the SCM Agreement that would dictate a different conclusion.
>
> Although we are required in this dispute to interpret the term 'like product' in conformity with the specific definition provided in the SCM Agreement, we believe that useful guidance can nevertheless be derived from prior analysis of 'like product' issues under other provisions of the WTO Agreement. Thus, we note the statement of the Appellate Body in *Alcoholic Beverages (1996)* that, in this context as in any other, the issue of 'like product' must be considered on a case-by-case basis, that in applying relevant criteria panels can only use their best judgment regarding whether in fact products are like, and that this will always involve an unavoidable element of individual, discretionary judgement."[384]

271. Further in its "like products" analysis under footnote 46, the Panel on *Indonesia – Autos* rejected the argument that it "must consider all passenger cars to be 'like' because any effort to differentiate between passenger cars with a multitude of differing characteristics would inevitably result in arbitrary divisions":[385]

> "We are aware that there are innumerable differences among passenger cars and that the identification of appropriate deciding lines between them may not be a simple task. However, this does not in our view justify lumping all such products together where the differences among the products are so dramatic. . . . We must endeavour to find some reasonable way to assess the relative importance of the various differences in the minds of consumers and to devise some sensible means to categorize passenger cars."[386]

[384] Panel Report on *Indonesia – Autos*, paras. 14.173–14.174.
[385] Panel Report on *Indonesia – Autos*, para. 14.176.
[386] Panel Report on *Indonesia – Autos*, para. 14.176.

272. The Panel on *Indonesia – Autos* decided that "One reasonable way . . . to approach the 'like product' issue is to look at the manner in which the automotive industry itself has analysed market segmentation."[387] The Panel opted for an analysis which "considered the physical characteristics of the cars in question when designing its segmentation"; it considered that "an approach, which segments the market based on a combination of size and price/market position, [is] a sensible one which is consistent with the criteria relevant to 'like product' analysis under the SCM Agreement".[388]

273. In *Indonesia – Autos*, Indonesia argued that the low price of its Timor car placed it in a "special market niche" and rendered it unlike other, more expensive, car models. The Panel noted that the complainants in the case before it were claiming that the Indonesian Timor was being sold at undercutting prices as a result of subsidization and rejected the argument by Indonesia:

> "We do not preclude that price might be a relevant consideration in performing 'like product' analysis, particularly where differences in price represent one way to assess the relative importance of differing physical characteristics to consumers. In this case, however, the complainants allege that the Timor is being sold at undercutting prices as a result of subsidization. If we were to conclude that the low price of the Timor in the Indonesian market were to render the Timor 'unlike' other models which are similar in physical characteristics to the Timor but priced higher, the result would be that, in cases where the subsidization and resulting price undercutting were sufficiently high, price undercutting claims under Article 6 could never prevail. Thus, we do not consider that the Timor's lower price is a basis to conclude that it is unlike the models alleged by the complainants to be 'like' the Timor."[389]

274. Considering whether "the difference between a product assembled and unassembled is sufficiently important that the unassembled product does not 'closely resemble' the assembled product",[390] the Panel on *Indonesia – Autos* stated:

> "We do not consider that an unassembled product *ipso facto* is not a like product to that product assembled. Recalling the view of the Appellate Body that tariff classification may be a useful tool in like product analysis [footnote omitted], we note that, under the General Rules for the Interpretation of the Harmonized System:
>
> Any reference in a heading to an Article shall be taken to include a reference to that Article complete or unfinished, provided that, as presented, the incomplete or unassembled Article has the essential character of the complete or unfinished article.
>
> We think that a comparable approach to the relation between assembled and unassembled products makes good sense in the context of this dispute."[391]

2. Relationship with other Articles

275. When reversing the Panel's findings that the *de minimis* standard contained in Article 11.9 was applicable to sunset review investigations, the Appellate Body in *US – Carbon Steel* considered Article 15 and its footnote 45 as support for its views. In this regard, see paragraph 256 above.

XVI. ARTICLE 16

A. TEXT OF ARTICLE 16

Article 16
Definition of Domestic Industry

16.1 For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related[48] to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers.

(*footnote original*) [48] For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

16.2. In exceptional circumstances, the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of subsidized imports into such an isolated market and provided further that the subsidized imports are causing injury to the producers of all or almost all of the production within such market.

[387] Panel Report on *Indonesia – Autos*, para. 14.177.
[388] Panel Report on *Indonesia – Autos*, para. 14.178.
[389] Panel Report on *Indonesia – Autos*, para. 14.192.
[390] Panel Report on *Indonesia – Autos*, para. 14.196.
[391] Panel Report on *Indonesia – Autos*, para. 14.197.

16.3 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 2, countervailing duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of countervailing duties on such a basis, the importing Member may levy the countervailing duties without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 18, and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

16.4 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraphs 1 and 2.

16.5 The provisions of paragraph 6 of Article 15 shall be applicable to this Article.

B. INTERPRETATION AND APPLICATION OF ARTICLE 16

No jurisprudence or decision of a competent WTO body.

XVII. ARTICLE 17

A. TEXT OF ARTICLE 17

Article 17
Provisional Measures

17.1 Provisional measures may be applied only if:

(a) an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments;

(b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports; and

(c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

17.2 Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization.

17.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

17.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months.

17.5 The relevant provisions of Article 19 shall be followed in the application of provisional measures.

B. INTERPRETATION AND APPLICATION OF ARTICLE 17

1. Article 17.3

(a) General

276. In *US – Softwood Lumber III*, the Panel found that the provisional measures were in violation of Article 17.3 (and 17.4) of the *SCM Agreement* because they were imposed less than 60 days after the date of initiation of the investigation and because they applied to imports for a period of more than four months. The Panel found that "Article 17.3 and 17.4 of the SCM Agreement are unambiguous, clearly specifying that provisional measures shall not be applied sooner than 60 days after initiation and their application shall be limited to maximum 4 months."[392]

(b) Relationship with other Articles

(i) Article 20

277. Furthermore, the Panel on *US – Softwood III* considered that regarding "the starting-point for the application of provisional and final measures, Article 20 of the SCM Agreement establishes two exceptions to the general rule of non-retroactivity of final countervailing duties and no exceptions to the general rule of non-retroactivity of provisional measures. Nothing in Article 20 SCM Agreement provides an exception to the rules relating to the minimum period between initiation and application of provisional measures or the maximum period of application of such measures as provided for in Articles 17.3 and 17.4 SCM Agreement."[393]

2. Article 17.4

(a) General

278. In *US – Softwood Lumber III*, the Panel considered that the text of Article 17.3 (and Article 17.4) is unambiguous. See paragraph 276 above.

(b) Period of application

279. The Panel on *US – Softwood Lumber III* rejected the argument that the period of application referred to

[392] Panel Report *US – Softwood Lumber III*, para. 7.100.
[393] Panel Report *US – Softwood Lumber III*, para. 7.100.

in Article 17.4 is the period during which cash deposits or bonds are taken, rather than the period during which the affected imports enter for consumption. For the Panel, this interpretation would allow for significantly more than four months' worth of entries to be covered by a provisional measure. The Panel considered that such an interpretation would effectively nullify the disciplines of Article 17, particularly in light of the obligation contained in Article 20.1:

> "We consider that the US argument that the period of application in Article 17.4 SCM Agreement refers to the period during which cash deposits or bonds are taken rather than the period during which the affected imports enter for consumption would have the effect of nullifying the provision, particularly in light of Article 20.1 SCM Agreement. We cannot accept such an interpretation which would reduce a provision of the treaty to redundancy or inutility.[394] The US interpretation would allow significantly more than 4 months worth of entries to be covered by a provisional measure. For example, under this interpretation, a decision under Article 17.1 SCM Agreement could be taken after 60 days, following which the importing country would wait say 3 months before 'applying' the provisional measures for 4 months, including retroactively to imports entering after the date of the decision. In our view this would render meaningless the disciplines imposed by Article 17 SCM Agreement."[395]

(c) Relationship with other Articles

(i) Article 20.1

280. In *US – Softwood Lumber III*, the Panel considered that Article 20 does not provide an exception to the maximum period of application of provisional measures in Article 17.4. See paragraph 279 above.

XVIII. ARTICLE 18

A. TEXT OF ARTICLE 18

Article 18
Undertakings

18.1 Proceedings may[49] be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

(*footnote original*) [49] The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of undertakings, except as provided in paragraph 4.

(a) the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

(b) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy. It is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.

18.2 Undertakings shall not be sought or accepted unless the authorities of the importing Member have made a preliminary affirmative determination of subsidization and injury caused by such subsidization and, in case of undertakings from exporters, have obtained the consent of the exporting Member.

18.3 Undertakings offered need not be accepted if the authorities of the importing Member consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

18.4 If an undertaking is accepted, the investigation of subsidization and injury shall nevertheless be completed if the exporting Member so desires or the importing Member so decides. In such a case, if a negative determination of subsidization or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases, the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of subsidization and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

18.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that governments or exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the subsidized imports continue.

18.6 Authorities of an importing Member may require any government or exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking, and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing

[394] (*footnote original*) Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS/2/AB/R, adopted on 20 May 1996, p. 23.
[395] Panel Report *US – Softwood Lumber III*, para. 7.102.

Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

B. INTERPRETATION AND APPLICATION OF ARTICLE 18

No jurisprudence or decision of a competent WTO body.

XIX. ARTICLE 19

A. TEXT OF ARTICLE 19

Article 19

Imposition and Collection of Countervailing Duties

19.1 If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.

19.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties[50] whose interests might be adversely affected by the imposition of a countervailing duty.

(*footnote original*) [50] For the purpose of this paragraph, the term "domestic interested parties" shall include consumers and industrial users of the imported product subject to investigation.

19.3 When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

19.4 No countervailing duty shall be levied[51] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

(*footnote original*) [51] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

B. INTERPRETATION AND APPLICATION OF ARTICLE 19

1. Article 19.1

(a) Relationship with other Articles

(i) Article 4.7

281. The Panel on *Australia – Automotive Leather II (Article 21.5 – US)* relied, *inter alia*, on Article 19.1 in its finding that the phrase "withdraw the subsidy" under Article 4.7 referred to retroactive remedies (repayment). See paragraph 161 above.

(ii) Article 19.4

282. For the relationship with Article 19.4, see paragraphs 286–287 below.

2. Article 19.3

283. In *US – Softwood Lumber III*, the Panel recalled the relevant part of Article19.3 concerning the rights of any investigated exporter to an expedited review (unless he is being investigated for refusing to cooperate):

> "[T]he relevant part of Article 19.3 SCM Agreement, namely that any exporter whose exports were not actually investigated for reasons other than a refusal to cooperate is '*entitled*' to an expedited review to establish an individual countervailing duty rate must be conducted, upon request, for any exporter of the type referred to in Article 19.3 SCM Agreement."[396]

284. The Panel on *US – Softwood Lumber III* found the relevant Member's regulations to be silent on the issue of whether the regulations under consideration prohibit the investigating authorities from conducting such reviews in aggregate cases and stated that the fact that no regulation exists regarding the case of aggregate investigations "does not imply" that the Member is "required by law to deny any requests for expedited review where an aggregate countervailing duty rate has been applied". Therefore, the Panel concluded that the

[396] Panel Report *US – Softwood Lumber III*, para. 7.136.

laws and regulations that had been examined in the case did not mandate a violation of the requirement in Article 19.3 to conduct an expedited review. For this reason, the Panel also found that the Member is not required by law to violate Article 19.4 by levying countervailing duties in excess of the amount of the subsidy found:

> "We consider that the fact that no regulation exists regarding the apparently rare case of aggregate investigations does not imply that the USDOC is required by law to deny any requests for expedited review where an aggregate countervailing duty rate has been applied. In other words, the USDOC Regulations are simply silent on the issue.
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> We thus agree with the US that the fact that the USDOC has not elected to codify specific rules for handling what could potentially be an extremely large number of expedited reviews in an aggregate case does not in any way diminish the Department's statutory authority to conduct such reviews. We therefore find that the fact that 19 C.F.R. § 351.214(k)(1) does not specifically address the possibility of expedited reviews in aggregate cases does not prohibit such reviews . . . We consider that the fact that no regulation exists regarding the apparently rare case of aggregate investigations, does not imply that exporters are denied by law the right to an expedited review where an aggregate countervailing duty rate was applied. The US laws and regulations cited by Canada thus do not mandate a violation of the requirement under Article 19.3 SCM Agreement to conduct an expedited review in order that the authority promptly establish an individual countervailing duty rate for any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate. For this reason also, we do not find that the USDOC is required by law to violate Article 19.4 SCM Agreement in the softwood lumber case by inevitably levying countervailing duties in excess of the amount of the subsidy found.
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> In sum, we find that the above-cited US laws and regulations concerning expedited reviews do not mandate a violation of Article 19.3 SCM Agreement, or thereby, of Article 19.4 SCM Agreement, and thus reject Canada's claims in this respect."[397]

285. Finally, the Panel on *US – Softwood Lumber III*, noting that no final determination had been made and that no reviews of such a determination had been requested at the time of the preliminary determination under review by the Panel, and given the Panel's findings that the Member's laws and regulations did not preclude the Member from acting consistently with Article 19.3 and Article 21, considered that with respect to expedited and administrative reviews "it is not appropriate to rule on a potential denial of a request for review if no such request has even been made. The WTO dispute settlement system allows a Member to challenge a law as such or its actual application in a particular case, but not its possible future application."[398]

3. Article 19.4

(a) General

286. Referring to the ordinary meaning of Article 19.4, the Panel on *US – Lead and Bismuth II* stated that "no countervailing duty may be imposed on an imported product if no (countervailable) subsidy is found to exist with respect to that imported product, since in such cases the amount of subsidy found to exist with respect to the imported product would be zero. Thus, like Article 19.1, Article 19.4 ... establishes a clear nexus between the imposition of a countervailing duty, and the existence of a (countervailable) subsidy."[399]

287. The Panel on *US – Lead and Bismuth II* concluded that "consistent with the fundamental premise underlying Articles 19.1, 19.4, and 21.1 of the SCM Agreement, and Article VI:3 of the GATT 1994, and consistent with the object and purpose of countervailing duties envisaged by Part V of the SCM Agreement, we consider that a countervailing duty may only be imposed on an imported product if it is demonstrated that a (countervailable) subsidy was bestowed directly or indirectly on the manufacture, production or export of that merchandise".[400]

(b) Relationship with other Articles

288. With respect to the relationship with Article 19.1, see paragraph 282 above.

289. With respect to the relationship with Article 19.3, see paragraphs 284–285 above.

290. With respect to the relationship with Article 21.1, see paragraph 287 above.

XX. ARTICLE 20

A. TEXT OF ARTICLE 20

Article 20
Retroactivity

20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.

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[397] Panel Report *US – Softwood Lumber III*, paras. 7.133 and 7.140–7.142.
[398] Panel Report *US – Softwood Lumber III*, paras. 7.156–7.157.
[399] Panel Report on *US – Lead and Bismuth II*, para. 6.52.
[400] Panel Report on *US – Lead and Bismuth II*, para. 6.57.

20.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the subsidized imports would, in the absence of the provisional measures, have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

20.3 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

20.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.6 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

B. INTERPRETATION AND APPLICATION OF ARTICLE 20

1. Retroactive application of countervailing duties

291. The Panel on *US – Softwood Lumber III* noted that Article 20 only provides for the exceptional retroactive application of definitive duties but not of provisional duties:

> "As its text indicates, Article 20.1 SCM Agreement provides that provisional measures and countervailing duties shall only be applied to products entering the country following the imposition of such measures, '*subject to the exceptions set out in this Article*'. While Article 20.2 and Article 20.6 SCM Agreement provide for explicit exceptions in the case of the *definitive* countervailing duties, we find no similar exceptions relating to provisional measures. Article 20.2 SCM Agreement sets forth the circumstances in which definitive countervailing duties may be applied retroactively for the period during which provisional measures were applied. Similarly, in critical circumstances, Article 20.6 SCM Agreement allows for the definitive duties to be assessed on imports which entered the country from 90 days prior to the date of application of the provisional measures.
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> . . .
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> . . . In respect of the starting-point for the application of provisional and final measures, Article 20 SCM Agreement thus establishes two exceptions to the general rule of non-retroactivity of final countervailing duties and no exceptions to the general rule of non-retroactivity of provisional measures. Nothing in Article 20 SCM Agreement provides an exception to the rules relating to the minimum period between initiation and application of provisional measures or the maximum period of application of such measures as provided for in Article 17.3 and 17.4 SCM Agreement."[401]

292. On the basis of the "clear language in the SCM Agreement", the Panel on *US – Softwood Lumber III* found that "the general rule of non-retroactivity applies to provisional measures, without exceptions", and concluded that the retroactive application of the provisional measure imposed by the Member was inconsistent with Article 20.6 of the *SCM Agreement*.[402] The Panel agreed "that a Member is allowed to take measures which are necessary to preserve the right to later apply definitive duties retroactively. In our view, an effective interpretation of the right to apply definitive duties retroactively requires that a Member be allowed to take such steps as are necessary to preserve the possibility of exercising that right." The Panel considered that "what kind of measures may thus be taken by the Member concerned will have to be determined on a case-by-case basis".[403]

293. However, the Panel on *US – Softwood Lumber III* rejected the argument that suspension of liquidation and the posting of a cash deposit or bond are necessary for the Member's authorities to collect *definitive* duties retroactively, as is expressly permitted under Article 20.6 of the *SCM Agreement*. The Panel considered on the basis of an "effective treaty interpretation" that the express permission in Article 20.6 to apply definitive duties retroactively up to 90 days prior to the application of the provisional measures leads to the conclusion that Article 20.3 *does not* preclude the imposition of definitive duties on entries for which no cash deposit or bond was collected. The Panel held that:

[401] Panel Report *US – Softwood Lumber III*, paras. 7.93 and 7.100.
[402] Panel Report *US – Softwood Lumber III*, para. 7.94.
[403] Panel Report *US – Softwood Lumber III*, para. 7.95.

"Article 20.3 SCM Agreement states that if the amount guaranteed by the cash deposit is lower than the definitive countervailing duty, the difference shall not be collected. If the reverse is true, the excess amount shall be reimbursed and the bond released in an expeditious manner. Article 20.3 SCM Agreement thus concerns the wholly different issue of how to deal with a discrepancy between the provisional and the final rates of the countervailing duty. It does not address the retroactive imposition and collection of definitive duties for the period before the application of provisional measures. Article 20.6 SCM Agreement provides that definitive duties may in certain circumstances be assessed on imports which were entered for consumption from 90 days *prior to the date of application of provisional measures*.

The text thus clearly indicates that the Agreement allows for the retroactive application of definitive duties at a time when no provisional measures were in place and thus no provisional duties were collected. To accept the US argument that Article 20.3 SCM Agreement would preclude a Member from collecting definitive duties for the period prior to the date of application of provisional measures would mean that a Member doing what Article 20.6 SCM Agreement expressly allows for would be violating the Agreement nevertheless. We cannot accept an interpretation which leads to this contradictory result. We consider that the principle of effective treaty interpretation requires the treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously'[404]"[405]

2. Relationship between paragraphs 1, 2 and 6 of Article 20

294. In this regard, see paragraphs 291–293 above.

3. Relationship with other Articles

(a) Article 17.3 and 17.4

295. The Panel on *US – Softwood Lumber III* considered that "Nothing in Article 20 SCM Agreement provides an exception to the rules relating to the minimum period between initiation and application of provisional measures or the maximum period of application of such measures as provided for in Articles 17.3 and 17.4 SCM Agreement."[406] See also paragraph 277 above.

XXI. ARTICLE 21

A. TEXT OF ARTICLE 21

Article 21
Duration and Review of Countervailing Duties and Undertakings

21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.[52] The duty may remain in force pending the outcome of such a review.

(*footnote original*) [52] When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

21.4 The provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

21.5 The provisions of this Article shall apply mutatis mutandis to undertakings accepted under Article 18.

B. INTERPRETATION AND APPLICATION OF ARTICLE 21

1. Article 21.1

(a) Relationship with other Articles

296. With respect to the relationship with Article 19.4, see paragraph 287 above.

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[404] (*footnote original*) Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted on 12 January 2000, para. 81.
[405] Panel Report *US – Softwood Lumber III*, paras. 7.96–7.97.
[406] Panel Report *US – Softwood Lumber III*, para. 7.100.

2. Article 21.2

(a) General

297. In *Brazil – Desiccated Coconut*, the Panel found that, if the *SCM Agreement* is not applicable, the imposition of a countervailing duty is not covered by Article VI of the GATT 1994. However, the Panel opined that even measures to which the *WTO Agreement* is not "immediately applicable" will fall under the *SCM Agreement* through reviews pursuant to Article 21.2:

> "We recognize that these provisions regarding review are not comparable in effect to the immediate application of the WTO Agreement to all countervailing measures. The effect of reviews regarding the continued need for imposition of countervailing measures will likely be prospective and, depending on the date of imposition of the measure and the circumstances subsequent to its imposition, the exporting country Member may or may not be entitled to an immediate review. Nevertheless, it is clear from this provision that measures to which the WTO Agreement is not immediately applicable will nevertheless be brought under WTO disciplines over time pursuant to reviews under Article 21.2 of the SCM Agreement."[407]

(b) Types of review under Article 21.2

298. The Panel on *US – Softwood Lumber III* noted that Article 21.2 provides different kinds of reviews but is silent on administrative reviews:

> "Article 21.2 SCM Agreement deals with different kinds of review mechanisms, requiring the authority to provide for the right of interested parties to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. Thus, the first type of review addresses the question of whether subsidization is present at all, while the second type of review, by its very terms, has to do primarily with injury questions, that is, the effect on the domestic industry of changing or removing entirely the countervailing duty. This second type of review thus does not have to do with finalizing the rate of countervailing duty during a particular period for which estimated duties have been collected, but rather with the underlying need and rationale, from the standpoint of the affected domestic industry, for maintaining a countervailing duty. In short, Article 21.2 SCM Agreement is silent on the question of 'administrative reviews'."[408]

(c) Reviews not yet requested

299. In *US – Softwood Lumber III*, the Panel considered that it was not appropriate to rule on a potential denial of a request for a review, where such a request had not been made:

> "The WTO dispute settlement system allows a Member to challenge a law as such or its actual application in a particular case, but not its possible future application."[409]

(d) "necessary to offset subsidization"

301. The Appellate Body on *US – Lead and Bismuth II* agreed with the Panel that "while an investigating authority may presume, in the context of an administrative review under Article 21.1, that a 'benefit' continues to flow from an untied, non-recurring 'financial contribution', this presumption can never be 'irrebuttable'".[410]

302. The Appellate Body on *US – Lead and Bismuth II* rejected the panel's implied view that "in the context of an administrative review under Article 21.2, an investigating authority must *always* establish the existence of a 'benefit' during the period of review *in the same way as* an investigating authority must establish a 'benefit' in an original investigation". The Appellate Body stated:

> "We believe that it is important to distinguish between the original investigation leading to the imposition of countervailing duties and the administrative review. In an original investigation, the investigating authority must establish that *all* conditions set out in the *SCM Agreement* for the imposition of countervailing duties are fulfilled. In an administrative review, however, the investigating authority must address those issues which have been raised before it by the interested parties or, in the case of an investigation conducted on its own initiative, those issues which warranted the examination."[411]

3. Article 21.3

(a) Self-initiation of sunset reviews

(i) General

303. The Appellate Body on *US – Carbon Steel* agreed with the Panel that Article 21.3 of the *SCM Agreement* does not prohibit the automatic self-initiation of sunset reviews by investigating authorities:

> "[O]ur review of the context of Article 21.3 of the *SCM Agreement* reveals no indication that the ability of authorities to self-initiate a sunset review under that provision is conditioned on compliance with the evidentiary

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[407] Panel Report on *Brazil – Desiccated Coconut*, para. 277.
[408] Panel Report *US – Softwood Lumber III*, para. 7.151.
[409] Panel Report *US – Softwood Lumber III*, para. 7.157.
[410] Appellate Body Report on *US – Lead and Bismuth II*, para. 62, referring to the Panel Report on *US – Lead and Bismuth II*, para. 6.71.
[411] Appellate Body Report on *US – Lead and Bismuth II*, para. 63. With respect to the issue whether a national authority must conduct an investigation on its own initiative or whether it can limit its investigation to issues raised by the interested parties themselves, see the Chapter on the *Agreement on Safeguards*, Section IV.B.2(a).

standards set forth in Article 11 of the *SCM Agreement* relating to initiation of investigations. Nor do we consider that any other evidentiary standard is prescribed for the self-initiation of a sunset review under Article 21.3.

This is not to say that authorities may continue the countervailing duties after five years in the absence of evidence that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. Article 21.3 prohibits the continuation of countervailing duties unless a review is undertaken and the prescribed determination, based on adequate evidence, is made.

For all of these reasons, we agree with the Panel that Article 21.3 of the *SCM Agreement* does not prohibit the automatic self-initiation of sunset reviews by investigating authorities.[412]"[413]

(ii) Evidentiary requirements for self-initiation of sunset reviews

304. The Appellate Body on *US – Carbon Steel* observed that Article 21.3 explicitly contemplates the termination of countervailing orders within five years, unless the prescribed determination is made in a review. It further considered that Article 21.3 requires initiation of such a review by the authorities ("on their own initiative") or based on "a duly substantiated request made by or on behalf of the domestic industry". The Appellate Body remarked that the terms "duly substantiated" are applicable to the authorization to initiate a review upon request, and not a self-initiation situation. Finally, the Appellate Body noted that Article 21.3 does not contain cross-references to evidentiary rules relating to self-initiation of an investigation, and considered that this omission did not mean that Article 11 evidentiary standards are applicable to the self-initiation of sunset reviews under Article 21.3. The Appellate Body considered:

"[W]e wish to underline the thrust of Article 21.3 of the *SCM Agreement*. An automatic time-bound termination of countervailing duties that have been in place for five years from the original investigation or a subsequent comprehensive review is at the heart of this provision. Termination of a countervailing duty is the rule and its continuation is the exception. The continuation of a countervailing duty must therefore be based on a properly conducted review and a positive determination that the revocation of the countervailing duty would 'be likely to lead to continuation or recurrence of subsidization and injury'. Where the level of subsidization at the time of the review is very low, there must be persuasive evidence that revocation of the duty would nevertheless lead to injury to the domestic industry. Mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient. Rather, a fresh determination, based on credible evidence, will be necessary to establish that the continuation of the countervailing duty is warranted to remove the injury to the domestic industry.

. . .

Article 21.3 requires the termination of countervailing duties within five years unless the prescribed determination is made in a review. Article 21.3 contemplates initiation of this review in one of two alternative ways, as is made clear through the use of the word 'or'. Either the authorities may make their determination 'in a review initiated . . . on their own initiative'; *or*, *alternatively*, the authorities may make the determination 'in a review initiated . . . upon a *duly substantiated* request made by or on behalf of the domestic industry . . .'. The words 'duly substantiated' qualify only the authorization to initiate a review upon request made by or on behalf of the domestic industry. No such language qualifies the first method for initiating a sunset review, namely self-initiation of a review by the authorities.

We believe the absence of any such cross-reference to be of some consequence given that, as we have seen, the drafters of the *SCM Agreement* have made active use of cross-references, *inter alia*, to apply obligations relating to *investigations* to review proceedings. In our view, the omission of any express cross-reference thus serves as a further indication that the negotiators of the *SCM Agreement* did not intend the evidentiary standards applicable to the self-initiation of *investigations* under Article 11 to apply to the self-initiation of *reviews* under Article 21.3."[414]

305. While recognizing that the lack of an explicit limitation is "not dispositive of whether any such limitation exists", the Appellate Body in *US – Carbon Steel* also took into account the context of Article 21.3. In particular, the Appellate Body noted that Article 21.4 explicitly states that the detailed evidentiary and procedural rules contained in Article 12 regarding the *conduct* of an investigation apply to Article 21.3 reviews. As a result, it stated that this explicit cross-reference to Article 12 suggests that evidentiary rules regarding the *initiation* of an investigation contained in Article 11 "are not incorporated by reference into Article 21.3". For the Appellate Body, the fact that the Article 11 rules governing these matters are not incorporated by reference into Article 21.3 suggests that they do not apply to sunset reviews:

"Article 21.2 differs from Article 21.3 in that the former identifies certain circumstances in which the authorities are under an *obligation* to review ("shall review") whether the continued imposition of the countervailing duty is necessary. In contrast, the principal obligation in Article 21.3 is not, *per se*, to conduct a review, but rather

[412] (*footnote original*) Panel Report on *US – Carbon Steel*, para 8.49.
[413] Appellate Body Report on *US – Carbon Steel*, paras. 116–118.
[414] Appellate Body Report on *US – Carbon Steel*, paras. 88, 103 and 105.

to *terminate* a countervailing duty *unless* a specific determination is made in a review. We note that Article 21.2 sets down an explicit evidentiary standard for requests by interested parties for a review under that provision. In order to trigger the authorities' obligation to conduct a review, such requests must, *inter alia*, include 'positive information substantiating the need for review'. Article 21.2 does not, on its face, apply this same standard to the initiation by authorities 'on their own initiative' of a review carried out under that provision. Thus, Article 21.2 contemplates that, for reviews carried out pursuant to that provision, the self-initiation by the authorities of a review is not governed by the same standards that apply to initiation upon request by other parties.

As we have noted earlier, the fourth paragraph of Article 21 explicitly applies to Article 21.3 reviews the detailed rules set out in Article 12 of the *SCM Agreement* regarding evidence and procedure in the *conduct* of investigations. However, the rules on evidence and procedure contained in Article 12 do not relate to the *initiation* of such investigations. Rather, the rules relating to evidence needed to *initiate* an investigation are set out in Article 11, which is not referred to in Article 21.4. The fact that the rules in Article 11 governing such matters are not incorporated by reference into Article 21.3 suggests that they are not, *ipso facto*, applicable to sunset reviews."[415]

306. The Appellate Body on *US – Carbon Steel* concluded that there is no indication in the framework of Article 21.3 that the authorities' ability to self-initiate a sunset review is conditional upon compliance with evidentiary standards in Article 11 and that no other evidentiary standard is required for the self-initiation of a sunset review under Article 21.3.

"[O]ur review of the context of Article 21.3 of the *SCM Agreement* reveals no indication that the ability of authorities to self-initiate a sunset review under that provision is conditioned on compliance with the evidentiary standards set forth in Article 11 of the *SCM Agreement* relating to initiation of investigations. Nor do we consider that any other evidentiary standard is prescribed for the self-initiation of a sunset review under Article 21.3."[416]

(iii) De minimis standard

307. As regards the application of the *de minimis* standards to sunset reviews, see paragraphs 250–257 above.

(b) Determination of likelihood of continuation/recurrence of subsidization

(i) General

308. In findings not appealed to the Appellate Body, the Panel on *US – Carbon Steel* referred to Article 21.1 and 21.2 of the *SCM Agreement* and highlighted that Article 21.3 of the *SCM Agreement* puts into effect the purpose of the *SCM Agreement*, i.e. to regulate the imposition of countervailing duty measures:

"Article 21.3 reflects the application of the general rule set out in Article 21.1 – that a CVD shall remain in place only as long as necessary – in the specific instance where five years have elapsed since the imposition of a CVD. Article 21.2 reflects the same general rule in a different circumstance, when a reasonable period has elapsed since the imposition of the duty, and it is deemed necessary to review the need for the continued imposition of the duty. We also note that one of the principal objects of the SCM Agreement is to regulate the imposition of CVD measures. Article 21.3 effectuates that purpose by providing that after five years, a CVD should be terminated unless the investigating authorities determine that there is a likelihood of continuation or recurrence of subsidization and injury."[417]

(ii) Sufficient factual basis for the non-determination

309. The Panel on *US – Carbon Steel* considered any determination made by an investigating authority under the *SCM Agreement* must be properly substantiated even if there is no specific language in this regard in the Agreement itself. The Panel referred to the similarity with safeguards and anti-dumping investigations, and concluded that a determination of likelihood under Article 21.3 of the *SCM Agreement* must rest on a sufficient factual basis:

"In our opinion, although there is no specific language in the SCM Agreement to that effect, it goes without saying that any determination made by investigating authorities under the SCM Agreement must be properly substantiated in order for that determination to be legally justified. In this regard, the Appellate Body has stated in *US – Lamb*:

'[C]ompetent authorities must have a sufficient factual basis to allow them to draw reasoned and adequate conclusions concerning the situation of the "domestic industry".'[418]

We recognise that the Appellate Body's statement refers to the basis of an injury determination in a safeguard investigation. Yet, as far as the adequacy of the factual basis for a determination is concerned, we see no reason to distinguish between injury determinations in a safeguard investigation and a determination of the likelihood of continuation or recurrence of subsidization in a CVD sunset review.

We also note the decision of the Panel in *US – DRAMS* in which the Panel stated:

[415] Appellate Body Report on *US – Carbon Steel*, paras. 108 and 109.
[416] Appellate Body Report on *US – Carbon Steel*, para. 116.
[417] Panel Report on *US – Carbon Steel*, para. 8.91.
[418] (*footnote original*) Appellate Body Report on *US – Lamb*, para. 131.

> 'Accordingly, we must assess the essential character of the necessity involved in cases of continued imposition of an anti-dumping duty. We note that the necessity of the measure is a function of certain objective conditions being in place, *i.e.* whether circumstances require continued imposition of the anti-dumping duty. That being so, such continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.'[419]

Although the decision of the Panel was made as part of a review under Article 11.2 of the AD Agreement we believe this excerpt provides helpful guidance for our case relative to the adequacy of the factual basis for a determination.

Based on the two foregoing decisions, we consider that a determination of likelihood under Article 21.3 must rest on a sufficient factual basis.

An investigating authority's determination of the likelihood of continuation or recurrence of subsidization should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews and finally the sunset review. In our view, a likelihood analysis based on this evidentiary framework would be consistent with the requirements of Article 21.3."[420]

310. In *US – Carbon Steel*, the Panel further considered that one of the components of the likelihood analysis was the assessment of the likely rate of subsidization:

> "In our view, one of the components of the likelihood analysis in a sunset review under Article 21.3 is an assessment of the likely rate of subsidization. We do not consider, however, that an investigating authority must, in a sunset review, use the same calculation of the rate of subsidization as in an original investigation. What the investigating authority must do under Article 21.3 is to assess whether subsidization is likely to continue or recur should the CVD be revoked. This is, obviously, an inherently prospective analysis. Nonetheless, it must itself have an adequate basis in fact. The facts necessary to assess the likelihood of subsidization in the event of revocation may well be different from those which must be taken into account in an original investigation. Thus, in assessing the likelihood of subsidization in the event of revocation of the CVD, an investigating authority in a sunset review may well consider, *inter alia*, the original level of subsidization, any changes in the original subsidy programmes, any new subsidy programmes introduced after the imposition of the original CVD, any changes in government policy, and any changes in relevant socio-economic and political circumstances."[421]

(c) Relationship with other paragraphs of Article 21

(i) Article 21.2 and 21.4

311. In *US – Carbon Steel*, the Panel reflected on the relationship between paragraphs 1, 2 and 3 of Article 21: see paragraph 308 above.

312. The Appellate Body on *US – Carbon Steel* noted the difference between paragraphs 2 and 3 of Article 21 as follows:

> "Article 21.2 differs from Article 21.3 in that the former identifies certain circumstances in which the authorities are under an *obligation* to review ('shall review') whether the continued imposition of the countervailing duty is necessary. In contrast, the principal obligation in Article 21.3 is not, *per se*, to conduct a review, but rather to *terminate* a countervailing duty *unless* a specific determination is made in a review. We note that Article 21.2 sets down an explicit evidentiary standard for requests by interested parties for a review under that provision. In order to trigger the authorities' obligation to conduct a review, such requests must, *inter alia*, include 'positive information substantiating the need for review'. Article 21.2 does not, on its face, apply this same standard to the initiation by authorities 'on their own initiative' of a review carried out under that provision. Thus, Article 21.2 contemplates that, for reviews carried out pursuant to that provision, the self-initiation by the authorities of a review is not governed by the same standards that apply to initiation upon request by other parties."[422]

313. In *US – Carbon Steel*, the Appellate Body further noted the differing scope of Article 21.3 and 21.4:

> "As we have noted earlier, the fourth paragraph of Article 21 explicitly applies to Article 21.3 reviews the detailed rules set out in Article 12 of the *SCM Agreement* regarding evidence and procedure in the *conduct* of investigations. However, the rules on evidence and procedure contained in Article 12 do not relate to the *initiation* of such investigations. Rather, the rules relating to evidence needed to *initiate* an investigation are set out in Article 11, which is not referred to in Article 21.4. The fact that the rules in Article 11 governing such matters are not incorporated by reference into Article 21.3 suggests that they are not, *ipso facto*, applicable to sunset reviews."[423]

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[419] (*footnote original*) Panel Report on *US – DRAMS*, para. 6.42.
[420] Panel Report on *US – Carbon Steel*, paras. 8.92–8.95.
[421] Panel Report on *US – Carbon Steel*, para. 8.96.
[422] Appellate Body Report on *US – Carbon Steel*, para. 108.
[423] Appellate Body Report on *US – Carbon Steel*, para. 109.

(d) Relationship with other Articles

(i) Article 11.6

314. The Appellate Body on *US – Carbon Steel* confirmed the Panel's finding in relation to the self-initiation of sunset reviews that "nothing in the text of Article 11.6 provides for its evidentiary standards to be implied in Article 21.3".[424] The Appellate Body on *US – Carbon Steel* commented:

> "Before leaving our analysis of the *text* of Article 21.3 of the *SCM Agreement*, we lastly note that the provision contains no explicit cross-reference to evidentiary rules relating to initiation, such as those contained in Article 11.6. We believe the absence of any such cross-reference to be of some consequence given that, as we have seen, the drafters of the *SCM Agreement* have made active use of cross-references, *inter alia*, to apply obligations relating to *investigations* to review proceedings. In our view, the omission of any express cross-reference thus serves as a further indication that the negotiators of the *SCM Agreement* did not intend the evidentiary standards applicable to the self-initiation of *investigations* under Article 11 to apply to the self-initiation of *reviews* under Article 21.3."[425]

315. The Panel on *US – Carbon Steel* considered that the terms of Article 21.3 have to be interpreted in light of their object and purpose and in context, which is the entire SCM Agreement and, in particular, Articles 11.6, 11.9 and 15.3 thereof.[426]

(ii) Article 11.9

316. The Appellate Body on *US – Carbon Steel* reversed the Panel's finding that the *de minimis* standard of Article 11.9 is implied in Article 21.3 and the Panel's finding of violations of the SCM Agreement.[427] The Appellate Body noted:

> "[T]he text of Article 21.3 does not mention any *de minimis* standard to be applied in sunset reviews. Nor does it make any express reference to the *de minimis* standard set forth in Article 11.9 of the *SCM Agreement*.
>
> [T]he lack of any indication, in the text of Article 21.3, that a *de minimis* standard must be applied in sunset reviews serves, at least at first blush, as an indication that no such requirement exists. However, as the Panel itself observed, the task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement.[428] Such silence does not exclude the possibility that the requirement was intended to be included by implication."[429]

317. However, ultimately, the Appellate Body concluded:

> "[A] finding on our part that the *de minimis* standard of Article 11.9 is implied in sunset reviews under Article 21.3 would upset the delicate balance of rights and obligations attained by the parties to the negotiations, as embodied in the final text of Article 21.3. Such a finding would be contrary to the requirement of Article 3.2, repeated in Article 19.2 of the DSU, that our findings and recommendations 'cannot add to or diminish the rights and obligations provided in the covered agreements'."[430]

318. See paragraph 315 above.

(iii) Article 15.3

319. See paragraph 315 above.

(e) Relationship with other WTO Agreements

320. In *US – Carbon Steel*, the Panel considered that it saw no reason to differentiate between injury determination in a safeguard investigation and a determination of a likelihood of continuation or recurrence of subsidization. See paragraph 309 above.

XXII. ARTICLE 22

A. TEXT OF ARTICLE 22

Article 22

Public Notice and Explanation of Determinations

22.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

22.2 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report,[53] adequate information on the following:

(*footnote original*) [53] Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

(i) the name of the exporting country or countries and the product involved;

(ii) the date of initiation of the investigation;

(iii) a description of the subsidy practice or practices to be investigated;

(iv) a summary of the factors on which the allegation of injury is based;

[424] Panel Report on *US – Carbon Steel*, para. 8.19
[425] Appellate Body Report on *US – Carbon Steel*, para. 105.
[426] Panel Report *US – Carbon Steel*, para. 8.47.
[427] Appellate Body Report on *US – Carbon Steel*, paras. 92–97.
[428] (*footnote original*) Panel Report, paras. 8.27–8.30.
[429] Appellate Body Report on *US – Carbon Steel*, paras. 64–65.
[430] Appellate Body Report on *US – Carbon Steel*, para. 91.

(v) the address to which representations by interested Members and interested parties should be directed; and

(vi) the time-limits allowed to interested Members and interested parties for making their views known.

22.3 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

22.4 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on the existence of a subsidy and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

(i) the names of the suppliers or, when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;

(iv) considerations relevant to the injury determination as set out in Article 15;

(v) the main reasons leading to the determination.

22.5 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

22.6 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 18 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

22.7 The provisions of this Article shall apply mutatis mutandis to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively.

B. INTERPRETATION AND APPLICATION OF ARTICLE 22

1. Article 22.1 and 22.7

321. In *US – Carbon Steel*, the Appellate Body noted that Article 22.1 and 22.7 on notification and public notice obligations upon Members in the context of investigations or reviews do not contain any evidentiary requirements *per se*.

> "Article 22.1 imposes *notification and public notice obligations* upon Members that have decided, in accordance with all the requirements of Article 11, that the initiation of a countervailing duty investigation is justified. Article 22.1 does not itself establish any evidentiary rule, but only refers to a standard established in Article 11.9:
>
> Article 22.7 applies the provisions of Article 22 *'mutatis mutandis* to the initiation and completion of reviews pursuant to Article 21'. To us, in the same way that Article 22.1 imposes notification and public notice requirements on investigating authorities that have decided, in accordance with the standards set out in Article 11, to initiate an *investigation*, Article 22.1 (by virtue of Article 22.7) also operates to impose notification and public notice requirements on investigating authorities that have decided, in accordance with Article 21, to initiate a *review*. Similarly, in the same way that Article 22.1 does *not* itself establish evidentiary standards applicable to the initiation of an *investigation*, it does *not* itself establish evidentiary standards applicable to the initiation of sunset reviews. Such standards, if they exist, must be found elsewhere."[431]

2. Relationship with other Articles

322. With respect to the relationship with Article 11, see paragraph 321 above.

XXIII. ARTICLE 23

A. TEXT OF ARTICLE 23

Article 23
Judicial Review

Each Member whose national legislation contains provisions on countervailing duty measures shall main-

[431] Appellate Body Report on *US – Carbon Steel*, paras. 111–112.

tain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

B. INTERPRETATION AND APPLICATION OF ARTICLE 23

No jurisprudence or decision of a competent WTO body.

PART VI: INSTITUTIONS

XXIV. ARTICLE 24

A. TEXT OF ARTICLE 24

Article 24
Committee on Subsidies and Countervailing Measures and Subsidiary Bodies

24.1 There is hereby established a Committee on Subsidies and Countervailing Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

24.4 The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7.

24.5 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved.

B. INTERPRETATION AND APPLICATION OF ARTICLE 24

1. Rules of procedure

323. At its meeting of 22 May 1996, the Council for Trade in Goods approved the rules of procedure for the SCM Committee.[432]

324. Pursuant to Article 32.7, the SCM Committee reports to the Council for Trade in Goods on an annual basis.[433]

2. Subsidiary bodies

(a) Permanent Group of Experts (PGE)

325. A decision taken on 13 June 1995 by the SCM Committee provided that "[t]he initial five persons elected to the Permanent Group of Experts shall serve staggered terms of office of 1, 2, 3, 4, and 5 years".[434] It further provided that "[T]he decisions as to which person shall serve which of these terms of office shall be decided by lot after the initial membership of the PGE has been established." The initial slate of experts was elected on 6 March 1996.[435] Since then, the SCM Committee has elected experts as required, according to the relevant process.[436] The PGE has not yet been called upon to perform any of its envisaged duties and the Committee has not yet approved any rules of procedure for the PGE.

(b) Informal Group of Experts (IGE)

326. By a decision of 13 June 1995, the Committee created an Informal Group of Experts[437] with the following terms of reference:[438]

> "To examine matters which are not specified in Annex IV to the Agreement or which need further clarification for the purposes of paragraph 1(a) of Article 6."

(c) Working Party on Subsidy Notifications

327. By a decision of 22 February 1995, the Committee created a Working Party on Subsidy Notifications.[439] The Working Party's work is generally reflected in Chairs' reports in the minutes of the SCM Committee meetings.

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[432] G/C/M/10, section 1(iv). The text of the adopted rules of procedure can be found in G/L/144.
[433] The reports are contained in documents G/L/31, 31/Corr.1, 126, 201, 267, 341, 341/Corr.1, 408, 655/Corr. 1.
[434] G/SCM/4, para. 1.
[435] G/SCM/M/8; G/SCM/9.
[436] G/SCM/4.
[437] G/SCM/M/2, item O; G/SCM/5.
[438] For reports of the IGE, see documents G/SCM/W/415/Rev.2, G/SCM/M/16, item H, G/SCM/W/415/Rev.2/Suppl.1 and G/SCM/M/24 item E.
[439] G/SCM/M/1, item P; G/SCM/1.

3. Relationship with other Articles

328. With respect to the relationship with Article 32.7, see paragraph 324 above and Section XXXII below.

PART VII: NOTIFICATION AND SURVEILLANCE

XXV. ARTICLE 25

A. TEXT OF ARTICLE 25

Article 25
Notifications

25.1 Members agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30 June of each year and shall conform to the provisions of paragraphs 2 through 6.

25.2 Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.

25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this connection, and without prejudice to the contents and form of the questionnaire on subsidies,[54] Members shall ensure that their notifications contain the following information:

(*footnote original*) [54] The Committee shall establish a Working Party to review the contents and form of the questionnaire as contained in BISD 9S/193–194.

(i) form of a subsidy (i.e. grant, loan, tax concession, etc.);

(ii) subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year);

(iii) policy objective and/or purpose of a subsidy;

(iv) duration of a subsidy and/or any other time-limits attached to it;

(v) statistical data permitting an assessment of the trade effects of a subsidy.

25.4 Where specific points in paragraph 3 have not been addressed in a notification, an explanation shall be provided in the notification itself.

25.5 If subsidies are granted to specific products or sectors, the notifications should be organized by product or sector.

25.6 Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing.

25.7 Members recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.

25.8 Any Member may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another Member (including any subsidy referred to in Part IV), or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.

25.9 Members so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting Member. In particular, they shall provide sufficient details to enable the other Member to assess their compliance with the terms of this Agreement. Any Member which considers that such information has not been provided may bring the matter to the attention of the Committee.

25.10 Any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the attention of such other Member. If the alleged subsidy is not thereafter notified promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee.

25.11 Members shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

25.12 Each Member shall notify the Committee (a) which of its authorities are competent to initiate and conduct investigations referred to in Article 11 and (b) its domestic procedures governing the initiation and conduct of such investigations.

B. INTERPRETATION AND APPLICATION OF ARTICLE 25

1. General

(a) Questionnaire format for subsidy notifications

329. At its meeting of 28 October and 1 and 8 December 2003, the SCM Committee adopted a revised Questionnaire Format for Subsidy Notifications under Article 25 of the *SCM Agreement* and under Article XVI

of the *GATT 1994*,[440] which consists of general rules relating to the notifications and information to be provided in the notifications.

(b) Periodicity of submission and review of subsidy notifications

330. At its meeting on 8 May 2003, the Committee took note of the Chair's statement concerning Members' views that their resources would be best utilized by giving maximum priority to submitting new and full subsidy notifications every two years and by de-emphasizing the review of updating notifications in the intervening years.[441] This was a continuation of the situation described in the Chair's statement of 31 May 2001, of which the Committee had previously taken note.[442] The Committee adopted procedures for review of 2003 new and full subsidy notifications at its meeting on 8 May 2003.[443]

2. Article 25.7

331. The Panel on *Canada – Aircraft* rejected the argument made by Brazil that assistance under the Canada-Quebec Subsidiary Agreements on Industrial Development (agreements pledging support by the Government of Canada to industrial projects in Quebec) could conceivably be provided in the form of non-repayable contributions.[444] In making this assertion, Brazil was relying on the notification by Canada of these subsidiary agreements to the SCM Committee, made pursuant to Article 25.2 of the *SCM Agreement*; the Panel held that the mere notification by Canada of the programme under these subsidiary agreements was an insufficient basis for a finding of a *prima facie* case that subsidiary agreement assistance was provided in the form of non-repayable contributions.[445]

3. Article 25.11

(a) "shall report . . . all preliminary or final actions"

332. At its meeting of 13 June 1995, the SCM Committee adopted the requirements for the minimum information to be provided under Article 25.11 of the Agreement in the reports on all preliminary or final countervailing actions.[446]

(b) "semi-annual reports"

333. At its meeting of 13 June 1995, the SCM Committee issued guidelines for information to be provided in the semi-annual reports.[447]

(c) Relationship with other Articles

(i) Article 27.4

334. In the *Brazil – Aircraft* dispute, Brazil argued that when determining whether a developing country Member has increased the level of its export subsidies within the meaning of Article 27.4 of the *SCM Agreement*, the Panel or the Appellate Body should consider the Member's budgetary appropriations rather than actual expenditures. In making this argument, Brazil was relying on Article 25 of the *SCM Agreement*, which provides that notifications shall contain the "subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy. . .". The Appellate Body on *Brazil – Aircraft* considered Article 25 to be "considerably less useful as context in interpreting the phrase 'the level of its export subsidies' in Article 27.4".[448] It noted that "Article 25 has a fundamentally different purpose from Article 27 of the *SCM Agreement*. Whereas Article 25 aims to promote transparency by requiring Members to notify their subsidies, without prejudging the legal status of those subsidies, Article 27 imposes positive obligations on developing country Members with respect to export subsidies."[449]

XXVI. ARTICLE 26

A. TEXT OF ARTICLE 26

Article 26
Surveillance

26.1 The Committee shall examine new and full notifications submitted under paragraph 1 of Article XVI of GATT 1994 and paragraph 1 of Article 25 of this Agreement at special sessions held every third year. Notifications submitted in the intervening years (updating notifications) shall be examined at each regular meeting of the Committee.

26.2 The Committee shall examine reports submitted under paragraph 11 of Article 25 at each regular meeting of the Committee.

B. INTERPRETATION AND APPLICATION OF ARTICLE 26

335. As regards the procedures adopted for review of new and full subsidy notifications, see paragraph 330 above.

[440] G/SCM/6/Rev. 1. See G/SCM/48, para. 213.
[441] G/SCM/M/46, item R.4.
[442] G/SCM/M/30, paras. 6–7.
[443] G/SCM/M/46, item R.5 and G/SCM/W/524.
[444] Panel Report on *Canada – Aircraft*, para. 9.256.
[445] Panel Report on *Canada – Aircraft*, para. 9.256.
[446] G/SCM/3.
[447] G/SCM/2.
[448] Appellate Body Report on *Brazil – Aircraft*, para. 149.
[449] Appellate Body Report on *Brazil – Aircraft*, para. 149.

PART VIII: DEVELOPING COUNTRY MEMBERS

XXVII. ARTICLE 27

A. TEXT OF ARTICLE 27

Article 27
Special and Differential Treatment of Developing Country Members

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies,[55] and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the eight-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

(*footnote original*) [55] For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either (a) on the basis of notification by the developing country Member having reached export competitiveness, or (b) on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

(a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or

(b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from devel-

oping country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.

27.12 The provisions of paragraphs 10 and 11 shall govern any determination of de minimis under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.

B. INTERPRETATION AND APPLICATION OF ARTICLE 27

1. General

(a) The Doha Round

336. As regards the Doha Ministerial Decision on Implementation relating to developing countries and non-actionable subsidies, see paragraph 292 above. See also Section V.7 of the Chapter on the *WTO Agreement*.

(b) Relationship with item (k) of the Illustrative List

337. In *Canada – Aircraft Credits and Guarantees*, the Panel concluded that Article 27 of the *SCM Agreement* could not be rendered ineffective by item (k) of the Illustrative List because "Article 27 accords developing country Members special and differential treatment in respect of all export subsidies, whatever form they take. Thus, to the extent that an export credit constitutes an export subsidy, it falls within the scope of Article 27, and developing country Members are in principle entitled to special and differential treatment in respect of that export credit. We are therefore unable to interpret the second paragraph of item (k) in a manner that would render Article 27, in part at least, ineffective.[450]"[451]

2. Article 27.2

(a) "subject to compliance with the provisions in paragraph 4"

338. The Panel on *Brazil – Aircraft* rejected the argument that "Article 27 is *lex specialis* to Article 3, in that it provides special rules with regard to export subsidy programmes of developing country Members" and therefore the specific provisions in Article 27 "displace the general provisions of Article 3.1(a)".[452] Referring to the ordinary meaning of Article 27.2, the Panel stated the following:

> "It is evident to us from this language that Article 27 does not 'displace' Article 3.1(a) of the SCM Agreement unconditionally . . . . Rather, the prohibition of Article 3.1(a) shall not apply 'subject to compliance with the provisions of paragraph 4'. The exemption for developing country Members other than those referred to in Annex VII from the application of the Article 3.1(a) prohibition on export subsidies is clearly conditional on compliance with the provision in paragraph 4 of Article 27. Thus, we consider that, where the provisions in Article 27.4 have not been complied with, the Article 3.1(a) prohibition applies to such developing country Members."[453]

339. The Panel on *Brazil – Aircraft* was called upon to decide the allocation of the burden of proof for claims under Article 27.4 of the *SCM Agreement*. In doing so, the Panel referred to Article 27.7 as context for Article 27.2(b):

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[450] (*footnote original*) *See United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R-WT/DS4/AB/R, adopted 20 May 1996, p. 23, and *Japan – Alcoholic Beverages II*, Report of the Appellate Body, p. 12.

[451] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.179.

[452] Panel Report on *Brazil – Aircraft*, para. 7.39.

[453] Panel Report on *Brazil – Aircraft*, para. 7.40.

"The phrase 'subject to compliance with the provisions in paragraph 4' contained in Article 27.2(b) can, in our view, be seen as analogous to the phrase 'which are in conformity with paragraphs 2 through 5' contained in Article 27.7. This supports an interpretation of Article 27.2(b) that developing country Members are excluded from the scope of application of the substantive obligation in question provided that they comply with certain specified conditions."[454]

340. With respect to the issue of burden of proof under Article 27.4, see paragraphs 364–365 below.

(b) Exception for LDCs

341. In paragraph 10.5 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns,[455] the Ministerial Conference reaffirms that LDCs are exempt from the prohibition on export subsidies in Article 3.1(a).

"Subject to the provisions of Articles 27.5 and 27.6, it is reaffirmed that least-developed country Members are exempt from the prohibition on export subsidies set forth in Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures, and thus have flexibility to finance their exporters, consistent with their development needs. It is understood that the eight-year period in Article 27.5 within which a least-developed country Member must phase out its export subsidies in respect of a product in which it is export-competitive begins from the date export competitiveness exists within the meaning of Article 27.6."

(c) Relationship with other Articles

(i) Article 3.1(a)

342. With respect to the relationship with Article 3.1(a), see paragraph 338 above.

(ii) Article 27.3

343. In determining the burden of proof for Article 27.4, the Panel on *Brazil – Aircraft* referred to Article 27.2(b) in the context of Article 27.3. Specifically, it stated:

"As [context] for Article 27.2(b), [Article 27.3] supports the view that the relevant provisions of Article 27, which extend 'special and differential treatment to developing countries', serve to exclude, in a qualified or unqualified manner, certain developing countries from the scope of application of certain substantive obligations found elsewhere in the Agreement for specified periods of time."[456]

(iii) Article 27.4

344. With respect to the relationship with Article 27.4, see paragraphs 338–339 above.

(iv) Article 27.7

345. With respect to the relationship with Article 27.7, see paragraph 339 above.

3. Article 27.3

(a) General

346. The Panel on *Indonesia – Autos* rejected the argument that "the obligations contained in Article III:2 of *GATT 1994* and the *SCM Agreement* are mutually exclusive"[457] because "the SCM Agreement 'explicitly authorizes' Members to provide subsidies that are prohibited by Article III:2 of GATT".[458] The Panel stated:

"Assuming that such 'explicit authorization' is the correct conflict test in the WTO context, we find that, whether or not the SCM Agreement is considered generally to 'authorize' Members to provide actionable subsidies so long as they do not cause adverse effects to the interests of another member, the SCM Agreement clearly does not authorize Members to impose discriminatory product taxes. Nor does a focus on Article 27.3 suggest a different approach. Whether or not Article 27.3 of the SCM Agreement can be reasonably interpreted to 'authorize', explicitly or implicitly, the provision of subsidies contingent on the use of domestic over imported goods (an issue we do not here decide), Article 27.3 is unrelated to, and cannot reasonably be considered to 'authorize', the imposition of discriminatory product taxes."[459]

(b) Termination of transition period

347. The five-year and eight-year transition periods exempting developing countries and least developing countries respectively from the Article 3.1(b) prohibition on subsidies contingent on the use of domestic over imported goods terminated on 31 December 1999 and 31 December 2002, respectively.

(c) Relationship with other Articles

348. With respect to the relationship with Article 27.2(b), see paragraph 343 above.

(d) Relationship with other WTO Agreements

349. With respect to the relationship with Article III:2 of the *GATT 1994*, see paragraph 346 above.

4. Article 27.4

(a) "shall phase out its export subsidies"

350. The Panel on *Brazil – Aircraft* was faced with interpreting what it termed the "internal contradiction

[454] Panel Report on *Brazil – Aircraft*, para. 7.52.
[455] WT/MIN(01)/17.
[456] Panel Report on *Brazil – Aircraft*, para. 7.53.
[457] Panel Report on *Indonesia – Autos*, para. 14.97.
[458] Panel Report on *Indonesia – Autos*, para. 14.98.
[459] Panel Report on *Indonesia – Autos*, para. 14.98.

within the text of Article 27.4",[460] created, on the one hand, by "the *mandatory* language providing that a developing country Member 'shall phase out its export subsidies'" and, on the other, by "the hortatory language in the final clause encouraging Members to perform their phase-out in a progressive manner".[461] The Panel ultimately found that it was not necessary to resolve this issue. It held that the wording of Article 27.4 of the *SCM Agreement* does not specify in how many phases the elimination of subsidies should be carried out, what the time-period between these phased reductions should be, and how these phased reductions should be distributed within the eight-year period (the transition period granted to developing country Members). The Panel then found that it could not "conclude on the basis of Brazil's actions in the first four years since the date of entry into force of the WTO Agreement that Brazil has failed to comply with the phase-out requirement of Article 27.4 by reason of a failure to undertake phased reductions within the eight-year transition period".[462]

351. In the same context as in the preceding paragraph, the Panel on *Brazil – Aircraft* stated that "we do not consider that the absence of a termination date for PROEX [as of the date of the circulation of the Report, i.e. April 1999] demonstrates that Brazil is not in compliance with its obligation to eliminate its export subsidies by the end of the eight-year period".[463]

352. Instead, however, the Panel on *Brazil – Aircraft* determined that "Because, under the PROEX interest rate equalization scheme, bonds relating to an export transaction are not issued until it has been confirmed that an export transaction will in fact occur, this strongly suggests that Brazil will continue to issue bonds – and hence to grant new subsidies – after 31 December 2002."[464] The Panel regarded this as "sufficient to show, in advance, that Brazil has not complied with the condition of Article 27.4 that it 'phase out its export subsidies within the eight-year period'".[465]

(b) "a developing country Member shall not increase the level of its export subsidies"

(i) "Granting" of subsidies for the purposes of Article 27.4

353. In considering at what point in time payments can be considered "granted" for the purposes of Article 27.4, the Panel on *Brazil – Aircraft* had first found that the subsidy under the Brazilian PROEX programme does not take the form of a "potential direct transfer of funds" (the issuance of the letter of commitment), but rather the form of a "direct transfer of funds" when a payment is made or will be made.[466] The Panel then addressed the issue of when the grant of the subsidy by the Brazilian Government occurs; it held that the right to receive the PROEX payments only arises after the conditions relating to receipt of PROEX payments, and specifically the condition that the product in question actually be exported, has been fulfilled.[467] The Appellate Body first criticized the Panel for addressing the first issue:

> "The issue in this case is when the subsidies for regional aircraft under PROEX should be considered to have been 'granted' *for the purposes of calculating the level of Brazil's export subsidies under Article 27.4 of the SCM Agreement*. The issue is *not* whether or when there is a 'financial contribution', or whether or when the 'subsidy' 'exists', within the meaning of Article 1.1 of that Agreement.
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> . . .
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> . . . [W]e see the issue of the *existence* of a subsidy and the issue of the point at which that subsidy is *granted* as two legally distinct issues."[468]

354. The Appellate Body on *Brazil – Aircraft* then proceeded to agree with the findings of the Panel on the precise moment of the grant of subsidy under the PROEX programme:

> "We agree with the Panel that 'PROEX payments may be "granted" where the unconditional legal right of the beneficiary to receive the payments has arisen, even if the payments themselves have not yet occurred.' We also agree with the Panel that the export subsidies for regional aircraft under PROEX have not yet been 'granted' when the letter of commitment is issued, because, at that point, the export sales contract has not yet been concluded and the export shipments have not yet occurred. For the purposes of Article 27.4, we conclude that the export subsidies for regional aircraft under PROEX are 'granted' when all the legal conditions have been fulfilled that entitle the beneficiary to receive the subsidies."[469]

355. For the relationship between the meaning of the word "grant" in Article 27.4 and Article 3.2 and the distinction between the existence of a subsidy and the moment of its "granting", see paragraphs 136–138 above.

(ii) Constant or nominal values

356. In assessing whether a developing country Member's level of export subsidies has increased, the

[460] Panel Report on *Brazil – Aircraft*, para. 7.79.
[461] Panel Report on *Brazil – Aircraft*, para. 7.79.
[462] Panel Report on *Brazil – Aircraft*, para. 7.81.
[463] Panel Report on *Brazil – Aircraft*, para. 7.82.
[464] Panel Report on *Brazil – Aircraft*, para. 7.84.
[465] Panel Report on *Brazil – Aircraft*, para. 7.85.
[466] Panel Report on *Brazil – Aircraft*, para. 7.70.
[467] Panel Report on *Brazil – Aircraft*, para. 7.71.
[468] Appellate Body Report on *Brazil – Aircraft*, paras. 154–156.
[469] Appellate Body Report on *Brazil – Aircraft*, para. 158.

Panel on *Brazil – Aircraft* used constant dollars instead of nominal dollars. The Panel considered it "appropriate in this case to use constant dollars, as that will provide a more meaningful assessment"[470] and noted that in this case, "the conclusion with respect to this issue would be the same whether constant or nominal dollars are used".[471] The Appellate Body on *Brazil – Aircraft* agreed with the Panel's decision and noted that the Panel "did *not* make a legal finding that the level of a developing country Member's export subsidies must be measured, in every case, using a constant value. The Panel simply made a pragmatic observation that using constant dollars is appropriate *in this case*."[472] The Appellate Body also stated that "Moreover, in our view, to take no account of inflation in assessing the level of export subsidies granted by a developing country Member would render the special and differential treatment provision of Article 27 meaningless."[473]

(iii) Benchmark period

357. In *Brazil – Aircraft*, the parties disagreed "as to the benchmark period against which an examination as to whether a Member has increased the level of its export subsidies should be made".[474] Referring to footnote 55 of Article 27.4, the Panel stated:

> "[Footnote 55] offers for such Members a ceiling level of export subsidies based on their 1986 level. Implicit in this explanation is that, absent footnote 55, a developing country Member which granted no export subsidies *as of the date of entry into force of the WTO Agreement* would be prohibited from providing any export subsidies during the eight-year transition period. Thus, footnote 55 indicates that the relevant benchmark period against which the obligation not to increase the level of export subsidies should be measured is a period immediately preceding the date of entry into force of the WTO Agreement."[475]

(iv) Actual expenditures or budgeted amounts

358. Considering whether actual expenditures or budgeted amounts should be used when examining the level of export subsidies, the Panel on *Brazil – Aircraft* found that "the level of a Member's export subsidies in its ordinary meaning refers to the level of subsidies actually provided, not the level of subsidies which a Member planned or authorized its government to provide through its budgetary process".[476] The Panel continued as follows:

> "This reading is in our view confirmed by footnote 55 . . . . The verb 'grant' has been defined to mean, *inter alia*, 'to bestow by a formal act' and 'give, bestow, confer'. Thus, the verb 'grant' in its ordinary meaning implies the actual provision of a subsidy, not its mere budgeting."[477]

359. In its finding that actual expenditures rather than the budgeted amounts should be used when examining whether a developing country Member has increased the level of its subsidies within the meaning of Article 27.4, the Panel on *Brazil – Aircraft* added that "an expenditure-based measurement is consistent with the object and purpose of the SCM Agreement, which is to reduce economic distortions caused by subsidies".[478] The Appellate Body on *Brazil – Aircraft* agreed with the Panel's reasoning on the use of actual expenditures rather than the budgeted amounts when examining the level of subsidies of a developing country Member under Article 27.4 and stated:

> "To us, the word 'granted' used in this context means 'something actually provided'. Thus, to determine the amount of export subsidies 'granted' in a particular year, we believe that the actual amounts *provided* by a government, and not just those *authorized* or *appropriated* in its budget for that year, is the proper measure. A government does not always spend the entire amount appropriated in its annual budget for a designated purpose. Therefore, in this case, to determine the level of export subsidies for the purposes of Article 27.4, we believe that the proper reference is to actual expenditures by a government, and not to budgetary appropriations."[479]

(c) Footnote 55

360. With respect to footnote 55, see paragraphs 357–358 above.

(d) "use of subsidies inconsistent with its development needs"

361. Noting the difficulties for a panel to determine whether export subsidies are inconsistent with a developing country Member's development needs, the Panel on *Brazil – Aircraft* considered that "it is the developing country Member itself which is best positioned to identify its development needs and to assess whether its export subsidies are consistent with those needs. Thus, in applying this provision we consider that panels should give substantial deference to the views of the developing country Member in question."[480]

362. The Panel on *Brazil – Aircraft* considered that the burden is on the claiming party to demonstrate that,

[470] Panel Report on *Brazil – Aircraft*, para. 7.73.
[471] Panel Report on *Brazil – Aircraft*, para. 7.73.
[472] Appellate Body Report on *Brazil – Aircraft*, para. 162.
[473] Appellate Body Report on *Brazil – Aircraft*, para. 163.
[474] Panel Report on *Brazil – Aircraft*, para. 7.61.
[475] Panel Report on *Brazil – Aircraft*, para. 7.62.
[476] Panel Report on *Brazil – Aircraft*, para. 7.65.
[477] Panel Report on *Brazil – Aircraft*, para. 7.65.
[478] Panel Report on *Brazil – Aircraft*, para. 7.66.
[479] Appellate Body Report on *Brazil – Aircraft*, para. 148.
[480] Panel Report on *Brazil – Aircraft*, para. 7.89.

because the developing country Member "has not complied with the conditions set forth in Article 27.4, the Article 3.1(a) prohibition on export subsidies applies to [the developing country Member]".[481] The Panel concluded that "in order to prevail on this issue Canada must present evidence and argument sufficient to raise a presumption that the use of export subsidies by Brazil is inconsistent with Brazil's development needs".[482]

363. In *Brazil – Aircraft*, Canada argued that the Brazilian PROEX programme was inconsistent with Brazil's development needs, because the Brazilian value-added of the aircraft, according to Canada, was "relatively low". The Panel was unconvinced by this argument:

> "In our view, the fact that Brazil has a generally applicable rule regarding the relationship between the domestic content of an exported product and the extent of the PROEX interest rate equalization available with respect to that product does not mean that the deviation from that rule in a particular case is necessarily inconsistent with a developing country Member's development needs. Nor do we see any basis to conclude that PROEX payments on regional aircraft are necessarily inconsistent with Brazil's development needs merely because the Brazilian value-added of the aircraft being exported is relatively low. There could be any number of reasons why the provision of export subsidies might be consistent with a Member's development needs in such a case."[483]

(e) Burden of proof

364. In *Brazil – Aircraft*, the Panel and the Appellate Body were called upon to address the issue of allocation of the burden of proof under Article 27.4. More specifically, the question was raised as to who bore the burden of proof with respect to the conditions contained in Article 27.4, conditions which determine whether Article 3.1(a) applies to a developing country Member. The Panel opined that the fundamental issue in this respect was "whether the prohibition in Article 3.1(a) of the SCM Agreement *applies* to the developing country Member in question, rather than whether the developing country Member, having been found to be subject to the substantive obligations of Article 3.1(a), and having been found to have acted inconsistently with these obligations, can find justifying protection by invoking Article 27.2(b) in conjunction with Article 27.4".[484] Based on this reasoning, the Panel then found that the burden of proof under Article 27.4 is on the complaining Member, in this case Canada. The Appellate Body upheld this finding of the Panel, emphasizing that the fundamental issue was whether Article 3.1(a) was applicable to the developing country Member in question:

> "With respect to the *application* of the prohibition of export subsidies in Article 3.1(a) of the *SCM Agreement*, paragraphs 2 and 4 of Article 27 contain a carefully negotiated balance of rights and obligations for developing country Members. During the transitional period . . . certain developing country Members are *entitled* to the *non-application* of Article 3.1(a), *provided* that they comply with the specific obligation set forth in Article 27.4. Put another way, when a developing country Member complies with the conditions in Article 27.4, a claim of violation of Article 3.1(a) cannot be entertained during the transitional period, because the export subsidy prohibition in Article 3 simply *does not apply* to that developing country Member."[485]

365. The Panel on *Brazil – Aircraft* had opined that until non-compliance with the conditions set out in Article 27.4 is demonstrated, there is also, on the part of a developing country Member within the meaning of Article 27.2(b), no inconsistency with Article 3.1(a). The Panel therefore concluded that "it is for the Member alleging a violation of Article 3.1(a) of the SCM Agreement to demonstrate that the substantive obligation in that provision – the prohibition on export subsidies – applies to the developing country Member complained against".[486] The Appellate Body agreed with these conclusions:

> "Both from its title and from its terms, it is clear that Article 27 is intended to provide special and differential treatment for developing country Members, under specified conditions. In our view, too, paragraph 4 of Article 27 provides certain obligations that developing country Members must fulfill if they are to benefit from this special and differential treatment during the transitional period. On reading paragraphs 2(b) and 4 of Article 27 together, it is clear that the conditions set forth in paragraph 4 are *positive obligations* for developing country Members, *not* affirmative defences. If a developing country Member complies with the obligations in Article 27.4, the prohibition on export subsidies in Article 3.1(a) simply does not apply. However, if that developing country Member does *not* comply with those obligations, Article 3.1(a) *does* apply.
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> For these reasons, we agree with the Panel that the burden is on the complaining party (*in casu* Canada) to demonstrate that the developing country Member (*in casu* Brazil) is not in compliance with at least one of the elements set forth in Article 27.4. If such non-compliance is demonstrated, then, and only then, does the prohibition of Article 3.1(a) *apply* to that developing country Member."[487]

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[481] Panel Report on *Brazil – Aircraft*, para. 7.90.
[482] Panel Report on *Brazil – Aircraft*, para. 7.90.
[483] Panel Report on *Brazil – Aircraft*, para. 7.92.
[484] Panel Report on *Brazil – Aircraft*, para. 7.56.
[485] Appellate Body Report on *Brazil – Aircraft*, para. 139.
[486] Panel Report on *Brazil – Aircraft*, para. 7.57.
[487] Appellate Body Report on *Brazil – Aircraft*, paras. 140–141.

(f) Extension of Article 27.4 transition period

366. On 26 October 2001, the Chairman of the SCM Committee issued a Report to the General Council, where he recommended that the SCM Committee continue to work on, among other things, seeking a solution for developing country Members with a small percentage share of exports in import markets and in global trade, within the framework of Article 27.4 of the *SCM Agreement* for extensions of the transition period for export subsidies.[488]

367. In paragraph 10.6 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns, the Ministerial Conference directs the SCM Committee to extend the transition period under Article 27.4 as follows:

> "Having regard to the particular situation of certain developing-country Members, directs the Committee on Subsidies and Countervailing Measures to extend the transition period, under the rubric of Article 27.4 of the Agreement on Subsidies and Countervailing Measures, for certain export subsidies provided by such Members, pursuant to the procedures set forth in document G/SCM/39. Furthermore, when considering a request for an extension of the transition period under the rubric of Article 27.4 of the Agreement on Subsidies and Countervailing Measures, and in order to avoid that Members at similar stages of development and having a similar order of magnitude of share in world trade are treated differently in terms of receiving such extensions for the same eligible programmes and the length of such extensions, directs the Committee to extend the transition period for those developing countries, after taking into account the relative competitiveness in relation to other developing-country Members who have requested extension of the transition period following the procedures set forth in document G/SCM/39."[489]

368. The "Procedures for Extensions under Article 27.4 for Certain developing country Members",[490] to which paragraph 10.6 of the Doha Decision refers, provide for a set of procedures in respect of requests for extension of the transition period under Article 27.4 of the *SCM Agreement* for certain eligible programmes of a number of developing countries.

369. Further to the requests of a number of developing country Members pursuant to Article 27.4, including requests pursuant to paragraph 10.6 of the Doha Decision, the SCM Committee granted an extension of the pertinent transition period in respect of a number of export subsidy programmes of: Antigua and Barbuda,[491] Barbados,[492] Belize,[493] Costa Rica,[494] Dominica,[495] Dominican Republic,[496] El Salvador,[497] Fiji,[498] Grenada,[499] Guatemala,[500] Jamaica,[501] Jordan,[502] Mauritius,[503] Panama,[504] Papua New Guinea,[505] St. Lucia,[506] St. Kitts and Nevis,[507] St. Vincent and the Grenadines,[508] Uruguay,[509] Colombia[510] and Thailand.[511]

370. All extensions granted in 2002 related to calendar year 2003. Those extensions granted pursuant to the procedures in document G/SCM/39 had a possibility of an annual "fast track" extension, through 2007, on the basis of mandated annual review by the SCM Committee of standstill and transparency commitments of the Members concerned. Provided all the requirements are satisfied, the final two-year period of Article 27.4 would begin on 1 January 2008. The extensions granted pursuant to Article 27.4 above, and those granted pursuant to paragraph 10.6 of the Doha Implementation Decision, are subject to the particular considerations reflected in Article 27.4, paragraph 10.6 of the Decision and the terms of the relevant decisions taken by the Committee.

371. In 2003, the SCM Committee agreed to grant a continuation of the extension of the transition period in respect of certain export subsidy programmes. These requests were made by a number of developing country

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488 G/SCM/38, pp. 1–4 and 6–18. On 2 August 2001, the Chairman of the General Council requested that the SCM Committee take up the issue of implementation of Article 27 of the *SCM Agreement* as it related to particular issues concerning developing country Members with small percentage share of exports in import markets and global trade. The SCM Committee was to report back by 30 September 2001. The Committee's Chairman's report (in document G/SCM/36 circulated on 2 October 2001) provided background information on the Committee's consideration and requested an extension to 26 October 2001, during which time the Committee would continue to work with a view to reaching a solution for developing country Members with a small percentage share of exports in import markets and global trade, within the framework of Article 27.4 for extension of transition period for export subsidies. During this time the Committee would seek to identify criteria for eligible countries and programmes, transparency elements, timeframes and any other relevant elements and operational aspects.

489 WT/MIN(01)/17.

490 G/SCM/39.

491 G/SCM/50, G/SCM/51.

492 G/SCM/52, G/SCM/53, G/SCM/54, G/SCM/55, G/SCM/56, G/SCM/95, G/SCM/96, G/SCM/97, G/SCM/98.

493 G/SCM/57, G/SCM/58, G/SCM/59, G/SCM/60.

494 G/SCM/61, G/SCM/62.

495 G/SCM/63.

496 G/SCM/64.

497 G/SCM/65, G/SCM/99.

498 G/SCM/66, G/SCM/67, G/SCM/68.

499 G/SCM/69, G/SCM/70, G/SCM/71.

500 G/SCM/72, G/SCM/73, G/SCM/74.

501 G/SCM/75, G/SCM/76, G/SCM/77, G/SCM/78.

502 G/SCM/79.

503 G/SCM/80, G/SCM/81, G/SCM/82, G/SCM/83.

504 G/SCM/84, G/SCM/85, G/SCM/100.

505 G/SCM/86.

506 G/SCM/87, G/SCM/88, G/SCM/89.

507 G/SCM/90.

508 G/SCM/91.

509 G/SCM/92.

510 G/SCM/93, G/SCM/94.

511 G/SCM/101, G/SCM/102.

Members pursuant to Article 27.4, including requests pursuant to paragraph 10.6 of the Doha Decision and the procedures in G/SCM/39, and on the basis of the mandated review of standstill and transparency commitments of the Member concerned. These extensions were accorded to: Antigua and Barbuda,[512] Barbados,[513] Belize,[514] Costa Rica,[515] Dominica,[516] Dominican Republic,[517] El Salvador,[518] Fiji,[519] Grenada,[520] Guatemala,[521] Jamaica,[522] Jordan,[523] Mauritius,[524] Panama,[525] Papua New Guinea,[526] St. Lucia,[527] St. Kitts and Nevis,[528] St. Vincent and the Grenadines,[529] Uruguay[530] and Colombia.[531] All continuations of extensions granted in 2003 were in respect of calendar year 2004.

(g) Relationship with other Articles

372. With respect to the relationship with Article 3.1(a), see paragraph 364 above.

373. With respect to the relationship with Article 3.2, see paragraphs 136–138 above.

374. With respect to the relationship with Article 25, see paragraph 334 above.

375. With respect to the relationship with Article 27.2(b), see paragraphs 364–365 above.

5. Article 27.5 and 27.6

(a) Export competitiveness

376. During 2003, one request under Article 27.6(b) was made to the Secretariat to undertake calculations with respect to export competitiveness.[532]

(b) Review of the operation of Article 27.6

377. The SCM Committee addressed the mandated review of the operation of Article 27.6 at its November 1999 meeting and took note of statements made.[533]

(c) Period for establishment of export competitiveness under Article 27.5

378. In its Decision of 15 December 2000,[534] the General Council decided:

> "6.2 The Committee on Subsidies and Countervailing Measures (SCM Committee) shall examine as an important part of its work all issues relating to Articles 27.5 and 27.6 of the SCM Agreement, including the possibility to establish export competitiveness on the basis of a period longer than two years."[535]

379. In paragraph 10.5 of the Doha Decision on Implementation-Related Issues and Concerns, the Ministers confirmed that the eight-year period in Article 27.5 for the phasing out of export subsidies by LDCs begins from the date of their export competitiveness:

> "Subject to the provisions of Articles 27.5 and 27.6, it is reaffirmed that least-developed country Members are exempt from the prohibition on export subsidies set forth in Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures, and thus have flexibility to finance their exporters, consistent with their development needs. It is understood that the eight-year period in Article 27.5 within which a least-developed country Member must phase out its export subsidies in respect of a product in which it is export-competitive begins from the date export competitiveness exists within the meaning of Article 27.6."

380. Two requests were made in 2002 for the Secretariat to conduct calculations with respect to export competitiveness under Article 27.6(b).[536]

6. Article 27.7

(a) Relationship with other Articles

381. With respect to the relationship with Article 27.2(b), see paragraph 339 above.

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[512] G/SCM/50/Add. 1, G/SCM/51/Add. 1.
[513] G/SCM/52/Add. 1, G/SCM/53/Add. 1, G/SCM/54/Add. 1, G/SCM/55/Add. 1 and G/SCM/56/Add. 1.
[514] G/SCM/57/Add. 1, G/SCM/58/Add. 1, G/SCM/59/Add. 1, G/SCM/60/Add. 1.
[515] G/SCM/61/Add. 1, G/SCM/62/Add. 1.
[516] G/SCM/63/Add. 1.
[517] G/SCM/64/Add. 1.
[518] G/SCM/65/Add. 1.
[519] G/SCM/66/Add. 1, G/SCM/67/Add. 1, G/SCM/68/Add. 1.
[520] G/SCM/69/Add. 1, G/SCM/70/Add. 1, G/SCM/71/Add. 1.
[521] G/SCM/72/Add. 1, G/SCM/73/Add. 1, G/SCM/74/Add. 1.
[522] G/SCM/75/Add. 1, G/SCM/76/Add. 1, G/SCM/77/Add. 1, G/SCM/78/Add. 1.
[523] G/SCM/79/Add. 1.
[524] G/SCM/80/Add. 1, G/SCM/81/Add. 1, G/SCM/82/Add. 1, G/SCM/83/Add. 1.
[525] G/SCM/84/Add. 1, G/SCM/85/Add. 1.
[526] G/SCM/86/Add. 1.
[527] G/SCM/87/Add. 1, G/SCM/88/Add. 1, G/SCM/89/Add. 1.
[528] G/SCM/90/Add. 1.
[529] G/SCM/91/Add. 1.
[530] G/SCM/92/Add. 1.
[531] G/SCM/93/Add. 1, G/SCM/94/Add. 1.
[532] The Secretariat Notes in response to the request by the United States in respect of India (G/SCM/103), and India's request for clarification, can be found in documents G/SCM/103/Add. 1 & /Add. 2.
[533] G/SCM/M/34, item j.
[534] WT/L/384.
[535] See SCM Chairman's Reports to the General Council in G/SCM/34, 36 and 38, reflecting the work undertaken pursuant to this mandate, in which context Members expressed differing views as to the interpretation of Articles 27.5 and 27.6 with respect to, *inter alia*, the meaning of the term "product" in the English text of Article 27.6 (i.e., whether "product", which is defined as a "section heading" of the HS, refers to a "section" or a "heading" of the HS).
[536] The Secretariat Note in response to the request by Ecuador in respect of Colombia can be found in document G/SCM/46. The Secretariat Note in response to the request by Ecuador and Peru in respect of Thailand can be found in document G/SCM/48.

7. Article 27.8

(a) "in accordance with the provisions of paragraphs 3 through 8 of Article 6"

382. The Panel on *Indonesia – Autos* stated that while a complaining party is, pursuant to Article 27.8, deprived of the rebuttable presumption of serious prejudice under Article 6.1(a) when trying to prove serious prejudice by virtue of a subsidy granted to a developing country Member, Article 27.8 does not establish a legal standard for making a prima facie case higher than that normally applicable under Article 6:

> "We do not agree, however, that the complainants bear a heavier than usual burden of proof in this dispute or that the concept of 'like product' should be interpreted more narrowly than usual because Indonesia is a developing country Member. . . . [B]ecause Indonesia is a developing country Member, Article 27.8 requires complainants to demonstrate serious prejudice by positive evidence 'in accordance with the provisions of paragraphs 3 through 8 of Article 6' rather than taking advantage of the rebuttable presumption of serious prejudice that otherwise would have applied under Article 6.1(a). Article 27 does not, however, impose a higher burden of proof on complainants than that normally applicable under Article 6, nor does it provide that the term 'like product' is to be defined differently in the case of subsidization provided by a developing country Member."[537]

8. Article 27.9

383. The Panel on *Indonesia – Autos* described the provision in Article 27.9 as follows:

> "Article 27.9 provides that, *in the usual case*, developing country Members may not be subject to a claim that their actionable subsidies have caused serious prejudice to the interests of another Member. Rather, a Member may only bring a claim that benefits under GATT have been nullified or impaired by a developing country Member's subsidies or that subsidized imports into the complaining Member have caused injury to a domestic industry."[538] (emphasis in original)

9. Article 27.10

384. The Appellate Body on *US – Carbon Steel*, rejected the Panel's findings that *de minimis* subsidization is non-injurious subsidization and noted that Article 27.10 (and 27.11) of the *SCM Agreement* requires termination of a countervailing duty *investigation* with respect to a developing country Member when "the overall level of subsidies granted does not exceed" 2 or 3 per cent:

> "Articles 27.10 and 27.11 of the *SCM Agreement* require termination of a countervailing duty *investigation* with respect to a developing country Member whenever 'the overall level of subsidies granted does not exceed' 2 or 3 percent, depending on the circumstances. These provisions require authorities, in a countervailing duty investigation, to apply a higher *de minimis* subsidization threshold to imports from developing country Members. To accept the Panel's reasoning – that *de minimis* subsidization is non-injurious subsidization – would imply that, for the same product, imported into the same country, and affecting the same domestic industry, the *SCM Agreement* establishes different thresholds at which the same industry can be said to suffer injury, depending on the origin of the product."[539]

10. Article 27.11

(a) "notified"

385. At its meeting of 22 February 1995, the SCM Committee adopted a Format for Notifications under Article 27.11 of the *SCM Agreement*, which sets out the information to be provided in the notification.[540]

386. As regards the termination of a countervailing duty investigation with respect to developing country Members, see paragraph 384 above.

11. Article 27.13

(a) "notified"

387. At its meeting of 22 February 1995, the SCM Committee adopted a Format for Notifications under Article 27.13 of the Agreement on Subsidies and Countervailing Measures, which sets out the information and documents to be provided in the notification.[541]

PART IX: TRANSITIONAL ARRANGEMENTS

XXVIII. ARTICLE 28

A. TEXT OF ARTICLE 28

Article 28
Existing Programmes

28.1 Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be:

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[537] Panel Report on *Indonesia – Autos*, para. 14.167.
[538] Panel Report on *Indonesia – Autos*, para. 14.156.
[539] Appellate Body Report on *US – Carbon Steel*, para. 82.
[540] Format for Notifications under Article 27.11 of the Agreement on Subsidies and Countervailing Measures, G/SCM/16.
[541] Format for Notifications under Article 27.13 of the Agreement on Subsidies and Countervailing Measures, G/SCM/15.

(a) notified to the Committee not later than 90 days after the date of entry into force of the WTO Agreement for such Member; and

(b) brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.

28.2 No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

B. INTERPRETATION AND APPLICATION OF ARTICLE 28

1. Article 28.1

(a) "inconsistent with the provisions of this Agreement"

388. The Panel on *Indonesia – Autos* addressed the question of whether Indonesia had extended the scope of a subsidy programme which was "inconsistent" with the provisions of the *SCM Agreement*, contrary to the prohibition contained in Article 28.2. Under Article 27.3, the prohibition of Article 3.1(b) was not applicable to Indonesia at the time of the dispute; therefore, the Indonesian programme did not violate the *SCM Agreement*. Nevertheless, the United States argued that the term "inconsistent" under Article 28.1 was to be understood as distinct from the concept of "prohibited"; more specifically, the United States argued that a subsidy programme could be inconsistent with the provisions of the *SCM Agreement*, regardless of the applicability of Article 3 in a particular case. The Panel rejected this argument:

> "In the SCM Agreement . . . the drafters have chosen to express the concept of subsidies meeting the substantive conditions of Article 3 by referring to subsidies 'falling under the provisions of Article 3' (See Article 2.3). If they had intended to express the same concept in Article 28, they could have used comparable language."[542]

XXIX. ARTICLE 29

A. TEXT OF ARTICLE 29

Article 29
Transformation into a Market Economy

29.1 Members in the process of transformation from a centrally-planned into a market, free-enterprise economy may apply programmes and measures necessary for such a transformation.

29.2 For such Members, subsidy programmes falling within the scope of Article 3, and notified according to paragraph 3, shall be phased out or brought into conformity with Article 3 within a period of seven years from the date of entry into force of the WTO Agreement. In such a case, Article 4 shall not apply. In addition during the same period:

(a) Subsidy programmes falling within the scope of paragraph 1(d) of Article 6 shall not be actionable under Article 7;

(b) With respect to other actionable subsidies, the provisions of paragraph 9 of Article 27 shall apply.

29.3 Subsidy programmes falling within the scope of Article 3 shall be notified to the Committee by the earliest practicable date after the date of entry into force of the WTO Agreement. Further notifications of such subsidies may be made up to two years after the date of entry into force of the WTO Agreement.

29.4 In exceptional circumstances Members referred to in paragraph 1 may be given departures from their notified programmes and measures and their time-frame by the Committee if such departures are deemed necessary for the process of transformation.

B. INTERPRETATION AND APPLICATION OF ARTICLE 29

No jurisprudence or decision of a competent WTO body.

PART X: DISPUTE SETTLEMENT

XXX. ARTICLE 30

A. TEXT OF ARTICLE 30

Article 30

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.[543]

B. INTERPRETATION AND APPLICATION OF ARTICLE 30

1. List of disputes

389. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the *SCM Agreement* were invoked:

[542] Panel Report on *Indonesia – Autos*, para. 14.261.

[543] In Marrakesh, the Ministerial Conference adopted a Declaration on Dispute Settlement pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures. See Section XXXIV.

	Case Name	Case Number	Invoked Articles
1	*Brazil – Desiccated Coconut*	WT/DS22	Article 32.3
2	*Brazil – Aircraft*	WT/DS46	Articles 3, 4.7, 27.4, 27.5 and Item (k)
3	*Indonesia – Autos*	WT/DS54, WT/DS55, WT/DS59, WT/DS64	Articles 1, 2, 5(c), 6.3(a), 6.3(c), 27.3, 27.9 and 28.2
4	*Canada – Aircraft*	WT/DS70	Articles 1, 3.1(a), 3.2, 27.4 and 4.7
5	*Canada – Dairy*	WT/DS103, WT/DS113	Articles 3.1 and 4.7
6	*US – FSC*	WT/DS108	Articles 1, 3.1(a), 3.1(b) and 4.7
7	*Australia – Automotive Leather II*	WT/DS126	Articles 1, 3.1(a) and 4.7
8	*US – Lead and Bismuth II*	WT/DS138	Articles 1, 10, 19.3, 19.4, 21 and 27.13
9	*Canada – Autos*	WT/DS139, WT/DS142	Articles 1, 3.1(a), 3.1(b) and 4.7
10	*US – Export Restraints*	WT/DS194	Articles 1.1, 10, 11, 17, 19 and 32.1
11	*US – Countervailing Measures on Certain EC Products*	WT/DS212	Articles 10, 14, 19.1, 19.4, 21.1, 21.2 and 21.3
12	*US – Carbon Steel*	WT/DS213	Article 21.3
13	*US – Offset Act (Byrd Amendment)*	WT/DS217	Articles 4.10, 5(b), 7.9, 18.3, 11.4, 32.1 and 32.5
14	*US – Section 129(c)(1) URAA*	WT/DS221	Articles 10, 19.4, 21.1, 32.1 and 32.5
15	*Canada – Aircraft Credits and Guarantees*	WT/DS222	Articles 1.1 (a) (1) (iii); 1.1(b); 3.1 (a), 4.7, 14 (d), 17.3, 17.4, 19.3, 19.4, 20.3, 21.2, 32.1 and Item (k) Illustrative List
16	*US – Softwood Lumber III*	WT/DS236	Articles 1, 3.1(a), 14(d), 17.3, 17.4, 19.3, 19.4, 20.6 and 21.2
17	*US – Softwood Lumber IV*	WT/DS257	Articles 1.2, 10, 11.4, 12.1, 12.3, 12.8, 14, 14(d), 19.1, 19.4 and 32.1 and 32.1
18	*US – Softwood Lumber VI*	WT/DS277	Articles 15.2, 15.4, 15.5 and 15.7

2. Standard of review

390. In *US – Lead and Bismuth II*, the United States claimed that under the *SCM Agreement*, the standards of review as set forth in Article 17.6 of the *Anti-Dumping Agreement* applied by virtue of a Ministerial Declaration which states that "[the] *Ministers recognize*, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures". Both the Panel and the Appellate Body rejected the United States' argument.[544] The Appellate Body opined that the Declaration is couched in hortatory language and does not specify any particular action to be taken or any particular standards of review to be applied. In its finding, the Appellate Body noted the provisions of Article 30 and concluded that the *SCM Agreement* does not "contain any 'special or additional rules' on the standard of review to be applied by panels".[545]

PART XI: FINAL PROVISIONS

XXXI. ARTICLE 31

A. TEXT OF ARTICLE 31

Article 31
Provisional Application

The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

B. INTERPRETATION AND APPLICATION OF ARTICLE 31

1. Review of Articles 6.1, 8 and 9

391. The Committee on Subsidies and Countervailing Measures held a special meeting on 20 December 1999

[544] Panel Report on *US – Lead and Bismuth II*, paras. 6.17–6.19; Appellate Body Report on *US – Lead and Bismuth II*, paras. 49–51.

[545] Appellate Body Report on *US – Lead and Bismuth II*, para. 45. See also para. 426 of this Chapter.

to conclude the review under Article 31 which had commenced earlier in 1999. At that meeting, no consensus was reached by the Committee to extend Articles 6.1, 8 and 9, either as drafted or in modified form.[546] Articles 6.1, 8 and 9 have therefore lapsed. (See paragraphs 206, 233 and 231 above.)

XXXII. ARTICLE 32

A. TEXT OF ARTICLE 32

Article 32
Other Final Provisions

32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[56]

(*footnote original*) [56] This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

32.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

32.3 Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

32.4 For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph.

32.5 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.

32.6 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

32.7 The Committee shall review annually the implementation and operation of this Agreement, taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

32.8 The Annexes[547] to this Agreement constitute an integral part thereof.

B. INTERPRETATION AND APPLICATION OF ARTICLE 32

1. Article 32.1

(a) "in accordance with the provisions of GATT 1994, as interpreted by this Agreement"

392. The Panel on *Brazil – Desiccated Coconut* considered the relevance of Article 32.1 to the question of separability of Article VI of the *GATT 1994* and the *SCM Agreement*. The Panel emphasized that Article 32.1 makes evident that the *SCM Agreement* is an "interpretation" of the subsidies provisions contained in the *GATT 1994*. The Panel concluded that, as a result, the meaning of Article VI of *GATT 1994* cannot be established without reference to the provisions of the *SCM Agreement*, since Article VI of *GATT 1994* "might have a different meaning if read in isolation than if read in conjunction with the *SCM Agreement*". In addition, the Panel pointed out that the general interpretive note to Annex 1A of the WTO Agreement reveals the possibility of conflict between *GATT 1994* and the annexed agreements and that, therefore, there could also be conflicts "between GATT 1994 taken in isolation and GATT 1994 interpreted in conjunction with an [annexed] agreement".[548] The Appellate Body agreed with the findings of the Panel but took a slightly different approach in that it focused on the phrase "in accordance with the provisions of GATT 1994, as interpreted by this Agreement":

> "From reading Article 10, it is clear that countervailing duties may only be imposed in accordance with Article VI of the GATT 1994 and the *SCM Agreement*. A countervailing duty being a specific action against a subsidy of another WTO Member, pursuant to Article 32.1, it can only be imposed 'in accordance with the provisions of GATT 1994, as interpreted by this Agreement'. The ordinary meaning of these provisions taken in their context leads us to the conclusion that the negotiators of the *SCM Agreement* clearly intended that, under the integrated *WTO Agreement*, countervailing duties may only be imposed in accordance with the provisions of Part V of the *SCM Agreement* and Article VI of the GATT 1994, taken together . . ."[549]

393. In *US – Offset Act (Byrd Amendment)*, the Appellate Body concluded that it is inappropriate to rely on the reasoning from *US – 1916 Act*[550] to determine what

[546] See G/SCM/M/22. (See also G/SCM/M/18, item G, G/SCM/M/20, item E and G/SCM/M/24, item G.)
[547] See Sections XXXV, XXXVI, XXXVII, XXXVIII, XXXIX, XL and XLI.
[548] Panel Report on *Brazil – Desiccated Coconut*, para. 238.
[549] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 16.
[550] The Appellate Body found in *US – 1916 Act* that "Article VI, and, in particular, Article VI:2 [of the GATT 1994], read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings."

is meant by 'in accordance with the provisions of the GATT 1994' as that phrase relates to permissible responses to subsidies.[551] The Appellate Body also considered that "to be in accordance with the GATT 1994, as interpreted by the *SCM Agreement*, a response to subsidization must be either in the form of definitive countervailing duties, provisional measures or price undertakings, or in the form of multilaterally-sanctioned countermeasures resulting from resort to the dispute settlement system".[552] Consequently, the Appellate Body upheld the finding of the Panel that the Offset Act is a "non-permissible specific action against" dumping or a subsidy, contrary to Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*.[553]

394. With respect to Article 32.3 and the term "this Agreement", see also paragraph 400 below.

395. With respect to the discussion on the applicability of Article VI of the *GATT 1994* in circumstances where the *SCM Agreement* does not apply, see also paragraphs 412–414 below.

(b) Relationship with other Articles

(i) Article 10

396. With respect to the relationship with Article 10, see paragraph 392 above.

(ii) Article 14

397. In *US – Softwood Lumber IV*, the Appellate Body reversed the Panel's decision that the United States had acted inconsistently with Article 32.1 of the *SCM Agreement*, although it concluded that it was unable to complete the legal analysis on whether the Department of Commerce's determination of benefit was consistent with Article14(d) of the *SCM Agreement*. Neither did the Appellate Body make findings on whether the Department of Commerce's "determination of the existence and amount of benefit in the underlying countervailing duty investigation" was consistent with Articles 14 and 14(d) and whether the imposition of countervailing duties at issue were consistent with Articles 10 and 32.1.[554]

2. Article 32.3

(a) Transitional rule

398. The Panel on *Brazil – Desiccated Coconut* described Article 32.3 as "a transition rule which defines with precision the temporal application of the SCM Agreement".[555] Addressing this temporal application of the *SCM Agreement*, the Appellate Body on *Brazil – Desiccated Coconut* examined Article 32.3 as "an express statement of intention" referred to in Article 28 of the *Vienna Convention*, concerning the non-retroactivity of treaties.[556] The Appellate Body stated:

> "The Appellate Body sees Article 32.3 of the *SCM Agreement* as a clear statement that for countervailing duty investigations or reviews, the dividing line between the application of the GATT 1947 system of agreements and the *WTO Agreement* is to be determined by the date on which the application was made for the countervailing duty investigation or review. . . . the Uruguay Round negotiators expressed an explicit intention to draw the line of application of the new *WTO Agreement* to countervailing duty investigations and reviews at a different point in time from that for other general measures. Because a countervailing duty is imposed only as a result of a sequence of acts, a line had to be drawn, and drawn sharply, to avoid uncertainty, unpredictability and unfairness concerning the rights of states and private parties under the domestic laws in force when the *WTO Agreement* came into effect."[557]

399. While discussing Article 32.3 with reference to the issue of separability of Article VI of the *GATT 1994* and the *SCM Agreement*, the Appellate Body on *Brazil – Desiccated Coconut* agreed that the transitional decisions approved by the Tokyo Round Subsidies and Countervailing Measures Committee and the Contracting Parties "do not modify the scope of rights and obligations under the *WTO Agreement*". Rather, the Appellate Body held these decisions "contribute to understanding the significance of Article 32.3 of the *SCM Agreement* as a transitional rule":[558]

> "Like the Panel, 'we are hesitant, in interpreting the WTO Agreement, to give great weight to the effect of decisions that had not yet been taken at the time the WTO Agreement was signed'. We agree with the Panel's statement that:
>
> > 'The availability of Article VI of GATT 1994 as applicable law in this dispute is a matter to be determined on the basis of the WTO Agreement, rather than on the basis of a subsequent decision by the signatories of the Tokyo Round SCM Code taken at the invitation of the Preparatory Committee.'[559]
>
> . . .

[551] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 266.
[552] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 273.
[553] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 274.
[554] Appellate Body Report on *US – Softwood Lumber IV*, paras. 119–122.
[555] Panel Report on *Brazil – Desiccated Coconut*, para. 228.
[556] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 15.
[557] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 19.
[558] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 18.
[559] (*footnote original*) Panel Report on *Brazil – Desiccated Coconut*, para. 272.

> While we agree with the Panel that these transitional decisions are of limited relevance in determining whether Article VI of the GATT 1994 can be applied independently of the *SCM Agreement*, they reflect the intention of the *Tokyo Round SCM Code* signatories to provide a forum for dispute settlement arising out of disputes under the *Tokyo Round SCM Code* for one year after its legal termination date. At the time the *Tokyo Round SCM Code* signatories agreed to these decisions, they were fully cognizant of the implications of the operation of Article 32.3 of the *SCM Agreement*."[560]

(b) "this Agreement"

400. After a contextual analysis of Article 32.3, the Appellate Body on *Brazil – Desiccated Coconut* concluded that "[i]f Article 32.3 is read in conjunction with Articles 10 and 32.1 of the *SCM Agreement*, it becomes clear that the term 'this Agreement' in Article 32.3 means 'this Agreement and Article VI of the GATT 1994'".[561]

401. With respect to further discussion on the applicability of Article VI of the *GATT 1994* in circumstances where, pursuant to Article 32.3, the *SCM Agreement* does not apply, see paragraph 412 below.

(c) "investigations"

402. The Panel on *Brazil – Desiccated Coconut*, in a finding subsequently not addressed by the Appellate Body, rejected the argument that the reference in Article 32.3 to "investigations" limits the application of the *SCM Agreement* to the "procedural" aspects of investigations. Rather, the Panel concluded that "the concept of 'investigations' as expressed in Article 32.3 includes both procedural and substantive aspects of an investigation and the imposition of a countervailing measure pursuant thereto".[562] The Panel also held that "one object and purpose of Article 32.3 is to prevent WTO Members from having to redo investigations begun before the entry into force of the WTO Agreement in accordance with the new and more detailed procedural provisions of the SCM Agreement. In our view, however, this consideration is equally applicable to the substantive provisions of the SCM Agreement."[563]

(d) "reviews of existing measures"

403. The Panel on *Brazil – Desiccated Coconut*, in a finding subsequently not addressed by the Appellate Body, rejected the argument that Article 32.3 does not preclude the application of the *SCM Agreement* to the continued collection of duties after the date of entry into force of the WTO Agreement. It stated:

> "It is thus through the mechanism of reviews provided for in the SCM Agreement, and only through that mechanism, that the Agreement becomes effective with respect to measures imposed pursuant to investigations to which the SCM Agreement does not apply. If . . . a panel could examine in the light of the SCM Agreement the continued collection of a duty even where its imposition was not subject to the SCM Agreement, and if . . . that examination of the collection of the duty extended to the basis on which the duty was imposed, then in effect the determinations on which those duties were based would be subject to standards that did not apply – and which, in the case of determinations made before the WTO Agreement was signed, did not yet even exist – at the time the determinations were made. In our view, such an interpretation would be contrary to the object and purpose of Article 32.3 and would render that Article a nullity."[564]

3. Article 32.5

(a) "to ensure . . . the conformity of its laws . . . with the provisions of this Agreement"

404. In *US – Offset Act (Byrd Amendment)*, the Panel suggested that the United States bring the Offset Act into conformity with the *SCM Agreement* by "repealing" the Act. The Panel had found violations of Articles 5.4 and 18.1 of the *Anti-Dumping Agreement* and Articles 11.4 and 32.1 of the *SCM Agreement*; it had also found consequent violations of Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement*, and therefore Article XVI:4 of the *WTO Agreement*.[565] The Appellate Body upheld the Panel's findings of violations of Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement*, and also of Article XVI:4 of the *WTO Agreement*, based on the violations of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*.[566]

405. In *US – Countervailing Measures on Certain EC Products*, the Panel had found that the disputed legislation, Section 1677(5)(F), as interpreted by the US Court of Appeals for the Federal Circuit and the SAA, was inconsistent with the *SCM Agreement*, and, therefore, the United States had failed to ensure conformity with Article 32.5 of the *SCM Agreement* and Article XVI.4 of the WTO Agreement respectively. In this regard, the Panel was of the view that:

> "[T]ogether with the other provisions of the SCM Agreement, Article 32.5 as well as Article XVI.4 of the WTO Agreement require the United States to maintain a

[560] Appellate Body Report on *Brazil – Desiccated Coconut*, pp. 19–20.
[561] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 17.
[562] Panel Report on *Brazil – Desiccated Coconut*, para. 229.
[563] Panel Report on *Brazil – Desiccated Coconut*, para. 229.
[564] Panel Report on *Brazil – Desiccated Coconut*, para. 230.
[565] Panel Report on *US – Offset Act (Byrd Amendment)*, paras. 7.91–7.92.
[566] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, paras. 300–301.

legislation, regulations and practices that guarantee that in cases of fair market value privatization at arm's-length no benefit *vis-à-vis* the privatized producer is determined to continue from prior subsidization or financial contributions bestowed on a state-owned producer."[567]

406. The Appellate Body, however, reversed the Panel's findings on the grounds that it did not consider that Section 1677(5)(F) had *per se* violated the *SCM Agreement*.[568]

4. Article 32.7

(a) Relationship with other Articles

407. With respect to the relationship with Article 24, see paragraph 324 above.

XXXIII. RELATIONSHIP WITH OTHER WTO AGREEMENTS

A. GATT 1994

1. Article III

(a) Absence of conflict between the *SCM Agreement* and Article III of the *GATT 1994*

408. Considering whether there is a general conflict between the *SCM Agreement* and Article III of the *GATT 1994*, the Panel on *Indonesia – Autos* stated:

> "As was the case under GATT 1947, we think that Article III of GATT 1994 and the WTO rules on subsidies remain focused on different problems. Article III continues to prohibit discrimination between domestic and imported products in respect of internal taxes and other domestic regulations, including local content requirements. It does not 'proscribe' nor does it 'prohibit' the provision of any subsidy *per se*. By contrast, the SCM Agreement prohibits subsidies which are conditional on export performance and on meeting local content requirements, provides remedies with respect to certain subsidies where they cause adverse effects to the interests of another Member and exempts certain subsidies from actionability under the SCM Agreement. In short, Article III prohibits discrimination between domestic and imported products while the SCM Agreement regulates the provision of subsidies to enterprises.
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> . . .
>
> Accordingly, we consider that Article III and the SCM Agreement have, generally, different coverage and do not impose the same type of obligations. Thus there is no general conflict between these two sets of provisions."[569]

409. The Panel on *Indonesia – Autos* further acknowledged that while Article III of the *GATT 1994* and the *SCM Agreement* may overlap to a certain extent, the two sets of provisions serve different purposes:

> "[T]he only subsidies that would be affected by the provisions of Article III are those that would involve discrimination between domestic and imported products. While Article III of GATT and the SCM Agreement may appear to overlap in respect of certain measures, the two sets of provisions have different purposes and different coverage. Indeed, they also offer different remedies, different dispute settlement time limits and different implementation requirements. Thus, we reject . . . [the] argument that the application of Article III to subsidies would reduce the SCM Agreement to 'inutility'.
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> . . .
>
> [T]he obligations contained in the WTO Agreement are generally cumulative, can be complied with simultaneously and . . . different aspects and sometimes the same aspects of a legislative act can be subject to various provisions of the WTO Agreement."[570]

(b) Absence of conflict between the *SCM Agreement* and Article III:2 of the *GATT 1994*

410. The Panel on *Indonesia – Autos* rejected the argument that "the obligations contained in Article III:2 of GATT and the SCM Agreement are mutually exclusive"[571] because "the SCM Agreement 'explicitly authorizes' Members to provide subsidies that are prohibited by Article III:2 of GATT".[572] The Panel stated:

> "We also recall that the obligations of the SCM Agreement and Article III:2 are not mutually exclusive. It is possible . . . to respect . . . obligations under the SCM Agreement without violating Article III:2 since Article III:2 is concerned with discriminatory product taxation, rather than the provision of subsidies as such. Similarly, it is possible . . . to respect the obligations of Article III:2 without violating . . . obligations under the SCM Agreement since the SCM Agreement does not deal with taxes on products as such but rather with subsidies to enterprises. At most, the SCM Agreement and Article III:2 are each concerned with different aspects of the same piece of legislation."[573]

411. As regards the relationship with Article 27.3 on a transition period for developing countries and least developing countries and Article III:2 of the *GATT 1994*, see also paragraph 346 above.

2. Article VI

412. In the *Brazil – Desiccated Coconut* dispute, the Panel was faced with the question "whether Article VI

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[567] Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 7.156.
[568] Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, paras. 159–160.
[569] Panel Report on *Indonesia – Autos*, paras. 14.33 and 14.36.
[570] Panel Report on *Indonesia – Autos*, paras. 14.39 and 14.56.
[571] Panel Report on *Indonesia – Autos*, para. 14.97.
[572] Panel Report on *Indonesia – Autos*, para. 14.98.
[573] Panel Report on *Indonesia – Autos*, paras. 14.98–14.99.

creates rules which are separate and distinct from those of the SCM Agreement, and which can be applied without reference to that Agreement, or whether Article VI of GATT 1994 and the SCM Agreement represent an inseparable package of rights and disciplines that must be considered in conjunction".[574] In phrasing this issue, the Panel on *Brazil – Desiccated Coconut* made clear that the *SCM Agreement* did not supersede Article VI of the *GATT 1994* as the basis for the regulation by the *WTO Agreement* of countervailing measures. In making this finding, the Panel relied on the existence of the general interpretive note to Annex 1A of the *WTO Agreement* and on the fact that certain provisions of Article VI are not "replicated or elaborated" in the *SCM Agreement*.[575] The Appellate Body on *Brazil – Desiccated Coconut* confirmed the statement by the Panel that the *SCM Agreement* did not supersede Article VI of the *GATT 1994*.[576] In making this finding, the Appellate Body emphasized the integrated nature of the *WTO Agreement* and the annexed agreements. More specifically, the Appellate Body found that although the provisions of the *GATT 1947* were now incorporated into the *GATT 1994*, they did not represent the totality of rights and obligations of WTO Members in a given subject area:

> "The relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis. Although the provisions of the GATT 1947 were incorporated into, and became a part of, the GATT 1994, they are not the sum total of the rights and obligations of WTO Members concerning a particular matter. For example, with respect to subsidies on agricultural products, Articles II, VI and XVI of the GATT 1994 alone do not represent the total rights and obligations of WTO Members. The *Agreement on Agriculture* and the *SCM Agreement* reflect the latest statement of WTO Members as to their rights and obligations concerning agricultural subsidies. The general interpretative note to Annex 1A was added to reflect that the other goods agreements in Annex 1A, in many ways, represent a substantial elaboration of the provisions of the GATT 1994, and to the extent that the provisions of the other goods agreements conflict with the provisions of the GATT 1994, the provisions of the other goods agreements prevail. This does not mean, however, that the other goods agreements in Annex 1A, such as the *SCM Agreement*, supersede the GATT 1994."[577]

413. The Appellate Body on *Brazil – Desiccated Coconut* noted that "The relationship between the *SCM Agreement* and Article VI of GATT 1994 is set out in Articles 10 and 32.1 of the *SCM Agreement*."[578] Apart from the integrated structure of the *WTO Agreement* and the annexed agreements, the Appellate Body therefore focused on these two provisions of the *SCM Agreement*. The Appellate Body then explicitly agreed with the Panel's statement that:

> "Article VI of GATT 1994 and the SCM Agreement represent a new and different package of rights and obligations, as among WTO Members, regarding the use of countervailing duties. Thus, Article VI and the respective SCM Agreements impose obligations on a potential user of countervailing duties, in the form of conditions that have to be fulfilled in order to impose a duty, but they also confer the right to impose a countervailing duty when those conditions are satisfied. The SCM Agreements do not merely impose additional substantive and procedural obligations on a potential user of countervailing measures. Rather, the SCM Agreements and Article VI together define, clarify and in some cases modify the whole package of rights and obligations of a potential user of countervailing measures."[579]

414. The Appellate Body on *Brazil – Desiccated Coconut* then proceeded to find that:

> "[C]ountervailing duties may only be imposed in accordance with Article VI of the GATT 1994 and the *SCM Agreement*. A countervailing duty being a specific action against a subsidy of another WTO Member, pursuant to Article 32.1, it can only be imposed 'in accordance with the provisions of GATT 1994, as interpreted by this Agreement'. The ordinary meaning of these provisions taken in their context leads us to the conclusion that the negotiators of the *SCM Agreement* clearly intended that, under the integrated *WTO Agreement*, countervailing duties may only be imposed in accordance with the provisions of Part V of the *SCM Agreement* and Article VI of the GATT 1994, taken together. If there is a conflict between the provisions of the *SCM Agreement* and Article VI of the GATT 1994, furthermore, the provisions of the *SCM Agreement* would prevail as a result of the general interpretative note to Annex 1A.
>
> . . .
>
> The fact that Article VI of the GATT 1947 could be invoked independently of the *Tokyo Round SCM Code* under the previous GATT system does not mean that Article VI of GATT 1994 can be applied independently of the *SCM Agreement* in the context of the WTO. The authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system."[580]

3. Article XVI

415. With respect to the relationship with Article XVI:4 of the *GATT 1994*, see paragraphs 82–83 above.

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[574] Panel Report on *Brazil – Desiccated Coconut*, para. 227.
[575] Panel Report on *Brazil – Desiccated Coconut*, para. 227.
[576] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 14.
[577] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 15.
[578] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 16.
[579] Panel Report on *Brazil – Desiccated Coconut*, para. 246; Appellate Body Report on *Brazil – Desiccated Coconut*, p. 17.
[580] Appellate Body Report on *Brazil – Desiccated Coconut*, pp. 16 and 18.

B. TRIMS AGREEMENT

416. The Panel on *Indonesia – Autos* considered the issue of whether a measure covered by the *SCM Agreement* can also be subject to the obligations contained in the *TRIMs Agreement*. The Panel first noted that the general interpretive note to Annex 1A of the *WTO Agreement* did not apply in this context and opined that it had to resort to the relevant provision of general international law. In so doing, the Panel emphasized the general international law presumption against conflicts:

> "We note first that the interpretive note to Annex IA of the WTO Agreement is not applicable to the relationship between the SCM Agreement and the TRIMs Agreement. The issue of whether there might be a general conflict between the SCM Agreement and the TRIMs Agreement would therefore need to be examined in the light of the general international law presumption against conflicts and the fact that under public international law a conflict exists in the narrow situation of mutually exclusive obligations for provisions that cover the same type of subject matter.
>
> In this context the fact that the drafters included an express provision governing conflicts between GATT and the other Annex 1A Agreements, but did not include any such provision regarding the relationship between the other Annex 1A Agreements, at a minimum reinforces the presumption in public international law against conflicts. With respect to the nature of obligations, we consider that, with regard to local content requirements, the SCM Agreement and the TRIMs Agreement are concerned with different types of obligations and cover different subject matters. In the case of the SCM Agreement, what is prohibited is the grant of a subsidy contingent on use of domestic goods, not the requirement to use domestic goods as such. In the case of the TRIMs Agreement, what is prohibited are TRIMs in the form of local content requirements, not the grant of an advantage, such as a subsidy."[581]

417. The Panel on *Indonesia – Autos* proceeded to emphasize the different types of obligations and the different subject matters covered by the *SCM Agreement* on the one hand and the *TRIMs Agreement* on the other. It explored how bringing a national measure into consistency with one of the agreements could nevertheless fail to remove the incompatibility with the other agreement. The Panel ultimately concluded that both the *TRIMs Agreement* and the *SCM Agreement* were applicable to the dispute before it:

> "A finding of inconsistency with Article 3.1(b) of the SCM Agreement can be remedied by removal of the subsidy, even if the local content requirement remains applicable. By contrast, a finding of inconsistency with the TRIMs Agreement can be remedied by a removal of the TRIM that is a local content requirement even if the subsidy continues to be granted. Conversely, for instance, if a Member were to apply a TRIM (in the form of local content requirement), as a condition for the receipt of a subsidy, the measure would continue to be a violation of the TRIMs Agreement if the subsidy element were replaced with some other form of incentive. By contrast, if the local content requirements were dropped, the subsidy would continue to be subject to the SCM Agreement, although the nature of the relevant discipline under the SCM Agreement might be affected. Clearly, the two agreements prohibit different measures. We note also that under the TRIMs Agreement, the advantage made conditional on meeting a local content requirement may include a wide variety of incentives and advantages, other than subsidies. There is no provision contained in the SCM Agreement that obliges a Member to violate the TRIMs Agreement, or vice versa.
>
> We consider that the SCM and TRIMs Agreements cannot be in conflict, as they cover different subject matters and do not impose mutually exclusive obligations. The TRIMs Agreement and the SCM Agreement may have overlapping coverage in that they may both apply to a single legislative act, but they have different foci, and they impose different types of obligations.
>
> . . .
>
> We find that there is no general conflict between the SCM Agreement and the TRIMs Agreement. Therefore, to the extent that the . . . programmes are TRIMs and subsidies, both the TRIMs Agreement and the SCM Agreement are applicable to this dispute.
>
> We consider . . . that the obligations contained in the WTO Agreement are generally cumulative, can be complied with simultaneously and that different aspects and sometimes the same aspects of a legislative act can be subject to various provisions of the WTO Agreement."[582]

C. DSU

1. Article 3.8

418. Most panel reports on subsidy disputes contain a paragraph in their recommendations providing that the findings at issue constitute a case of prima facie nullification or impairment of benefits pursuant to Article 3.8 of the *DSU*.[583]

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[581] Panel Report on *Indonesia – Autos*, para. 14.50.

[582] Panel Report on *Indonesia – Autos*, paras. 14.51–14.52 and 14.55–14.56.

[583] For instance, the following cases have made a reference to Article 3.8 of the *DSU*: Panel Report on *Brazil – Aircraft*, para. 8.3; Panel Report on *Indonesia – Autos*, para. 15.2; Panel Report on *Canada – Aircraft*, para. 10.2; Panel Report on *Canada – Dairy*, para. 8.2; Panel Report on *US – FSC*, para. 8.2; Panel Report on *Australia – Automotive Leather II*, para. 10.2; Panel Report on *US – Lead and Bismuth II*, para. 7.2; Panel Report on *Canada – Autos*, para. 11.2; Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 8.2; Panel Report on *US – Softwood Lumber III*, para. 8.4. Panel Report on *US – Export Restraints*; Panel Report on *US – Carbon Steel*; and Panel Report on *US – Section 129(c)(1) URAA* do not make any reference to Article 3.8 of the *DSU*.

419. Regarding the different disciplines applicable to prohibited subsidies and other illegal measures as regards compliance with panel recommendations, see paragraphs 177 and 181 above.

2. Article 4

420. With respect to the relationship between Article 4.4 of the *SCM Agreement* and Article 4 of the *DSU*, see paragraphs 155–156 above.

3. Article 11

421. With respect to the relationship between Article 4.2 of the *SCM Agreement* and Article 11 of the *DSU*, see paragraph 149 above.

4. Article 13.2

422. With respect to the relationship between Article 4.2 of the *SCM Agreement* and Article 13.2 of the *DSU*, see paragraph 150 above.

5. Article 23.1

423. In *Canada – Aircraft Credits and Guarantees*, the Panel recalled the prospective nature of WTO dispute settlement remedies and that such an approach was also applicable to the *SCM Agreement*:

> "In any event, even if the WTO dispute settlement mechanism does only provide for prospective remedies, we note that it does so in respect of all cases, and not only those involving prohibited export subsidies. Article 23.1 of the DSU provides that Members shall resolve all disputes through the multilateral dispute system, to the exclusion of unilateral self-help. Thus, to the extent that the WTO dispute settlement system only provides for prospective remedies, that is clearly the result of a policy choice by the WTO Membership. Given this policy choice, and given the fact that Article 23.1 of the DSU applies to all disputes, including those involving (alleged) prohibited export subsidies, we see no reason why the (allegedly) prospective nature of WTO dispute settlement remedies should impact on our interpretation of the second paragraph of item (k)."[584]

D. AGREEMENT ON AGRICULTURE

424. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* noted that the WTO-consistency of an export subsidy for agricultural products has to be examined, in the first place, under the *Agreement on Agriculture*. In this case, the Appellate Body considered that it was unable to determine whether the measures at issue "conform[] fully" to Articles 9.1(c) or 10.1 of the *Agreement on Agriculture* and therefore declined to examine the claim under Article 3.1(a) of the *SCM Agreement*.[585] See paragraphs 126–128 above.

E. GATT SUBSIDIES CODE

425. The Panel on *Canada – Aircraft Credits and Guarantees* held that it did not consider that the object and purpose of the *SCM Agreement* was necessarily the same as the object and purpose of the GATT Subsidies Code. For the Panel, the *SCM Agreement* provides for more extensive special and differential treatment for developing countries than the GATT Subsidies Code did. In addition, the preamble to the Marrakesh Agreement Establishing the World Trade Organization, of which agreement the *SCM Agreement* is an integral part, recognizes "that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development". No such "need" was identified in the GATT Subsidies Code. In addition, all WTO Members are bound by the *SCM Agreement*, whereas only a number of GATT Contracting Parties were signatories of the GATT Subsidies Code. Furthermore, the provisions of the *SCM Agreement* – unlike those of the GATT Subsidies Code – are subject to binding dispute settlement under the *DSU*.[586]

XXXIV. RELATIONSHIP WITH MINISTERIAL DECISIONS AND DECLARATIONS

A. TEXT OF DECLARATION

Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade or Part V of the Agreement on Subsidies and Countervailing Measures

Ministers,

Recognize, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.

B. INTERPRETATION AND APPLICATION

1. Standard of review

426. The Appellate Body on *US – Lead and Bismuth II* rejected the argument that, "by virtue of the Declaration, the standard of review specified in Article 17.6 of

[584] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.170.
[585] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 125.
[586] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.171.

the *Anti-Dumping Agreement* also applies to disputes involving countervailing duty measures under Part V of the *SCM Agreement*".[587] The Appellate Body emphasized the hortatory language of the Declaration and the fact that the Declaration does not provide for the application of any particular standards of review to be applied. See also Section XI.B.6(d) of the Chapter on the *DSU*.

427. With respect to this issue, see also paragraph 390 above.

XXXV. ANNEX I

A. TEXT OF ANNEX I

ANNEX I
ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available[57] on world markets to their exporters.

(*footnote original*) [57] The term "commercially available" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

(e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes[58] or social welfare charges paid or payable by industrial or commercial enterprises.[59]

(*footnote original*) [58] For the purpose of this Agreement:
The term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;
The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;
The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;
"Prior-stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;
"Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;
"Remission" of taxes includes the refund or rebate of taxes;
"Remission or drawback" includes the full or partial exemption or deferral of import charges.
(*footnote original*) [59] The Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any Member may draw the attention of another Member to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.

Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member.

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes[60] on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

[587] Appellate Body Report on *US – Lead and Bismuth II*, para. 48.

(*footnote original*) [60] Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

(i) The remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

B. INTERPRETATION AND APPLICATION OF ANNEX I

1. Items (c), (d), (j) and (k)

(a) "Provided or mandated by governments"

428. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* after observing that Article 9.1(c) of the *Agreement on Agriculture* does not require that payments be financed by virtue of government "mandate", or other "direction", but rather government "action", noted that in comparison, items (c), (d), (j) and (k) of the Illustrative List seemed to imply the need to find some type of government mandate in the context of determining the existence of a subsidy. The Appellate Body stated:

> "Article 9.1(c) of the *Agreement on Agriculture* may be contrasted with Article 9.1(e) of the *Agreement on Agriculture*, as well as with Article 1.1(a)(1)(iv) of the *SCM Agreement*, and items (c), (d), (j), and (k) of the Illustrative List of Export Subsidies (the 'Illustrative List') of the *SCM Agreement*. In these provisions, some kind of government mandate, direction, or control is an element of a subsidy provided through a third party."[588]

2. Item (d)

429. The Panel on *Brazil – Aircraft*, in a finding not subsequently addressed by the Appellate Body, described the test whether a measure is a prohibited export subsidy under item (d) as "a comparison of the terms and conditions of the goods or services being provided by the government with the terms and conditions that would otherwise be available *to the exporters receiving the alleged export subsidy*".[589] As a consequence, the Panel rejected the argument that the relevant test depends upon "whether the measure merely offsets advantages bestowed on competing products from another Member". The Panel noted that "the fact that a foreign competitor had access to the same goods or services on better terms than those available to the exporters in question would not be a defense".[590]

3. Items (e), (f), (g), (h) and (i)

430. Similarly to its finding with respect to item (d), the Panel on *Brazil – Aircraft*, in the context of items (e), (f), (g), (h) and (i), rejected the argument that whether a measure is a prohibited export subsidy should be decided based on whether the measure at issue merely serves to offset advantages bestowed on competing products from another Member.[591] Regarding items (e)

[588] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, footnote 113.
[589] Panel Report on *Brazil – Aircraft*, para. 7.25.
[590] Panel Report on *Brazil – Aircraft*, para. 7.25.
[591] Panel Report on *Brazil – Aircraft*, para. 7.25.

to (i), the Panel stated that "there is no hint that a tax advantage would not constitute an export subsidy simply because it reduced the exporter's tax burden to a level comparable to that of foreign competitors".[592]

4. Footnote 59 of Item (e)

(a) Fifth Sentence: "double taxation of foreign-source income"

(i) Scope of application

431. In the context of footnote 59, the Appellate Body in *US – FSC (Article 21.5 – EC)* considered that the fifth sentence of footnote 59 applies to measures taken by a Member to avoid taxation of income earned by a taxpayer of that Member in a foreign state:

> "'[D]ouble taxation' occurs when the same income, in the hands of the same taxpayer, is liable to tax in different States. The fifth sentence of footnote 59 applies to a measure taken by a Member to avoid such double taxation of 'foreign-source income'. In examining the phrase 'foreign-source income', we observe that, in ordinary usage, the word 'source' can refer to the place where a thing originates, and that the words 'source' and 'origin' can be synonyms. We consider, therefore, that the word 'source', in the context of the fifth sentence of footnote 59, has a meaning akin to 'origin' and refers to the place where the income is earned. This reading is supported by the combination of the words 'foreign' and 'source' as 'foreign' also refers to the place where the income is earned. Used in this way, the word 'foreign' indicates a source which is external to the Member adopting the measure at stake. Footnote 59, therefore, applies to measures taken by a Member to avoid the double taxation of income earned by a taxpayer of that Member in a 'foreign' State."[593]

(ii) Scope of discretion to avoid double taxation

432. The Appellate Body on *US – FSC* considered that Members have a discretion to avoid double taxation:

> "[I]t is 'implicit' in the requirement to use the arm's length principle that Members of the WTO are not obliged to tax foreign-source income, and also that Members may tax such income less than they tax domestic-source income. We would add that, even in the absence of footnote 59, Members of the WTO are *not* obliged, by WTO rules, to tax *any* categories of income, whether foreign- or domestic-source income. The United States argues that, since there is no requirement to tax export related foreign-source income, a government cannot be said to have 'foregone' revenue if it elects not to tax that income. It seems to us that, taken to its logical conclusion, this argument by the United States would mean that there could *never* be a foregoing of revenue 'otherwise due' because, in principle, under WTO law generally, *no* revenues are ever due and *no* revenue would, in this view, ever be 'foregone'. That cannot be the appropriate implication to draw from the requirement to use the arm's length principle."[594]

433. The Appellate Body on *US – FSC (Article 21.5 – EC)* noted that Members have the authority to determine their rules of taxation, provided they comply with WTO obligations. The Appellate Body upheld the Panel's findings that footnote 59 does not require Members to adopt particular legal standards to define when income is foreign-source for the purposes of their double taxation-avoidance measures and noted that footnote 59 does not give Members an unlimited discretion to avoid double taxation of "foreign-source income" through the grant of export subsidies. Accordingly, for the Appellate Body, the term "foreign-source income", as used in footnote 59, cannot be interpreted solely by reference to the rules of the Member taking the measure to avoid double taxation of foreign-source income:

> "It is, however, no easy matter to determine in every situation when income is susceptible of being taxed in two different States and, thus, when a Member may properly regard income as 'foreign-source income'. We have emphasized in previous appeals that Members have the sovereign authority to determine their own rules of taxation, provided that they respect their WTO obligations. Thus, subject to this important proviso, each Member is free to determine the rules it will use to identify the source of income and the fiscal consequences – to tax or not to tax the income – flowing from the identification of source. We see nothing in footnote 59 to the *SCM Agreement* which is intended to alter this situation. We, therefore, agree with the Panel that footnote 59 does not oblige Members to adopt any particular legal standard to determine whether income is foreign-source for the purposes of their double taxation-avoidance measures.
>
> At the same time, however, footnote 59 does not give Members an unfettered discretion to avoid double taxation of 'foreign-source income' through the grant of export subsidies. As the fifth sentence of footnote 59 to the *SCM Agreement* constitutes an exception to the prohibition on export subsidies, great care must be taken in defining its scope. If footnote 59 were interpreted to allow a Member to grant a fiscal preference for *any* income that a Member chooses to regard as foreign source, that reading would seriously undermine the prohibition on export subsidies in the *SCM Agreement*. That would allow Members, relying on whatever source rules they adopt, to grant fiscal export subsidies for income that may not actually be susceptible of being taxed in two jurisdictions. Accordingly, the term 'foreign-source

[592] Panel Report on *Brazil – Aircraft*, para. 7.25.
[593] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 137.
[594] Appellate Body Report on *US – FSC*, para. 98.

income', as used in footnote 59 cannot be interpreted by reference solely to the rules of the Member taking the measure to avoid double taxation of foreign-source income."[595]

(iii) Design, structure and architecture of double taxation to target foreign-source income

434. The Appellate Body on *US – FSC (Article 21.5 – EC)* also considered that measures falling under footnote 59 should not necessarily be "perfectly tailored" to the actual double tax burden, but that such measures must target "foreign-source income". Following the Panel's approach, the Appellate Body also examined the "design, structure and architecture" of the measures under consideration to determine if they fell under footnote 59.[596]

"The avoidance of double taxation is not an exact science. Indeed, the income exempted from taxation in the State of residence of the taxpayer might not be subject to a corresponding, or any, tax in a 'foreign' State. Yet, this does not necessarily mean that the measure is not taken to avoid double taxation of foreign-source income. Thus, we agree with the Panel, and the United States, that measures falling under footnote 59 are not required to be perfectly tailored to the actual double tax burden.

However, the fact that measures falling under footnote 59 to the *SCM Agreement* may grant a tax exemption even for income that is not taxed in another jurisdiction does not mean that such tax exemptions may be granted, under the fifth sentence of footnote 59, for *any* income. Footnote 59 prescribes that the income benefitting from a double taxation-avoidance measure must be 'foreign-source' and, as we have said, that means that the income must have links with a "foreign" State such that it could properly be subjected to tax in that State, as well as in the Member taking the double taxation-avoidance measure.

We also recognize that Members are not obliged by the covered agreements to provide relief from double taxation. Footnote 59 to the *SCM Agreement* simply preserves the prerogative of Members to grant such relief, at their discretion, for 'foreign-source income'. Accordingly, we do not believe that measures falling under footnote 59 must grant relief from *all* double tax burdens. Rather, Members retain the sovereign authority to determine for themselves whether, and to what extent, they will grant such relief."[597]

(b) "foreign-source income"

435. The Appellate Body on *US – FSC* analysed footnote 59 and rejected the argument that since there is no requirement to tax export-related foreign-source income, a decision not to tax that income cannot be said to constitute revenue "foregone." The Appellate Body noted that if it was to follow this approach, there could never be "a foregoing of revenue 'otherwise due'" because WTO law does not require the collection of any particular category of revenue. The Appellate Body considered that the arm's-length requirement in footnote 59 does not provide a solution because this principle operates independently of the choice that a Member makes on what categories of foreign-sourced income it will not tax or will tax less. The Appellate Body held:

"Furthermore, we do not believe that the requirement to use the arm's length principle resolves the issue that arises here. That issue is *not*, as the United States suggests, whether a Member is or is not obliged to tax a particular category of foreign-source income. As we have said, a Member is not, in general, under any such obligation. Rather, the issue in dispute is whether, *having decided to tax a particular category of foreign-source income*, namely foreign-source income that is 'effectively connected with a trade or business within the United States', the United States is *permitted to carve out an export contingent exemption from the category of foreign-source income that is taxed under its other rules of taxation*. Unlike the United States, we do not believe that the second sentence of footnote 59 addresses this question. It plainly does not do so expressly; neither, as far as we can see, does it do so by necessary implication. As the United States indicates, the arm's length principle operates when a Member chooses not to tax, or to tax less, certain categories of foreign-source income. However, the operation of the arm's length principle is unaffected by the choice a Member makes as to *which* categories of foreign-source income, if any, it will not tax, or will tax less. Likewise, the operation of the arm's length principle is unaffected by the choice a Member might make to grant exemptions from the generally applicable rules of taxation of foreign-source income that it has selected for itself. In short, the requirement to use the arm's length principle does not address the issue that arises here, nor does it authorize the type of export contingent tax exemption that we have just described. Thus, this sentence of footnote 59 does not mean that the FSC subsidies are not export subsidies within the meaning of Article 3.1(a) of the *SCM Agreement*."[598] (emphasis original)

436. For the Appellate Body in *US – FSC (Article 21.5 – EC)* the notion of "'foreign-source income', in footnote 59 to the *SCM Agreement*, refers to income

[595] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 139–140.

[596] The Panel on *US – FSC (Article 21.5 – EC)* held that the relationship between the measure and the purpose of avoiding the double taxation of foreign-source income must be "reasonably discernible". Panel report on *US – FSC (Article 21.5 – EC)*, para 8.95.

[597] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 146–148.

[598] Appellate Body Report on *US – FSC*, paras. 98–99.

generated by activities of a non-resident taxpayer in a 'foreign' State which have such links with that State so that the income could properly be subject to tax in that State".[599] The Appellate Body considered that the existence of a "foreign element" in itself does not necessarily indicate that "all" income from transactions covered by the measures under consideration constitute "foreign-source income". The Appellate Body concluded that in this case the methodology used did not accurately allocate covered income as foreign or domestic, with the result that the measure at stake "improperly combines domestic-source income and foreign-source income" in the calculation, causing it to "systematically" misallocate this income.[600] The Appellate Body held:

> "[T]he fact that a transaction involves some foreign element, such as the 'foreign economic process', does not necessarily mean that *all* of the income generated by such a transaction will be 'foreign-source income' within the meaning of footnote 59 to the *SCM Agreement*. . . . In our view, under footnote 59 to the *SCM Agreement*, the 'foreign-source income' arising in such a transaction is only that portion of the total income which is generated by and properly attributable to activities that do occur in a 'foreign' State.[601]
>
> . . .
>
> This reinforces our view that the approach embodied in the ETI measure can lead to very different allocations of income between domestic- and foreign-source in respect of precisely the same transaction. This implies to us that the different formulae for calculating QFTI result in a misallocation of income as between the domestic- and foreign-source and, through the election which the taxpayer can make between these formulae, allows the taxpayer to obtain the maximum benefit from the misallocation."[602]

(i) Recourse to international tax law

437. The Appellate Body on *US – FSC (Article 21.5 – EC)* acknowledged that in international tax law there is no agreed meaning for the term "foreign-source income" but that, on the basis of its recourse to international legal principles and its review of a number of bilateral and multilateral tax agreements, the term "foreign-source income" may be interpreted as follows:

> "Although there is no universally agreed meaning for the term 'foreign-source income' in international tax law, we observe that many States have adopted bilateral or multilateral treaties to address double taxation. . . .
>
> Although these instruments do not define 'foreign-source income' uniformly, it appears to us that certain widely recognized principles of taxation emerge from them. In seeking to give meaning to the term 'foreign-source income' in footnote 59 to the *SCM Agreement*, which is a tax-related provision in an international trade treaty, we believe that it is appropriate for us to derive assistance from these widely recognized principles which many States generally apply in the field of taxation. In identifying these principles, we bear in mind that the measure at issue seeks to address foreign-source income of United States citizens and residents – that is, income earned by these taxpayers in 'foreign' States where the taxpayers are not resident.
>
> We recognize, of course, that the detailed rules on taxation of non-residents differ considerably from State to State, with some States applying rules which may be more likely to tax the income of non-residents than the rules applied by other States. However, despite the differences, there seems to us to be a widely accepted common element to these rules. The common element is that a 'foreign' State will tax a non-resident on income which is generated by activities of the non-resident that have some link with that State. Thus, whether a 'foreign' State decides to tax non-residents on income generated by a permanent establishment or whether, absent such an establishment, it decides to tax a non-resident on income generated by the conduct of a trade or business on its territory, the 'foreign' State taxes a non-resident only on income generated by activities linked to the territory of that State. As a result of this link, the 'foreign' State treats the income in question as domestic-source, under its source rules, and taxes it. Conversely, where the income of a non-resident does not have any links with a 'foreign' State, it is widely accepted that the income will be subject to tax only in the taxpayer's State of residence, and that this income will not be subject to taxation by a 'foreign' State."[603]

(ii) Link between income of taxpayers and their activities in a foreign State

438. The Appellate Body on *US – FSC (Article 21.5 – EC)* noticed the need for a link between the taxpayer's income and their activities in a foreign State to establish

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[599] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 145.

[600] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 154–156, 165–167, and 177–179.

[601] (*footnote original*) We note that Isenbergh states that, in the case of sale of goods by a producer, the income generated by the sales transaction is attributable to "easily distinguishable activities" which are "often combined", namely "production and sale" activities. Isenbergh indicates that in an international sales transaction, these production and sales activities may take place "in different countries". These activities, therefore, generate income that has different sources which are "compounded" unless the income from the different sources is separated. Isenbergh states that "ideally" the different "elements of the transaction" would be "disengaged" using arm's length pricing rules. The manufacturer would be treated as if it had sold the goods to an independent distributor at arm's length prices, who in turn resold the goods. This would "dissect" the transaction on the basis of the place where the different activities occurred. (J. Isenbergh, *supra*, footnote, Vol. I, para. 10.9, p. 10:16.)

[602] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 154 and 168.

[603] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 141–143.

whether there is a foreign source of income. The Appellate Body examined rules on foreign leasing and rental income and referred to additional aspects of the measures under consideration and considered that domestic-source income was improperly treated as exempt foreign-source income.[604] The Appellate Body took the view that:

> "[I]n the absence of an established link between the income of such taxpayers and their activities in a 'foreign' State, we do not believe that there is 'foreign-source income' within the meaning of footnote 59 of the *SCM Agreement*.
>
> . . . In our view, however, sales income cannot be regarded as 'foreign-source income', under footnote 59, for the sole reason that the property, subject-matter of the sale, is exported to another State, for use there. The mere fact that the buyer uses property outside the United States does not mean that the seller undertook activities in a 'foreign' State generating income there. Such an interpretation of footnote 59 would, in effect, allow Members to grant a tax exemption in favour of export-related income on the ground that the exportation by itself of the property renders the income 'foreign-source'. In our view, this reading would allow Members easily to evade the prohibition on export subsidies in Article 3.1(a) of the *SCM Agreement* and render this prohibition meaningless."[605]

439. The Appellate Body, in *US – FSC (Article 21.5 – EC)*, considered that the flexibility under footnote 59 does not properly extend to allowing Members to adopt allocation rules that systematically result in a tax exemption for income that has no connection with a "foreign" country and that would not be regarded as foreign-source:

> "We have said that avoiding double taxation is not an exact science and we recognize that Members must have a degree of flexibility in tackling double taxation. However, in our view, the flexibility under footnote 59 to the *SCM Agreement* does not properly extend to allowing Members to adopt allocation rules that systematically result in a tax exemption for income that has no link with a 'foreign' State and that would not be regarded as foreign-source under any of the widely accepted principles of taxation we have reviewed."[606]

(c) Burden of proof

440. The Appellate Body on *US – FSC* (*Article 21.5 – EC*) addressed the issue of the burden of proof under the fifth sentence of footnote 59 and upheld the findings of the Panel in this regard. In reviewing the Panel's findings, the Appellate Body considered whether the footnote provides the "proper scope" of the Article 3.1(a) obligations, or whether it determines an "exception" for a measure that is otherwise an export contingent subsidy.[607] The Appellate Body concluded that footnote 59 does not modify the scope of the definition of a "subsidy" in Article 1.1, the scope of item 1(e) of the Illustrative List, nor the meaning of export contingent subsidies under Article 3.1(a). The Appellate Body thus concluded that: (i) measures falling within the scope of footnote 59 may continue to be export subsidies under Article 1.1; and (ii) the fifth sentence of footnote 59 is an "exception" to the legal regime applicable to export subsidies under Article 3.1(a), by allowing Members to take or adopt measures to avoid the double-taxation of foreign-source income, while the latter may continue to be considered as export subsidies, within the meaning of Article 3.1(a). The Appellate Body also concluded that footnote 59 is an "affirmative defence" that may justify a prohibited export subsidy, and that the burden of proof is on the party invoking the exception:

> "We recall that, in the original proceedings in this dispute, we said that the fifth sentence of footnote 59 'does not purport to establish an exception to the general definition of a "subsidy" . . .'. Thus, a measure taken to avoid the double taxation of foreign-source income, falling within footnote 59, may be a 'subsidy' under the *SCM Agreement*.
>
> Article 3.1 of the *SCM Agreement* provides specific obligations with respect to two types of subsidy: subsidies contingent upon export performance and subsidies contingent upon the use of domestic over imported goods. Subsidies of these defined types are prohibited under Article 3 of the *SCM Agreement*. Item (e) of the Illustrative List identifies a particular measure which is deemed to be a prohibited export subsidy under Article 3.1(a).
>
> The fifth sentence of footnote 59 provides that item (e) 'is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member.' In the same way that we do not see the fifth sentence of footnote 59 as altering the scope of the definition of a 'subsidy' in Article 1.1 of the *SCM Agreement*, we do not see it as altering either the scope of item (e) of the Illustrative List or the meaning to be given to the term 'subsidies contingent . . . upon export performance' in Article 3.1(a) of the *SCM Agreement*. Thus, measures falling within the scope of this sentence of footnote 59 may continue to be export subsidies, much as they may continue to be subsidies under Article 1.1 of the *SCM Agreement*.

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[604] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 169.

[605] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 175–176.

[606] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 185.

[607] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 128.

> The import of the fifth sentence of footnote 59 is that Members are entitled to 'take', or 'adopt' measures to avoid double taxation of foreign-source income, notwithstanding that they may be, in principle, export subsidies within the meaning of Article 3.1(a). The fifth sentence of footnote 59, therefore, constitutes an exception to the legal regime applicable to export subsidies under Article 3.1(a) by explicitly providing that when a measure is taken to avoid the double taxation of foreign-source income, a Member is entitled to adopt it.
>
> Accordingly, as we indicated in *US – FSC*, the fifth sentence of footnote 59 constitutes an affirmative defence that justifies a prohibited export subsidy when the measure in question is taken 'to avoid the double taxation of foreign-source income'.[608] In such a situation, the burden of proving that a measure is justified by falling within the scope of the fifth sentence of footnote 59 rests upon the responding party."[609]

(d) Relationship with other Articles

441. With respect to the relationship between footnote 59 and Article 3.1(a), see paragraphs 118 and 120 above.

5. Item (j)

442. In *Canada – Aircraft Credits and Guarantees*, the Panel concluded that in its view, "item (j) sets out the circumstances in which the grant of loan guarantees is *per se* deemed to be an export subsidy . . . Item (j) certainly does not provide . . . that all loan guarantees are *per se* prohibited by item (j)."[610]

6. Item (k)

(a) First paragraph of item (k) – "material advantage" clause

(i) General

443. In both *Brazil – Aircraft* and *Brazil – Aircraft (Article 21.5 – Canada)*, Brazil asserted that the first paragraph of item (k) could be interpreted in an *a contrario* manner, so as to establish that subsidies constituting "payments", "of all or part of the costs incurred by exporters or financial institutions in obtaining credits", but which were *not* "used to secure a material advantage in the field of export credit terms", would not be prohibited export subsidies within the meaning of Article 3.1(a). The Appellate Body on *Brazil – Aircraft* did not follow the Panel's findings to the extent that it did not make an explicit finding on whether or not it was permissible to use item (k) in an *a contrario* manner. Rather, the Appellate Body found that Brazil had not met its burden of proof of showing that the PROEX payments were not used to secure a material advantage in the field of export credit terms. In *Brazil – Aircraft (Article 21.5 – Canada)*, the Appellate Body made the same finding about the revised PROEX programme. In this report, however, the Appellate Body made an additional statement:

> "If Brazil had demonstrated that the payments made under the revised PROEX were not 'used to secure a material advantage in the field of export credit terms', and that such payments were 'payments' by Brazil of 'all or part of the costs incurred by exporters or financial institutions in obtaining credits', then we would have been prepared to find that the payments made under the revised PROEX are justified under item (k) of the Illustrative List. However, Brazil has not demonstrated that those conditions of item (k) are met in this case. In making this observation, we wish to emphasize that we are not interpreting footnote 5 of the *SCM Agreement*, and we do not opine on the scope of footnote 5, or on the meaning of any other items in the Illustrative List.
>
> However, we do not believe it is necessary for us to rule on these general questions in order to resolve this dispute. We, therefore, hold that the Article 21.5 Panel's finding that 'the first paragraph of item (k) cannot be used to establish that a subsidy which is contingent upon export performance within the meaning of Article 3.1(a) is "permitted"' is moot, and, thus, is of no legal effect."[611]

(ii) "payments of all or part of the costs incurred by exporters or financial institutions in obtaining credits"

444. In interpreting the phrase "payments of all or part of the costs incurred by exporters or financial institutions in obtaining credits", the Panel on *Brazil – Aircraft (Article 21.5 – Canada)* started with the ordinary meaning of the terms and opined that "the word 'credits' refers to 'export credits' as used earlier in the paragraph. Next, it also found that the costs involved must relate to *obtaining* export credits, not to providing them."[612] Finally, the Panel rejected an argument by Brazil that cost incurred by a financial institution in raising capital could be equated with the cost of "obtaining" export credits.[613] The Appellate Body on *Brazil – Aircraft (Article 21.5 – Canada)* did not believe that it was necessary to examine this issue (the Appellate Body had found that Brazil had not proven that the PROEX interest equalization payments were *not* used to secure a material advantage) and therefore did not address the Panel's findings. The Appellate Body stated that "These find-

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608 (*footnote original*) Appellate Body Report, *supra*, footnote, para. 101.

609 Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 129–133.

610 Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.395.

611 Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)*, paras. 80–81.

612 Panel Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 6.71.

613 Panel Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 6.72.

ings of the Article 21.5 Panel are moot, and, thus, of no legal effect."[614] The Panel on *Brazil – Aircraft (Article 21.5 – Canada II)* reached the same conclusion as the Panel on *Brazil – Aircraft (Article 21.5 – Canada)* on this matter.[615]

445. With respect to the term "export credit practice" under the second paragraph of item (k), see paragraph 460 below.

(iii) "used to secure a material advantage"

General

446. The Panel on *Brazil – Aircraft* opined that a payment is used to "secure a material advantage in the field of export credit terms" when it provides the recipient with export credits on terms which are more favourable than those available in the absence of such payments, i.e. in the "marketplace". The Panel considered it "evident that PROEX payments result in the availability of export credit for Brazilian regional aircraft on terms which are more favourable than the terms that would otherwise be available with respect to the transaction in question".[616] In this context, the Panel on *Brazil – Aircraft* also recalled a statement by Brazil to the effect that PROEX would presumably always be more favourable to the purchaser than the terms it could obtain on its own.[617] However, the Appellate Body in *Brazil – Aircraft* rejected this interpretation by the Panel of the phrase "used to secure a material advantage".

"material"

447. More specifically, the Appellate Body in *Brazil – Aircraft* criticized the Panel for not adequately considering the term "material" and disagreed with equating the term "material advantage" under item (k) of the Illustrative List to the term "benefit" under Article 1.1(b):

> "We agree with the Panel's statement that the ordinary meaning of the word 'advantage' is 'a more favorable or improved position' or a 'superior position'. However, we note that item (k) does not refer simply to 'advantage'. The word 'advantage' is qualified by the adjective 'material'. As mentioned before, in its ultimate interpretation of the phrase 'used to secure a material advantage' which the Panel finally adopted and applied to the export subsidies for regional aircraft under PROEX, the Panel read the word 'material' out of item (k). This we consider to be an error.
>
> . . .
>
> We note that the Panel adopted an interpretation of the 'material advantage' clause in item (k) of the Illustrative List that is, in effect, the same as the interpretation of the term 'benefit' in Article 1.1(b) . . . . If the 'material advantage' clause in item (k) is to have *any* meaning, it must mean something different from 'benefit' in Article 1.1(b). It will be recalled that for any payment to be a 'subsidy' within the meaning of Article 1.1, that payment must consist of both a 'financial contribution' and a 'benefit'. The first paragraph of item (k) describes a type of subsidy that is deemed to be a prohibited export subsidy. Obviously, when a payment by a government constitutes a 'financial contribution' and confers a 'benefit', it is a 'subsidy' under Article 1.1. Thus, the phrase in item (k), 'in so far as they are used to secure a material advantage', would have no meaning if it were simply to be equated with the term 'benefit' in the definition of 'subsidy'. As a matter of treaty interpretation, this cannot be so. Therefore, we consider it an error to interpret the 'material advantage' clause in item (k) of the Illustrative List as meaning the same as the term 'benefit' in Article 1.1(b) of the *SCM Agreement*."[618]

Commercial Interest Reference Rate (CIRR) as market benchmark

448. Rather than considering the terms of export credits available to a purchaser in the absence of the PROEX interest equalization payments, the Appellate Body in *Brazil – Aircraft* held that the determination of whether a payment is "used to secure a material advantage" implies a comparison between the export credit terms available under the measure at issue and some other "market benchmark". The Appellate Body further viewed the second paragraph of item (k) as "useful context for interpreting the 'material advantage' clause in the text of the first paragraph".[619] In this respect, the Appellate Body stated that the Commercial Interest Reference Rate (the "CIRR"), defined in the Arrangement on Guidelines for Officially Supported Export Credits (the "OECD Arrangement"), could be "appropriately viewed as … a market benchmark" for assessing whether a payment "is used to secure a material advantage".[620]

449. The Appellate Body on *Brazil – Aircraft (Article 21.5 – Canada)* agreed with the Panel that a Member may under the first paragraph of item (k), as interpreted by the Appellate Body, establish that a payment is not used to secure a material advantage in the field of export credit terms, *even if it resulted in a below-CIRR interest rate.*[621] The Appellate Body then set forth the manner in which Brazil could prove that the PROEX interest

[614] Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 78.
[615] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.274–5.275.
[616] Panel Report on *Brazil – Aircraft*, para. 7.34.
[617] Panel Report on *Brazil – Aircraft*, para. 7.34.
[618] Appellate Body Report on *Brazil – Aircraft*, paras. 177 and 179.
[619] Appellate Body Report on *Brazil – Aircraft*, paras. 177 and 179.
[620] Appellate Body Report on *Brazil – Aircraft*, para. 181.
[621] Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 63. See also Panel Report on *Brazil – Aircraft (Article 21.5 – Canada)*, paras. 6.84 and 6.92.

equalization payments did *not* secure a material advantage to Brazilian exporters:

> "To establish that subsidies under the revised PROEX are not 'used to secure a material advantage in the field of export credit terms', Brazil must prove *either*: that the net interest rates under the revised PROEX are at or above the relevant CIRR, the specific 'market benchmark' we identified in the original dispute as an 'appropriate' basis for comparison; *or*, that an alternative 'market benchmark', other than the CIRR, is appropriate, and that the net interest rates under the revised PROEX are at or above this alternative 'market benchmark'.
>
> . . . Brazil contends . . . that the revised PROEX is *not* 'used to secure a material advantage in the field of export credit terms' within the meaning of the first paragraph of item (k) of the Illustrative List.
>
> To prove this argument, Brazil must establish *both* of two elements: first, Brazil must prove that it has identified an appropriate 'market benchmark'; and, second, Brazil must prove that the net interest rates under the revised PROEX are at or above that benchmark."[622]

450. The Panel on *Brazil – Aircraft (Article 21.5 – Canada II)*, first interpreted the "material advantage" clause by referring to the Appellate Body report in *Brazil – Aircraft (Article 21.5 – Canada)* (see paragraph 449 above). The Panel concluded that if Brazil wanted to establish that the programme's payments were not used to secure a "material advantage", by reference to the CIRR, Brazil must show that export credits supported by PROEX III respect the CIRR and the applicable rules of the OECD Arrangement which relate to the application of the CIRR.[623] The Panel further held:

> "It could be argued that this interpretation of the 'material advantage' clause in effect re-creates in the first paragraph of item (k) the standard already provided for in the second paragraph of item (k), at least insofar as the interest rate benchmark used under the first paragraph of item (k) is the CIRR.[624] However, this is an unavoidable implication of the Appellate Body's adoption of the CIRR as an appropriate benchmark for determining the existence of a material advantage. . . . To the extent that the first paragraph of item (k) could be used *a contrario* to establish that a payment that is not used to secure a material advantage is not prohibited – an issue addressed below – we would, in other words, not only have re-created a safe haven in the first paragraph, but, in fact, would have deprived the second paragraph of *all* useful effect with respect to the export credit practices at issue in the first paragraph."[625]

451. The Panel on *Brazil – Aircraft (Article 21.5 – Canada II)* found that given the nature of the CIRR as a constructed interest rate, a Member may also attempt to demonstrate that a rate *below* the CIRR would, at a particular point in time, constitute a more appropriate benchmark.[626] In *Brazil – Aircraft (Article 21.5 – Canada II)*, the Panel further indicated that "to establish that PROEX III is not used to secure a material advantage in the field of export credit terms, Brazil must either: (i) demonstrate conformity with the relevant CIRR as well as with all those rules of the 1998 *OECD Arrangement* which operate to support or reinforce the CIRR; or (ii) identify an appropriate 'market benchmark', other than the CIRR, and establish that net interest rates resulting from PROEX III support are at or above that alternative 'market benchmark'".[627]

(b) First paragraph of item (k) as an affirmative defence

452. The Panel on *Brazil – Aircraft (Article 21.5 – Canada II)* incorporated by reference its reasoning in *Brazil – Aircraft (Article 21.5 – Canada)* into its analysis and remained of the view that the relationship between the Illustrative List and Article 3.1(a) is governed by footnote 5 to the SCM Agreement, and that the first paragraph of item (k) does not "refer to" any measures as "not constituting export subsidies" within the meaning of the footnote as an affirmative defence. On this basis, the Panel concluded that the first paragraph of item (k) cannot, as a legal matter, provide an affirmative defence to a violation of Article 3.1(a).[628] As regards the use of the second paragraph see paragraph 472 below.

(c) Second paragraph of item (k) – "the safe haven"

(i) General

453. The Panel on *Canada – Aircraft (Article 21.5 – Brazil)* set forth the propositions that a Member would need to prove in order to qualify, with respect to specific individual transactions, for the "safe haven" provided under the second paragraph of item (k):

> "[F]irst, it would need to be determined that the transaction was in the form of either direct credits/financing,

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[622] Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)*, paras. 67–69.

[623] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.234–5.252

[624] (*footnote original*) See Article 21.5 Panel Report on *Brazil – Aircraft*, *supra*, para. 6.87. Of course, the second paragraph of item (k) is broader in scope than the first paragraph of item (k), which only refers to two types of export credit practices. To that extent, the second paragraph of item (k) retains independent meaning also on our interpretation of the "material advantage" clause.

[625] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 5.251.

[626] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 5.265.

[627] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 5.266.

[628] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.272–5.275.

refinancing or interest rate support with repayment terms of at least two years, at fixed interest rates, and therefore was subject to the *Arrangement* generally and to the CIRRs (or a sector-specific minimum interest rate, if applicable) specifically. Second, it would need to be determined whether the interest rate was at or above the CIRR (or the applicable sector-specific rate). Third, it would need to be determined which of the other provisions of the *Arrangement* that operate to reinforce the minimum interest rate rule applied to that particular transaction (a determination that would need to be made on a case-by-case, transaction-specific basis). Fourth, the details of the transaction would need to be examined to determine whether or not it respected all such additional provisions, and did not involve any derogations or matching of derogations."[629]

(d) "in the field of export credit terms"

454. With respect to the phrase "in the field of export credit terms", the Panel on *Brazil – Aircraft* held that in its ordinary meaning, that phrase would refer to "items directly related to export credits, such as interest rates, grace periods, transaction costs, maturities and the like".[630] Furthermore, the Panel opined that the term "field of export credit terms" did not encompass the price at which a product is sold.[631] Although the Appellate Body in *Brazil – Aircraft* made no specific reference to this statement by the Panel, it rejected the Panel's interpretation of the phrase "used to secure a material advantage"[632] which was made in the same context as the above statements on the term "in the field of export credit terms".[633]

(e) "international undertaking on official export credits"

455. In *Canada – Aircraft (Article 21.5 – Brazil)*, Canada claimed that as part of the revision of its subsidies programmes following the Appellate Body Report on *Canada – Aircraft*, it had implemented a new policy guideline for its Canada Account financing under which "any financing which does not comply with the OECD Arrangement would not be in the national interest". Canada argued that compliance with the OECD Arrangement meant that such financing would not be a prohibited export subsidy, according to the second paragraph of item (k). Although the Panel – whose report was not appealed – ultimately found against Canada, it did agree that the OECD Arrangement was an "international undertaking on official export credits" within the meaning of item (k):

> "[I]t is well accepted that the *OECD Arrangement* is an 'international undertaking on official export credits' in the sense of the second paragraph of item (k). Moreover, in practice the *OECD Arrangement* is at present the only international undertaking that fits this description. Thus, we understand the essence of the second paragraph of item (k) at least at present to be that 'an export credit practice' which is in 'conformity' with 'the interest rates provisions' of the *OECD Arrangement* 'shall not be considered an export subsidy prohibited by' the SCM Agreement."[634]

(f) "a successor undertaking"

456. In *Brazil – Aircraft (Article 21.5 – Canada II)*, the Panel had to decide which was the "successor undertaking" to the 1979 OECD Arrangement, i.e. the 1992 or 1998 version. The Panel started by interpreting the terms of "has been adopted" and concluded that it referred to the present of the addressees of the *SCM Agreement* rather than to an act of adoption prior to the entry into force of the *SCM Agreement*:

> "The parties differ, however, regarding whether the relevant 'successor undertaking' is the 1992 version of the *OECD Arrangement* or the 1998 version.
>
> . . .
>
> In interpreting the phrase 'a successor undertaking which has been adopted [. . .]', we focus first on the language 'has been adopted'. Brazil attaches great importance to the fact that that language is in the present perfect tense. The present perfect tense, Brazil maintains, refers to a time regarded as present. We agree. Brazil goes on to argue, however, that the relevant present is the time when the *SCM Agreement* entered into force. From this Brazil concludes that only those successor undertakings which had been adopted before the entry into force of the *SCM Agreement* are, textually, within the scope of the second paragraph of item (k). We are not persuaded by that view.
>
> It should be noted, moreover, that, on our interpretation, the language 'has been adopted' retains meaning and effect. Thus, the use of the present perfect tense tells Members that any time they seek to determine the relevant successor undertaking, they should consider only those successor undertakings which, at that time, have been adopted by the relevant OECD Members. In other words, Members are not allowed to rely on, nor are they bound by, the relevant provisions of a successor undertaking which has *not yet* been formally accepted by the relevant OECD Members. A successor undertaking which is merely being proposed for adoption or which exists only in draft form could not, therefore, constitute a successor undertaking which 'has been adopted'.

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[629] Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.153.
[630] Panel Report on *Brazil – Aircraft*, para. 7.28.
[631] Panel Report on *Brazil – Aircraft*, para. 7.28.
[632] Appellate Body Report on *Brazil – Aircraft*, para. 186.
[633] Appellate Body Report on *Brazil – Aircraft*, para. 286.
[634] Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.78.

> On the basis of the foregoing considerations, we find that the phrase 'has been adopted' is properly read as referring to the present of its addressees rather than as referring to an act of adoption prior to the entry into force of the *SCM Agreement*, i.e. prior to 1 January 1995."[635]

457. In *Brazil – Aircraft (Article 21.5 – Canada II)*, the Panel continued its analysis by interpreting the term "successor undertaking" and concluded that the relevant successor undertaking was the most recent one, provided that it had been adopted. The Panel then found that the most recent adopted successor undertaking was the 1998 OECD Arrangement:

> "Turning next to the term 'successor undertaking', we note that, in its ordinary meaning, this term refers to an undertaking which 'succeeds [i.e. follows] another in [. . .] function'.[636] There can be no question, in our view, that both the 1992 and the 1998 version of the *OECD Arrangement* constitute 'successor' undertakings *to the OECD Arrangement in effect in 1979*.[637] It should be pointed out, in this regard, that the 1998 *OECD Arrangement* is the latest adopted version of the *OECD Arrangement* and, as such, is currently in effect, whereas the 1992 *OECD Arrangement* is no longer in effect. This raises the question of which successor undertaking is the *relevant* successor undertaking if there is more than one. The text of the second paragraph of item (k) does not explicitly answer that question.[638]
>
> We consider that the relevant successor undertaking is the *most recent* successor undertaking which has been adopted. It would not, in our view, have been rational for the drafters to consider, *without specifying so*, that, say, the fifth successor undertaking should be the relevant one. Indeed, the fact that the drafters used the simple and unqualified term "a successor undertaking" strongly suggests to us that they intended to incorporate, and thus give effect to, the relevant provisions of *all* adopted successor undertakings. This, however, would not logically be possible, unless effect is given also to the changes introduced by the most recent successor undertaking. On that basis, we find that, in the absence of other textual directives, the most recent successor undertaking is the relevant benchmark undertaking for purposes of the second paragraph of item (k), subject to the one condition that it must have been adopted.
>
> . . .
>
> In view of the foregoing, we conclude that the 'successor undertaking' at issue in the second paragraph of item (k) is the most recent successor undertaking which has been adopted prior to the time that the second paragraph is considered. For purposes of these proceedings, we conclude that the most recent successor undertaking which has been adopted is the 1998 *OECD Arrangement*.[639]"[640]

(g) OECD Arrangement

458. Considering that "in practice eligibility for item (k)'s safe haven from the prohibition on export subsidies is defined entirely in terms of the OECD Arrangement, at least for the time being",[641] the Panel on *Canada – Aircraft (Article 21.5 – Brazil)* stated the following:

> "We take note of the reference to 'a successor undertaking' in the second paragraph of item (k). In this regard, first, it is clear from this reference that to the extent that the [OECD] *Arrangement* today is the only undertaking of the kind referred to in the second paragraph of item (k), if in the future a 'successor undertaking' were to take effect, export credit practices conforming with the interest rate provisions of that undertaking also would be eligible for the safe haven in that paragraph. Thus, our detailed analysis of the *Arrangement* in its *present* form is not in any way intended to exclude this possibility. Second, for purposes of our analysis of the *Arrangement,* we assume that the *Sector Understandings* on Export Credits for Ships, for Nuclear Power Plant, and for Civil Aircraft, contained in Annexes I–III of the *Arrangement*, form an integral part of the *Arrangement* itself. Even if in the strict sense this were not the case (an issue that we do not here decide), in our view these *Sector Understandings* at a minimum would constitute 'successor undertakings' in the sense of the second paragraph of item (k), as the *Arrangement* as originally implemented in 1979 did not contain these Annexes. . . . The *Sector Understandings* were negotiated and implemented later, and incorporate by reference provisions of the *Arrangement*. Thus, if they are not formally integral to the *Arrangement*, there is no doubt that these *Understandings* at a minimum constitute successor undertakings, and thus, conformity with the 'interest rates provisions' of the *Understandings* would qualify an export credit practice for the safe haven in the second paragraph of item (k)."[642]

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[635] Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 5.73 and 5.75–5.79.

[636] (*footnote original*) The New Shorter Oxford English Dictionary, Vol. II, Oxford (1993), pp. 3127 and 3128.

[637] (*footnote original*) For the 1998 *OECD Arrangement*, see its Introduction, p. 7 ("Status").

[638] (*footnote original*) It is clear to us, however, that the drafters could not have left the addressees of the second paragraph free to choose among different successor undertakings. Were it otherwise, complainants could select the strictest successor undertaking with as much justification as respondents could select the most generous successor undertaking. The second paragraph would then fail to do what it is there to do, i.e. to inform Members regarding what their rights and obligations are.

[639] (*footnote original*) It should be reiterated here that the 1992 *OECD Arrangement* is no longer in effect.

[640] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.80–5.81 and 5.83.

[641] Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.79.

[642] Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.78, footnote 69.

459. As regards the discussion on whether the relevant successor undertaking to the 1979 OECD Arrangement was the 1992 or 1998 version, see paragraphs 456–457 above.

(h) "export credit practice"

460. In the context of Canada's defence under the second paragraph of item (k), the Panel on *Canada – Aircraft (Article 21.5 – Brazil)* considered that the phrase "export credit practice", must, in its ordinary meaning, be a relatively broad term.[643] The Panel, whose report was not appealed, continued:

> "[T]his term on its own suggests any practices that might be associated in some way with export credits (i.e., export financing). This certainly would involve export credits as such, but presumably other sorts of practices as well. The first paragraph of item (k) provides useful context in this regard. In particular, we note that the first paragraph refers exclusively to 'export credits' and 'credits', in contrast to the second paragraph's reference to 'export credit practices'. This supports the conclusion that the second paragraph of item (k) concerns a *broader* range of 'practices' than export credits as such."[644]

461. Following an analysis of the provisions of the OECD Arrangement, the Panel on *Canada – Aircraft (Article 21.5 – Brazil)* concluded that at the time of the dispute, only export credit practices in certain forms qualified for the "safe haven" under the second paragraph of item (k). Specifically, the Panel held that practices involving floating interest rates or support for export credits with shorter maturity were not eligible for this exception:

> "[T]he safe haven in the second paragraph of item (k) at present is potentially available *only* to export credit practices in the form of direct credits/financing, refinancing, and interest rate support at fixed interest rates with repayment terms of two years or more. In other words, any such practices involving floating interest rates, as well as official support for export credits with shorter maturity or in the forms of guarantees and insurance, because none are *subject to* the *Arrangement*'s 'interest rates provisions', most especially the CIRR but also the sector-specific minimum interest rates in the *Sector Understandings*, would not be eligible for the safe haven, as it simply would not be possible to judge their 'conformity' with the relevant interest rate provisions of the *Arrangement*, all of which pertain exclusively to fixed rates."[645]

462. The Panel on *Brazil – Aircraft (Article 21.5 – Canada II)* held that based on "a reading which gives meaning to all of the terms used, the second paragraph suggests that export credit practices which are in conformity with the interest rates provisions of the relevant international undertaking *are* export subsidies – and, as such, would normally be prohibited under the provisions of Article 3 of the *SCM Agreement* –, but that they are nevertheless not *prohibited* under the *SCM Agreement*".[646]

463. The Panel on *Brazil – Aircraft (Article 21.5 – Canada II)*, in a finding upheld by the Appellate Body, considered that if "the second paragraph of item (k) makes available an exception, it must be possible to invoke it as an affirmative defence to a claim of violation.[647]"[648] See also paragraph 472 below.

(i) "in conformity" with "interest rates provisions"

(i) "interest rate provisions"

464. In *Brazil – Aircraft (Article 21.5 – Canada II)*, the Panel recalled that the only export credit practices that are subject to the OECD Arrangement are those which take the form of "official financing support", *i.e.*, "direct credits/financing, refinancing and interest rate support". Therefore, the Panel considered whether PROEX III payments are "official financing support". In this regard, the Panel noted that the OECD Arrangement does not define the term "interest rate support", but merely states that "interest rate support" is a form of official financing support. It concluded that official interest rate support will normally involve government payments to providers of export credits, and that for such payments to amount to "support", they need to be made with the "aim or effect of securing net borrowing rates for the recipients of export credits which are below those that they would have been without an official financing support":

> "The Panel notes that the 1998 *OECD Arrangement* does not define the term 'interest rate support'. It merely states that 'interest rate support' is a form of official financing support. Since the 1998 *OECD Arrangement* does not give a special meaning to the term 'interest rate support', we must read it in accordance with its ordinary meaning in context.

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[643] Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.80.

[644] Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.80. See also Panel Report on *Canada – Aircraft (Article 21.5 – Canada II)*, paras. 5.65–5.66.

[645] Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.106.

[646] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 5.61.

[647] (*footnote original*) See the Appellate Body Report on *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted 23 May 1997, WT/DS33/AB/R, p. 16; Article 21.5 Appellate Body Report on *Brazil – Aircraft*, *supra*, para. 66.

[648] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 5.63.

> We consider that, in its ordinary meaning, the term 'interest rate support' relates broadly to official support for one particular export credit term, namely the interest rate to be paid in connection with export credits. Moreover, as a matter of relevant context, it is clear from the 1998 *OECD Arrangement* that interest rate support is distinct from direct credits/financing, refinancing, export credit insurance and guarantees. From this it may be deduced that official interest rate support will normally involve government payments to providers of export credits. For such payments to amount to 'support', we think they need to be made with the aim or effect of securing net borrowing rates for the recipients of export credits which are lower than they would have been in the absence of official financing support."[649]

465. The Panel on *Brazil – Aircraft (Article 21.5 – Canada II)* followed the interpretation of the Panel on *Canada – Aircraft (Article 21.5 – Brazil)* (see paragraph 466 below) and concluded that certain provisions of the OECD Arrangement explicitly pertain to interest rates as such. The Panel observed that the programme under consideration provided, *inter alia*, support for interest rates ("financing costs"), involved payments by the Brazilian Government to commercial providers of export credits, and was framed to lower the net interest rates charged by commercial lenders so that they were compatible with the interest rates in the international market. The Panel concluded that the programme support constituted "interest rate support", and was therefore an export credit practice subject to the interest rates provisions of the OECD Arrangement.[650]

(ii) "in conformity"

General

466. With respect to conformity with the interest rate provisions of export credit practices under the OECD Arrangement, the Panel on *Canada – Aircraft (Article 21.5 – Brazil)* concluded that "full conformity with the 'interest rates provisions' – in respect of 'export credit practices' subject to the CIRR – must be judged on the basis not only of full conformity with the CIRR but in addition full adherence to the other rules of the [OECD] *Arrangement* that operate to support or reinforce the minimum interest rate rule by limiting the generosity of the terms of official financing support".[651, 652]

"Concept of conformity" under the OECD Arrangement

467. The Panel on *Canada – Aircraft (Article 21.5 – Brazil)* considered that the text of the OECD Arrangement provides the following guidance on how the term "conformity" should be understood:

> "In the first place, the *Arrangement* text provides explicitly that derogations from provisions of the *Arrangement*, and the matching of such derogations, do not 'conform' with the provisions of the *Arrangement*. Thus, any transaction that involves derogations or matching of derogations by definition cannot be in conformity with the *interest rate provisions* of the *Arrangement*, as . . . conformity with the interest rate provisions requires conformity not just with the minimum interest rate rule but also with the other provisions that support/reinforce that rule. As such, an otherwise eligible transaction involving derogations or matching of derogations could not qualify for the safe haven of the second paragraph of item (k). On the other hand, the *Arrangement* explicitly defines permitted exceptions and the matching of permitted exceptions, within the allowed limits, to be in compliance, i.e., in conformity with the relevant provisions of the *Arrangement*. Therefore, . . . making use of permitted exceptions, within the specified limits, would not disqualify an eligible transaction from the safe haven, so long as the transaction conformed with the minimum interest rate and all of the other applicable disciplines."[653]

468. The Panel on *Canada – Aircraft (Article 21.5 – Brazil)* found that the Canadian Policy Guideline did not qualify for the "safe haven" under the second paragraph of item (k) of the Illustrative List. The Panel first held that it was "incumbent upon Canada to provide an explanation not only of what in its view constituted conformity with the interest rate provisions of the *OECD Arrangement*, but also how the Policy Guideline ensured such conformity".[654] The Panel then turned to the Policy Guideline and found:

> "[E]ven if the Policy Guideline contained all of the details that Canada has provided in its arguments concerning 'conformity' with the 'interest rates provisions' of the *Arrangement*, we would find on substantive grounds that it would not ensure that future Canada Account transactions would so conform. We note, however, that in fact the Policy Guideline contains no details at all, but simply indicates that transactions that 'do not comply' with 'the OECD Arrangement' will not be considered to be in the national interest. Thus, we find that the Policy Guideline is insufficient to accomplish what Canada says it will accomplish, namely to 'ensure that any future Canada Account financing transactions will be in conformity with the interest rate provisions of the [OECD] Arrangement and therefore the provisions referred to in the second paragraph of item (k)'.

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[649] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.131–132.
[650] *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.133–134.
[651] Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.114.
[652] The Panel on *Brazil – Aircraft (Article 21.5 – Canada II)* followed the interpretation of the Panel in *Canada – Aircraft (Article 21.5 – Brazil)*.
[653] Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.126.
[654] Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.142.

> In particular, the Policy Guideline is both generally worded and worded in the negative. In both of these aspects it seems to fall considerably short of what might reasonably be considered the minimum sufficient assurance which Canada wishes to provide. Concerning the generality of the wording, as just noted, the Policy Guideline simply refers to compliance with the *OECD Arrangement*. As has been discussed in detail, however, general conformity with whichever provisions of the *Arrangement* happen to apply to a given transaction would not appear to be sufficient to qualify for the relatively narrow safe haven in the second paragraph of item (k). Rather, only conformity with the *Arrangement*'s interest rate provisions, *which presupposes that those provisions apply* (i.e., that the practice in question is in the form of official financing support at fixed interest rates), along with conformity with the *Arrangement*'s other disciplines on financing terms, would qualify a practice for the safe haven."[655]

(j) Burden of proof

469. The Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)* found that "Brazil's argument under item (k) constituted an alleged 'affirmative defence' for which Brazil bore the burden of proof".[656] Referring to its report on *US – Wool Shirts and Blouses*, the Appellate Body confirmed that Brazil, as the party asserting a defence, bore the burden of proof of proving that the revised PROEX was justified under the first paragraph of item (k). (However, as noted in paragraph 443 above, the Appellate Body in *Brazil – Aircraft (Article 21.5 – Canada)* did not make a finding on whether the first paragraph of item (k) could in fact be used in an *a contrario* manner as an affirmative defence.) The Appellate Body then set forth in what manner Brazil could successfully prove that the revised subsidies scheme was not "used to secure a material advantage in the field of export credit terms":

> "To establish that subsidies under the revised PROEX are not 'used to secure a material advantage in the field of export credit terms', Brazil must prove *either*: that the net interest rates under the revised PROEX are at or above the relevant CIRR, the specific 'market benchmark' we identified in the original dispute as an 'appropriate' basis for comparison; *or*, that an alternative 'market benchmark', other than the CIRR, is appropriate, and that the net interest rates under the revised PROEX are at or above this alternative 'market benchmark'."[657]

470. The Panel on *Canada – Aircraft (Article 21.5 – Brazil)* did not state explicitly that Canada bore the burden of proving that its measure qualified for the "safe haven" clause under the second paragraph of item (k) of the Illustrative List. However, the Panel termed Canada's invocation of the second paragraph of item (k) a "defence to Brazil's claim".[658]

471. The Panel on *Brazil – Aircraft (Article 21.5 – Canada II)* concluded that, while the programme as such allows the Member to make payments in such a way that they do not secure a material advantage in the field of export credit terms, payments under the programme are not the payment by the Member of "all or part of the costs incurred by exporters or financial institutions in obtaining credits". Therefore, the Panel considered that the Member failed to demonstrate the required elements for its defence under the first paragraph of item (k):

> "[W]hile PROEX III, as such, allows Brazil to make PROEX III payments in such a way that they do not secure a material advantage in the field of export credit terms, PROEX III payments are not the payment by Brazil of 'all or part of the costs incurred by exporters or financial institutions in obtaining credits'. Brazil has, therefore, failed to demonstrate the required elements for its defence under the first paragraph of item (k). We have further concluded that, in any event, the first paragraph of item (k) cannot, as a legal matter, be invoked as an affirmative defence."[659]

(i) Second paragraph of item (k) as an affirmative defence

472. In *Brazil – Aircraft (Article 21.5 – Canada II)*, the Panel noted that the second paragraph of item (k) provides for an "exception" from any prohibition on export subsidies, such that it may be invoked as an affirmative defence to a claim of violation:

> "On a reading which gives meaning to all of the terms used, the second paragraph suggests that export credit practices which are in conformity with the interest rates provisions of the relevant international undertaking *are* export subsidies – and, as such, would normally be prohibited under the provisions of Article 3 of the *SCM Agreement* –, but that they are nevertheless not *prohibited* under the *SCM Agreement*.
>
> This interpretation leads us to the conclusion that the second paragraph of item (k) provides for an exception from any prohibition on export subsidies laid down elsewhere in the *SCM Agreement*. The fact that the second paragraph does not, itself, impose *obligations* supports that conclusion.
>
> Consistently with our view that the second paragraph of item (k) makes available an exception, it must be possible to invoke it as an affirmative defence to a claim of

[655] Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 5.143–5.144.
[656] Appellate Body Report on *Brazil – Aircraft*, para. 65.
[657] Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)*, paras. 66–67.
[658] Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.73.
[659] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 5.276.

violation. As is clear from relevant WTO jurisprudence, the burden of establishing an affirmative defence rests with the party raising it.[660]"[661]

(ii) "Matching of a derogation"

General

473. The Panel on *Canada – Aircraft (Article 21.5 – Brazil)* considered that: "Members' conformity with GATT/WTO rules [should not be] defined by the behaviour of non-Members". The Panel considered that this concern would arise even if the inclusion of the matching of a derogation in the item (k) safe haven would mean that matching Members were acting in accordance with their WTO obligations. This is because the inclusion of the matching of a derogation in the item (k) safe haven would not establish any objective benchmark against which to determine whether or not a Member is in accordance with its WTO obligations. In any given case, the benchmark would be set by reference to the terms and conditions of the non-conforming offer. To the extent that the non-conforming offer were made by a non-WTO Member, the benchmark for determining whether or not a matching Member acts in accordance with its WTO obligations would therefore be the non-conforming terms and conditions offered by the non-Member. Thus, the fact that the matching of a derogation is included in the second paragraph of item (k) would not remove the potential for a "Member's conformity with GATT/WTO rules [to be] defined by the behaviour of non-Members".[662]

474. The Panel on *Canada – Aircraft Credits and Guarantees* concluded that, as a matter of law, the matching of a derogation is not "in conformity with" the interest rates provisions of the OECD Arrangement and therefore cannot fall within the scope of the item (k) safe haven.[663] The Panel held:

> "Indeed, if one were to accept that the matching of a derogation could fall within the item (k) safe haven, one would effectively be accepting that a Member could be 'in conformity with' the 'interest rates provisions' of the *OECD Arrangement* even though that Member failed to respect the CIRR (or a permitted exception). In our view, such an interpretation would be unjustified."[664]

475. For the Panel on *Canada – Aircraft Credits and Guarantees*, the fact that the OECD Arrangement allows matching of derogations, or the *fact* that participants' view matching of derogations as a means of disciplining export credits, does not necessarily mean that the *SCM Agreement* should allow matching of derogations. The Panel considered that unlike the OECD Arrangement, the *SCM Agreement* is not an "informal" "gentleman's agreement". The SCM Agreement therefore does not need to allow recourse to the matching of derogations in order to instil discipline. The *SCM Agreement* is a binding instrument, and is therefore enforceable through the WTO dispute settlement mechanism.[665]

476. The Panel on *Brazil – Aircraft (Article 21.5 – Canada II)* recalled that practices that follow "permitted exceptions" under the OECD Arrangement are "in conformity" with the interest rates provisions, whereas practices pursuant to "derogations" are not. The Panel on *Brazil – Aircraft (Article 21.5 – Canada II)* stated that "to accept, for purposes *of* the *SCM Agreement*, that even non-conforming departures from the provisions of the *OECD Arrangement* were covered by the safe haven, would, in effect, remove any disciplines on official financing support for export credits". For the Panel:

> "[T]he fact that the *OECD Arrangement* allows matching of derogations does not logically imply that it should also be allowed under the *SCM Agreement*. Indeed, the *OECD Arrangement* and the *SCM Agreement* are very different . . . In those circumstances, matching may serve an important deterrent and enforcement function and that rationale for matching does not apply to the *SCM Agreement* because the *SCM Agreement* is a binding instrument, and it is enforceable through the WTO dispute settlement mechanism."[666]

Burden of proof in the framework of a derogation

477. The Panel on *Canada – Aircraft Credits and Guarantees* considered that the transaction under consideration could not be justified under the safe haven and that consequently such financing is a prohibited export subsidy, contrary to Article 3.1(a) of the *SCM Agreement* because Canada has failed to *establish* that the matching of a derogation could, as a matter of law, be "in conformity with" the "interest rates provisions" of the *OECD Arrangement*.[667] For the Panel, the burden is on the Member affirming that the matching of a derogation from the OECD Arrangement could, as a "matter of law", be "in conformity with" the "interest rates provisions" of the OECD Arrangement, pursuant to the safe

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[660] (*footnote original*) See the Appellate Body Report on *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted 23 May 1997, WT/DS33/AB/R, p. 16; Article 21.5 Appellate Body Report on *Brazil – Aircraft*, *supra*, para. 66.

[661] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.61–5.63.

[662] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.177.

[663] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.164.

[664] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.165.

[665] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.176.

[666] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 5.115.

[667] Panel Report on *Canada – Aircraft Credits and Guarantees*, paras. 7.180–7.181.

haven. Only if the Member demonstrates this would the Panel then examine whether it had, in fact, complied with the "matching" requirement of the OECD Arrangement:

> "In order to avail itself of the item (k) safe haven, Canada must first establish that the matching of a derogation could, as a matter of law, be 'in conformity with' the 'interest rates provisions' of the *OECD Arrangement*. Only if Canada establishes that this is possible as a matter of law, will we need to consider whether Canada has met its burden of establishing that the Canada Account financing to Air Wisconsin is matching according to the provisions of the *OECD Arrangement*. Similarly, only if Canada establishes that matching a derogation could, as a matter of law, fall within the item (k) safe haven, will we need to address Brazil's arguments regarding Canada's alleged failure to comply with the procedural requirements of Articles 47(a) and 53 of the *OECD Arrangement*."[668]

(iii) Mandatory/discretionary distinction in the context of an affirmative defence under item (k) second paragraph

478. In *Brazil – Aircraft (Article 21.5 – Canada II)*, the Panel recalled that the programme had been challenged "as such", and that the mandatory/discretionary distinction was therefore relevant. Accordingly, the Panel considered whether the Member was *required* to apply the programme under consideration "in a manner that gives rise to a prohibited export subsidy". In doing so, the Panel first dealt with the preliminary issue of whether the distinction between mandatory and discretionary legislation is applicable in the context of an affirmative defence under the second paragraph of item (k):[669]

> "[T]he distinction between mandatory and discretionary legislation is applicable in the context of the second paragraph of item (k). It is of course correct that, in the present context, we are concerned not with conformity with a WTO *obligation*, but with conformity with conditions attached to a WTO *exception*. This fact alone does not, however, render the GATT/WTO distinction between mandatory and discretionary legislation inapplicable or inappropriate.
>
> In our understanding, the rationale underpinning the traditional GATT/WTO distinction between mandatory and discretionary legislation is that, when the executive branch of a Member is not required to act inconsistently with requirements of WTO law, it should be entitled to a presumption of good faith compliance with those requirements. We consider that that rationale is no less valid in the context of WTO exceptions than it is in the context of WTO obligations.
>
> We have stated above that the Member invoking an exception as an affirmative defence has the burden of establishing it. In our view, the allocation of the burden of proof is a procedural issue which is distinct from the substantive standard to be applied in assessing the conformity of legislation with a particular provision of the *WTO Agreement*.
>
> Accordingly, the task before us is to examine whether, under PROEX III, Brazil is *required* to act in a manner that is *not* in conformity with the interest rates provisions of the 1998 *OECD Arrangement* or, expressed otherwise, whether PROEX III allows compliance with the interest rates provisions."[670]

479. In *Canada – Aircraft Credits and Guarantees*, the Panel found that the fact that export credit agencies provide export subsidies does not answer the question of *mandatory* subsidization and that "the existence of item (k) does not eliminate the requirement for a complaining party to prove the mandatory nature of the programme in order to prevail on an 'as such' claim".[671]

480. As regards the relevance of the mandatory/discretionary distinction when challenging subsidy programmes "as such," see paragraphs 56–64 above.

(k) Relationship with other Articles

481. With respect to the relationship with Article 1.1(b), see paragraph 76 above.

XXXVI. ANNEX II

A. TEXT OF ANNEX II

ANNEX II
GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS[61]

(*footnote original*) [61] Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.

I

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).

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[668] Panel Report on Canada Aircraft Credits and Guarantees, para. 7.161.
[669] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.119–5.120.
[670] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.123–5.126.
[671] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.82.

2. The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate.

II

In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.

3. Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. The Members note that an input need not be present in the final product in the same form in which it entered the production process.

4. In determining the amount of a particular input that is consumed in the production of the exported product, a "normal allowance for waste" should be taken into account, and such waste should be treated as consumed in the production of the exported product. The term "waste" refers to that portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.

5. The investigating authority's determination of whether the claimed allowance for waste is "normal" should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The investigating authority should bear in mind that an important question is whether the authorities in the exporting Member have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

B. INTERPRETATION AND APPLICATION OF ANNEX II

1. Footnote 61

482. On 15 December 2000, the General Council adopted a decision that mandates the SCM Committee to examine as an important part of its work the issues of aggregate and generalized rates of remission of import duties and the definition of "inputs consumed in the production process", taking into account the particular needs of developing country Members.[672]

483. According to the SCM Committee Chairman's Reports to the General Council, reflecting the work undertaken pursuant to this mandate in relation to the issues of aggregate and generalized rates of remission of import duties, Members have engaged constructively with proponents including through sharing information on various Members' domestic duty drawback procedures. This said, for a number of Members, the system proposed represented an unworkable framework, due to its technical complexity as well as the general complexity of the issue of duty drawback, and their concerns over the accuracy and transparency of the proposed system.[673]

484. The said Reports indicate, in relation to the definition of inputs consumed in the production process,

[672] See paragraph 6.3 of the General Council Decision of 15 December 2000 (WT/L/384).

[673] G/SCM/34, p. 2; G/SCM/36, p. 9 and G/SCM/38, p. 23.

that divergent views remained and it is SCM Chairman's view that consensus could not be reached in the Committee, not because of lack of political will but because of an enormous amount of technical problems which could not be resolved in that process.[674]

XXXVII. ANNEX III

A. TEXT OF ANNEX III

ANNEX III
GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES

I

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as those substituted for the imported inputs. Pursuant to paragraph (i) of the Illustrative List of Export Subsidies in Annex I, substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed.

II

In examining any substitution drawback system as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Paragraph (i) of the Illustrative List stipulates that home market inputs may be substituted for imported inputs in the production of a product for export provided such inputs are equal in quantity to, and have the same quality and characteristics as, the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting Member to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is no drawback of import charges in excess of those originally levied on the imported inputs in question.

2. Where it is alleged that a substitution drawback system conveys a subsidy, the investigating authorities should first proceed to determine whether the government of the exporting Member has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy should be presumed to exist. It may be deemed necessary by the investigating authorities to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the verification procedures are being effectively applied.

3. Where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually applied or not applied effectively, there may be a subsidy. In such cases a further examination by the exporting Member based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 2.

4. The existence of a substitution drawback provision under which exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy.

5. An excess drawback of import charges in the sense of paragraph (i) would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.

B. INTERPRETATION AND APPLICATION OF ANNEX III

1. Relationship with other Articles

(a) Article 3.1(a)

485. With respect to export subsidies of Article 3.1(a), see paragraphs 88–128 above.

(b) Article 27.2(a)

486. With respect to the exceptions for developing and least-developed countries in Article 27.2(a), see paragraphs 338–345 above.

XXXVIII. ANNEX IV

A. TEXT OF ANNEX IV

ANNEX IV
CALCULATION OF THE TOTAL AD VALOREM SUBSIDIZATION (PARAGRAPH 1(a) OF ARTICLE 6)[62]

(*footnote original*) [62] In cases where the existence of serious prejudice has to be demonstrated.

1. Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government.

[674] G/SCM/34, p. 2; G/SCM/36, p. 10 and G/SCM/38, p. 23.

2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's[63] sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.[64]

(*footnote original*) [63] The recipient firm is a firm in the territory of the subsidizing Member.
(*footnote original*) [64] In the case of tax-related subsidies the value of the product shall be calculated as the total value of the recipient firm's sales in the fiscal year in which the tax-related measure was earned.

3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.

4. Where the recipient firm is in a start-up situation, serious prejudice shall be deemed to exist if the overall rate of subsidization exceeds 15 per cent of the total funds invested. For purposes of this paragraph, a start-up period will not extend beyond the first year of production.[65]

(*footnote original*) [65] Start-up situations include instances where financial commitments for product development or construction of facilities to manufacture products benefiting from the subsidy have been made, even though production has not begun.

5. Where the recipient firm is located in an inflationary economy country, the value of the product shall be calculated as the recipient firm's total sales (or sales of the relevant product, if the subsidy is tied) in the preceding calendar year indexed by the rate of inflation experienced in the 12 months preceding the month in which the subsidy is to be given.

6. In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.

7. Subsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization.

8. Subsidies which are non-actionable under relevant provisions of this Agreement shall not be included in the calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6.

B. INTERPRETATION AND APPLICATION OF ANNEX IV

1. Expiry

487. Article 6.1(a) of the *SCM Agreement*, which refers to Annex IV in footnote 14, has lapsed pursuant to Article 31. See paragraphs 198 and 391 above. See also information under the Informal Group of Experts under Article 24 in paragraph 326 above.

2. Relationship with other Articles

488. With respect to the relationship with Article 1.1(b), see paragraph 78 above.

XXXIX. ANNEX V

A. TEXT OF ANNEX V

ANNEX V
PROCEDURES FOR DEVELOPING
INFORMATION CONCERNING SERIOUS PREJUDICE

1. Every Member shall cooperate in the development of evidence to be examined by a Panel in procedures under paragraphs 4 through 6 of Article 7. The parties to the dispute and any third-country Member concerned shall notify to the DSB, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for administration of this provision within its territory and the procedures to be used to comply with requests for information.

2. In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyse the adverse effects caused by the subsidized product.[66] This process may include, where appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII.[67]

(*footnote original*) [66] In cases where the existence of serious prejudice has to be demonstrated.
(*footnote original*) [67] The information-gathering process by the DSB shall take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by any Member involved in this process.

3. In the case of effects in third-country markets, a party to a dispute may collect information, including through the use of questions to the government of the third-country Member, necessary to analyse adverse effects, which is not otherwise reasonably available from the complaining Member or the subsidizing Member. This requirement should be administered in such a way as not to impose an unreasonable burden on the third-country Member. In particular, such a Member is not expected to make a market or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by

this Member (e.g. most recent statistics which have already been gathered by relevant statistical services but which have not yet been published, customs data concerning imports and declared values of the products concerned, etc.). However, if a party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country Member and such a person or firm shall be given access to all information which is not normally maintained confidential by the government.

4. The DSB shall designate a representative to serve the function of facilitating the information-gathering process. The sole purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties.

5. The information-gathering process outlined in paragraphs 2 through 4 shall be completed within 60 days of the date on which the matter has been referred to the DSB under paragraph 4 of Article 7. The information obtained during this process shall be submitted to the panel established by the DSB in accordance with the provisions of Part X. This information should include, *inter alia*, data concerning the amount of the subsidy in question (and, where appropriate, the value of total sales of the subsidized firms), prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in question and changes in market shares. It should also include rebuttal evidence, as well as such supplemental information as the panel deems relevant in the course of reaching its conclusions.

6. If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available.

7. In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.

8. In making a determination to use either best information available or adverse inferences, the panel shall consider the advice of the DSB representative nominated under paragraph 4 as to the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner.

9. Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process.

B. INTERPRETATION AND APPLICATION OF ANNEX V

1. Relationship with other WTO Agreements

489. With respect to the drawing of adverse inferences, see also Section XI.B.3(d) of the Chapter on the *DSU*.

XL. ANNEX VI

A. TEXT OF ANNEX VI

ANNEX VI

PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 6 OF ARTICLE 12

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. In case of such a request the investigating authorities may place themselves at the disposal of the firm; such a visit may only be made if *(a)* the authorities of the importing Member notify the representatives of the government of the Member in question and *(b)* the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further

details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

B. INTERPRETATION AND APPLICATION OF ANNEX VI

No jurisprudence or decision of a competent WTO body.

XLI. ANNEX VII

A. TEXT OF ANNEX VII

ANNEX VII
DEVELOPING COUNTRY MEMBERS REFERRED TO IN PARAGRAPH 2(a) OF ARTICLE 27

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum:[68] Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

(*footnote original*) [68] The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.

B. INTERPRETATION AND APPLICATION OF ANNEX VII

1. Annex VII(b)

(a) Rectification to include Honduras

490. On 15 December 2000, the General Council adopted a decision to include Honduras in Annex VII(b):

> "Taking into account the unique situation of Honduras as the only original Member of the WTO with a GNP per capita of less than US $1,000 that was not included in Annex VII(b) to the Agreement on Subsidies and Countervailing Measures (SCM Agreement), Members call upon the Director-General to take appropriate steps, in accordance with WTO usual practice, to rectify the omission of Honduras from the list of Annex VII(b) countries."[675]

(b) Graduation methodology

491. With regard to the graduation methodology from Annex VII(b), paragraph 10.1 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns provides for a modification of a consecutive three-year period where the US$ GNP per capita requirement must be fulfilled accordingly:

> "Agree[d] that Annex VII(b) to the Agreement on Subsidies and Countervailing Measures includes the Members that are listed therein until their GNP per capita reaches US $1,000 in constant 1990 dollars for three consecutive years. This decision will enter into effect upon the adoption by the Committee on Subsidies and Countervailing Measures of an appropriate methodology for calculating constant 1990 dollars. If, however, the Committee on Subsidies and Countervailing Measures does not reach a consensus agreement on an appropriate methodology by 1 January 2003, the methodology proposed by the Chairman of the Committee set forth in G/SCM/38, Appendix 2 shall be applied. A Member shall not leave Annex VII(b) so long as its GNP per capita in current dollars has not reached US $1,000 based upon the most recent data from the World Bank."[676]

492. As of 1 January 2003, because no alternative methodologies were proposed, the methodology set out in Annex 2 of G/SCM/38 applies.

493. In 2002, four Members listed in Annex VII(b)[677] reserved rights, as provided for in G/SCM/39, to seek extensions of the transition period for the exemption from the prohibition on export subsidies in Article 3.1(a), in the event that they graduate from Annex VII during the period in which other Members have extensions in effect pursuant to G/SCM/39. See "Extension of Article 27.4 transition period" in paragraph 492 above.

494. As foreseen in paragraph 10.1 of the *Doha Ministerial Decision on Implementation-Related Issues and Concerns*, and in application of the methodology in G/SCM/38, the Secretariat has informed the Committee of updated calculations reflecting: (i) GNI per capita in constant 1990 dollars covering the three most recent

[675] Paragraph 6.1 of the General Council Decision of 15 December 2000 (WT/L/384). See Procès-Verbal of Rectification of the Agreement on Subsidies and Countervailing Measures, rectifying the text of Annex VII(b) to include Honduras in the list of countries (WT/LET/371, 20 January 2001).

[676] (WT/MIN(01)/17).

[677] Bolivia, Honduras, Kenya and Sri Lanka.

years for which data are available; and (ii) GNI per capita in current dollars for the years 2001 and 2002 (see documents G/SCM/110 and /Add. 1). In the most recent note, the Secretariat indicated that Annex VII(b) to the *SCM Agreement* includes the following Members that are listed therein until their GNP per capita reaches US $1,000 in constant 1990 dollars for three consecutive years: Bolivia, Cameroon, Congo, Côte d'Ivoire, Egypt, Ghana, Guyana, Honduras, India, Indonesia, Kenya, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

(c) Re-inclusion of Member in Annex VII(b)

495. With regard to re-inclusion in Annex VII(b), paragraph 10.4 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns provides that "if a Member has been excluded from the list in paragraph (b) of Annex VII to the Agreement on Subsidies and Countervailing Measures, it shall be re-included in it when its GNP per capita falls back below US $1,000".[678]

XLII. OTHER ISSUES[679]

A. OBJECT AND PURPOSE OF THE SCM AGREEMENT

496. In *Brazil – Aircraft*, the Panel considered that the object and purpose of the *SCM Agreement* is to impose multilateral disciplines on subsidies which distort international trade:

> "In our view, the object and purpose of the SCM Agreement is to impose multilateral disciplines on subsidies which distort international trade. It is for this reason that the SCM Agreement prohibits two categories of subsidies – subsidies contingent upon exportation and upon the use of domestic over imported goods – that are specifically designed to affect trade."[680]

497. In *Canada – Aircraft*, the Panel stated that "the object and purpose of the SCM Agreement could more appropriately be summarized as the establishment of multilateral disciplines 'on the premise that some forms of government intervention distort international trade, [or] have the potential to distort [international trade]'".[681]

498. In *US – Export Restraints*, the Panel indicated its agreement with the Panels on *Brazil – Aircraft* and *Canada – Aircraft* with regard to their statements on the object of the *SCM Agreement* (see paragraphs 496–497 above).[682] The Panel concluded, however, that not every government action or intervention is to be considered as a subsidy that may distort trade and that, accordingly, the object and purpose of the *SCM Agreement* can only be in respect of 'subsidies' as defined in the Agreement:

> "It does not follow from those statements, however, that every government intervention that might in economic theory be deemed a subsidy with the potential to distort trade is a subsidy within the meaning of the SCM Agreement. Such an approach would mean that the 'financial contribution' requirement would effectively be replaced by a requirement that the government action in question be commonly understood to be a subsidy that distorts trade.
>
> [W]hile the object and purpose of the Agreement clearly is to discipline subsidies that distort trade, this object and purpose can only be in respect of 'subsidies' *as defined* in the Agreement. This definition, which incorporates the notions of 'financial contribution', 'benefit', and 'specificity', was drafted with the express purpose of ensuring that not every government intervention in the market would fall within the coverage of the Agreement."[683]

499. In *US – Carbon Steel*, the Appellate Body agreed with the Panel that the objectives and purposes of the *SCM Agreement* include "the establishment of a framework of rights and obligations relating to countervailing duties, and the creation of a set of rules which WTO Members must respect in the use of such duties".[684] The Appellate Body stated:

> "[W]e turn to the object and purpose of the *SCM Agreement*. We note, first, that the Agreement contains no preamble to guide us in the task of ascertaining its object and purpose. In *Brazil – Desiccated Coconut*, we observed that the '*SCM Agreement* contains a set of rights and obligations that go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the GATT 1947.'[685] The *SCM Agreement* defines the concept of 'subsidy', as well as the conditions under which Members may not employ subsidies. It establishes remedies when Members employ prohibited subsidies, and sets out additional remedies available to Members whose trading interests are harmed by another Member's subsidization practices. Part V of the *SCM Agreement* deals with one such remedy, permitting Members to levy countervailing duties on imported products to offset the benefits of specific subsidies bestowed on the manufacture, production or export of those goods. However, Part V also conditions the right to apply such duties on the demonstrated existence of three substantive conditions (subsidization, injury, and a causal link between the two)

[678] (WT/MIN(01)/17).
[679] The *SCM Agreement* has no preamble.
[680] Panel Report on *Brazil – Aircraft*, para. 7.26.
[681] Panel Report on *Canada – Aircraft*, para. 9.119.
[682] Panel Report on *US – Exports Restraints*, para. 8.62.
[683] Panel Report on *US – Exports Restraints*, para. 8.63.
[684] Appellate Body Report on *US – Carbon Steel*, para. 74.
[685] (*footnote original*) Appellate Body Report on *Brazil – Desiccated Coconut*, at 181.

and on compliance with its procedural and substantive rules, notably the requirement that the countervailing duty cannot exceed the amount of the subsidy. Taken as a whole, the main object and purpose of the *SCM Agreement* is to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures.

We thus believe that the Panel properly identified, as among the objectives of the *SCM Agreement*, the establishment of a framework of rights and obligations relating to countervailing duties,[686] and the creation of a set of rules which WTO Members must respect in the use of such duties.[687] Part V of the Agreement is aimed at striking a balance between the right to impose countervailing duties to offset subsidization that is causing injury, and the obligations that Members must respect in order to do so."[688]

500. In the same vein, the Panel on *US – FSC (Article 21.5 – EC)* concluded that the United States' argument that a government could choose to bestow financial contributions in the form of fiscal incentives by, for example, manipulating the definition of the tax base to accommodate "exemptions" so that there would not be a foregoing of revenue "otherwise due", would have the effect of reducing paragraph (ii) of Article 1.1(a)(1) of the *SCM Agreement* to "redundancy and inutility" and "[a]s such, it is inherently contradictory to what may be viewed as the object and purpose of the *SCM Agreement* in terms of disciplining trade-distorting subsidies in a way that provides legally binding security of expectations to Members".[689] The Panel found that:

"In this regard, it is evident that the interpretation advanced by the United States would be irreconcilable with that object and purpose, given that it would offer governments '*carte-blanche*' to evade any effective disciplines, thereby creating fundamental uncertainty and unpredictability. In short, such an approach would eviscerate the subsidies disciplines in the *SCM Agreement*."[690]

501. In *US – Softwood Lumber IV* the Appellate Body, upholding the Panel's finding, rejected Canada's interpretation of the definition of "goods" as it excluded standing timber from the term, on the ground that such a narrow reading of Article 1.1(a)(1)(iii) would undermine the object and purpose of the *SCM Agreement*. The Appellate Body opined:

"[T]o accept Canada's interpretation of the term 'goods' would, in our view, undermine the object and purpose of the *SCM Agreement*, which is to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while recognizing, at the same time, the right of Members to impose such measures under certain conditions. It is in furtherance of this object and purpose that Article 1.1(a)(1)(iii) recognizes that subsidies may be conferred, not only through monetary transfers, but also by the provision of non-monetary inputs. Thus, to interpret the term 'goods' in Article 1.1(a)(1)(iii) narrowly, as Canada would have us do, would permit the circumvention of subsidy disciplines in cases of financial contributions granted in a form other than money, such as through the provision of standing timber for the sole purpose of severing it from land and processing it."[691]

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[686] (*footnote original*) Panel Report, para. 8.32.
[687] (*footnote original*) Ibid., para. 8.68.
[688] Appellate Body Report on *US – Carbon Steel*, paras. 73–74.
[689] Panel Report on *US – FSC (Article 21.5 – EC)*, para. 8.39.
[690] Panel Report on *US – FSC (Article 21.5 – EC)*, para. 8.39.
[691] Appellate Body Report on *US – Softwood Lumber IV*, para. 64.

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Having in mind the overall objective of the Members to improve and strengthen the international trading system based on GATT 1994;

Recognizing the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control;

Recognizing the importance of structural adjustment and the need to enhance rather than limit competition in international markets; and

Recognizing further that, for these purposes, a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994, is called for;

Hereby *agree* as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

1. In *Korea – Dairy*, the Appellate Body referred to the Preamble of the *Agreement on Safeguards* as additional support for its finding that all provisions of both Article XIX of *GATT 1994* and the *Agreement on Safeguards* apply cumulatively and must be given their full meaning and legal effect:[1]

> "Our reading . . . is consistent with the desire expressed by the Uruguay Round negotiators in the Preamble to the *Agreement on Safeguards* 'to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX . . ., to re-establish multilateral control over safeguards and eliminate measures that escape such control . . .' In furthering this statement of the object and purpose of the *Agreement on Safeguards*, it must always be remembered that safeguard measures result in the temporary suspension of treaty concessions or the temporary withdrawal of treaty obligations, which are fundamental to the WTO Agreement, such as those in Article II and Article XI of the GATT 1994."[2]

2. In a finding subsequently upheld by the Appellate Body, the Panel on *US – Lamb* rejected the United States argument that the term "domestic industry" under Article 4.1(c) should be defined on the basis of a "continuous line of production" and a "coincidence of economic interests". The Panel then referred to the object and purpose of the *Agreement on Safeguards*, as evidenced in the Preamble, as relevant context for its more restrictive approach to the concept of "domestic industry":

> "In our view, [our] reading of the industry definition is consistent with the object and purpose of the Safeguards Agreement. In particular, this reading is consistent with the Agreement's objectives of, on the one hand, creating a mechanism for effective, temporary protection from imports to an industry that is experiencing serious injury or threat thereof from imports in the wake of trade liberalization, and on the other hand, encouraging 'structural adjustment', and 'clarify[ing] and reinforc[ing] the disciplines of . . . Article XIX of GATT', in view of 'the need to enhance rather than limit competition in international markets'.
>
> If WTO law were not to offer a 'safety valve' for situations in which, following trade liberalization, imports increase so as to cause serious injury or threat thereof to a domestic industry, Members could be deterred from entering into additional tariff concessions and from engaging in further trade liberalization. It is for this reason that the safeguard mechanism in Article XIX has always been an integral part of the GATT. . . . [W]e note that SG Article XIX of GATT 1994 as well as SG Article 11.1 both refer to safeguard measures as 'emergency' measures, and the Appellate Body has characterized them as 'extraordinary' remedies.[3] A conceptual approach to defining the relevant domestic industry which would leave it to the discretion of competent national authorities how far upstream and/or downstream the production chain of a given 'like' end product to look in defining the scope of the domestic industry could easily defeat the Safeguards Agreement's purpose of reinforcing disciplines in the field of safeguards and enhancing rather than limiting competition."[4]

3. The Appellate Body on *US – Lamb* referred to the object and purpose of the *Agreement on Safeguards* in distinguishing between the concepts of "serious injury"

[1] With respect to Article XIX of *GATT 1994* in general and the term "unforeseen developments" in particular, see Section II.B.1 of this Chapter.
[2] Appellate Body Report on *Korea – Dairy*, para. 88. See also Appellate Body Report on *Argentina – Footwear*, para. 95.
[3] (*footnote original*) Appellate Body Report, *Argentina – Footwear*, para. 94.
[4] Panel Report on *US – Lamb*, paras. 7.76 and 7.77.

under the *Agreement on Safeguards* and "material injury" under the *Anti-Dumping Agreement* and the *Agreement on Subsidies and Countervailing Duties*:

> "We believe that the word 'serious' connotes a much higher standard of injury than the word 'material'. Moreover, we submit that it accords with the object and purpose of the *Agreement on Safeguards* that the injury standard for the application of a safeguard measure should be higher than the injury standard for anti-dumping or countervailing measures . . ."[5]

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1
General Provision

This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. Relationship with Article XIX of the GATT 1994

(a) General

4. In *Korea – Dairy*, the Appellate Body examined the relationship between Article XIX of the *GATT 1994* and the *Agreement on Safeguards* in light of, on the one hand, Article II of the *WTO Agreement*,[6] and, on the other, Articles 1 and 11.1(a) of the *Agreement on Safeguards*.[7] The Appellate Body concluded that any safeguard measure imposed after the entry into force of the *WTO Agreement* must comply with the provisions of both Article XIX and the *Agreement on Safeguards*:

> "The specific relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards* within the WTO Agreement is set forth in Articles 1 and 11.1(a) of the *Agreement on Safeguards*:
>
> . . .
>
> Article 1 states that the purpose of the *Agreement on Safeguards* is to establish 'rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.' . . . The ordinary meaning of the language in Article 11.1(a) – 'unless such action conforms with the provisions of that Article applied in accordance with this Agreement' – is that any safeguard action must conform with the provisions of Article XIX of the GATT 1994 as well as with the provisions of the *Agreement on Safeguards*. Thus, any safeguard measure[8] imposed after the entry into force of the WTO Agreement must comply with the provisions of both the *Agreement on Safeguards* and Article XIX of the GATT 1994."[9]

5. In *Argentina – Footwear (EC)*, the Appellate Body reversed a conclusion by the Panel in that dispute that "safeguard investigations and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new *Agreement on Safeguards* satisfy the requirements of Article XIX of GATT".[10] The Appellate Body noted that Articles 1 and 11.1(a) of the *Agreement on Safeguards* described the precise nature of the relationship between Article XIX of *GATT 1994* and the *Agreement on Safeguards* within the *WTO Agreement*,[11] and then observed:

> "We see nothing in the language of either Article 1 or Article 11.1(a) of the *Agreement on Safeguards* that suggests an intention by the Uruguay Round negotiators to *subsume* the requirements of Article XIX of the GATT 1994 within the *Agreement on Safeguards* and thus to render those requirements no longer applicable. Article 1 states that the purpose of the *Agreement on Safeguards* is to establish 'rules for the application of safeguard measures which shall be understood to mean *those measures provided for* in Article XIX of GATT 1994.' . . . This suggests that Article XIX continues in full force and effect, and, in fact, establishes certain prerequisites for the imposition of safeguard measures. Furthermore, in Article 11.1(a), the ordinary meaning of the language 'unless such action *conforms with the provisions of that Article applied in accordance with this Agreement*' . . . clearly is that any safeguard action must *conform with* the provisions of Article XIX of the GATT 1994 *as well as* with the provisions of the *Agreement on Safeguards*. Neither of these provisions states that any safeguard action taken after the entry into force of the *WTO Agreement* need only conform with the provisions of the *Agreement on Safeguards*."[12][13]

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[5] Appellate Body Report on *US – Lamb*, para. 124.

[6] For the Appellate Body's analysis under Article II of the *WTO Agreement*, see Chapter on the *WTO Agreement*, Section II.B.

[7] The issue of the relationship between Article XIX of the *GATT 1994* and the *Agreement on Safeguards* arose in these disputes in connection with claims raised regarding a failure to examine whether the import trends of the products under investigation were the result of "unforeseen developments" within the meaning of Article XIX:1(a) of the *GATT 1994*. For the interpretation of the phrase "If, as a result of unforeseen developments . . . concessions" in Article XIX:1(a) of the *GATT 1994*, see Chapter on the *GATT 1994*, Section XX.B.2 (a).

[8] (*footnote original*) With the exception of special safeguard measures taken pursuant to Article 5 of the *Agreement on Agriculture* or Article 6 of the *Agreement on Textiles and Clothing*.

[9] Appellate Body Report on *Korea – Dairy*, paras. 76–77. See also Appellate Body Report on *Argentina – Footwear (EC)*, para. 84.

[10] Panel Report on *Argentina – Footwear (EC)*, para. 8.69.

[11] Appellate Body Report on *Argentina – Footwear (EC)*, para. 82.

[12] (*footnote original*) We note that the provisions of Article 11.1(a) of the *Agreement on Safeguards* are significantly different from the provisions of Article 2.4 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*, which state:

> "Sanitary or phytosanitary measures *which conform to* the relevant provisions of this Agreement *shall be presumed to be in accordance with* the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)." (emphasis added)

[13] Appellate Body Report on *Argentina – Footwear (EC)*, para. 83.

6. The Appellate Body on *Argentina – Footwear (EC)* further rejected the Panel's conclusion that because the clause "[i]f, as a result of unforeseen developments . . . concessions"[14] in Article XIX:1(a) had been expressly omitted from Article 2.1 of the Agreement on Safeguards, safeguard measures that meet the requirements of the Agreement on Safeguards will automatically also satisfy the requirements of Article XIX. The Appellate Body considered this conclusion inconsistent with the principles of effective treaty interpretation[15] and with the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards*:

> "[I]t is clear from Articles 1 and 11.1(a) of the *Agreement on Safeguards* that the Uruguay Round negotiators did not intend that the *Agreement on Safeguards* would entirely replace Article XIX. Instead, the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards* confirms that the intention of the negotiators was that the provisions of Article XIX of the GATT 1994 and of the *Agreement on Safeguards* would apply *cumulatively*, except to the extent of a conflict between specific provisions . . . We do not see this as an issue involving a conflict between specific provisions of two Multilateral Agreements on Trade in Goods. Thus, we are obliged to apply the provisions of Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 *cumulatively*, in order to give meaning, by giving legal effect, to all the applicable provisions relating to safeguard measures."[16]

7. The Panel on *US – Lamb*, referring to the statements by the Appellate Body on the relationship between the *Agreement on Safeguards* and Article XIX of the *GATT 1994*, observed:

> "Thus the Appellate Body explicitly rejected the idea that those requirements of GATT Article XIX which are not reflected in the *Safeguards Agreement* could have been superseded by the requirements of the latter and stressed that all of the relevant provisions of the *Safeguards Agreement* and GATT Article XIX must be given meaning and effect."[17]

8. The Appellate Body on *US – Lamb* reiterated the conclusions drawn by the Appellate Body in *Argentina – Footwear (EC)* and in *Korea – Dairy* on the relationship between the *Agreement on Safeguards* and Article XIX of the *GATT 1994* and observed:

> "[A]rticles 1 and 11.1(a) of the Agreement on Safeguards express the full and continuing applicability of Article XIX of the GATT 1994, which no longer stands in isolation, but has been clarified and reinforced by the Agreement on Safeguards."[18]

9. The Panel on *Argentina – Preserved Peaches* also concluded that in disputes relating to safeguards measures, a panel must apply the *Agreement on Safeguards* and Article XIX of the *GATT 1994* cumulatively.[19]

10. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, reiterated that Article XIX of the *GATT 1994* and the *Agreement on Safeguards* apply "cumulatively" when assessing the WTO compatibility of safeguards measures taken by WTO Members:

> "[T]here is no reference to unforeseen developments in the Agreement on Safeguards. However, as repeatedly affirmed by the Appellate Body, Articles 1 and 11.1(a) of the Agreement on Safeguards express the continuing applicability of Article XIX of GATT which has been clarified and reinforced by the Agreement on Safeguards.[20] This interpretation ensures that the provisions of the Agreement on Safeguards and those of Article XIX are given their full meaning and their full legal effect within the context of the WTO Agreement.[21]"[22]

11. As regards the possibility of resorting to judicial economy in cases where it has been found that the requirements of Articles 2 and 4 of the *Agreement on Safeguards* have not been met, see Section XX.B.2(a)(iii) of the Chapter on the *GATT 1994*.

(b) "unforeseen developments"

12. With respect to the concept of "unforeseen developments" in Article XIX of *GATT 1994*, see Section XX.B.2 of the Chapter on the *GATT 1994*.

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2
Conditions

1. A Member[1] may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

[14] The discussion on "unforeseen developments"" can be found in Section XX.B.2(a)(i) of the Chapter on the *GATT 1994*.
[15] With respect to treaty interpretation in general, see the Chapter on the *DSU*, Section III.B.1(c).
[16] Appellate Body Report on *Argentina – Footwear (EC)*, para. 89.
[17] Panel Report on *US – Lamb*, para. 7.11.
[18] Appellate Body Report on *US – Lamb*, para. 70.
[19] Panel Report on *Argentina – Preserved Peaches*, para. 7.12.
[20] (*footnote original*) See for instance the Appellate Body Report in *Korea – Dairy* at para. 74: "We agree with the statement of the Panel that: It is now well established that the WTO Agreement is a 'Single Undertaking' and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously . . ." and para. 78: "Having found that the provisions of *both* Article XIX:1 of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* apply to any safeguard measure taken under the *WTO Agreement*".
[21] (*footnote original*) Appellate Body Reports, *Argentina – Footwear (EC)*, para. 95; *Korea – Dairy*, para. 85; *US – Lamb*, para. 71.
[22] Panel Reports on *US – Steel Safeguards*, para. 10.36

(*footnote original*) [1] A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

2. Safeguard measures shall be applied to a product being imported irrespective of its source.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. General

(a) The two basic inquiries

13. In *US – Line Pipe*, the Appellate Body referred to two basic inquiries that are conducted in interpreting the *Agreement on Safeguards*: (i) "Is there a right to apply a safeguard measure?"; and (ii) "If so, has that right been exercised, through the application of such a measure, within the limits set out in the treaty?" The Appellate Body emphasized that these two inquiries are "separate and distinct" and should not be "confused" by the treaty interpreter:

> "[There are] basic inquiries that are conducted in interpreting the *Agreement on Safeguards*. These two basic inquiries are: *first*, is there a right to apply a safeguard measure? And, *second*, if so, has that right been exercised, through the application of such a measure, within the limits set out in the treaty? These two inquiries are separate and distinct. They must not be confused by the treaty interpreter. One necessarily precedes and leads to the other. *First*, the interpreter must inquire whether there is a right, under the circumstances of a particular case, to apply a safeguard measure. For this right to exist, the WTO Member in question must have determined, as required by Article 2.1 of the *Agreement on Safeguards* and pursuant to the provisions of Articles 3 and 4 of the *Agreement on Safeguards*, that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. *Second*, if this first inquiry leads to the conclusion that there *is* a right to apply a safeguard measure in that particular case, then the interpreter must next consider whether the Member has applied that safeguard measure 'only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment', as required by Article 5.1, first sentence, of the *Agreement on Safeguards*. Thus, the right to apply a safeguard measure – even where it has been found to exist in a particular case and thus can be exercised – is not unlimited. Even when a Member has fulfilled the treaty requirements that establish the right to apply a safeguard measure in a particular case, it must do so 'only to the extent necessary. . . .'"[23]

14. The Appellate Body on *US – Line Pipe* considered the existence of "a natural tension between, on the one hand, defining the appropriate and legitimate scope of the right to apply safeguard measures and, on the other hand, ensuring that safeguard measures are not applied against 'fair trade' beyond what is necessary to provide extraordinary and temporary relief".[24] Moreover, it found this natural tension to be "inherent" in the "two basic inquiries" that are conducted in interpreting the *Agreement on Safeguards* (see paragraph 13 above in this regard).[25]

15. In *US – Steel Safeguards*, the Panel applied the two basic inquiries test under the *Agreement on Safeguards* as enunciated by the Appellate Body in *US – Line Pipe* (see paragraph 13 above) as follows:

> "Throughout its examination, this Panel has kept the two enquiries distinct. The Panel is of the view that, first, it must examine whether the United States had the *right* to take the safeguard measures. Second, should the Panel consider that the United States had the right to take such safeguard measures, the Panel would then assess whether the measures were applied (as regards the type of measure, their level and duration) only to the extent necessary to remedy or prevent serious injury and allow for readjustment.
>
> In examining whether the United States had a right to impose the specific safeguard measures at issue, the Panel will concern itself with the application of Articles 2, 3 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994 (the latter being relevant in particular for the assessment of whether the United States was faced with unforeseen developments) in reviewing the report of the competent authority. In relation to the second enquiry, when assessing the appropriateness of such safeguards measures, the importing Member is obliged, when challenged by a WTO Member who has made a prima facie case of inconsistency with Article 5.1 of the Agreement on Safeguards, to justify before the Panel that the safeguard measures were imposed only to the extent necessary to prevent or remedy injury and allow for readjustment. Reversals of this burden of proof may take place."[26]

[23] Appellate Body Report on *US – Line Pipe*, para. 84.
[24] Appellate Body Report on *US – Line Pipe*, para. 83.
[25] Appellate Body Report on *US – Line Pipe*, para. 84.
[26] Panel Reports on *US – Steel Safeguards*, paras. 10.15–10.16.

2. Article 2.1

(a) Relationship with Article XIX of the GATT 1994

16. With respect to the relationship with Article XIX of the GATT 1994, see paragraphs 4–10 above.

(b) Findings under Article 4 and Article 2

17. The question whether a violation of Article 4 necessarily implies a violation of Article 2 of the *Agreement on Safeguards* has been addressed mainly at the panel level. The Appellate Body has confirmed these findings. The Panel Report in *Korea – Dairy* discussed the relationship between claims under Article 4 and claims under Article 2 of the *Agreement on Safeguards* and concluded that a violation of parts of Article 4 would constitute a violation of Article 2:

> "The European Communities raised various other arguments in support of its claims that Korea violated Article 4, and consequently Article 2, of the Agreement on Safeguards, namely that Korea did not adequately demonstrate the existence of serious injury and a causal link with the increased imports. We shall address the EC argument that Korea did not perform an adequate assessment of whether the products under investigation were being imported into its territory in such increased quantities and under such conditions as to cause serious injury to the domestic industry when we examine the European Communities' more specific claims of inadequate serious injury and causation assessments made pursuant to Article 4.1 and 4.2 of the Agreement on Safeguards. We note that a violation of Article 4.2 or 4.3 (sic) would constitute a violation of Article 2 of the Agreement on Safeguards."[27]

18. However, despite holding that a violation of Article 4 would necessarily imply a violation of Article 2 of the *Agreement on Safeguards*, the Panel on *Korea – Dairy* declined to reach a conclusion on Article 2, referring to the fact that this violation had not been argued by the complaining party:

> "Article 2.1 permits the application of a safeguard measure only if, inter alia, there has been a determination of serious injury pursuant to Article 4.2. Since we find that Korea's determination of serious injury does not meet the requirements of Article 4.2, the application of the safeguard measure at issue would necessarily also violate Article 2.1 of the *Agreement on Safeguards*. We note that in its request for establishment of a panel, the European Communities claims generally that Korea violated Articles 2.1, 4.2(a), 4.2(b), 5.1 and 12.1 to 12.3 of the *Agreement on Safeguards*. However, in its submissions, the European Communities did not argue specifically, nor did it submit any evidence, in support of its claim under Article 2.1, other than those relating to 'under such conditions' . . . Therefore, we do not reach any conclusion on the issue of whether Korea's determination of serious injury violates the provisions of Article 2.1 of the *Agreement on Safeguards*."[28]

19. The Panel on *Argentina – Footwear (EC)* considered Articles 2 and 4 largely in parallel:

> "[W]e conclude that Argentina's investigation did not demonstrate that there were increased imports within the meaning of Articles 2.1 and 4.2(a); that the investigation did not evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry within the meaning of Article 4.2(a); that the investigation did not demonstrate on the basis of objective evidence the existence of a causal link between increased imports and serious injury within the meaning of Article 2.1 and 4.2(b); that the investigation did not adequately take into account factors other than increased imports within the meaning of Article 4.2(b); and that the published report concerning the investigation did not set forth a complete analysis of the case under investigation as well as a demonstration of the relevance of the factors examined within the meaning of Article 4.2(c).
>
> Therefore, we find that Argentina's investigation and determinations of increased imports, serious injury and causation are inconsistent with Articles 2 and 4 of the *Safeguards Agreement*. As such, we find that Argentina's investigation provides no legal basis for the application of the definitive safeguard measure at issue, or any safeguard measure."[29]

20. The Panel on *US – Wheat Gluten* also linked violations of Article 4 to Article 2.1, finding, *inter alia*:

> "In light of the findings made in section VIII above, we conclude that the definitive safeguard measure imposed by the United States on certain imports of wheat gluten based on the United States investigation and determination is inconsistent with Articles 2.1 and 4 of the *Agreement on Safeguards* in that:
>
> (i) the causation analysis applied by the USITC did not ensure that injury caused by other factors was not attributed to imports; and
>
> (ii) imports from Canada (a NAFTA partner) were excluded from the application of the measure after imports from all sources were included in the investigation for the purposes of determining serious injury caused by increased imports (following a separate inquiry concerning whether imports from Canada accounted for a 'substantial share' of total imports and whether they 'contributed importantly' to the 'serious injury' caused by total imports)."[30]

[27] Panel Report on *Korea – Dairy*, para. 7.53.
[28] Panel Report on *Korea – Dairy*, para. 7.86.
[29] Panel Report on *Argentina – Footwear (EC)*, paras. 8.279–8.280; See also Panel Report on *US – Wheat Gluten*, paras. 9.1–9.2 and Panel Report on *US – Lamb*, para. 8.1.
[30] Panel Report on *US – Wheat Gluten*, para. 9.2.

21. The Panel on *US – Lamb* also addressed the relationship between violations of Article 2 and Article 4, finding that the safeguard measure at issue was applied inconsistently with Articles 4.1(c) and 4.2(b) and subsequently holding:

> "[B]y virtue of the above violations of Article 4 of the Agreement on Safeguards, the United States also has acted inconsistently with Article 2.1 of the Agreement on Safeguards."[31]

22. The Appellate Body on *US – Lamb* confirmed that a violation of Article 4.1(c) necessarily also implies a violation of Article 2:

> "As a result, the imposition of the safeguard measure at issue was based on a determination of serious injury caused to an industry other than the relevant 'domestic industry'. In addition, that measure was imposed without a determination of serious injury to the 'domestic industry', which, properly defined, should have been limited only to packers and breakers of lamb meat. Accordingly, we uphold the Panel's finding, in paragraph 7.118 of the Panel Report, that the safeguard measure at issue is inconsistent with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*."[32]

23. The Appellate Body on *US – Lamb* made an even clearer statement with respect to Article 4.2(b) and Article 2:

> "In the absence of [an explanation by the investigating authority as to/concerning/regarding how it ensured that injury caused to the domestic industry by factors other than increased imports was not attributed to increased imports], we uphold, albeit for different reasons, the Panel's conclusions that the United States acted inconsistently with Article 4.2(b) of the *Agreement on Safeguards*, and, hence, with Article 2.1 of that Agreement."[33]

(c) "that such product is being imported . . . in such increased quantities"

(i) Relevance of quantity versus value of imports

24. The Panel on *Argentina – Footwear (EC)* acknowledged that both parties had referred to data on both the quantity and the value of imports in connection with this requirement, but observed:

> "The Agreement is clear that it is the data on import quantities . . . in absolute terms and relative to (the quantity of) domestic production that are relevant in this context, in that the Agreement refers to imports 'in such increased quantities' . . . Therefore, our evaluation will focus on the data on import quantities.[34]"[35]

(ii) Relationship between Article 2.1 and Article 4.2(a)

25. The Panel on *Argentina – Footwear (EC)*, in examining whether in the case at hand there were "increased imports in the sense of Articles 2.1 and 4.2(a) of the Agreement", noted that Article 2.1 "sets forth the conditions for the application of a safeguard measure", and that Article 4.2 "sets forth the operational requirements for determining whether the conditions in Article 2.1 exist".[36] The Panel in this connection made the following statement, subsequently expressly confirmed by the Appellate Body:

> "Thus, to determine whether imports have increased in 'such quantities' for purposes of applying a safeguard measure, these two provisions require an analysis of the rate and amount of the increase in imports, in absolute terms and as a percentage of domestic production."[37]

(iii) Nature and timing of the increase in imports

26. The Panel on *Argentina – Footwear (EC)* examined whether there is consistency with Articles 2.1 and 4.2(a) in making a finding of increased imports on the basis of a comparison between the volume of imports at the starting-point of an investigation period and the volume of imports at the end of that period ("end-point-to-end-point-comparison"). The Panel, later upheld in this respect by the Appellate Body, came to the conclusion that:

> "[I]n assessing whether an end-point-to-end-point increase in imports satisfies the increased imports requirement of Article 2.1, the sensitivity of the comparison to the specific years used as the end-points is important as it might confirm or reverse the apparent initial conclusion. If changing the starting-point and/or ending-point of the investigation period by just one year means that the comparison shows a decline in imports rather than an increase, this necessarily signifies an intervening decrease in imports at least equal to the initial increase, thus calling into question the conclusion that there are increased imports.
>
> In other words, if an increase in imports in fact is present, this should be evident both in an end-point-to-end-point comparison and in an analysis of intervening trends over the period. That is, the two analyses should be mutually reinforcing. Where as here their results diverge, this at least raises doubts as to whether imports have increased in the sense of Article 2.1."[38]

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[31] Panel Report on *US – Lamb*, para. 8.1.
[32] Appellate Body Report on *US – Lamb*, para. 96.
[33] Appellate Body Report on *US – Lamb*, para. 188.
[34] (*footnote original*) We note that the trends in the data on import values generally confirm those on import quantities.
[35] Panel Report on *Argentina – Footwear (EC)*, para. 8.152.
[36] Panel Report on *Argentina – Footwear (EC)*, para. 8.140. The Appellate Body characterized Article 2.1 as a provision which sets forth the conditions for *imposing* a safeguard measure.
[37] Panel Report on *Argentina – Footwear (EC)*, para. 8.141. See Appellate Body Report on *Argentina – Footwear (EC)*, para. 144, confirming the Panel's finding.
[38] Panel Report on *Argentina – Footwear (EC)*, paras. 8.156–8.157. See Appellate Body Report on *Argentina – Footwear (EC)*, para. 129, confirming the Panel's finding.

27. In *Argentina – Footwear (EC)*, the Panel, in a finding subsequently confirmed by the Appellate Body, considered, in this connection, that an analysis of intervening trends of imports was indispensable:

> "[T]he question of whether any decline in imports is 'temporary' is relevant in assessing whether the 'increased imports' requirement of Article 2.1 has been met. In this context, we recall Article 4.2(a)'s requirement that 'the rate and amount of the increase in imports' be evaluated.[39] In our view this constitutes a requirement that the intervening *trends* of imports over the period of investigation be analysed. We note that the term 'rate' connotes both speed and direction, and thus intervening trends (up or down) must be fully taken into consideration. Where these trends are mixed over a period of investigation, this may be decisive in determining whether an increase in imports in the sense of Article 2.1 has occurred. In practical terms, we consider that the best way to assess the significance of any such mixed trends in imports is by evaluating whether any downturn in imports is simply temporary, or instead reflects a longer-term change."[40]

28. The Panel on *Argentina – Footwear (EC)* found that in the case before it the decline in the volume of imports could not be characterized as a temporary reversal of an increase in the volume of imports.[41] It then stated that:

> "[T]he Agreement requires not just an increase (i.e., any increase) in imports, but an increase in 'such . . . quantities' as to cause or threaten to cause serious injury. . . . the increase in imports must be judged in its full context, in particular with regard to its 'rate and amount' as required by Article 4.2(a). Thus, considering the changes in import levels over the entire period of investigation, as discussed above, seems unavoidable when making a determination of whether there has been an increase in imports 'in such quantities' in the sense of Article 2.1.
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> . . .
>
> Where . . . the volume of imports has declined continuously and significantly during each of the most recent years of the period, more than a 'temporary' reversal of an increase has taken place (as reflected as well in the sensitivity of the outcome of the comparison to a one-year shift of its start or end year)."[42]

29. In applying this analytical standard to the facts of the case in *Argentina – Footwear (EC)*, the Panel came to a conclusion contrary to the determination effectuated by the Argentine authorities:

> "In sum, we find highly significant that the absolute volume of footwear imports and the ratio of those imports to domestic production, increased only until 1993, i.e., during the first two years of the period for which Argentina collected data, and declined continuously thereafter. We also find significant that these decreases were of such a magnitude that a one-year change in base year of the data series on the volume of imports transforms the increase relied upon by Argentina into a decline, and that the resolution applying the provisional measure refers only to anticipated increases in imports, showing that at that time, no increase in imports was present."[43]

30. In *Argentina – Footwear (EC)*, the Panel found, in interpreting the phrase "is being imported . . . in such quantities", that an investigation period of five years "can be quite useful" to the national authorities. The Panel also rejected the argument that the *Agreement on Safeguards* requires a "sharply increasing" trend in imports at the end of the investigation period. The Appellate Body reversed both of these findings. First, it did not find a five-year investigative period reasonable in the light of the phrase "is being imported" and emphasized the need to focus the investigation on the "recent past":

> "[T]he actual requirement, and we emphasize that this requirement is found in *both* Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, is that 'such product *is being imported* . . . in such increased quantities' 'and under such conditions as to cause or threaten to cause serious injury to the domestic industry'. Although we agree with the Panel that the 'increased quantities' of imports cannot be just *any* increase, we do not agree with the Panel that it is reasonable to examine the trend in imports over a five-year historical period. In our view, the use of the present tense of the verb phrase 'is being imported' in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years – or, for that matter, during any other period of several years.[44] In our view, the phrase 'is being imported' implies that the increase in imports must have been sudden and recent."[45]

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[39] (*footnote original*) We recognize that Article 4.2(a) makes this reference in the specific context of the causation analysis, which in our view is inseparable from the requirement of imports in "*such* increased quantities" (emphasis added). Thus, we consider that in the context of both the requirement that imports have increased, and the analysis to determine whether these imports have caused or threaten to cause serious injury, the Agreement requires consideration not just of data for the end-points of an investigation period, but for the entirety of that period.

[40] Panel Report on *Argentina – Footwear (EC)*, para. 8.159. See Appellate Body Report in *Argentina – Footwear (EC)*, para. 129, confirming the Panel's finding.

[41] Panel Report on *Argentina – Footwear (EC)*, para. 8.160.

[42] Panel Report on *Argentina – Footwear (EC)*, paras. 8.161–8.162.

[43] Panel Report on *Argentina – Footwear (EC)*, para. 8.164.

[44] (*footnote original*) The Panel . . . recognizes that the present tense is being used, which it states "would seem to indicate that, whatever the starting-point of an investigation period, it has to *end* no later than the very recent past". (emphasis added) Here, we disagree with the Panel. We believe that the relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the recent past.

[45] Appellate Body Report on *Argentina – Footwear (EC)*, para. 130.

31. With regard to the nature of the increase in imports, the Appellate Body in *Argentina – Footwear (EC)*, in contrast to the Panel, held that the increase in imports must have been recent, sudden, sharp and significant enough to cause or threaten to cause serious injury:

> "[T]he determination of whether the requirement of imports 'in such increased quantities' is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There must be '*such* increased quantities' as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. And this language in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'."[46]

32. Subsequently, the Panel on *US – Wheat Gluten*, echoing the findings of the Appellate Body in *Argentina – Footwear (EC)*, interpreted the phrase "in such increased quantities":

> "[A]rticle XIX:1(a) of the GATT 1994 and Article 2.1 [of the *Agreement on Safeguards* ("SA")] do not speak only of an 'increase' in imports. Rather, they contain specific requirements with respect to the quantitative and qualitative nature of the 'increase' in imports of the product concerned. Both Article XIX:1(a) of the GATT 1994 and Article 2.1 SA require that a product is being imported into the territory of the Member concerned in such increased quantities (absolute or relative to domestic production) as to cause or threaten serious injury. Thus, not just any increase in imports will suffice. Rather, we agree with the Appellate Body's finding in *Argentina – Footwear Safeguard* that the increase must be sufficiently recent, sudden, sharp and significant, both quantitatively and qualitatively, to cause or threaten to cause serious injury."[47]

33. In *US – Line Pipe*, the Panel found, in a statement not reviewed by the Appellate Body, that the word "recent" implies a "retrospective analysis"; but that it does not imply an analysis of the conditions immediately preceding the authority's decision nor does it imply that the analysis must focus exclusively on conditions at the very end of the period of investigation:

> "[W]e note that the Appellate Body in *Argentina-Footwear Safeguard* found that 'the phrase "is being imported" implies that the increase in imports must have been sudden and recent'. According to Korea, the phrase 'is being imported . . . in such increased quantities' refers to 'the period immediately preceding the authority's decision'.[48] The word 'recent' – which was used by the Appellate Body in interpreting the phrase 'is being imported' – is defined as 'not long past; that happened, appeared, began to exist, or existed lately'. In other words, the word 'recent' implies some form of retrospective analysis. It does not imply an analysis of the conditions immediately preceding the authority's decision. Nor does it imply that the analysis must focus exclusively on conditions at the very end of the period of investigation. We consider that an analysis that compares the first semester of 1998 with the first semester of 1999 is not inconsistent with the requirement that the increase in imports be 'recent'."[49]

34. In *US – Line Pipe*, the Panel found, in a statement not reviewed by the Appellate Body, that "there is no need for a determination that imports are presently still increasing**.** Rather, imports could have 'increased' in the recent past, but not necessarily be increasing up to the end of the period of investigation or immediately preceding the determination":

> "[T]here remains the question of whether the finding of increased imports can be maintained in light of the decline in absolute imports from the first semester of 1998 to the first semester of 1999. In order to answer this question we recall our discussion regarding the meaning of 'recent', and our finding that 'recent' does not imply an analysis of the present. We are also of the view that the fact that the increase in imports must be 'recent' does not mean that it must continue up to the period immediately preceding the investigating authority's determination, nor up to the very end of the period of investigation. We find support for our view in Article 2.1, which provides 'that such product is being imported . . . in such increased quantities'. The Agreement uses the adjective 'increas**ed**', as opposed to 'increas**ing**'. The use of the word 'increas**ed**' indicates to us that there is no need for a determination that imports are presently still increas**ing**. Rather, imports could have 'increas**ed**' in the recent past, but not necessarily be increasing up to the end of the period of investigation or immediately preceding the determination. Provided the investigated product 'is being imported' at such increas**ed** quantities at the end of the period of investigation, the requirements of Article 2.1 are met.[50]"[51]

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[46] Appellate Body Report on *Argentina – Footwear (EC)*, para. 131.
[47] Panel Report on *US – Wheat Gluten*, para. 8.31. See also para. 8.33.
[48] (*footnote original*) Korea's reply to Question 1 from the Panel at the first substantive meeting (see Annex B-1).
[49] Panel Report on *US – Line Pipe*, para. 7.204.
[50] (*footnote original*) We observe that an increase in imports before the date of a determination, but not sustained at the date of the determination, could still cause actual serious injury at the time of the determination.
[51] Panel Report on *US – Line Pipe*, para. 7.207.

35. In light of the provisions in Article 2.1 and Article XIX:1(a),[52] the Panel on *US – Line Pipe* reasoned, in a statement not reviewed by the Appellate Body, that it is within its standard of review to examine the appropriateness of the methodology in evaluating the increase in the imports:

> "[I]n determining whether the US methodology for the analysis of the existence of increased imports complied with its obligations under the Agreement on Safeguards and the GATT 1994, our review will consist of an objective assessment, pursuant to Article 11 of the DSU, of whether the methodology selected is unbiased and objective, such that its application permits an adequate, reasoned and reasonable explanation of how the facts in the record before the ITC support the determination made with respect to increased imports."[53]

36. In *US – Line Pipe*, Korea had argued that the period of investigation of five years chosen by the United States authorities was in conflict with the requirements of Article 2.1 and Article XIX:1(a). The Panel, in a finding not reviewed by the Appellate Body, ruled that it is up to the discretion of the investigating authority of the importing Member to decide the "length of the period of investigation" and its "breakdown":

> "We note that the Agreement contains no requirements as to how long the period of investigation in a safeguards investigation should be, nor how the period should be broken down for purposes of analysis. Thus, the period of investigation and its breakdown is left to the discretion of the investigating authorities.
>
> In the case before us the period selected by the ITC was five years and six months, which is a period similar in length to the one used by the Argentine investigating authority in *Argentina – Footwear Safeguard*. However, we note that the Appellate Body, in the findings relied upon by Korea to argue the question of the length of the period of investigation, emphasized not the length of the period *per se,* but that there should be a focus on recent imports and not simply trends over the period examined. In the case of the line pipe investigation the ITC did not merely compare end points, or look at the overall trend over the period of investigation (as Argentina had done in the investigation at issue in *Argentina – Footwear Safeguard*). It analysed the data regarding imports on a year-to-year basis for the 5 complete years, and also considered whether there was an increase in interim 1999 as compared with interim 1998.
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> . . . . .
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> We are of the view that by choosing a period of investigation that extends over 5 years and six months, the ITC did not act inconsistently with Article 2.1 and Article XIX. This conclusion is based on the following considerations: first, the Agreement contains no specific rules as to the length of the period of investigation; second, the period selected by the ITC allows it to focus on the recent imports; and third, the period selected by the ITC is sufficiently long to allow conclusions to be drawn regarding the existence of increased imports."[54]

37. In *US – Line Pipe*, the Panel examined whether the United States authority was entitled to compare interim 1998 data with interim 1999 data in performing the analysis or whether it was, in addition, required to compare "the second half of 1998" with interim 1999 data.[55] The Panel found, in a statement not reviewed by the Appellate Body, that the *Agreement on Safeguards* does not prescribe such practice by the importing Member:

> "We recall that there are no provisions in the Safeguards Agreement which give any guidance on how the period of investigation should be broken down for purpose of analysis by the investigating authorities. In the case before us the period selected by the ITC would have allowed it to find that there was a decrease in the imports if the facts in the case supported such a finding. We do not believe that the methodology chosen by the ITC for the purposes of analysing whether or not there was an increase in imports was inherently biased or would have precluded it from performing a reasonable evaluation of the facts in the investigation. The United States asserts that the ITC acted according to its past practice, and that this shows that the methodology was objective and unbiased. We agree with the United States. The United States responds that a comparison of matching interim periods, in this case January–June, of different years, is the standard ITC practice.[56] According to the United States this standard practice helps eliminate the possible effect of any seasonal or cyclical distortions which may affect the comparison. Although the ITC concedes that line pipe is not a seasonal product, we are of the view that the methodology applied in the comparison was not chosen in order to manipulate the data and show a particular result. Nor is there any evidence of manipulation or bias resulting from an alleged inconsistency with the ITC's serious injury analysis. Although the ITC did make some observations that include or make reference to the second half of 1998 in its determination on serious injury or threat of serious injury, we do not consider that the ITC was comparing the situation in the first half of 1999 to that in the second half of 1998. The ITC was simply describing factual circumstances that existed in the second half of 1998 and

[52] Panel Report on *US – Line Pipe*, para. 7.193.
[53] Panel Report on *US – Line Pipe*, para. 7.194.
[54] Panel Report on *US – Line Pipe*, paras. 7.196, 7.197 and 7.201.
[55] Panel Report on *US – Line Pipe*, para. 7.192.
[56] The fact that the ITC conformed to its previous practice does not necessarily mean that the methodology used, or that such past practice, is in conformity with the Agreement. Nevertheless, it has not been established that the usual ITC practice regarding the period of investigation was not appropriate for the line pipe investigation.

the first half of 1999. The ITC was not drawing conclusions based on a comparison of those periods."[57]

38. The Panel on *Argentina – Preserved Peaches* concurred with the Panel on *US – Line Pipe* (see paragraph 33 above) that the word "recent" does not imply that the analysis must focus exclusively on conditions at the end of the period of analysis.[58] The Panel believed that a recent and sharp increase in imports is a necessary, but not a sufficient, condition to satisfy Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the *GATT 1994*:

"The increase is not merely the product of a quantitative analysis, it must also be qualitative. This was the approach of the Appellate Body in the passage quoted above from *Argentina – Footwear (EC),* where it found that an increase in imports as required by Article 2.1 and Article XIX:1(a) must be recent, sudden, sharp and significant *enough*, both quantitatively and qualitatively. It is therefore not sufficient to find that an increase in imports is only recent, sudden, sharp and significant mathematically.

The qualitative analysis required was illustrated by the Appellate Body in *Argentina – Footwear (EC)* when it interpreted the requirement in Article 4.2(a) that the competent authorities evaluate the "rate and amount" of the increase in imports. They found that it meant that the competent authorities in that case should have considered the trends in imports over the period of investigation, rather than just comparing the end points, and to consider the sensitivity of their analysis to the particular end points of the investigation period used.[59]"[60]

39. In *Argentina – Preserved Peaches*, the Panel also concluded that there is no absolute formula to determine whether increased imports justify the application of a safeguard measure:

"[T]he point is that there is no fixed period of five years or any other length of time over which figures can simply be subtracted to yield an increase in imports in the sense of Article 2.1 and Article XIX:1(a). Accordingly, neither the mathematical increase in imports of preserved peaches in the last two years, nor the mathematical decrease over the whole five year period of analysis, is determinative."[61]

40. In *US – Steel Safeguards*, the Panel, in a finding upheld by the Appellate Body, concluded that "a finding that imports have increased pursuant to Article 2.1 can be made when an increase evidences a certain degree of recentness, suddenness, sharpness and significance".[62] In stating this, the Panel emphasized "that there are no absolute standards as regards *how* sudden, recent, and significant the increase must be in order to qualify as an 'increase' in the sense of Article 2.1 of the Agreement on Safeguards", but added that one cannot conclude "that any increase between any two identified points in time meets the requirements of Article 2.1 of the Agreement on Safeguards".[63]

41. In *US – Steel Safeguards*, the Panel, in a ruling explicitly confirmed by the Appellate Body, insisted that there are no absolute standards in judging how sudden, recent and significant the increase must be in order to qualify as an "increase" in the sense of Article 2.1 of the Agreement on Safeguards.[64] The Panel said that the evaluation is not to be done in the abstract. Instead according to the Panel "[a] *concrete* evaluation is what is called for" and, thus, a "competent authority must conduct an analysis considering all the features of the development of import quantities and that an increase in imports has a certain degree of being recent and sudden".[65] The Panel went on to state the importance of the analysis of the entire period of investigation:

"[A] competent authority's findings on increased imports, distinct from its causality and injury findings, *may be informed by the results of its entire investigation*. The competent authority's findings on the first requirement – increased imports – may have effects on the injury findings or on the causation findings, as prescribed by Article 4.2(a). As a competent authority considers the other conditions necessary for imposition of a safeguard, it determines, as directed by the Appellate Body in *Argentina – Footwear (EC)*, whether the increase in imports was recent enough, sudden enough, and significant enough to cause or threaten serious injury to the relevant domestic producers."[66]

42. In *US – Steel Safeguards*, the Panel, in findings upheld by the Appellate Body, addressed the question of how recently the imports must have increased and concurred with the Panel's view in *US – Line Pipe* (see paragraph 34 above) in stating as follows:

"As the Panel in *US – Line Pipe* did,[67] that Article 2.1 of the Agreement on Safeguards speaks of a product that 'is being imported ... in such increased quantities'. Thus, imports need not be increas*ing* at the time of the determination; what is necessary is that imports *have* increase*d*, if the products continue 'being imported' in (such) increase*d* quantities. The Panel, therefore, agrees with the *US – Line Pipe* Panel's view that the fact that the increase in imports must be 'recent' does not mean that

[57] Panel Report on *US – Line Pipe*, para. 7.203.
[58] Panel Report on *Argentina – Preserved Peaches*, para. 7.53.
[59] (*footnote original*) Appellate Body Report in *Argentina – Footwear (EC)*, paragraph 129.
[60] Panel Report on *Argentina – Preserved Peaches*, paras. 7.54–7.55.
[61] Panel Report on *Argentina – Preserved Peaches*, para.7.52
[62] Panel Report on *US – Steel Safeguards*, para. 10.167.
[63] Panel Report on *US – Steel Safeguards*, para. 10.168.
[64] Panel Report on *US – Steel Safeguards*, para. 10.168.
[65] Panel Report on *US – Steel Safeguards*, para. 10.168.
[66] Panel Report on *US – Steel Safeguards*, para. 10.171.
[67] (*footnote original*) Panel Report, *US – Line Pipe*, para. 7.207.

it must continue up to the period immediately preceding the investigating authority's determination, nor up to the very end of the period of investigation.[68] As pointed out by the Panel in *US – Line Pipe*,[69] the most recent data must be the focus, but should not be considered *in isolation* from the data pertaining to the less recent portion of the period of investigation. However, as indicated by the present continuous 'are being', there is an implication that imports, in the present, remain at higher (i.e. increased) levels.

Whether a decrease in imports at the end of the period of investigation, in the individual case, prevents a finding of increased imports in the sense of Article 2.1 of the Agreement on Safeguards will, therefore, depend on whether, despite the later decrease, a previous increase nevertheless results in the product (still) 'being imported in (such) increased quantities'. In this evaluation, factors that must be taken into account are the duration and the degree of the decrease at the end of the relevant period of investigation, as well as the nature, for instance the sharpness and the extent, of the increase that intervened beforehand.

To give an extreme example, a short and very recent slight decrease would not detract from an overall increase if imports have increased tenfold over the several years beforehand. Conversely, to give an opposite extreme example, one could no longer talk about a product that 'is being imported in (such) increased quantities', or in fact in *any* increased quantities at all, if, at the time of the determination, import numbers have plummeted nearly to zero or to a level below any past point in the period of investigation.[70]

The Panel believes that, in their investigation whether imports have increased in the recent period, and whether increased imports are causing serious injury to the domestic producers of like or directly competitive domestic products, competent authorities are required to consider the *trends* in imports over the period of investigation, as suggested by Article 4.2(a).[71] While Article 4.2(a) requires the evaluation of the 'rate and amount of the increase in imports . . . in absolute and relative terms', the Panel sees no basis for the argument that this rate must always accelerate or that the rate must always be positive at each point in time during the period of investigation."[72]

43. In *US – Steel Safeguards*, the Appellate Body reiterated the importance of trends over the entire period of investigation:

> "A determination of whether there is an increase in imports cannot, therefore, be made merely by comparing the end points of the period of investigation. Indeed, in cases where an examination does not demonstrate, for instance, a clear and uninterrupted upward trend in import volumes, a simple end-point-to-end-point analysis could easily be manipulated to lead to different results, depending on the choice of end points. A comparison could support either a finding of an increase or a decrease in import volumes simply by choosing different starting and ending points.
>
> For instance, if the starting point for the period of investigation were set at a time when import levels were particularly low, it would be more likely that an increase in import volumes could be demonstrated. The use of the phrase 'such increased quantities' in Articles XIX:1(a) and 2.1, and the requirement in Article 4.2 to assess the 'rate and amount' of the increase, make it abundantly clear, however, that such a comparison of end points will *not* suffice to demonstrate that a product 'is being imported in such increased quantities' within the meaning of Article 2.1. Thus, a demonstration of 'any increase' in imports between any two points in time is not sufficient to demonstrate 'increased imports' for purposes of Articles XIX and 2.1. Rather, as we have said, competent authorities are required to examine the trends in imports over the entire period of investigation.[73]"[74]

44. The Appellate Body on *US – Steel Safeguards* referred to the importance of an explanation concerning the trend in imports over the entire period of investigation:

> "In our view, what is called for in every case is an *explanation* of how the *trend* in imports supports the competent authority's finding that the requirement of 'such increased quantities' within the meaning of Articles XIX:1(a) and 2.1 has been fulfilled. It is this *explanation* concerning the *trend* in imports – over the entire period of investigation – that allows a competent authority to *demonstrate* that 'a product is being imported in such increased quantities'."[75]

45. In *US – Steel Safeguards*, the Appellate Body upheld the findings of the Panel that by not explaining the "most recent decrease" in absolute imports, the USITC had *not* provided an explanation concerning the overall *trend* in imports that had occurred during the period of investigation:

> "Again we recall that, in *Argentina – Footwear (EC)*, in clarifying the *Agreement on Safeguards*, we stated that 'authorities are required to examine trends'.[76] In our

[68] (*footnote original*) Panel Report, *US – Line Pipe*, para. 7.207.
[69] (*footnote original*) Panel Report, *US – Line Pipe*, para. 7.207.
[70] (*footnote original*) We do not intend to rule out that an exception could be made, if, despite the deep drop, there are indications that this drop is only temporary and in some sense artificial. *See*, also, Panel Report, *Argentina – Footwear (EC)*, para. 8.159.
[71] (*footnote original*) Appellate Body Report, *Argentina – Footwear (EC)*, para. 129; and Panel Report, *Argentina – Footwear (EC)*, para. 8.276.
[72] Panel Report on *US – Steel Safeguards*, para. 10.162–166.
[73] (*footnote original*) Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.
[74] Appellate Body Report on *US – Steel Safeguards*, paras. 354–355.
[75] Appellate Body Report on *US – Steel Safeguards*, para. 374
[76] (*footnote original*) Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

view, by failing to address the decrease in imports that occurred between interim 2000 and interim 2001 (the most recent decrease), the United States did not – and could not – provide a reasoned and adequate explanation of how the facts supported its finding that imports of hot-rolled bar 'increased', as required by Article 2.1 of the *Agreement on Safeguards*. This failure to account for the decrease in absolute imports is all the more serious in the light of the fact that the intervening trend that was not addressed by the USITC occurred at the very end of the period of investigation. In *US – Lamb*, we found that the competent authority 'must assess' the data from the most recent past 'in the context of the data for the entire investigative period'.[77] As the Panel found, it is, precisely, those most recent data that the USITC failed to account for with respect to absolute imports."[78]

46. In *US – Steel Safeguards*, the Appellate Body confirmed that imports need not be increasing at the time of the determination and insisted on the investigating authority's obligation to examine the trends of imports over the entire period of investigation (see paragraph 43 above):

"We agree with the United States that Article 2.1 does *not* require that imports need to be increasing at the time of the determination. Rather, the plain meaning of the phrase 'is being imported in such increased quantities' suggests merely that imports must *have* increased, and that the relevant products continue 'being imported' in (such) increased quantities. We also do *not* believe that a decrease in imports at the end of the period of investigation would necessarily prevent an investigating authority from finding that, nevertheless, products continue to be imported 'in such increased quantities.'[79]"[80]

47. The Appellate Body on *US – Steel Safeguards* reiterated its ruling made in *Argentina – Footwear (EC)* (see paragraph 31 above) and emphasized the importance of reading "such increased quantities" in the context of Article XIX:1(a) of the *GATT 1994* and Article 2.1 of the *Agreement on Safeguards* which confirm that such increased imports must be linked to the ability of the relevant increased imports to cause serious injury or threat thereof:

"We reaffirm this finding [*Argentina – Footwear (EC)*]. In that appeal, we underlined the importance of reading the requirement of 'such increased quantities' in the context in which it appears in both Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*. That context includes the words 'to cause or threaten to cause serious injury'. Read in context, it is apparent that 'there must be "such increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfill this requirement for applying a safeguard measure.'[81] Indeed, in our view, the term 'such', which appears in the phrase 'such increased quantities' in Articles XIX:1(a) and 2.1, clearly links the relevant increased imports to their ability to cause serious injury or the threat thereof. Accordingly, we agree with the United States that our statement in *Argentina – Footwear (EC)* that the 'increase in imports must have been recent enough, sudden enough, sharp enough and significant enough . . . to cause or threaten to cause serious injury',[82] was a statement about 'the entire investigative responsibility of the competent authorities under the Safeguards Agreement',[83] and that '[w]hether an increase in imports is recent, sudden, sharp and significant enough to cause or threaten serious injury are questions that are answered as the competent authorities proceed with the remainder of their analysis (i.e., their consideration of serious injury/threat and causation).'[84]"[85]

(iv) Absolute or relative increase in imports

48. In *US – Line Pipe*, the Panel faced the question of whether the finding of increased imports can be maintained in light of a decline in absolute imports during part of the investigation period. The Panel found, in a statement not reviewed by the Appellate Body, that decline in absolute imports at the end of period of investigation should not be considered in isolation, and does not preclude a finding of imports "in such increased quantities" for the purpose of Article 2.1:

"In a safeguard investigation, the period of investigation for examination of the increased imports tends to be the same as that for the examination of the serious injury to the domestic industry. This contrasts with the situation in an anti-dumping or countervailing duty investigation where the period for evaluating the existence of dumping or subsidization is usually shorter than the period of investigation for a finding of material injury. We are of the view that one of the reasons behind this difference is that, as found by the Appellate Body in *Argentina – Footwear Safeguard,* 'the determination of whether the requirement of imports "in such increased quantities" is met is not a merely mathematical or technical determination.' The Appellate Body noted that when it comes to a determination of increased imports 'the competent authorities are required to consider the *trends* in imports over the period of investigation'. The evaluation of

[77] (*footnote original*) Appellate Body Report, *US – Lamb*, para. 138.
[78] Appellate Body Report on *US – Steel Safeguards*, para. 388.
[79] (*footnote original*) We note that a decrease at the end of a period of investigation may, for instance, result from the seasonality of the relevant product, the timing of shipments, or importer concerns about the investigation. As we have said, the text of Article 2.1 does not necessarily prevent, in our view, a finding of "increased imports" in the face of such a decline.
[80] Appellate Body Report on *US – Steel Safeguards*, para. 367
[81] (*footnote original*) Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[82] (*footnote original*) *Ibid.*
[83] (*footnote original*) United States' appellant's submission, para. 107.
[84] (*footnote original*) *Ibid.*
[85] Appellate Body Report on *US – Steel Safeguards*, para. 346

trends in imports, as with the evaluation of trends in the factors relevant for determination of serious injury to the domestic industry, can only be carried out over a period of time. Therefore, we conclude that the considerations that the Appellate Body has expressed with respect to the period relevant to an injury determination also apply to an increased imports determination.

In view of the considerations expressed above we do not believe that the analysis of data for the first semester of 1999 should be considered in isolation. We find the analysis of whether imports had increased on a yearly basis from 1994 to 1998 very relevant to the question of whether there were increased imports. Although we are aware that imports decreased for the first semester of 1999 when compared to the first semester of 1998, we note that regardless of the decrease for the first half of 1999, the ITC in their report found that imports of line pipe 'remained at a very high level in interim 1999'. This high level of imports for 1999 supports a finding that imports were still entering the United States 'in such increased quantities' as prescribed in Article 2.1. In other words, although Korea may be correct in arguing that absolute imports declined, this does not preclude a finding of imports 'in such increased quantities' for the purpose of Article 2.1. Based on the above considerations we conclude that the ITC was correct in its finding of an absolute increase in imports of line pipe."[86]

(d) "and under such conditions"

49. The Panel reports in *Korea – Dairy*,[87] *Argentina – Footwear (EC)*[88] and *US – Wheat Gluten*[89] have held that the phrase "under such conditions" in Article 2.1 does not constitute a separate analytical requirement in a safeguards investigation. Related to this, these Panel Reports observe that this phrase does not necessarily require an analysis of the prices of imported products and like or directly competitive products. The Appellate Body agreed with these findings in *US – Wheat Gluten*.[90]

50. The Panel on *Korea – Dairy* stated:

"We consider that the phrase 'and under such conditions' does not provide for an additional criterion or analytical requirement to be performed before an importing Member may impose a safeguard measure. We are of the view that the phrase 'and under such conditions' qualifies and relates both to the circumstances under which the products under investigation are imported and to the circumstances of the market into which products are imported, both of which must be addressed by the importing country when performing its assessment as to whether the increased imports are causing serious injury to the domestic industry producing the like or directly competitive products. In this sense, we consider that the phrase 'under such conditions' refers more generally to the obligation imposed on the importing country to perform an adequate assessment of the impact of the increased imports at issue and the specific market under investigation."[91]

51. In this connection, the Panel on *Argentina – Footwear (EC)* explained the relationship between the phrase "under such conditions" in Article 2.1 of the *Agreement on Safeguards* and the analysis under Article 4.2(a) and (b):

"In our view, the phrase 'under such conditions' does not constitute a specific legal requirement for a price analysis, in the sense of an analysis separate and apart from the increased import, injury and causation analyses provided for in Article 4.2. We consider that Article 2.1 sets forth the fundamental legal requirements (i.e., the conditions) for application of a safeguard measure, and that Article 4.2 then further develops the operational aspects of these requirements."[92]

52. In *Argentina – Footwear (EC)*, the Panel also considered the phrase "under such conditions" as referring to the conditions of competition between the imported product and the domestic like or directly competitive products in the importing country's market. The Panel held that the phrase "under such conditions" in fact refers to the substance of the causation analysis that must be performed under Article 4.2(a) and (b):

"We believe that the phrase 'under such conditions' would indicate the need to analyse the *conditions of competition* between the imported product and the domestic like or directly competitive products in the *importing country's market*. That is, it is these 'conditions of competition' in the importing country's market that will determine whether increased imports cause or threaten to cause serious injury to the domestic industry. The text of Article 2.1 supports this interpretation, as the relevant phrase in its entirety reads 'under such conditions *as to cause* or threaten to cause serious injury' (emphasis added). Seen another way, for a safeguard measure to be permitted, the investigation must demonstrate that conditions of competition in the importing country's market are such that the increased imports can and do cause or threaten to cause serious injury. Article 4.2(a) confirms this interpretation, in requiring that the competent authorities 'evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry', which is further reinforced by Article 4.2(b)'s requirement that the analysis be conducted on the basis of 'objective evidence'. In our view, these provisions give meaning to the phrase 'under such

[86] Panel Report on *US – Line Pipe*, paras. 7.209–7.210. See also the Panel Report on *Argentina – Preserved Peaches*, paras. 7.54–7.55.
[87] Panel Report on *Korea – Dairy*, para. 7.52.
[88] Panel Report on *Argentina – Footwear (EC)*, para. 8.249.
[89] Panel Report on *US – Wheat Gluten*, para. 8.108.
[90] Appellate Body Report on *US – Wheat Gluten*, para. 78.
[91] Panel Report on *Korea – Dairy*, para. 7.52.
[92] Panel Report on *Argentina – Footwear (EC)*, para. 8.249.

conditions', and support as well our view that for an analysis to demonstrate causation, it must address specifically the nature of the interaction between the imported and domestic products in the domestic market of the importing country. That is, we believe that the phrase 'under such conditions' in fact refers to the substance of the causation analysis that must be performed under Article 4.2(a) and (b)."[93]

53. In the view of the Panel on *Argentina – Footwear (EC)*, the factors underlying competition between domestic and imported like products are to be analysed within the context of the causation analysis:

"We note in this regard that there are different ways in which products can compete. Sales price clearly is one of these, but it is certainly not the only one, and indeed may be irrelevant or only marginally relevant in any given case. Other bases on which products may compete include physical characteristics (e.g., technical standards or other performance-related aspects, appearance, style or fashion), quality, service, delivery, technological developments, consumer tastes, and other supply and demand factors in the market. In any given case, other factors that affect the conditions of competition between the imported and domestic products may be relevant as well. It is these sorts of factors that must be analysed on the basis of objective evidence in a causation analysis to establish the effect of the imports on the domestic industry."[94]

54. The Panel on *US – Wheat Gluten* also effectively equated the phrase "under such conditions" with the causation analysis:

"We are of the view that the phrase 'under such conditions' does not impose a separate analytical requirement in addition to the analysis of increased imports, serious injury and causation. Rather, this phrase refers to the substance of the causation analysis that must be performed under Article 4.2(a) and (b) SA."[95]

55. The Panel on *Korea – Dairy* specifically addressed the issue of the analysis of price competition between domestic and imported like products in the context of the phrase "under such conditions":

"Although the prices of the imported products will most often be a relevant factor indicating how the imports do, in fact, cause serious injury to the domestic industry, we note that there is no explicit requirement in Article 2,[96] that the importing Member perform a price analysis of the imported products and the prices of the like or directly competitive products in the market of the importing country."[97]

56. In *US – Wheat Gluten*, the Appellate Body expressed its agreement with the Panel's analysis. Like the Panel, the Appellate Body considered the phrase "under such conditions" to refer to the analysis to be performed under Article 4.2. The Appellate Body also referred to the phrase "under such conditions" in Article 2.1 as support for its view that Article 4.2 contemplates an analysis of whether increased imports, in conjunction with other relevant factors,[98] cause serious injury:

"Article 2.1 reflects closely the 'basic principles' in Article XIX:1(a) of the GATT 1994 and also sets forth 'the conditions for imposing a safeguard measure', including those relating to causation. The rules on causation, which are elaborated further in the remainder of the *Agreement on Safeguards*, therefore, find their roots in Article 2.1. According to that provision, a safeguard measure may be applied if a 'product is being imported . . . *in such increased quantities* . . . *and under such conditions as to cause* . . .' serious injury. Thus, under Article 2.1, the causation analysis embraces two elements: the first relating to increased 'imports' specifically and the second to the 'conditions' under which imports are occurring.

Each of these two elements is, in our view, elaborated further in Article 4.2(a). While Article 2.1 requires account to be taken of the 'increased quantities' of imports, both in 'absolute' terms and 'relative to domestic production', Article 4.2(a) states, correspondingly, that 'the rate and amount of the increase in imports of the product concerned in absolute and relative terms, [and] the share of the domestic market taken by increased imports' are relevant.

As for the second element under Article 2.1, we see it as a complement to the first. While the first element refers to increased imports specifically, the second relates more generally to the 'conditions' in the marketplace for the product concerned that may influence the domestic industry. Thus, the phrase 'under such conditions' refers generally to the prevailing 'conditions', in the marketplace for the product concerned, when the increase in imports occurs. Interpreted in this way, the phrase 'under such conditions' is a shorthand reference to the remaining factors listed in Article 4.2(a), which relate to the overall state of the domestic industry and the domestic market, as well as to other factors 'having a bearing on the situation of [the] industry'. The phrase 'under such conditions', therefore, supports the view that, under Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards*, the competent authorities should determine whether the increase in imports, not alone, but in con-

[93] Panel Report on *Argentina – Footwear (EC)*, para. 8.250.
[94] Panel Report on *Argentina – Footwear (EC)*, para. 8.251.
[95] Panel Report on *US – Wheat Gluten*, para. 8.108.
[96] (*footnote original*) Contrary to the explicit references to prices in Article 3 of the Agreement on Implementation of Article VI of GATT 1994 ("AD Agreement") and Article 15 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").
[97] Panel Report on *Korea – Dairy*, para. 7.51.
[98] With respect to the analysis of other relevant factors, see paras. 192–203 of this Chapter.

junction with the other relevant factors, cause serious injury.[99]"[100]

57. The Appellate Body on *US – Steel Safeguards* concluded that assessing whether increased imports justify the application of a safeguard measure calls for the assessment of the "conditions" under which those imports occur:

> "We further note that Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* require that the relevant product 'is being imported in such increased quantities *and under such conditions* as to cause or threaten to cause serious injury'. The question whether 'such increased quantities' of imports will suffice as 'increased imports' to justify the application of a safeguard measure is a question that can be answered only in the light of 'such conditions' under which those imports occur. The relevant importance of these elements varies from case to case."[101]

(e) The relevance of price analysis when assessing the situation of the domestic industry

58. As the Panel on *Argentina – Footwear (EC)* reveals, a price analysis may be required in the specific circumstances of a particular case:

> "Therefore, in the present dispute, while the phrase 'under such conditions' does not require a price analysis per se, it nevertheless has an implication for the nature and content of a causation analysis, which may logically necessitate a price analysis in a given case. Moreover, the absence of an analysis of the conditions of competition in the domestic market for the product in question, in which the interaction of the imported with the domestic product is explained in the report on the investigation (including inter alia a price analysis where relevant), results in an incomplete analysis of the causal link."[102]

59. The Panel on *US – Wheat Gluten* also adopted an approach to price analysis as a non-mandatory, but potentially relevant point of analysis:

> "'Price' is not expressly listed in Article 4.2(a) [of the Agreement on Safeguards] as a 'relevant factor' having a bearing on the situation of the domestic industry. However, this is not to say that 'price' may not be a relevant factor in a given case. An imported product can compete with a domestic product in various ways in the market of the importing country. Clearly, the relative price of the imported product is one of these ways, but it is certainly not the only way, and it may be irrelevant or only marginally relevant in a given case.
>
> Therefore, in the context of safeguards measures, the relevance of 'price' will vary from case to case, in light of the particular circumstances and the nature of the particular product and domestic industry involved. Given that this is the nature of the 'price' factor under the Agreement on Safeguards, we consider that the phrase 'under such conditions' does not necessarily, in every case, require a price analysis."[103]

60. The Panel on *US – Steel Safeguards*, in findings not reviewed by the Appellate Body, was of the view that price is the most important factor when analysing conditions of competition:

> "A consideration of the various factors that have been mentioned provides context for the consideration of *price*, which, in the Panel's view, is an important, if not the most important, factor in analysing the conditions of competition in a particular market, although consideration of prices is not necessarily mandatory.[104] The Panel agrees with the argument advanced by the European Communities insofar as it submits that price will often be relevant to explain how the increased volume of imports caused serious injury. Indeed, we consider that relative price trends as between imports and domestic products will often be a good indicator of whether injury is being transmitted to the domestic industry (provided that the market context for such trends is borne in mind) given that price changes have an immediate effect on profitability, all other things being equal. In turn, profitability is a useful measure of the state of the domestic industry."[105]

61. After referring to the Panel Reports on *Argentina – Footwear (EC)* (see paragraph 53 above) and *US – Wheat Gluten* (see paragraph 59 above), the Panel on *US – Steel Safeguards* noted that pricing trends must always be considered in context:

> "With respect to the argument made by the European Communities that if imports are sold at a higher price than domestic products, it is unlikely that such imports are responsible for any serious injury, the Panel considers that the existence or absence of underselling by imports cannot, on its own, lead to a definitive conclusion regarding the presence or otherwise of a causal link between the increased imports and the serious injury. In our view, pricing trends must always be considered in context. It is only after this contextual consideration that conclusions can be drawn regarding the existence or otherwise of the causal link."[106]

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[99] (*footnote original*) We do not, of course, exclude the possibility that "serious injury" could be caused by the effects of increased imports *alone*.

[100] Appellate Body Report on *US – Wheat Gluten*, paras. 76–78.

[101] Appellate Body Report on *US – Steel Safeguards*, para. 350.

[102] Panel Report on *Argentina – Footwear (EC)*, para. 8.252.

[103] Panel Report on *US – Wheat Gluten*, paras. 8.109–8.110.

[104] (*footnote original*) The Panel agrees with the following comments made by the panel in *Korea – Dairy* at para. 7.51 in this regard: "Although the prices of the imported products will most often be a relevant factor indicating how the imports do, in fact, cause serious injury to the domestic industry, we note that there is no explicit requirement in Article 2, that the importing Member perform a price analysis of the imported products and the prices of the like or directly competitive products in the market of the importing country."

[105] Panel Report on *US – Steel Safeguards*, para.10.320.

[106] Panel Report on *US – Steel Safeguards*, para. 10.322.

(f) Scope of application of a safeguard measure in the case of a regional trade agreement

62. The Panel on *Argentina – Footwear (EC)* considered whether Argentina was permitted under the *Agreement on Safeguards* to take MERCOSUR imports into account in the analysis of injury factors and of a causal link between increased imports and the alleged (threat of) serious injury, and was at the same time permitted to exclude MERCOSUR countries from the application of the safeguard measure imposed.[107] Relying on footnote 1 to Article 2.1 and Article XXIV:8 of the GATT 1994, the Panel concluded that "in the case of a customs union the imposition of a safeguard measure only on third country sources of supply cannot be justified on the basis of a member-state-specific investigation that finds serious injury or threat thereof caused by imports from all sources of supply from within and outside a customs union".[108] Upon appeal, the Appellate Body reversed the legal reasoning and findings of the Panel relating to footnote 1 to Article 2.1 since it considered that footnote 1 to Article 2.1 did not apply to the safeguard measures imposed by Argentina in this case:

> "We question the Panel's implicit assumption that footnote 1 to Article 2.1 of the *Agreement on Safeguards* applies to the facts of this case. The ordinary meaning of the first sentence of footnote 1 appears to us to be that the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'.
>
> MERCOSUR did not apply these safeguard measures, either as a single unit or on behalf of Argentina.
>
> . . .
>
> It is Argentina that is a Member of the WTO for the purposes of Article 2 of the *Agreement on Safeguards*, and it is Argentina that applied the safeguard measures after conducting an investigation of products being imported into *its* territory and the effects of those imports on *its* domestic industry. For these reasons, we do not believe that footnote 1 to Article 2.1 applies to the safeguard measures imposed by Argentina in this case. . . ."[109]

63. The Appellate Body on *Argentina – Footwear (EC)* also rejected the Panel's view that Article XXIV of *GATT 1994* was relevant to the issue before it. Recalling its finding in *Turkey – Textiles*, the Appellate Body reiterated that Article XXIV may serve as an "affirmative defence" and emphasized that Argentina had not argued expressly that Article XXIV provided it with such an affirmative defence:

> "This issue, as the Panel itself observed, is whether Argentina, after including imports from all sources in its investigation of 'increased imports' of footwear products into its territory and the consequent effects of such imports on its domestic footwear industry, was justified in excluding other MERCOSUR member States from the application of the safeguard measures. In our Report in *Turkey – Restrictions on Imports of Textile and Clothing Products*, we stated that under certain conditions, 'Article XXIV may justify a measure which is inconsistent with certain other GATT provisions.' We indicated, however, that this defence is available only when it is demonstrated by the Member imposing the measure that 'the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of subparagraphs 8(a) and 5(a) of Article XXIV' and 'that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.'
>
> In this case, we note that Argentina did not argue before the Panel that Article XXIV of the GATT 1994 provided it with a defence to a finding of violation of a provision of the GATT 1994. As Argentina did not argue that Article XXIV provided it with a defence against a finding of violation of a provision of the GATT 1994, and as the Panel did not consider whether the safeguard measures at issue were introduced upon the formation of a customs union that fully meets the requirements of subparagraphs 8(a) and 5(a) of Article XXIV, we believe that the Panel erred in deciding that an examination of Article XXIV:8 of the GATT 1994 was relevant to its analysis of whether the safeguard measures at issue in this case were consistent with the provisions of Articles 2 and 4 of the *Agreement on Safeguards*."[110]

(g) Parallelism

64. In *Argentina – Footwear (EC)*, the Appellate Body examined "whether . . . there is an implied '*parallelism* between the scope of a safeguard *investigation* and the scope of the *application* of safeguard measures'".[111] In this connection, the Appellate Body held:

> "Taken together, the provisions of Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* demonstrate that a Member of the WTO may only apply a safeguard measure after that Member has determined that a product is being imported *into its territory* in such increased quantities and under such conditions as to cause or threaten to cause serious injury to *its* domestic industry *within its territory*. According to Articles 2.1 and 4.1(c), therefore, all of the relevant aspects of a safeguard investigation must be conducted by the Member that ultimately applies the safeguard measure, on the basis of increased imports entering its territory and causing or threatening to cause serious injury to the domestic industry within its territory.

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[107] (*footnote original*) Panel Report on *Argentina – Footwear (EC)*, para. 8.75.
[108] (*footnote original*) Panel Report on *Argentina – Footwear (EC)*, para. 8.102.
[109] Appellate Body Report on *Argentina – Footwear (EC)*, paras. 106–108.
[110] Appellate Body Report on *Argentina – Footwear (EC)*, paras. 109–110.
[111] Appellate Body Report on *Argentina – Footwear (EC)*, para. 111.

While Articles 2.1 and 4.1(c) set out the conditions for imposing a safeguard measure and the requirements for the scope of a safeguard *investigation*, these provisions do not resolve the matter of the scope of *application* of a safeguard measure. In that context, Article 2.2 of the *Agreement on Safeguards* provides:

> 'Safeguard measures shall be applied to a product being imported irrespective of its source.'

As we have noted, in this case, Argentina applied the safeguard measures at issue after conducting an investigation of products being imported into Argentine territory and the effects of those imports on Argentina's domestic industry. In applying safeguard measures on the basis of this investigation in this case, Argentina was also required under Article 2.2 to apply those measures to imports from all sources, including from other MERCOSUR member States.

On the basis of this reasoning, and on the facts of this case, we find that Argentina's investigation, which evaluated whether serious injury or the threat thereof was caused by imports from *all* sources, could only lead to the imposition of safeguard measures on imports from *all* sources. Therefore, we conclude that Argentina's investigation, in this case, cannot serve as a basis for excluding imports from other MERCOSUR member States from the application of the safeguard measures."[112]

65. The Appellate Body on *Argentina – Footwear (EC)* also stressed that it was not ruling on:

> "[W]hether, as a general principle, a member of a customs union can exclude other members of that customs union from the application of a safeguard measure."[113]

66. In *US – Wheat Gluten*, the Appellate Body upheld the finding by the Panel in that dispute that the United States had acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* when, after including imports from all sources in their investigation of increased imports of wheat gluten into the United States and the consequent effects of such imports on the domestic industry, the United States investigating authorities excluded imports from Canada from the application of the safeguard measure. This exclusion was based on a separate inquiry concerning whether Canada accounted for a substantial share of total imports and whether imports from Canada contributed "importantly" to the serious injury caused by imports. The Appellate Body reiterated its findings from *Argentina – Footwear (EC)* on the existence of parallelism between a safeguard investigation and the application of a safeguard measure:

> "[A]rticle 2.1 of the *Agreement on Safeguards* . . . provides that a safeguard measure may only be applied when 'such increased quantities' of a "*product* [are] *being imported* into its territory . . . under such conditions as to cause or threaten to cause serious injury to the domestic industry'. As we have said, this provision, as elaborated in Article 4 of the *Agreement on Safeguards*, sets forth the *conditions* for imposing a safeguard measure. Article 2.2 of the *Agreement on Safeguards*, which provides that a safeguard measure 'shall be applied to a *product being imported* irrespective of its source', sets forth the rules on the *application* of a safeguard measure.
>
> The same phrase – 'product . . . being imported' – appears in *both* these paragraphs of Article 2. In view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the *same* meaning to this phrase in both Articles 2.1 and 2.2. To include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase 'product being imported' a *different* meaning in Articles 2.1 and 2.2 of the *Agreement on Safeguards*. In Article 2.1, the phrase would embrace imports from *all* sources whereas, in Article 2.2, it would exclude imports from certain sources. This would be incongruous and unwarranted. In the usual course, therefore, the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2.[114]"[115]

67. Furthermore, the Appellate Body in *US – Wheat Gluten* rejected the United States argument that its safeguard measure was nevertheless justified because its authorities had conducted an additional investigation focusing specifically on imports from Canada:

> "In the present case, the United States asserts that the exclusion of imports from Canada from the scope of the safeguard measure was justified because, following its investigation based on imports from *all* sources, the USITC conducted an additional inquiry specifically focused on imports from Canada. The United States claims, in effect, that the scope of its initial investigation, *together with its subsequent and additional inquiry* into imports from Canada, did correspond with the scope of application of its safeguard measure.
>
> In our view, however, although the USITC examined the importance of imports from Canada separately, it did not

[112] Appellate Body Report on *Argentina – Footwear (EC)*, para. 111–113.

[113] Appellate Body Report on *Argentina – Footwear (EC)*, para. 114.

[114] (*footnote original*) The United States relies on Article 9.1 of the *Agreement on Safeguards* in support of its argument that the scope of the serious injury investigation need not correspond exactly to the scope of application of a safeguard measure. Article 9.1 is an exception to the general rules set out in the *Agreement on Safeguards* that applies only to developing country Members. We do not consider that it is of relevance to this appeal.

[115] Appellate Body Report on *US – Wheat Gluten*, paras. 95–96.

make any explicit determination relating to increased imports, *excluding imports from Canada*. In other words, although the safeguard measure was applied to imports from all sources, *excluding* Canada, the USITC did not establish explicitly that imports from these *same* sources, excluding Canada, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*. Thus, we find that the separate examination of imports from Canada carried out by the USITC in this case was not a sufficient basis for the safeguard measure ultimately applied by the United States."[116]

68. The Appellate Body on *US – Line Pipe* reiterated its ruling in *US – Wheat Gluten* by stating as follows:

"As we then stated in *US – Wheat Gluten*, 'the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2.' We added that a gap between imports covered under the investigation and imports falling within the scope of the measure can be justified only if the competent authorities 'establish explicitly' that imports from sources covered by the measure 'satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*.' And, as we explained further in *US – Lamb*, in the context of a claim under Article 4.2(a) of the *Agreement on Safeguards*, 'establish[ing] explicitly' implies that the competent authorities must provide a '*reasoned and adequate explanation* of how the facts support their determination'."[117]

69. The Appellate Body on *US – Line Pipe* further concluded that by demonstrating the gap between imports covered under the investigation performed by the importing Member's competent authority and imports falling within the scope of the safeguard measure, the exporting Member established a prima facie case of the absence of "parallelism" with respect to the safeguard measure.[118]

"It is clear, therefore, that, in its investigation, the USITC considered imports from *all sources*, including imports from Canada and Mexico. Nevertheless, exports from Canada and Mexico were excluded from the safeguard measure at issue. Therefore, there is a gap between imports covered under the investigation performed by the USITC and imports falling within the scope of the measure.

In our view, Korea has demonstrated that the USITC considered imports from all sources in its investigation. Korea has also shown that exports from Canada and Mexico were excluded from the safeguard measure at issue. And, in our view, this *is* enough to have made a *prima facie* case of the absence of parallelism in the line pipe measure. Contrary to what the Panel stated,[119] we do not consider that it was necessary for Korea to address the information set out in the USITC Report, or in particular, in footnote 168 in order to establish a *prima facie* case of violation of parallelism. Moreover, to require Korea to rebut the information in the USITC Report, and in particular, in footnote 168, would impose an impossible burden on Korea because, as the exporting country, Korea would not have had any of the relevant data to conduct its own analysis of the imports."[120]

70. In addition, the Appellate Body in *US – Line Pipe* found that a footnote in the importing Member's safeguard determination report, which explained that it would have reached the same result had it excluded imports from FTA members in the investigation, does not meet the "establishes explicitly" requirement, and it is not a "reasoned and adequate explanation":

"Although footnote 168 contains a determination that imports from non-NAFTA sources increased significantly, footnote 168 does not, as we read it, establish *explicitly* that increased imports from non-NAFTA sources alone caused serious injury or threat of serious injury. Nor does footnote 168, as we read it, provide a *reasoned and adequate explanation* of how the facts would support such a finding. To be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous.

Footnote 168 does not express distinctly or state clearly and unambiguously how the facts would support a finding by the USITC that imports from non-NAFTA sources alone caused serious injury or threat of serious injury. Footnote 168 may, as the Panel found, provide a basis for a finding that imports from non-NAFTA sources, alone, caused serious injury, but this is not enough. Footnote 168 does not establish explicitly that imports from sources covered by the measure 'satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*.' Footnote 168 does not amount to a '*reasoned and adequate explanation* of how the facts support [the] determination.'"[121]

71. However, the Appellate Body in *US – Line Pipe* avoided ruling on whether Article 2.2 of the *Agreement on Safeguards* "permits a Member to exclude imports

[116] Appellate Body Report on *US – Wheat Gluten*, paras. 97–98.
[117] Appellate Body Report on *US – Line Pipe*, para. 181.
[118] Appellate Body Report on *US – Line Pipe*, para. 187. The Appellate Body found in *US – Line Pipe* that the importing Member violated Articles 2 and 4 of the *Agreement on Safeguards* by including FTA imports in the analysis of whether increased imports caused or threatened to cause serious injury, but excluding FTA imports from the application of the safeguard measure, without providing a reasoned and adequate explanation that establishes explicitly that imports from non-FTA sources by themselves satisfied the conditions for the application of a safeguard measure. Appellate Body report, para. 197.
[119] (*footnote original*) Panel Report on *US – Line Pipe*, para. 7.171.
[120] Appellate Body Report on *US – Line Pipe*, paras. 186–187.
[121] Appellate Body Report on *US – Line Pipe*, paras. 194–195.

originating in member states of a free-trade area from the scope of a safeguard measure", or on the question of whether Article XXIV of the *GATT 1994* permits excepting other members of an FTA from a safeguard measure. [122] For the latter question, the Appellate Body ruled as follows:

> "The question of whether Article XXIV of the GATT 1994 serves as an exception to Article 2.2 of the *Agreement on Safeguards* becomes relevant in only two possible circumstances. One is when, in the investigation by the competent authorities of a WTO Member, the imports that are exempted from the safeguard measure *are not considered* in the determination of serious injury. The other is when, in such an investigation, the imports that are exempted from the safeguard measure *are considered* in the determination of serious injury, *and* the competent authorities have *also* established explicitly, through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2." [123]

72. The Panel on *US – Steel Safeguards*, in a finding upheld by the Appellate Body,[124] recalled that the requirement of parallelism, as developed by panels and the Appellate Body, meant that the competent authorities must explicitly establish that imports covered by the safeguard measure satisfy the conditions for its application.[125] The Panel further added:

> "This implies that the competent authorities must provide a reasoned and adequate explanation of how the facts support their determination.[126] As the Appellate Body has also clarified, 'to be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous.'[127]
>
> The Panel believes that the requirement of parallelism also exists in the interest of the other Members. The other Members who are facing the safeguard measure should be able to assess its legality on the basis of the determination and explanations provided by the competent authorities. This function would not be fulfilled if the other Members were left with statements such as those to the effect that the exclusion of subsets of all imports would not change the conclusions and, elsewhere in the report, that certain imports are very small.
>
> Finally, the Panel notes the dispute between the parties as to whether competent authorities must consider imports from sources excluded by the measure as an 'other factor' in the sense of Article 4.2(b) of the Agreement on Safeguards, when they perform the exercise of establishing explicitly that imports from sources covered by the measure satisfy the requirements set out in Article 2.1 and elaborated in Article 4.2.
>
> As clarified by the Appellate Body, if the scope of the measure does not match the scope of the determination, competent authorities must 'establish *explicitly* that increased imports from non-[FTA] sources alone'[128] caused serious injury or threat of serious injury.[129] Increased imports from sources ultimately excluded from the application of the measure must hence be *excluded* from the analysis. The increase of these imports and their effect on the domestic industry cannot be used to support a conclusion that the product in question 'is being imported in such increased quantities so as to cause serious injury'. This makes it necessary – whether imports excluded from the measure are an 'other factor' or not – to account for the fact that excluded imports may have some injurious impact on the domestic industry. As said, this impact must not be used as a basis supporting the establishment of the Article 2.1 criteria." [130]

73. In *US – Steel Safeguards*, the Appellate Body indicated that the requirement of "parallelism" is found in the "parallel" language used in the first and second paragraphs of Article 2 of the *Agreement on Safeguards*:

> "The word 'parallelism' is not in the text of the *Agreement on Safeguards*; rather, the requirement that is

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[122] The Panel in *US – Line Pipe* had interpreted the definition of a FTA in Article XXIV:8 "to mean that Members are authorised, under certain prescribed circumstances, to eliminate 'duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) . . . on substantially all the trade' between them and their free-trade area partners". The Panel further found that such an authorisation existed "despite the fact that the formation of a free-trade area will necessarily result in more favourable treatment for free-trade area partners than for non-free-trade area partners". The Panel concluded that the United States were entitled to rely on Article XXIV defence against Korea's claims of discrimination under Articles I, XIII and XIX (Panel Report on *US – Line Pipe*, paras. 7.140 and 7.146). However, the Appellate Body declared the Panel's findings in paragraphs 7.135 to 7.163 (which comprises the issues discussed above) moot and as having no legal effect (Appellate Body Report on *US – Line Pipe*, para. 199).

[123] Appellate Body Report on *US – Line Pipe*, para. 198.

[124] Appellate Body Report on *US – Steel Safeguards*, para. 450.

[125] Panel Report on *US – Steel Safeguards*, para. 10.595.

[126] (*footnote original*) Appellate Body Report, *US – Line Pipe*, para. 181.

[127] (*footnote original*) Appellate Body Report, *US – Line Pipe*, para. 194.

[128] (*footnote original*) In the view of the Panel, "alone", in this context, means: "to the exclusion of increased imports from other sources (i.e. sources excluded from the measure)"; it does not mean: "to the exclusion of other factors, i.e. non-increased imports in the sense of Article 4.2(b), second sentence". The Appellate Body has clarified that increased imports precisely need not, by themselves, cause serious injury (Appellate Body Report, *US – Wheat Gluten*, paras. 70 and 79; Appellate Body Report, *US – Lamb*, para. 170). There is no reason why this latter aspect should be any different in the context of parallelism, where the same test of Articles 2 and 4 is applied, only to a narrower base of imports. *See also* Appellate Body Report, *US – Wheat Gluten*, para 98: "establish explicitly that imports from these *same* sources, excluding Canada, satisfied the conditions for the application of a safeguard measure".

[129] (*footnote original*) Appellate Body Report, *US – Line Pipe*, para. 194;

[130] Panel Report on *US – Steel Safeguards*, para. 10.595–10.598.

described as 'parallelism' is found in the 'parallel' language used in the first and second paragraphs of Article 2 of the *Agreement on Safeguards*."[131]

74. In *US – Steel Safeguards*, the Appellate Body concluded that the competent authority has an obligation to establish that imports from sources *other than* the excluded members satisfy, alone, and in and of themselves, the conditions for the application of a safeguard measure:

"[It was] incumbent on the USITC, in fulfilling the obligations of the United States under Article 2 of the *Agreement on Safeguards*, to justify this gap by establishing explicitly, in its report, that imports from sources covered by the measures – that is, imports from sources *other than* the excluded countries of Canada, Israel, Jordan, and Mexico – satisfy, *alone*, and in and of themselves, the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*. Further, and as we have already explained, to provide such a justification, the USITC was obliged by the *Agreement on Safeguards* to provide a reasoned and adequate explanation of how the facts supported its determination that imports from sources *other than* Canada, Israel, Jordan, and Mexico satisfy, *alone*, and in and of themselves, the conditions for the application of a safeguard measure."[132]

75. In *US – Steel Safeguards*, the Appellate Body clarified that imports *excluded* from the application of the safeguard measure must be considered a factor "other than increased imports" within the meaning of Article 4.2(b):

"Since the non-attribution requirement is part of the overall requirement, the competent authorities must explain how it ensured that it did not attribute the injurious effects of *factors other than included imports* – which subsume 'excluded imports' – to the imports included in the measure.

As a result, the phrase 'increased imports' in Articles 4.2(a) and 4.2(b) must, in our view, be read as referring to the same set of imports envisaged in Article 2.1, that is, *to imports included in the safeguard measure*. Consequently, imports *excluded* from the application of the safeguard measure must be considered a factor 'other than increased imports' within the meaning of Article 4.2(b). The possible injurious effects that these excluded imports may have on the domestic industry must not be attributed to imports included in the safeguard measure pursuant to Article 4.2(b). The requirement articulated by the Panel 'to account for the fact that excluded imports may have some injurious impact on the domestic industry' is, therefore, not, as the United States argues, an 'extra analytical step' that the Panel added to the analysis of imports from all sources. To the contrary, this requirement necessarily follows from the obligation in Article 4.2(b) for the competent authority to ensure that the effects of factors other than increased imports – a set of factors that subsumes *imports excluded from the safeguard measure* – are not attributed to imports included in the measure, in establishing a causal link between imports included in the measure and serious injury or threat thereof.

The non-attribution requirement is part of the overall requirement, incumbent upon the competent authority, to demonstrate the existence of a 'causal link' between increased imports (covered by the measure) and serious injury, as provided in Article 4.2(b).Thus, as we found in *US – Line Pipe*, 'to fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports'.

In order to provide such a reasoned and adequate explanation, the competent authority must explain how it ensured that it did not attribute the injurious effects of *factors other than included imports* – which subsume 'excluded imports' – to the imports included in the measure. As we explained in *US – Line Pipe* in the context of Article 3.1 and 'unforeseen developments' in this Report, if the competent authority does not provide such an explanation, a panel is not in a position to find that the competent authority ensured compliance with the clear and express requirement of non-attribution under Article 4.2(b) of the *Agreement on Safeguards*."[133]

76. The Appellate Body on *US – Steel Safeguards* determined that a series of separate and partial determinations cannot satisfy the requirement to establish explicitly that imports from sources covered by a measure, *alone*, satisfy the conditions for the application of a safeguard measure:

"The requirement of the *Agreement on Safeguards* to establish explicitly that imports from sources covered by a measure, *alone*, satisfy the conditions for the application of a safeguard measure cannot be fulfilled by conducting a *series of separate and partial* determinations.

For example, where a WTO Member seeks to establish explicitly that imports from *sources other than A and B* satisfy the conditions for the application of a safeguard measure, if that Member conducts a separate investigation, and makes a separate determination, on whether imports from sources *other than A* satisfy the relevant conditions, and then, subsequently, conducts *another* separate and distinct investigation, and makes a separate determination, on whether imports from sources *other than B* satisfy the relevant conditions, then these *two separate* determinations, in our view, do not demonstrate that imports from sources other than *A and B together* satisfy the requirements for the imposition of

[131] Appellate Body Report on *US – Steel Safeguards*, para. 439.
[132] Appellate Body Report on *US – Steel Safeguards*, para. 444.
[133] Appellate Body Report on *US – Steel Safeguards*, paras. 450–452.

a safeguard measure. By making these two separate determinations, that Member will, logically, for each of them, be basing its determination, in part, either on imports from A or on imports from B. If this were permitted, a determination on the application of a safeguard measure could be easily subjected to mathematical manipulation. This could not have been the intent of the Members of the WTO in drafting and agreeing on the *Agreement on Safeguards*.

We are, therefore, of the view that the Panel raised a valid methodological concern when it stated that 'it would . . . be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan.'[134]"[135]

77. The Appellate Body on *US – Steel Safeguards* added that even if the amount of imports that would be excluded is small, it still must be adequately explained by the competent authority:

"As we explained in *US – Wheat Gluten* and *US – Line Pipe*, a competent authority must establish, unambiguously, with a reasoned and adequate explanation, and *in a way that leaves nothing merely implied or suggested*, that imports from sources covered by the measure, *alone*, satisfy the requirements for the application of a safeguard measure. We are *not* suggesting that very low imports volumes, either from some, or from all, of the excluded sources at issue, are irrelevant for a competent authority's findings or the reasoned and adequate explanation underpinning such findings. We recognize that, where import volumes from excluded sources are very small, it is quite possible that the explanation underpinning the competent authority's conclusion need not be as extensive as in circumstances where the excluded sources account for a large proportion of total imports. Nevertheless, even if an explanation need not necessarily be extensive, the requisite explicit finding *must still be provided*. That finding must be contained in the authority's report, must be supported by a reasoned and adequate explanation, and – as we stated above – must address imports from all covered sources, excluding *all* of the non-covered sources. Nowhere in the *Agreement on Safeguards* is there any indication that these important principles can be disregarded in circumstances where imports from some or all sources are at low levels."[136]

(h) "cause or threaten to cause serious injury"

(i) Necessity of discrete determination of serious injury or of threat of serious injury

78. In *US – Line Pipe*, the Appellate Body held that a discrete finding of injury or threat of serious injury was not required under Article 2.1.[137] Although the Appellate Body agreed with the Panel that the definitions of "serious injury" and "threat of serious injury" are two distinct concepts, it reversed the Panel's finding[138] by clarifying that the crucial word "or" in the text of Article 2.1 could mean *either one or the other, or both in combination:*

"We emphasize that we are dealing here with . . . whether there is a right in a particular case to apply a safeguard measure. The question at issue is whether the right exists in this particular case. And, as the right exists if there is a finding by the competent authorities of a 'threat of serious injury' or – something *beyond* – 'serious injury', then it seems to us that it is irrelevant, *in determining whether the right exists*, if there is 'serious injury' or only 'threat of serious injury' – so long as there is a determination that there is *at least* a 'threat'. In terms of the rising continuum of an injurious condition of a domestic industry that ascends from a 'threat of serious injury' up to 'serious injury', we see 'serious injury' – because it is something *beyond* a 'threat' – as necessarily *including* the concept of a 'threat' and *exceeding* the presence of a 'threat' for purposes of answering the relevant inquiry: is there a right to apply a safeguard measure?

Based on this analysis of the most relevant context of the phrase 'cause or threaten to cause' in Article 2.1, we do not see that phrase as necessarily meaning *one or the other, but not both*. Rather, that clause could also mean *either one or the other, or both in combination*. Therefore, for the reasons we have set out, we do not see that it matters – for the purpose of determining whether there is a right to apply a safeguard measure under the *Agreement on Safeguards* – whether a domestic authority finds that there is 'serious injury', 'threat of serious injury', or, as the USITC found here, 'serious injury or threat of serious injury'. In any of those events, the right to apply a safeguard is, in our view, established."[139]

79. The Appellate Body on *US – Line Pipe* also found that a "threat of serious injury" finding sets a lower threshold for the right to apply a safeguard measure than a "serious injury" finding:

"In the sequence of events facing a domestic industry, it is fair to assume that, often, there is a continuous progression of injurious effects eventually rising and culminating in what can be determined to be 'serious injury'. Serious injury does not generally occur suddenly. Present serious injury is often preceded in time by an injury that threatens clearly and imminently to become serious injury, as we indicated in *US – Lamb*. Serious injury is, in

[134] (*footnote original*) Panel Report, para. 10.622.
[135] Appellate Body report on *US – Steel Safeguards*, para. 466–467.
[136] Appellate Body report on *US – Steel Safeguards*, para. 472.
[137] The issue arose from the USITC injury determination which was inconjunctive, "Line Pipe . . . is being imported into the United States in such increased quantities as to be a substantial cause of *serious injury or the threat of serious injury.*"
[138] The Panel concluded that the exporting Member could not have it both ways; it needed to find either serious injury or threat. Panel Report on *US – Line Pipe*, para.7.264.
[139] Appellate Body Report on *US – Line Pipe*, paras. 170–171.

other words, often the realization of a threat of serious injury. Although, in each case, the investigating authority will come to the conclusion that follows from the investigation carried out in compliance with Article 3 of the *Agreement on Safeguards*, the precise point where a 'threat of serious injury' becomes 'serious injury' may sometimes be difficult to discern. But, clearly, 'serious injury' is something *beyond* a 'threat of serious injury'.

In our view, defining 'threat of serious injury' separately from 'serious injury' serves the purpose of setting a *lower threshold* for establishing the *right* to apply a safeguard measure. Our reading of the balance struck in the *Agreement on Safeguards* leads us to conclude that this was done by the Members in concluding the Agreement so that an importing Member may act sooner to take preventive action when increased imports pose a 'threat' of 'serious injury' to a domestic industry, but have not yet caused 'serious injury'. And, since a 'threat' of 'serious injury' is defined as 'serious injury' that is 'clearly imminent', it logically follows, to us, that 'serious injury' is a condition that is above that *lower threshold* of a 'threat'. A 'serious injury' is *beyond* a 'threat', and, therefore, is *above* the threshold of a 'threat' that is required to establish a right to apply a safeguard measure."[140]

80. In addition, the Appellate Body in *US – Line Pipe* ruled that Article 5.2(b) is an "exception" to the general rule, and not relevant to the non-discrete determination of injury or threat thereof:

"Article 5.2(b) excludes quota modulation in the case of threat of serious injury. It is, in our view, the only provision in the *Agreement on Safeguards* that establishes a difference in the legal effects of 'serious injury' and 'threat of serious injury'. Under Article 5.2(b), in order for an importing Member to adopt a safeguard measure in the form of a quota to be allocated in a manner departing from the general rule contained in Article 5.2(a), that Member must have determined that there is 'serious injury'. A Member cannot engage in quota modulations if there is only a 'threat of serious injury'. This is an exception that must be respected. But we do not think it appropriate to generalize from such a limited exception to justify a general rule. In any event, this exceptional circumstance is not relevant to the line pipe measure. We find nothing in Article 5.2(b), viewed as part of the context of Article 2.1, that would support a finding that, in this case, the USITC acted inconsistently with the *Agreement on Safeguards* by making a non-discrete determination in this case."[141]

81. In conclusion, the Appellate Body in *US – Line Pipe* also cited the 1947 *US – Fur Felt Hats* case, in which it noted that the Working Party had "conducted a single analysis based on the presence of serious injury or threat of serious injury, and that it did not consider it necessary to make a discrete determination of serious injury or threat of serious injury":

"Following the *Vienna Convention* approach, we have also looked to the GATT *acquis* and to the relevant negotiating history of the pertinent treaty provisions. We have concluded that our view is reinforced by the jurisprudence under the GATT 1947. In the only relevant GATT 1947 case, *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade* ('*US – Fur Felt Hats')*, the Working Party established under the GATT 1947 was required to assess the consistency of a safeguard measure with Article XIX of the GATT 1947. The Working Party concluded that the available data presented supported the view 'that increased imports had caused or threatened some adverse effect to United States producers.' We note that the Working Party conducted a single analysis based on the presence of serious injury or threat of serious injury, and that it did not consider it necessary to make a discrete determination of serious injury or of threat of serious injury. The question of a discrete determination apparently was not an issue in that case."[142]

(i) Relationship with other Articles

82. The Panel on *US – Lamb*, after making findings of inconsistency with Article XIX:1(a) of the *GATT 1994* and with Articles 2.1, 4.1(c), and 4.2(b) of the *Agreement on Safeguards*, exercised judicial economy with respect to claims raised under Articles 2.2, 3.1, 5.1, 8, 11 and 12 of the *Agreement on Safeguards*.[143]

83. The Panel on *Argentina – Footwear (EC)* considered that, in light of its findings "concerning the investigation and the definitive measure" (the Panel had found a violation of Articles 2.1, 4.2(a), 4.2(b) and 4.2(c)), it did not find it necessary to make a finding concerning a claim under Article 6.[144]

84. The Appellate Body on *US – Line Pipe* ruled that Article 5.2(b) is an "exception" to general rules, and not relevant to the non-discrete determination of injury or threat thereof under Article 2.1. See paragraph 80 above.

(j) Relationship with other WTO Agreements

(i) Article XXIV of the GATT 1994

85. See paragraphs 63–71 and Section XXV.B.F. of the Chapter on the *GATT 1994*.

[140] Appellate Body Report on *US – Line Pipe*, paras. 168–169.
[141] Appellate Body Report on *US – Line Pipe*, para. 173 (footnote omitted).
[142] Appellate Body Report on *US – Line Pipe*, para. 174.
[143] Panel Report on *US – Lamb*, para. 7.280.
[144] Panel Report on *Argentina – Footwear (EC)*, para. 8.292.

3. Article 2.2

(a) Scope of application of safeguard measures in the case of regional trade agreements

86. With respect to the scope of application of safeguard measures in the case of regional trade agreements, see paragraphs 62–67.

(b) Relationship with other Articles

87. The Panel on *US – Lamb*, after making findings of inconsistency with Articles 2.1, 4.1(c) and 4.2(b) of the *Agreement on Safeguards* (and with Article XIX:1(a) of the *GATT 1994*), exercised judicial economy with respect to claims raised under Article 2.2 (and Articles 3.1, 5.1, 8, 11 and 12) of the *Agreement on Safeguards*.[145]

(c) Relationship with other WTO Agreements

88. The Panel on *US – Lamb*, after making findings of inconsistency with Article XIX:1(a) of the *GATT 1994* (and with Articles 2.1, 4.1(c) and 4.2(b) of the *Agreement on Safeguards*), exercised judicial economy with respect to claims raised under Article 2.2 (and Articles 3.1, 5.1, 8, 11 and 12) of the *Agreement on Safeguards*.[146]

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3
Investigation

1. A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

2. Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. General

(a) Absence of a claim under Article 3

89. The Panel on *Korea – Dairy*, in a finding not reviewed by the Appellate Body, observed that the absence of a claim under Article 3 concerning the requirement to publish a report on a safeguard investigation did not preclude the possibility of claims relating to other aspects of an injury determination or safeguard measure:

> "[T]he absence of a claim under Article 3 of the Agreement on Safeguards means at most that the European Communities agrees that the report is WTO compatible for the purpose of Article 3.1 of the Agreement on Safeguards. The European Communities has the right to raise more specific claims under Article 4 of the Agreement on Safeguards and has done so. We consider that if a Member wants to challenge the WTO compatibility of the manner in which an 'injury' determination was performed, or the choice of an appropriate measure to be imposed, this Member does not have to challenge the publication of the final report as such."[147]

2. Article 3.1

(a) "investigation"

(i) Duty of national authorities

90. In *US – Wheat Gluten*, the Appellate Body referred to Article 3.1 as part of the context for the interpretation of the requirement of Article 4.2(a) to evaluate "all relevant factors". The Appellate Body addressed the question whether, and to what extent, national authorities must, in their investigation, seek out pertinent information on possible injury factors other than those explicitly raised as relevant by the parties to the national investigation. In the course of its discussion, the Appellate Body further considered the meaning, nature and focus of an investigation:

> "The ordinary meaning of the word 'investigation' suggests that the competent authorities should carry out a 'systematic inquiry' or a 'careful study' into the matter before them. The word, therefore, suggests a proper

[145] Panel Report on *US – Lamb*, para. 7.280.
[146] Panel Report on *US – Lamb*, para. 7.280.
[147] Panel Report on *Korea – Dairy*, para. 7.22.

degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study . . . must actively seek out pertinent information.

The nature of the 'investigation' required by the *Agreement on Safeguards* is elaborated further in the remainder of Article 3.1, which sets forth certain investigative steps that the competent authorities '*shall include*' in order to seek out pertinent information. . . . The focus of the investigative steps mentioned in Article 3.1 is on 'interested parties', who must be notified of the investigation, and who must be given an opportunity to submit 'evidence', as well as their 'views', to the competent authorities. The interested parties are also to be given an opportunity to 'respond to the presentations of other parties'. The *Agreement on Safeguards*, therefore, envisages that the interested parties play a central role in the investigation and that they will be a primary source of information for the competent authorities."[148]

91. The Appellate Body reversed the Panel on *US – Wheat Gluten*, which had held that national authorities need only consider other factors that are "clearly raised before them as relevant by the interested parties in the domestic investigation"[149] and held that national authorities may not limit their investigation to information submitted and claims raised by the parties:

"However, in our view, that does *not* mean that the competent authorities may limit their evaluation of 'all relevant factors', under Article 4.2(a) of the *Agreement on Safeguards*, to the factors which the interested parties have raised as relevant. The competent authorities must, in every case, carry out a full investigation to enable them to conduct a proper evaluation of all of the relevant factors expressly mentioned in Article 4.2(a) of the *Agreement on Safeguards*. Moreover, Article 4.2(a) requires the competent authorities – and *not the interested parties* – to evaluate fully the relevance, if any, of 'other factors'. If the competent authorities consider that a particular 'other factor' may be relevant to the situation of the domestic industry, under Article 4.2(a), their duties of investigation and evaluation preclude them from remaining passive in the face of possible short-comings in the evidence submitted, and views expressed, by the interested parties. . . . In that respect, we note that the competent authorities' 'investigation' under Article 3.1 is *not limited* to the investigative steps mentioned in that provision, but must simply '*include*' these steps. Therefore, the competent authorities must undertake additional investigative steps, when the circumstances so require, in order to fulfill their obligation to evaluate all relevant factors."[150]

92. The Appellate Body on *US – Wheat Gluten* did however set limits to the duty of the national authorities to undertake additional investigative steps:

"However, . . . we also reject the . . . argument that the competent authorities have an open-ended and unlimited duty to investigate all available facts that might possibly be relevant."[151]

93. In *US – Steel Safeguards*, the Panel concluded that the findings of three Commissioners were not based on an identically defined like product, and that this rendered the findings of the three Commissioners "irreconcilable". On the basis of this conclusion, the Panel had deduced that these findings could not provide a reasoned and adequate explanation for the USITC's single determination. The Appellate Body reversed this Panel conclusion on the grounds that USITC had not examined the conclusions reached by each Commissioner critically and in-depth:

"[W]e do not read Article 3.1 as necessarily precluding the possibility of providing multiple findings instead of a single finding in order to support a determination under Articles 2.1 and 4 of the *Agreement on Safeguards*. Nor does any other provision of the *Agreement on Safeguards* expressly preclude such a possibility. The *Agreement on Safeguards*, therefore, in our view, does not interfere with the discretion of a WTO Member to choose whether to support the determination of its competent authority by a single explanation or, alternatively, by multiple explanations by members of the competent authority. This discretion reflects the fact that, as we stated in *US – Line Pipe*, 'the *Agreement on Safeguards* does not prescribe the internal decision-making process for making [ ] a determination [in a domestic safeguard investigation]'.[152]

. . .

[R]ather, a panel must ascertain whether a reasoned and adequate explanation for the USITC's determination is contained in the report, even if only in one of the Commissioners' individual findings.

In our view, in the case before us, the Panel should, therefore, not have ended its enquiry after noting that the conclusions of Commissioners Bragg and Devaney were based on a product definition that differed from that on which Commissioner Miller based her conclusion. After making this correct observation, the Panel should have continued its enquiry by examining the views of the three Commissioners *separately*, in order to ascertain whether one of these sets of findings contained a reasoned and adequate explanation for the USITC's 'single institutional determination' on tin mill products.

It bears emphasizing that, in reviewing each of such findings separately, a panel is of course obliged to assess whether that particular finding provides a reasoned and

[148] Appellate Body Report on *US – Wheat Gluten*, paras. 53–54.
[149] Panel Report on *US – Wheat Gluten*, para. 8.121.
[150] Appellate Body Report on *US – Wheat Gluten*, para. 55.
[151] Appellate Body Report on *US – Wheat Gluten*, para. 56.
[152] (*footnote original*) Appellate Body Report, *US – Line Pipe*, para. 158.

adequate explanation of how the facts support the competent authority's determination. As we held in *US – Lamb*, 'panels must [not] simply *accept* the conclusions of the competent authorities'; they must examine these conclusions 'critically' and 'in depth'.[153] Hence, in examining whether one of the multiple sets of explanations set forth by the competent authority, taken individually, provides a reasoned and adequate explanation for the competent authority's determination, a panel may have to address, *inter alia*, the question whether, *as a matter of WTO obligations*, findings by individual Commissioners made on the basis of a *broad* product grouping can provide a reasoned and adequate explanation for a 'single institutional determination' of the USITC concerning a *narrow* product grouping.[154]

. . .

[O]ur finding implies that a panel may not conclude that there is no reasoned and adequate explanation for a competent authority's determination by relying merely on the fact that distinct multiple explanations given by the competent authority are not based on an identically-defined like product.[155]"[156]

(ii) The conduct of the investigation – the obligation to consult interested parties

94. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, concluded that the relevant authority must consult with interested parties but that this consultation can be conducted by means of questionnaires:

"The Panel recalls that the European Communities, China, Norway and New Zealand argue that, because the issue of unforeseen developments was only discussed in the Second Supplementary Report which came out after the conclusion of the investigation, the interested parties were not given an opportunity to comment on the discussion.

. . .

[B]y inviting comments in response to the questionnaires, and addressing the issue during its public hearings,[157] the Panel is of the view that the United States has complied with its Article 3.1 obligation to provide 'appropriate means in which importers, exporters and other interested parties [can] present evidence and their views'.

The European Communities complains that 'there was no provisional reasoning on or explanation of unforeseen developments on which interested parties could comment'.[158] The Panel does not believe that Article 3 of the Agreement on Safeguards requires the competent authority to send to interested parties 'draft findings' of its demonstration relating to unforeseen developments in order to allow them to comment prior to the publication of the competent authority's report."[159]

(b) Internal decision-making process prior to determination

95. The Appellate Body on *US – Line Pipe* stated that it was not concerned with the way the investigating authority reach their safeguards determinations:

"We note also that we are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The Agreement on Safeguards does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or – as here – six individual decision-makers under the municipal law of that WTO Member. What matters to us is whether the determination, however it is decided domestically, meets the requirements of the Agreement on Safeguards.

. . .

Article 5.1 does not establish a general procedural obligation to demonstrate compliance with Article 5.1, first sentence, at the time a measure is applied."[160]

96. In *US – Steel Safeguards*, the Panel, in a finding not reviewed by the Appellate Body, recalled that the *Agreement on Safeguards* is not concerned with the manner in which determinations are made:

"There is no provision on how or when the investigation is to be initiated or whether, in a specific Member, the initiation of the investigation should be undertaken by the King, the President or the industry. Nor does the Agreement on Safeguards dictate the manner in which determinations are to be arrived at. What matters is that, ultimately, there is a reported determination of the right to take a safeguards measure (pursuant to Articles 2, 3 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994) and that, if, and when, challenged *prima*

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[153] (*footnote original*) Appellate Body Report, *US – Lamb*, para. 106. (original emphasis)

[154] (*footnote original*) In this regard, we note that the fact that, pursuant to the domestic law of a WTO Member, a finding made on the basis of a *broad* product grouping is deemed to support a competent authority's determination which relates to a *narrower* product, does not, in and of itself, imply that this conclusion holds true also for the purposes of the *Agreement on Safeguards*.

[155] (*footnote original*) We also emphasize that our finding does not address the question whether the USITC and/or individual Commissioners correctly defined the "like product", the "imported product", or the "domestic industry".

[156] Appellate Body Report on *US – Steel Safeguards*, paras. 414–419.

[157] (*footnote original*) United States' first written submission, para. 954.

[158] (*footnote original*) European Communities' second written submission, para. 85.

[159] Panel Report on *US – Steel Safeguards*, para. 10.60 and 10.64–65.

[160] Appellate Body Report, *US – Line Pipe*, paras. 158 and 234.

facie before a WTO panel, the choice of safeguard measure (Articles 5, 7 and 9) can be justified."[161]

97. In *US – Steel Safeguards*, the Appellate Body considered whether a failure to comply with the appropriate standard of review was merely a procedural mistake inconsistent with Article 3.1 of *the Agreement on Safeguards*. The Appellate Body rejected the United States' allegation that a failure to provide an adequate and reasoned explanation pursuant to Article 3.1 of the *Agreement on Safeguards* does not imply a violation of Articles 2 and 4 of the *Agreement on Safeguards*:

"We turn now to the United States' argument that, since 'the Panel based many of its findings against the United States on its conclusions that the USITC Report failed to provide a "reasoned and adequate explanation' of certain findings",[162] it follows that there can only be a violation of Article 3.1, and not also of Articles 2 and 4 of the *Agreement on Safeguards*'. The United States adds that a failure to explain a finding does not automatically prove that the USITC had not performed the analysis necessary to make the finding.[163]

We recall again our earlier statements on the appropriate standard of review for panels in disputes that arise under the *Agreement on Safeguards*. When the Panel found that the USITC report failed to provide a 'reasoned and adequate explanation' of certain findings, the Panel was assessing compliance with the obligations contained in Articles 2 and 4 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994. As we said in *US – Lamb*, '[i]f a panel concludes that competent authorities, in a particular case, have not provided a reasoned or adequate explanation for their determination . . . [that] panel has . . . reached a conclusion that the determination is inconsistent with the specific requirements of [the relevant provision] of the *Agreement on Safeguards*.'[164] Thus, we do not agree with the United States that the lack of a reasoned and adequate explanation does not imply a violation of Articles 2 and 4 of the *Agreement on Safeguards*. (emphasis added)

Moreover, we cannot accept the United States' interpretation that a failure to explain a finding does not support the conclusion that the USITC 'did not actually *perform* the analysis correctly, thereby breaching Article 2.1, 4.2, or 4.2(b) [of the *Agreement on Safeguards*]'.[165] As we stated above, because a panel may not conduct a *de novo* review of the evidence before the competent authority, it is the *explanation* given by the competent authority for its determination that alone enables panels to determine whether there has been compliance with the requirements of Article XIX of the GATT 1994 and of Articles 2 and 4 of the *Agreement on Safeguards*. It may well be that, as the United States argues, the competent authorities have performed the appropriate analysis correctly.

However, where a competent authority has not provided a reasoned and adequate explanation to support its determination, the panel is not in a position to conclude that the relevant requirement for applying a safeguard measure has been fulfilled by that competent authority. Thus, in such a situation, the panel has no option but to find that the competent authority has not performed the analysis correctly."[166]

(c) The published report

(i) "To publish" versus "to make publicly available"

98. In *Chile – Price Band System*, in the context of similar obligations under the SCM and Anti-Dumping Agreements, the Panel distinguished between "to publish" and "to make publicly available", and ruled, in a finding not reviewed by the Appellate Body, that the Article 3.1 requirement to "publish" must be interpreted as meaning "to make generally available through an appropriate medium" as contrasted with "making publicly available":

"[W]e note that the Minutes of the relevant CDC sessions have not been 'published' through any official medium. Rather, they were transmitted to the interested parties and placed at the disposal of 'whoever wishes to consult them at the library of the Central Bank of Chile'. In order to determine whether it is sufficient under Article 3.1 of the Agreement on Safeguards to make the investigating authorities' report 'available to the public' in such a manner, we first refer to the dictionary meaning of 'to publish'. The term can mean 'to make generally known', 'to make generally accessible', or 'to make generally available through [a] medium'. We therefore turn to the context of Article 3.1 provided by similar publication requirements in the AD and SCM Agreements. We note that both Article 22 of the SCM Agreement ('public notice and explanation of determinations') and Article 12 of the AD Agreement ('public notice and explanation of determination') distinguish between giving 'public notice' and 'making otherwise available through a separate report', which must be 'readily available to the public'. In addition, we also note that various 'transparency' provisions in the covered agreements, such as Article III of the GATS, Article 63.1 of the TRIPS Agreement, and Article 2.11 of the TBT Agreement all distinguish between 'to publish' and 'to make publicly available'. In the light of these considerations, we find that the verb 'to publish' in Article 3.1 of the Agreement on Safeguards must be interpreted as meaning 'to make generally available through an appropriate medium', rather than simply 'making publicly available'. As regards the minutes of the relevant CDC sessions, we therefore

[161] Panel Report on *US – Steel Safeguards*, para. 10.17.
[162] (*footnote original*) United States' appellant's submission, para. 73.
[163] (*footnote original*) *Ibid.*, para. 74.
[164] Appellate Body Report, *US – Lamb*, para. 107.
[165] (*footnote original*) United States' appellant's submission, para. 73. (original emphasis)
[166] Appellate Body Report on *US – Steel Safeguards*, paras. 301–303.

find that they have not been generally made available through an appropriate medium so as to constitute a 'published' report within the meaning of Article 3.1 of the Agreement on Safeguards."[167]

(ii) Reasoned conclusions

99. In *US – Steel Safeguards*, the Appellate Body expressed the opinion that since the report must contain "reasoned conclusions", such report must therefore include, as suggested by the Panel, an explanation of the rationale for the determinations from the facts and data contained in the report of the competent authority:

"[W]e note that the definition of 'conclusion' is 'the result of a discussion or an examination of an issue' or a 'judgement or statement arrived at by reasoning: an inference; a deduction'. Thus, the 'conclusion' required by Article 3.1 is a 'judgement or statement arrived at by reasoning'. We further note that the word 'reasoned', which the United States defines in terms of the verb 'to reason', is, in fact, used in Article 3.1, last sentence, as an adjective to qualify the term 'conclusion'. The relevant definition of the intransitive verb 'to reason' is 'to think in a connected or logical manner; use one's reason in forming conclusions'. The definition of the transitive verb 'to reason' is 'to arrange the thought of in a logical manner, embody reason in; express in a logical form'. Thus, to be a 'reasoned' conclusion, the 'judgement or statement' must be one which is reached in a connected or logical manner or expressed in a logical form. Article 3.1 further requires that competent authorities must 'set forth' the 'reasoned conclusion' in their report. The definition of the phrase 'set forth' is 'give an account of, esp. in order, distinctly, or in detail; expound, relate, narrate, state, describe'. Thus, the competent authorities are required by Article 3.1, last sentence, to 'give an account of' a 'judgement or statement which is reached in a connected or logical manner or expressed in a logical form', 'distinctly, or in detail.'

Panels have a responsibility in WTO dispute settlement to assess whether a competent authority has complied with its obligation under Article 3.1 of the *Agreement on Safeguards* to 'set forth' 'findings and reasoned conclusions' for their determinations. The European Communities and Norway argue that panels could not fulfill this responsibility if they were left to 'deduce for themselves' from the report of that competent authority the 'rationale for the determinations from the facts and data contained in the report of the competent authority.'[168] We agree.

. . .

Thus, we see Article 4.2(c) as an elaboration of the requirement set out in Article 3.1, last sentence, to provide a 'reasoned conclusion' in a published report.

. . .

Article 4.2(c) is an elaboration of Article 3; moreover 'unforeseen developments' under Article XIX:1(a) of the GATT 1994 is one of the 'pertinent issues of fact and law' to which the last sentence of Article 3.1 refers. It follows that Article 4.2(c) also applies to the competent authorities' demonstration of 'unforeseen developments' under Article XIX:1(a)."[169]

100. In adding to its discussion on the "specifics" of any determination, the Appellate Body on *US – Steel Safeguards* concluded that the competent authority shall provide a conclusion supported by facts and reasoning:

"The issue in this case is not whether certain data referred to in the USITC report had, in fact, been 'considered' by the USITC. The USITC may indeed have 'considered' all the relevant data contained in its report or referred to in the footnotes thereto. However, it did not use those data to *explain* how 'unforeseen developments' resulted in increased imports. Rather, as the Panel found, 'the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came.'[170] Hence, what is wanting here is not the data, but the reasoning that uses those data to support the conclusion. The USITC did not, in our view, provide a conclusion that is supported by facts and reasoning, in short, a 'reasoned conclusion', as required by Article 3.1. Moreover, as we have stated previously, it was for the USITC, and not the Panel, to provide 'reasoned conclusions'. It is not for the Panel to do the reasoning for, or instead of, the competent authority, but rather to assess the adequacy of that reasoning to satisfy the relevant requirement. In consequence, we cannot agree with the United States that the Panel was 'required' to consider the relevant data to which the USITC referred in other sections of its report to support the USITC's finding that 'unforeseen developments' had resulted in increased imports; and, for the reasons mentioned, we do not see how our findings in *EC – Tube or Pipe Fittings* support the United States' view to that effect."[171]

(iii) "on all pertinent issues of law and fact"

101. In *US – Lamb*, the Appellate Body stated that a published report within the meaning of Article 3.1 must also contain a finding on the existence of "unforeseen developments" within the meaning of Article XIX:1(a) of the *GATT 1994*:

"Article 3.1 requires competent authorities to set forth findings and reasoned conclusions on 'all pertinent issues of fact and law' in their published report. As Article XIX:1(a) of the GATT 1994 requires that 'unforeseen developments' must be demonstrated, as a matter

[167] Panel Report on *Chile – Price Band System*, para. 7.128.
[168] (*footnote original*) European Communities' appellee's submission, para. 48; Norway's appellee's submission, para. 75.
[169] Appellate Body Report on *US – Steel Safeguards*, paras 287–290.
[170] (*footnote original*) Panel Reports, para. 10.133.
[171] Appellate Body Report on *US – Steel Safeguards*, para. 329.

of fact, for a safeguard measure to be applied, the existence of 'unforeseen developments' is, in our view, a 'pertinent issue[] of fact and law', under Article 3.1, for the application of a safeguard measure, and it follows that the published report of the competent authorities, under that Article, must contain a 'finding' or 'reasoned conclusion' on 'unforeseen developments'."[172]

(iv) Format of the report

102. The Panel on *US – Steel Safeguards*, in a finding upheld by the Appellate Body, concluded that the report may be presented in different parts or in any other format:

"The Panel agrees with the United States that nothing in the requirement to publish a report dictates the form that the report must take, provided that the report complies with all of the other obligations contained in the Agreement on Safeguards and Article XIX of GATT 1994. In the end, it is left to the discretion of the Members to determine the format of the report, including whether it is published in parts, so long as it contains all of the necessary elements, including findings and reasoned conclusions on all pertinent issues of fact and law. Together, these parts can form the report of the competent authority.

The Panel believes that a competent authority's report can be issued in different parts but such multi-part or multi-stage report must always provide for a coherent and integrated explanation proving satisfaction with the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards, including the demonstration that unforeseen developments resulted in increased imports causing serious injury to the relevant domestic producers. Whether a report drafted in different parts or a multi-stage report constitutes 'the report of the competent authority' is to be determined on a case-by-case basis and will depend on the overall structure, logic and coherence between the various stages or the various parts of the report. If separate parts of the report are issued at different times, the discussion relating to unforeseen developments must, in all cases, be integrated logically in the overall explanation as to how the importing Member's safeguard measure satisfies the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards. The publication of a report in many stages may produce added difficulties for the competent authorities to set forth coherent findings in a reasoned and adequate manner."[173]

(v) Timing of the report

103. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, explained that the timing of the explanation is a factor that can affect the reasonableness and adequacy of the explanation:

"The nature of the facts, including their complexity, will dictate the extent to which the relationship between the unforeseen developments and increased imports causing injury needs to be explained. The timing of the explanation [relating to unforeseen developments], its extent and its quality are all factors that can affect whether [that] explanation is reasoned and adequate."[174]

(d) Relationship with other paragraphs of Article 3

104. As regards the relationship of Article 3.1 with Article 3.2, see paragraph 110 below.

(e) Relationship with other Articles

105. In *US – Steel Safeguards*, the Panel and the Appellate Body discussed the relationship between Articles 3.1 and 4.2(c) of the *Agreement on Safeguards*:

"We note further, as context, that Article 4.2(c) of the *Agreement on Safeguards* requires the competent authorities to:

> . . . publish promptly, *in accordance with the provisions of Article 3*, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. (emphasis added)

We observe that this requirement is expressed as being 'in accordance with' Article 3, and not 'in addition' thereto. Thus, we see Article 4.2(c) as an elaboration of the requirement set out in Article 3.1, last sentence, to provide a 'reasoned conclusion' in a published report."[175]

(f) Relationship with other WTO Agreements

(i) Article XIX of the GATT 1994

106. In *US – Steel Safeguards*, the Panel and the Appellate Body discussed the relationship between Article XIX of the *GATT 1994* on unforeseen developments and Articles 3.1 and 4.2(c) of the *Agreement on Safeguards*:

"The United States argued at the oral hearing that 'Article 4.2(c) does not apply to the competent authorities' demonstration of unforeseen developments'[176] under Article XIX:1(a) of the GATT 1994. We disagree. Article 4.2(c) is an elaboration of Article 3; moreover 'unforeseen developments' under Article XIX:1(a) of the GATT 1994 is one of the 'pertinent issues of fact and law' to which the last sentence of Article 3.1 refers. It follows that Article 4.2(c) also applies to the competent authorities' demonstration of 'unforeseen developments' under Article XIX:1(a)."[177]

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[172] Appellate Body Report on *US – Lamb*, para. 76.
[173] Panel Report on *US – Steel Safeguards*, paras. 10.49–10.50
[174] Panel Report on *US – Steel Safeguards*, para. 10.115.
[175] Appellate Body Report on *US – Steel Safeguards*, para. 289.
[176] (*footnote original*) United States' response to questioning at the oral hearing.
[177] Appellate Body Report on *US – Steel Safeguards*, para. 290.

(ii) Article 11 of the DSU

107. In *US – Steel Safeguards*, the Appellate Body reviewed the relationship between Article 11 of the *DSU* and Articles 3.1 and 4.2 of the *Agreement on Safeguards*:

> "It bears repeating that a panel will not be in a position to assess objectively, as it is required to do under Article 11 of the DSU, whether there has been compliance with the prerequisites that must be present before a safeguard measure can be applied, if a competent authority is not required to provide a 'reasoned and adequate explanation' of how the facts support its determination of those prerequisites, including 'unforeseen developments' under Article XIX:1(a) of the GATT 1994. A panel must not be left to *wonder* why a safeguard measure has been applied.
>
> It is precisely by 'setting forth findings and reasoned conclusions on all pertinent issues of fact and law', under Article 3.1, and by providing 'a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined', under Article 4.2(c), that competent authorities provide panels with the basis to 'make an objective assessment of the matter before it' in accordance with Article 11. As we have said before, a panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the competent authorities.[178] Therefore, the 'reasoned conclusions' and 'detailed analysis' as well as 'a demonstration of the relevance of the factors examined' that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations under the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994. This is all the more reason why they must be made explicit by a competent authority."[179]

3. Article 3.2

(a) Confidential information

108. In examining a claim concerning the omission from the published report of a safeguards investigation of certain information considered to be confidential by the investigating authorities, the Panel on *US – Wheat Gluten* interpreted the requirements of Article 3.2 concerning the treatment to be accorded to such confidential information:

> "Article 3.2 [of the *Agreement on Safeguards* ("SA")] places an obligation upon domestic investigating authorities not to disclose – including in their published report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law and demonstrating the relevance of the factors examined – information which is 'by nature confidential or which is provided on a confidential basis' without permission of the party submitting it. Article 3.2 SA does not define the term 'confidential' nor does it contain any examples of the type of information that might qualify as 'by nature confidential' or 'information that is submitted on a confidential basis'.
>
> Article 3.2 SA requires that information that is by nature confidential or which is submitted on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. In the absence of a detailed elaboration or definition of the types of information that must be treated as confidential, we consider that the investigating authorities enjoy a certain amount of discretion in determining whether or not information is to be treated as 'confidential'. While Article 3.2 does not specifically address the nature of any policies pertaining to the treatment of such 'confidential' information which a Member's investigating authority may or must adopt, that provision does specify that such 'information shall not be disclosed without permission of the party submitting it'. The provision is specific and mandatory in this regard. This furnishes an assurance that the confidentiality of qualifying information will be preserved in the course of a domestic safeguards investigation, and encourages the fullest possible disclosure of relevant information by interested parties."[180]

109. The Panel on *US – Wheat Gluten* subsequently addressed the argument that certain aggregate data could not be considered to be "confidential" within the meaning of Article 3.2, and that, even if it was confidential, it could have been presented in percentages and indexes:

> "While the United States has described the USITC's efforts to characterize as much confidential information as possible in its Report without compromising the confidential nature of that information, the USITC might ideally have been more creative in trying to provide the essence of the confidential information in its findings in the published USITC Report. We draw attention to the provision in Article 3.2 SA that parties providing confidential information in a domestic safeguard investigation 'may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided . . .' The language of this provision is hortatory. However, this is one vehicle envisaged by the *Agreement on Safeguards* that may provide a greater degree of transparency while respecting the confidentiality of qualifying information.
>
> Nevertheless, given the small number of firms comprising the United States domestic industry (and the non-US producers and exporters) in this case; the fundamental importance of maintaining the confidentiality of sensitive business information in order to ensure the effectiveness of domestic safeguards investigations; the

[178] (*footnote original*) Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.
[179] Appellate Body Report on *US – Steel Safeguards*, paras. 298–299.
[180] Panel Report on *US – Wheat Gluten*, paras. 8.19–8.20.

discretion implied in Article 3.2 SA for the investigating authorities to determine whether or not 'cause' has been shown for information to be treated as 'confidential'; and the specific and mandatory prohibition in that provision against disclosure by them of such information without permission of the party submitting it, we cannot find that the United States has violated its obligations under Articles 2.1 and 4 SA, nor specifically under Article 4.2(c), by not disclosing, in the published report of the USITC, information qualifying under the USITC policy as information 'which is by nature confidential or which is provided on a confidential basis', including aggregate data."[181]

(b) Relationship with other paragraphs of Article 3

110. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, addressed the issue of the relationship of Article 3.2 with Article 3.1:

"The Panel agrees that a competent authority is not barred from relying on data provided by individual parties on a confidential basis in the course of the investigation. Article 3.2 of the Agreement on Safeguards contains an obligation to treat such data as confidential, i.e. not to disclose it (without permission). In this sense, the Panel, therefore, takes a position similar to that of the Appellate Body in *Thailand – H-Beams*.[182] Competent authorities may rely on confidential data, even if these data are not disclosed to the public in their Reports.

However, Article 3.1 of the Agreement on Safeguards contains the obligation that competent authorities 'publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.' Article 4.2(c) adds the obligation that competent authorities 'publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined'. On the basis of these obligations and the obligation under Article 2.1, to make a determination, *inter alia*, that imports of the product in question have increased, competent authorities must provide a reasoned and adequate explanation of how the facts support the conclusion. In the view of the Panel, this requirement can, in an individual case, be limited by the obligation of Article 3.2 to protect confidential data.

However, we believe that Article 3.1 and 3.2 can be interpreted harmoniously.[183] The obligation of Article 3.1 cannot be interpreted so as to imply a violation of Article 3.2. In other words, a competent authority is obliged to provide these explanations to the fullest extent possible without disclosing confidential information. This implies that if there are ways of presenting data in a modified form (e.g. aggregation or indexing), which protects confidentiality, a competent authority is obliged to resort to these options. Conversely, the provision of no data at all is permitted only when all these methods fail in a particular case.

The Panel believes that even if competent authorities are permitted not to disclose the data yet, nevertheless, rely on it, they are still required to provide through means other than full disclosure of that data, a reasoned and adequate explanation. This obligation could be complied with through the kind of explanation that the USITC has provided on page 215 of its report,[184] i.e. an explanation in words and without numbers. However, this obligation also includes an explanation by the competent authority of why there was no possibility of presenting *any* facts in a manner consistent with the obligation of protecting confidential information. That explanation was not provided in the instant case."[185]

(c) Relationship with other WTO Agreements

(i) Articles 11 and 13 of the DSU

111. The Panel on *US – Wheat Gluten* commented on the relationship between Article 3.2 of the *Agreement on Safeguards* and Article 13 of the *DSU*. This Panel had taken certain steps to have access to certain information that had not been included in the published report of the investigation at issue on account of its confidential nature, but the parties were unable to reach agreement on the procedures proposed by the Panel for viewing this information.[186] In light of this disagreement between the parties, the Panel had decided not to adopt these procedures. The report then commented as follows:

"In our view, the protracted exchange of communications between the parties about the circumstances

[181] Panel Report on *US – Wheat Gluten*, paras. 8.23–8.24. See also Chapter on the *Anti-Dumping Agreement*, Sections VI.B.1and 4 and the Appellate Body Report on *Thailand – H-Beams*, para. 112.

[182] (*footnote original*) Appellate Body Report, *Thailand – H-Beams*, paras. 111, 112 and 119.

[183] (*footnote original*) *See* Appellate Body Report, *Korea – Dairy*, para. 81: "In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously'." *See* also Appellate Body Report, *Argentina – Footwear (EC)*, para. 81; Appellate Body Report, *US – Gasoline*, p. *23; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. *12; and Appellate Body Report, *India – Patents (US)*, para. 45.

[184] (*footnote original*) For instance, at page 215 of the USITC's Report, Vol. I, one can read the following analysis protecting confidential information:

> "The ratio of imports of stainless steel rod to domestic production also increased significantly during the period, increasing from *** percent in 1996 to *** percent in 2000. While the ratio fluctuated somewhat during the period of investigation, the largest single increase in the ratio (*** percentage points) occurred in 2000, the last full year of the period of investigation. The ratio of imports to domestic production decreased from *** percent of domestic production in interim 2000 to *** percent in interim 2001." (Footnotes omitted).

[185] Panel Report on *US – Steel Safeguards*, paras.10.272–10.275.

[186] Panel Report on *US – Wheat Gluten*, paras. 8.7–8.10.

under which the Panel should view the requested information demonstrates the existence of a serious systemic issue as to the relationship between, on the one hand, the confidentiality obligations under Article 3.2 SA of a Member's investigating authorities with respect to confidential information obtained in the course of a domestic safeguards investigation and, on the other hand, the duties of Members when faced with a panel request for such confidential information under Article 13 DSU. The Panel's efforts to develop a consensual approach to the conditions under which the Panel might view the requested information were ultimately unsuccessful."[187]

112. Although in *US – Wheat Gluten*, the Panel concluded that the record before it, without the confidential information, provided a sufficient basis for an objective assessment of the facts as required by Article 11 of the *DSU*, it cautioned that "the WTO dispute settlement system cannot function optimally if relevant information is withheld from a panel".[188] The Appellate Body on *US – Wheat Gluten* endorsed this finding:

"[We agree] with the panel that a 'serious systemic issue' is raised by the question of the procedures which should govern the protection of information requested by a panel under Article 13.1 of the DSU and which is alleged by a Member to be 'confidential'. We believe that these issues need to be addressed."[189]

113. The Appellate Body on *US – Wheat Gluten* also shared the concerns expressed by the Panel related to the proper functioning of the WTO dispute settlement system:

"[T]he refusal by a Member to provide information requested of it undermines seriously the ability of a panel to make an objective assessment of the facts and the matter, as required by Article 11 of the DSU. Such a refusal also undermines the ability of other Members of the WTO to seek the 'prompt' and 'satisfactory' resolution of disputes under the procedures 'for which they bargained in concluding the DSU'."[190]

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4
Determination of Serious Injury or Threat Thereof

1. For the purposes of this Agreement:

   (a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;

   (b) "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility; and

   (c) in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

2. (a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

(b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

(c) The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

1. Article 4.1(a)

(a) "serious injury" as "significant overall impairment" in the position of the domestic industry

(i) "serious injury" as a high standard of injury

114. The Appellate Body on *US – Lamb* also described "serious injury" as a "very high standard of injury":

"The standard of 'serious injury' set forth in Article 4.1(a) is, on its face, very high. Indeed, in *United States* –

[187] Panel Report on *US – Wheat Gluten*, para. 8.11.
[188] Panel Report on *US – Wheat Gluten*, para. 8.12.
[189] Appellate Body Report on *US – Wheat Gluten*, para. 170.
[190] Appellate Body Report on *US – Wheat Gluten*, para. 171. Faced with a Member's refusal to grant access to confidential information, a WTO panel has the discretion, under Article 11 of the *DSU*, to draw inferences "adverse" to such Member's position in a particular dispute. With respect to adverse inferences in general, see Chapter on the *DSU*, Section XI.B.3(c).

Wheat Gluten Safeguard, we referred to this standard as 'exacting'. Further, in this respect, we note that the word 'injury' is qualified by the adjective 'serious', which, in our view, underscores the extent and degree of 'significant overall impairment' that the domestic industry must be suffering, or must be about to suffer, for the standard to be met.

. . .

[I]n making a determination on . . . the existence of 'serious injury' . . . panels must always be mindful of the very high standard of injury implied by these terms."[191]

115. Moreover, the Appellate Body, also on *US – Lamb*, juxtaposed the concept of "serious injury" in the *Agreement on Safeguards* and the concept of "material injury" contained in the *Anti-Dumping Agreement* and the *SCM Agreement*:

"We are fortified in our view that the standard of 'serious injury' in the *Agreement on Safeguards* is a very high one when we contrast this standard with the standard of 'material injury' envisaged under the *Anti-Dumping Agreement,* the *Agreement on Subsidies and Countervailing Measures* (the '*SCM Agreement*') and the GATT 1994. We believe that the word 'serious' connotes a much higher standard of injury than the word 'material'.[192] Moreover, we submit that it accords with the object and purpose of the *Agreement on Safeguards* that the injury standard for the application of a safeguard measure should be higher than the injury standard for anti-dumping or countervailing measures, since, as we have observed previously:

> '[t]he application of a safeguard measure does not depend upon 'unfair' trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.'[193]"[194]

(ii) Evaluation of all injury factors

116. In *Argentina – Footwear (EC)*, the Appellate Body discussed the relationship between the definition of "serious injury" in Article 4.1(a) and the requirement of an evaluation of "all relevant factors" in Article 4.2(a):

"[I]t is only when the overall position of the domestic industry is evaluated, in light of all the relevant factors having a bearing on a situation of that industry, that it can be determined whether there is 'a significant overall impairment' in the position of that industry. Although Article 4.2(a) technically requires that certain listed factors must be evaluated, and that all other relevant factors must be evaluated, that provision does not specify what such an evaluation must demonstrate. Obviously, any such evaluation will be different for different industries in different cases, depending on the facts of the particular case and the situation of the industry concerned. An evaluation of each listed factor will not necessarily have to show that each such factor is 'declining'. In one case, for example, there may be significant declines in sales, employment and productivity that will show 'significant overall impairment' in the position of the industry, and therefore will justify a finding of serious injury. In another case, a certain factor may not be declining, but the overall picture may nevertheless demonstrate 'significant overall impairment' of the industry. Thus, in addition to a technical examination of whether the competent authorities in a particular case have evaluated all the listed factors and any other relevant factors, we believe that it is essential for a panel to take the definition of 'serious injury' in Article 4.1(a) of the Agreement on Safeguards into account in its review of any determination of 'serious injury'."[195]

117. The Panel on *US – Wheat Gluten*, in a finding upheld by the Appellate Body, elaborated on the meaning of the term "serious injury":

"[A] determination as to the existence of such 'significant overall impairment' can be made only on the basis of an evaluation of the overall position of the domestic industry, in light of all the relevant factors having a bearing on the situation of that industry.

. . .

[W]e do not consider that a negative trend in every single factor examined is necessary in order for an industry to be in a position of significant overall impairment. Rather, it is the totality of the trends, and their interaction, which must be taken into account in a serious injury determination. Thus, such upturns in a number of factors would not necessarily preclude a determination of serious injury. It is for the investigating authorities to assess and weigh the evidence before them, and to give an adequate, reasoned and reasonable explanation of how the facts support the determination made."[196]

118. The Appellate Body on *US – Wheat Gluten* held that "serious injury" should be determined on the basis of all relevant factors:

"The term 'serious injury' is defined as 'a significant *overall* impairment in the position of a domestic industry'. (emphasis added) The breadth of this term also sug-

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[191] Appellate Body Report on *US – Lamb*, paras. 124 and 126.
[192] (*footnote original*) We find support for our view that the standard of "serious injury" is higher than "material injury" in the French and Spanish texts of the relevant agreements, where the equivalent terms are, respectively, *dommage grave* and *dommage important*; and *daño grave* and *daño importante*.
[193] (*footnote original*) Appellate Body Report, *Argentina – Footwear Safeguard*, para. 94.
[194] Appellate Body Report on *US – Lamb*, para. 124.
[195] Appellate Body Report on *Argentina – Footwear (EC)*, para. 139.
[196] Panel Report on *US – Wheat Gluten*, paras. 8.80 and 8.85.

gests that all factors relevant to the overall situation of the industry should be included in the competent authorities' determination."[197]

119. In reviewing a determination of the existence of a threat of serious injury, the Panel on *US – Lamb* found that not each of the listed injury factors in Article 4.2 (a) need show a declining tendency. Rather, a determination of serious injury within the meaning of Article 4.1(b) requires an assessment of all injury factors "as a whole":

"[W]e do not exclude that in the particular circumstances of a case, e.g., prices remaining at a depressed level for a longer period may be sufficient for a determination on the whole that an industry is threatened with serious injury even if a given injury factor does not show a recent, sharp and sudden decline. Also, a threat finding does not require that, e.g., financial performance of each individual firm operating in the industry show a decline. A competent national authority may arrive at a threat determination even if the majority of firms within the relevant industry is not facing declining profitability, provided that an evaluation of the injury factors as a whole indicates threat of serious injury.

. . .

. . . Article 4.1(b) and 4.2(a) do not require the competent national authority to show that each listed injury factor is declining, i.e., point in the direction of serious injury or threat thereof. The competent national authority is required to make its determination in the light of the developments of injury factors *on the whole* in order to determine whether the relevant industry's condition is facing 'significant *overall* impairment' in the industry's condition is imminent."[198]

(b) "current" serious injury

120. The Panel on *US – Wheat Gluten* considered that, as the investigation of increased imports should focus on recent imports, serious injury should also be found to exist within the recent past. (The Appellate Body did not specifically address this finding.)

"[A]ny determination of serious injury must pertain to the recent past. This flows from the wording of the text of Article XIX:1(a) of the GATT 1994 and Article 2.1 SA, which requires an examination as to whether a product 'is being imported' 'in such increased quantities . . . and under such conditions as to cause or threaten serious injury. . .'. The use of the present tense of the verb in the phrase 'is being imported' in that provision indicates that it is necessary for the competent authorities to examine recent imports. It seems to us logical that if the increase in imports that the investigating authorities must examine must be recent, so also must be any basis for a determination by the authorities as to the situation of the domestic industry. Given that a safeguard measure will necessarily be based upon a determination of serious injury concerning a previous period, we consider it essential that current serious injury be found to exist, up to and including the very end of the period of investigation.[199]"[200]

2. Article 4.1(b)

(a) Serious injury "that is clearly imminent"; determination of a threat of serious injury "based on facts and not merely on allegation, conjecture or remote possibility"

121. The Panel on *US – Lamb* interpreted Article 4.1(b) to signify that an industry's overall impairment "needs to be 'ready to take place'[201] or 'be impending, soon to happen . . . event, especially danger or disaster'".[202] Next, the Panel stated that a determination of a threat of serious injury has to be based on facts and not on allegation, conjecture, or remote possibility. The Panel concluded (i) that a threat determination needs to be based on an analysis which takes objective and verifiable data from the recent past (i.e. the latter part of an investigation period) as a starting-point so as to avoid basing a determination on allegation, conjecture or remote possibility; (ii) that factual information from the recent past, complemented by fact-based projections concerning developments in the industry's condition, and concerning imports in the imminent future, needs to be taken into account in order to ensure an analysis of whether a significant overall impairment of the relevant industry's position is imminent in the near future; (iii) that the analysis needs to determine whether injury of a serious degree will actually occur in the near future unless safeguard action is taken.[203] The Appellate Body's approach largely coincided with the Panel's:

"[W]e note that th[e] term ['threat of serious injury'] is concerned with 'serious injury' which has not *yet* occurred, but remains a future event whose actual materialization cannot, in fact, be assured with certainty. We note, too, that Article 4.1(b) builds on the definition of 'serious injury' by providing that, in order to constitute a 'threat', the serious injury must be *'clearly imminent'*. The word 'imminent' relates to the moment in time when the 'threat' is likely to materialize. The use of this word implies that the anticipated 'serious injury' must be on the very verge of occurring. Moreover, we see the word 'clearly', which qualifies the word 'imminent', as an indication that there must be a high degree of likelihood that the anticipated serious injury will materialize

[197] Appellate Body Report on *US – Wheat Gluten*, para. 74.
[198] Panel Report on *US – Lamb*, paras. 7.188 and 7.203.
[199] (*footnote original*) Except, of course, in a case involving threat of serious injury, where the issue involves future injury.
[200] Panel Report on *US – Wheat Gluten*, para. 8.81.
[201] (*footnote original*) Webster's New Encyclopaedic Dictionary (1994), at 496.
[202] (*footnote original*) Oxford English Dictionary, at 1316.
[203] Panel Report on *US – Lamb*, paras. 7.127–7.129.

in the very near future. We also note that Article 4.1(b) provides that any determination of a threat of serious injury 'shall be based on facts and not merely on allegation, conjecture or *remote possibility*.' (emphasis added) To us, the word 'clearly' relates also to the factual demonstration of the existence of the 'threat'. Thus, the phrase 'clearly imminent' indicates that, as a matter of fact, it must be manifest that the domestic industry is on the brink of suffering serious injury."[204]

122. In *US – Lamb*, the Appellate Body also reiterated the strict standard of "serious injury" in the context of the "threat of serious injury":

"We recall that, in *Argentina – Footwear Safeguard*, we stated that 'it is essential for a panel to take the definition of "serious injury" in Article 4.1(a) of the *Agreement on Safeguards* into account in its review of any determination of "serious injury".'[205] The same is equally true for the definition of 'threat of serious injury' in Article 4.1(b) of that Agreement. Thus, in making a determination on either the existence of 'serious injury', or on a 'threat' thereof, panels must always be mindful of the very high standard of injury implied by these terms."[206]

123. The Panel on *US – Lamb* considered that a focus on the recent data available pertaining to the end of an investigation period was logical in view of the future-oriented nature of a threat of serious injury analysis:

"In our view, due to the future-oriented nature of a threat analysis, it would seem logical that occurrences at the beginning of an investigation period are less relevant than those at the end of that period. While the SG Agreement does not specify the appropriate duration of the time-period to be considered in an investigation, the Panel and Appellate Body in Argentina – Footwear both considered this issue to some extent. Both concluded that (for an actual serious injury finding) the most recent data were clearly the most relevant. In particular, the Appellate Body stated that 'the relevant investigation period should not only end in the very recent past, the investigation period should be the recent past'.

Given that a threat of serious injury pertains to imminent significant overall impairment, i.e., an event to take place in the immediate future, the same principle should hold true a fortiori for threat determinations compared with present serious injury determinations. This supports the view that the USITC was correct to focus on the most recent data available from the end of the investigation period. We also consider that data from 1997 and interim-1998 cover an adequate and reasonable time-period if complemented by projections extrapolating existing trends into the imminent future so as to ensure the prospective analysis which a threat determination requires.

Therefore, we consider that, by basing its determination on events at the end of the investigation period (i.e., one year and nine months) rather than over the course of the entire investigation period, the USITC analysed sufficiently recent data for making a valid evaluation of whether significant overall impairment was "imminent" in the near future. By the same token, we also consider that, by basing its determination at all on data about events from the recent past, rather than relying exclusively on projections for the various industry indicators into the future, the USITC made its threat determination on the basis of objective and quantifiable facts, and 'not merely on allegation, conjecture or remote possibility'."[207]

(b) Increased imports as a prerequisite for a determination of threat of serious injury

124. The Panel on *Argentina – Footwear (EC)* considered that a mere threat of increased imports is insufficient for the purposes of a determination of threat of serious injury (the Appellate Body did not explicitly address this issue):

"[I]f only a threat of increased imports is present, rather than actual increased imports, this is not sufficient. Article 2.1 requires an actual increase in imports as a basic prerequisite for a finding of either threat of serious injury or serious injury. A determination of the existence of a threat of serious *injury* due to a threat of increased *imports* would amount to a determination based on allegation or conjecture rather than one supported by facts as required by Article 4.1(b)."[208]

125. The Panel on *US – Lamb*, in a finding subsequently not reviewed by the Appellate Body, addressed the question whether, once imports have increased to already cause already some degree of injury, there is a requirement of *additional* increased imports in order to legitimately determine the existence of a threat of serious injury:

"The complainants further claim that the US reference to projections of future increases in imports in defending its threat analysis amounts to equating a 'threat of increased imports' with a 'threat of serious injury', which the *Argentina – Footwear* panel found not to be permissible.

. . .

We agree in general with the complainants' argument that a threat of increased imports as such cannot be equated with threat of serious injury. However, in our view, this is not what the USITC has done in this case. Moreover, we also deem it possible that imports continuing on an elevated level for a longer period without further increasing at the end of the investigation period

[204] Appellate Body Report on *US – Lamb*, para. 125.
[205] (*footnote original*) [Appellate Body Report on *Argentina – Footwear (EC)*,] para. 139.
[206] Appellate Body Report on *US – Lamb*, para. 126.
[207] Panel Report on *US – Lamb*, paras. 7.192–7.194.
[208] Panel Report on *Argentina – Footwear (EC)*, para. 8.284.

> may, if unchecked, go on to cause serious injury (i.e., may threaten to cause serious injury). That is, if increased imports at a certain point in time cause less than serious injury, it is not necessarily true that a threat of serious injury can only be caused by a further increase, i.e., additional increased imports. In our view, in the particular circumstances of a case, a continuation of imports at an already recently increased level may suffice to cause such threat."[209]

(c) Relationship between a determination of the existence of serious injury and a determination of the existence of a threat of serious injury

126. The Panel on *Argentina – Footwear (EC)* observed that in the dispute before it, it was not necessary "to rule on the question of whether it is possible to make simultaneously findings of serious injury and threat of serious injury".[210]

(d) Relationship with Article 4.1(c)

127. In *US – Lamb*, the Panel held that the definition of domestic industry by the United States authorities was inconsistent with Article 4.1(c) of the *Agreement on Safeguards*. The Panel then explained its decision not to exercise judicial economy, but rather to proceed to examine other claims, including those pertaining to Article 4.1(b):

> "A finding that the industry definition used by the USITC is inconsistent with SG Article 4.1(c) would appear to compromise the investigation and determination overall. . . . [T]he Appellate Body focuses on the need for panels to address all claims and/or measures necessary to secure a positive solution to a dispute and adds that providing only a partial resolution of the matter at issue would be false judicial economy. It is in the spirit of the Appellate Body's statements in *Australia – Salmon* that we continue with an analysis of other claims in the alternative, assuming arguendo either (1) that the USITC's industry definition were consistent with the Safeguards Agreement or (2) that, as the United States argues in the alternative, the USITC would have made a finding of threat of serious injury even if the industry definition had been limited to packers and breakers."[211]

3. Article 4.1(c)

(a) "domestic industry" – "producers as a whole . . . of the like or directly competitive products"

128. In *US – Lamb* the Appellate Body concurred with the finding of the Panel in that dispute that in the context of an investigation in which the relevant like product was defined as lamb meat, the term "domestic industry" could not be interpreted as including growers and feeders of live lambs. The Appellate Body began by identifying the analytical approach towards defining "domestic industry":

> "Accordingly, the first step in determining the scope of the domestic industry is the identification of the products which are 'like or directly competitive' with the imported product. Only when those products have been identified is it possible then to identify the 'producers' of those products."[212]

129. The Appellate Body first considered the definition of "domestic industry" with reference to products:

> "[A] safeguard measure is imposed on a specific '*product*', namely, the imported product. The measure may only be imposed if that specific product ('such *product*') is having the stated effects upon the 'domestic industry that *produces like or directly competitive products*'. (emphasis added) The conditions in Article 2.1, therefore, relate in several important respects to specific products. In particular, according to Article 2.1, the legal basis for imposing a safeguard measure exists only when imports of a specific product have prejudicial effects on domestic producers of products that are 'like or directly competitive' with that imported product. In our view, it would be a clear departure from the text of Article 2.1 if a safeguard measure could be imposed because of the prejudicial effects that an imported product has on domestic producers of products that are *not* 'like or directly competitive products' in relation to the imported product."[213]

130. After addressing the definition of "domestic industry" with respect to products, the Appellate Body in *US – Lamb* then proceeded to consider the issue of producers:

> "As the Panel indicated, 'producers' are those who grow or manufacture an article; 'producers' are those who bring a thing into existence. This meaning of 'producers' is, however, qualified by the second element in the definition of 'domestic industry'. This element identifies the particular products that must be produced by the domestic 'producers' in order to qualify for inclusion in the 'domestic industry'. According to the clear and express wording of the text of Article 4.1(c), the term 'domestic industry' extends solely to the 'producers . . . *of the like or directly competitive products*'. (emphasis added) The definition, therefore, focuses exclusively on the producers of a very specific group of products. Producers of products that are not 'like or directly competitive products' do not, according to the text of the treaty, form part of the domestic industry."[214]

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[209] Panel Report on *US – Lamb*, paras. 7.185–7.187.
[210] Panel Report on *Argentina – Footwear (EC)*, para. 8.285.
[211] Panel Report on *US – Lamb*, para. 7.119.
[212] Appellate Body on *US – Lamb*, para. 87.
[213] Appellate Body on *US – Lamb*, para. 86.
[214] Appellate Body on *US – Lamb*, para. 84.

131. In *US – Lamb*, the Appellate Body upheld the findings of the Panel and also concluded that the definition of "domestic industry" by the United States authorities was too broad:

> "There is no dispute that in this case the 'like product' is 'lamb meat', which is the imported product with which the safeguard investigation was concerned. The USITC considered that the 'domestic industry' producing the 'like product', lamb meat, includes the growers and feeders of live lambs. The term 'directly competitive products' is not, however, at issue in this dispute as the USITC did not find that there were any such products in this case.[215]
>
> "In this respect, we are not persuaded that the words 'as a whole' in Article 4.1(c), appearing in the phrase 'producers as a whole', offer support to the United States position. These words do not alter the requirement that the 'domestic industry' extends only to producers of 'like or directly competitive products'. The words 'as a whole' apply to 'producers' and, when read together with the terms 'collective output' and 'major proportion' which follow, clearly address the *number* and the *representative nature* of producers making up the domestic industry. The words 'as a whole' do not imply that producers of *other products*, which are *not* like or directly competitive with the imported product, can be included in the definition of domestic industry. Like the Panel, we see the words 'as a whole' as no more than 'a *quantitative* benchmark for the proportion of producers . . . which a safeguards investigation has to cover.'"[216]

132. The Appellate Body on *US – Lamb* expressed scepticism that the degree of integration of production processes within an industry should have any bearing on the determination of the "domestic industry".

> "Although we do not disagree with the Panel's analysis of the USITC Report, nor with the conclusions it drew from that analysis, we have reservations about the role of an examination of the degree of integration of production processes for the products at issue. As we have indicated, under the Agreement on Safeguards, the determination of the "domestic industry" is based on the 'producers . . . of the like or directly competitive products'. The focus must, therefore, be on the identification of the products, and their 'like or directly competitive' relationship, and not on the processes by which those products are produced.[217]"[218]

(b) "those whose collective output . . . constitutes a major proportion"

133. The Panel on *US – Wheat Gluten* addressed the link between the phrase "major proportion" and the question of data coverage:

> "[T]he Agreement expressly envisages that, in certain circumstances, the 'domestic industry' may consist of those domestic producers 'whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products'. This implies that complete data coverage may not always be possible and is not required. While the fullest possible data coverage is required in order to maximize the accuracy of the investigation, there may be circumstances in a particular case which do not allow an investigating authority to obtain such coverage. In this case, the fact that the USITC record included full period data for only two domestic producers was partially a result of the fact that Heartland became part of the domestic industry only in 1996. Furthermore, the profitability data provided by ADM did not pertain specifically to the domestic industry under investigation and was therefore excluded.
>
> Moreover, the USITC found that '[p]rofitability reflected the trends in average unit value prices, which initially rose and then fell.' The USITC had before it data pertaining to unit value from all producers, including ADM. The concurrence in trends between these two factors supports the view that the profitability data used by the USITC was representative of the domestic industry's situation.
>
> On the basis of the information contained, or referred to, in the sections of the USITC Report relating to profits and losses and the statement by the USITC that the three domestic producers that provided usable financial data on wheat gluten 'accounted for the substantial majority of domestic production of wheat gluten', we find that the United States did not act inconsistently with Article 4.2(a) in terms of the coverage of the 'profits and losses' data."[219]

134. In contrast to the Panel's findings on *US – Wheat Gluten*, the Panel on *US – Lamb* held that the data gathered by the investigating authorities in the specific case were not sufficiently representative of those producers whose collective output constitutes a major proportion of the products in question:

> "[T]he crucial problem with the data used by the USITC relates to the representativeness of the questionnaire data where they were used (e.g., employment, financial

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[215] (*footnote original*) We note that two Commissioners (Askey and Crawford) did not join in the findings of the USITC on this point. These two Commissioners both found that *live lambs*, produced by growers and feeders, are directly competitive with lamb *meat* and that, accordingly, the "domestic industry" includes the producers of these competing products. USITC Report, pp. I-8 and I-9, footnotes 7 (Commissioner Askey) and 8 (Commissioner Crawford). The United States has not argued, before the Panel or before us, that *live lambs* are directly competitive with lamb *meat*, and that issue, as we stated earlier, does not form part of this appeal.

[216] Appellate Body Report on *US – Lamb*, para. 91.

[217] (*footnote original*) We can, however, envisage that in certain cases a question may arise as to whether two articles are *separate products*. In that event, it may be relevant to inquire into the production processes for those products.

[218] Appellate Body Report on *US – Lamb*, para. 94.

[219] Panel Report on *US – Wheat Gluten*, paras. 8.54–8.56.

indicators), and not with the use of USDA data where available. In particular the low data coverage for growers and feeders (approximately six per cent), the lack of financial data for interim 1997 and 1998 for grower/feeders, and the uneven data coverage for packers and breakers (especially in the financial data as outlined above) raises serious doubts as to whether the data represent a 'major proportion' of the domestic industry, in the sense of SG Article 4.1(c)."[220]

135. The Panel on *US – Lamb* also pointed out that an incorrect determination of what constitutes the "domestic industry" will likely vitiate also the representativeness of data related to such incorrectly determined domestic industry:

"This lack of representativeness is likely compounded by the fact that the USITC defined the domestic industry broadly as including growers and feeders, as the conclusions drawn from the data pertaining to only a small proportion of US growers and feeders are central to the USITC's overall finding of threat of serious injury."[221]

136. The Panel on *US – Lamb* made clear that a national authority is not under an obligation to collect information from all domestic producers so as to ensure the representativeness of the data used for its final determination. Nevertheless, the Panel invoked, among other things, the need for a "statistically valid sample":

"We agree with the United States that the Safeguards Agreement does not specify any particular methodology to ensure the representativeness of data collected in an investigation. But we also note that the USITC itself concedes that the questionnaire responses do not constitute a statistically valid sample of the producers which, in the USITC's view, form an essential part of the domestic industry. While, again accepting arguendo the USITC's industry definition,[222] we recognize that in practical terms it would have been impossible for the USITC to collect data from all of the more than 70,000 growers, we nevertheless believe that the USITC could have obtained data from a larger percentage of the growers than it did or from a statistically valid sample, so as to ensure that the data collected were representative of growers as a whole. In any case, petitioners requesting the initiation of an investigation could not automatically be taken to represent a major proportion of the domestic industry.

In the light of the foregoing, we conclude that on the basis of the information made available by the United States in this dispute (and absent more detailed information on the exact coverage of the questionnaire responses), by industry segment and by injury factor, we are not persuaded that the data used as a basis for the USITC's determination in this case was sufficiently *representative* of 'those producers whose collective output . . . constitutes *a major proportion* of the total domestic production of those products' within the meaning of SG Article 4.1(c)."[223]

(c) Relationship with other Articles

137. With respect to the relationship with Article 4.1(b), see paragraph 127 above.

4. Article 4.2(a)

(a) "shall evaluate all relevant factors"

(i) Relationship between the requirement to evaluate all relevant factors and the definition of serious injury in Article 4.1(a)

138. With respect to the relationship between the requirement to evaluate all relevant factors and the definition of serious injury in Article 4.1(a), see paragraphs 116–118 above.

(ii) "All" relevant factors – factors relating to imports and factors relating to the domestic industry

139. In the context of reversing the interpretation by the Panel on *US – Wheat Gluten* of the requisite causal link between increased imports and serious injury, the Appellate Body held that a national authority should consider all the factors listed in Article 4.2(a), regardless of whether they relate to imports specifically or to the domestic industry more generally. The Appellate Body did not consider that Article 4.2(a) attached any special significance to any one of these factors in particular:

"The use of the word 'all' in the phrase 'all relevant factors' in Article 4.2(a) indicates that the effects of any factor may be relevant to the competent authorities' determination, irrespective of whether the particular factor relates to imports specifically or to the domestic industry more generally. This conclusion is borne out by the list of factors which Article 4.2(a) stipulates are, 'in particular', relevant to the determination. This list includes factors that relate *both to* imports specifically *and* to the overall situation of the domestic industry more generally. The language of the provision does not distinguish between, or attach special importance or preference to, any of the listed factors. In our view, therefore, Article 4.2(a) of the Agreement on Safeguards suggests that all these factors are to be *included* in the determination and that the contribution of each relevant factor is to be counted in the determination of serious injury according to its 'bearing' or effect on the situation of the domestic industry. Thus, we consider that Article

[220] Panel Report on *US – Lamb*, para. 7.218.
[221] Panel Report on *US – Lamb*, para. 7.219.
[222] (*footnote original*) Of course, only once the relevant domestic industry has been defined consistently with SG Article 4.1(c) is it logically possible to select producers representing a "major proportion" of the collective output of the like or directly competitive product in question, or to develop a valid statistical sample that would ensure that the data collected are representative of a major proportion of the domestic industry.
[223] Panel Report on *US – Lamb*, paras. 7.220–7.221.

4.2(a) does not support the Panel's conclusion that some of the 'relevant factors' – those related exclusively to increased imports – should be counted towards an affirmative determination of serious injury, while others – those not related to increased imports – should be excluded from that determination."[224]

140. In *US – Wheat Gluten*, after finding that the phrase "all relevant factors" under Article 4.2(a) refers to factors relating both to imports and to the domestic industry, the Appellate Body further held that the determination of "causality" under Article 4.2(b) must give the phrase "all relevant factors" the same meaning as under Article 4.2(a). The Appellate Body noted that Article 4.2(a) imposes an obligation to evaluate (and by implication to include) the effect of *all* the relevant factors on the domestic industry and went on to state that this obligation under Article 4.2(a) would be violated if the very *same* effects, caused by those *same* factors, were – with the exception of increased imports – to be excluded from consideration under Article 4.2(b).

"We believe that Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards* must be given a mutually consistent interpretation, particularly in light of the explicit textual connection between these two provisions. According to the opening clause of Article 4.2(b) – "The determination referred to in subparagraph (a) shall not be made unless . . ." – *both* provisions lay down rules governing a *single* determination, made under Article 4.2(a). In our view, it would contradict the requirement in Article 4.2(a) to evaluate – and, thereby, include in the determination – the 'bearing' or effect *all* the relevant factors have on the domestic industry, if those *same* effects, caused by those *same* factors, were, with the exception of increased imports, to be excluded under Article 4.2(b), as the Panel suggested."[225]

(iii) Requirement to consider all factors listed in Article 4.2(a)

141. The Panel on *Korea – Dairy* found, with respect to the list of factors contained in Article 4.2(a), that the national investigating authority was under an obligation to evaluate *all* of these factors:

"This provision sets out the general principle regarding the economic factors which need to be considered in a serious injury investigation, and provides a list of factors that are a priori considered to be especially relevant and informative of the situation of the domestic industry. The use of the wording 'in particular' makes it clear to us that, among 'all relevant factors' that the investigating authorities 'shall evaluate', the consideration of the factors listed is always relevant and therefore required, even though the authority may later dismiss some of them as not having a bearing on the situation of that industry."[226]

142. The Panel on *Argentina – Footwear (EC)* in a finding subsequently upheld by the Appellate Body, made a similar statement:

"We note, first, that the text of Article 4.2(a) of the Safeguards Agreement explicitly requires the evaluation of 'all relevant factors', in particular those listed in that article. Second, Article 6.4 of the ATC contains no such express requirement and recognises that 'none of these factors . . . can necessarily give decisive guidance. Nonetheless, the panels on *United States – Underwear* and *United States – Shirts and Blouses* ruled that each and every injury factor mentioned in Article 6.4 of the ATC has to be considered by the national authority. With regard to the obligation to evaluate 'all relevant factors' we consider these past panel reports relevant. Consequently, in accordance with the text of the *Safeguards Agreement* and past practice, we consider that an evaluation of all factors listed in Article 4.2(a) is required.

. . .

. . . we must consider, first, whether all injury factors listed in the Agreement were considered by Argentina as the text of Article 4.2(a) of the Agreement ('all relevant factors. . . . including . . . changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment') is unambiguous that at a minimum each of the factors listed, in addition to all other factors that are 'relevant', must be considered."[227]

143. The Appellate Body on *Argentina – Footwear (EC)* agreed "with the Panel's interpretation that Article 4.2(a) of the *Agreement on Safeguards* requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) as well as all other factors that are relevant to the situation of the industry concerned".[228]

144. The Panel on *US – Wheat Gluten* reiterates this standard:

"[T]he language in this provision is mandatory ('shall . . .'). Furthermore, this list is preceded by the term 'in particular. . .'. On the basis of the text of the provision, we therefore concur with the shared view of the parties that all of the factors listed in Article 4.2(a) must be evaluated. Of course, an examination of any one of those factors in a given case may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination."[229]

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[224] Appellate Body Report on *US – Wheat Gluten*, para. 72.
[225] Appellate Body Report on *US – Wheat Gluten*, para. 73.
[226] Panel Report on *Korea – Dairy*, para. 7.55.
[227] Panel Report on *Argentina – Footwear (EC)*, paras. 8.123 and 8.206.
[228] Appellate Body Report on *Argentina – Footwear (EC)*, para.136.
[229] Panel Report on *US – Wheat Gluten*, para. 8.39. See also the Panel Report on *US – Lamb*, para 7.139.

(iv) Standard of review

145. In *Argentina – Footwear (EC)*, the Appellate Body reiterated its statement in *EC – Hormones*, and upheld the findings by the Panel that the *Agreement on Safeguards* is silent as to the appropriate standard of review. Therefore, the "objective assessment" requirement under Article 11 of the DSU sets forth the appropriate standard of review for examining the WTO-consistency of a safeguard measure. With respect to the application of the standard of review, the Appellate Body ruled that a panel is obliged to assess whether the importing authorities "had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination". In addition to "an objective assessment of the facts", the Appellate Body in *Argentina – Footwear (EC)* held that a panel shall examine "the applicability of and conformity with the relevant covered agreements". Specifically, the Appellate Body found that Article 11 of the DSU requires a panel to correctly interpret and apply the substantive provisions of Articles 2 and 4 of the *Agreement on Safeguards*, in particular, those relating to the requirements of imports "in such increased quantities", "serious injury" to the domestic industry, and causation:

> "Although that case dealt with the panel's assessment of the facts, and this case deals with the Panel's assessment of the matter, more generally, the same reasoning applies here. The *Agreement on Safeguards*, like the *Agreement on the Application of Sanitary and Phytosanitary Measures*, is silent as to the appropriate standard of review. Therefore, Article 11 of the DSU, and, in particular, its requirement that, . . . a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, sets forth the appropriate standard of review for examining the consistency of a safeguard measure with the provisions of the *Agreement on Safeguards*.
>
> Based on our review of the Panel's reasoning, we find that the Panel correctly stated the appropriate standard of review, as set forth in Article 11 of the DSU. And, with respect to its *application* of the standard of review, we do not believe that the Panel conducted a *de novo* review of the evidence, or that it substituted its analysis and judgement for that of the Argentine authorities. Rather, the Panel examined whether, as required by Article 4 of the *Agreement on Safeguards*, the Argentine authorities had considered all the relevant facts and had adequately explained how the facts supported the determinations that were made. Indeed, far from departing from its responsibility, in our view, the Panel was simply fulfilling its responsibility under Article 11 of the DSU in taking the approach it did. To determine whether the safeguard investigation and the resulting safeguard measure applied by Argentina were consistent with Article 4 of the *Agreement on Safeguards*, the Panel was obliged, by the very terms of Article 4, to assess whether the Argentine authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination.
>
> In addition to 'an objective assessment of the facts', we note, too, that part of the 'objective assessment of the matter' required of a panel by Article 11 of the DSU is an assessment of 'the applicability of and conformity with the relevant covered agreements'. Consequently, we must also examine whether the Panel correctly interpreted and applied the substantive provisions of Articles 2 and 4 of the *Agreement on Safeguards*, in particular, those relating to the requirements of imports 'in such increased quantities', 'serious injury' to the domestic industry, and causation."[230]

146. In *US – Lamb*, the Appellate Body articulated the standard of review for a national authority's determination of serious injury or threat thereof:

> "[I]n examining a claim under Article 4.2 of the *Agreement on Safeguards*, a panel's application of the appropriate standard of review of the competent authorities' determination has two aspects. First, a panel must review whether the competent authorities have, as a formal matter, evaluated *all relevant factors* and, second, a panel must review whether those authorities have, as a *substantive* matter, provided a *reasoned and adequate explanation* of how the facts support their determinations."[231]

147. The Appellate Body's application of its standard of review toward a national authority's determination of serious injury or threat thereof is illustrated by its findings in *US – Lamb*. Here, after criticizing the United States authorities' determination of threat of serious injury, the Appellate Body stated:

> "We wish to emphasize again that our remarks about the price data are not intended to suggest that the domestic industry was *not* threatened with serious injury. Rather, our conclusion is simply that the USITC has not adequately explained how the facts relating to prices support its determination, under Article 4.2(a), that the domestic industry *was* threatened with such injury."[232]

148. Although on *US – Lamb* the Appellate Body agreed with the Panel's articulation of the appropriate standard of review, it held that the Panel had not applied this standard correctly in that case. The Appellate Body took issue with the fact that the Panel had considered the evaluation of certain factors to be 'a sufficient basis' for the national authorities' determination, but did not

[230] Appellate Body Report on *Argentina – Footwear (EC)*, paras. 120–122.
[231] Appellate Body Report on *US – Lamb*, para. 141.
[232] Appellate Body Report on *US – Lamb*, para. 160.

engage in any substantive review of these factors. The Appellate Body found that the Panel had not applied the required standards of review because:

> "[B]y failing to review the USITC's determination in light of these detailed substantive arguments, [it] failed to examine critically whether the USITC had, indeed, provided a reasoned and adequate explanation of how the facts supported its determination that there existed a 'threat of serious injury'."[233]

149. The Appellate Body on *US – Cotton Yarn*, in the context of examination of a transitional textile safeguard under Article 6 of the ATC, found that a panel "must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority", and summarized the standard of review for past safeguard disputes as follows:

> "Our Reports in these disputes under the *Agreement on Safeguards* spell out key elements of a panel's standard of review under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations. This standard may be summarized as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority."[234]

(v) "of an objective and quantifiable nature"

General

150. In its determination of what would constitute "factors of an objective and quantifiable nature" within the meaning of Article 4.2(a), the Appellate Body in *US – Lamb* opined that the requirement of objectivity and quantifiability applies, not only to *factors*, but also to *data*, the evaluation of which would "enable the measurement and quantification of these factors". The Appellate Body then specified that for data to be "objective and quantifiable", such data would have to be both *sufficient* and *representative* of the domestic industry:

> "We note that no provision of the Agreement on Safeguards specifically addresses the question of the extent of data collection, and in particular, whether competent authorities must have before them data that is representative of the domestic industry. However . . . competent authorities are obliged to 'evaluate' all relevant factors of an 'objective and quantifiable' nature . . . We recognize that the clause 'of an objective and quantifiable nature' refers expressly to 'factors', but not expressly to data. We are, however, convinced that factors can only be 'of an objective and quantifiable nature' if they allow a determination to be made, as required by Article 4.2(b) of the Agreement on Safeguards, on the basis of 'objective evidence'. Such evidence is, in principle, objective data. The words 'factors of an objective and quantifiable nature' imply, therefore, an evaluation of objective data which enables the measurement and quantification of these factors.
>
> [T]he requirement for competent authorities to evaluate the 'bearing' that the relevant factors have on the 'domestic industry ' and, subsequently, to make a determination concerning the overall 'situation of that industry', means that competent authorities must have a sufficient factual basis to allow them to draw reasoned and adequate conclusions concerning the situation of the 'domestic industry'. The need for such a sufficient factual basis, in turn, implies that the data examined, concerning the relevant factors, must be representative of the 'domestic industry'. Indeed, a determination made on the basis of insufficient data would not be a determination about the state of the 'domestic industry', as defined in the Agreement, but would, in reality, be a determination pertaining to producers of something less than 'a major proportion of the total domestic production' of the products at issue. Accordingly, we agree with the Panel that the data evaluated by the competent authorities must be sufficiently representative of the 'domestic industry' to allow determinations to be made about that industry."[235]

151. The Appellate Body on *US – Lamb* nevertheless stressed that data could fulfil the requirement of being representative even if they did not cover *all* domestic producers whose production constitutes a major proportion of the domestic industry:

> "We do not wish to suggest that competent authorities must, in every case, actually have before them data pertaining to all those domestic producers whose production, taken together, constitutes a major proportion of the domestic industry. In some instances, no doubt, such a requirement would be both impractical and unrealistic. Rather, the data before the competent authorities must be sufficiently representative to give a true picture of the 'domestic industry'. What is sufficient in any given case will depend on the particularities of the 'domestic industry' at issue."[236]

Nature and temporal focus of data in a threat analysis

152. In *US – Lamb*, the Appellate Body addressed what it calls the "tension between a future-oriented 'threat'

[233] Appellate Body Report on *US – Lamb*, para. 148.
[234] Appellate Body Report on *US – Cotton Yarn*, para. 74.
[235] Appellate Body Report on *US – Lamb*, paras. 130–131.
[236] Appellate Body Report on *US – Lamb*, para. 132.

analysis" on the one hand, and the "need for a fact-based determination of serious injury" on the other:

> "[W]e agree with the Panel that a threat determination is 'future-oriented'. However, Article 4.1(b) requires that a "threat" determination be based on "facts" and not on 'conjecture'. As facts, by their very nature, pertain to the present and the past, the occurrence of future events can never be definitively proven by facts. There is, therefore, a tension between a future-oriented 'threat' analysis, which, ultimately, calls for a degree of 'conjecture' about the likelihood of a future event, and the need for a fact-based determination. Unavoidably, this tension must be resolved through the use of facts from the present and the past to justify the conclusion about the future, namely that serious injury is 'clearly imminent'. Thus, a fact-based evaluation, under Article 4.2(a) of the *Agreement on Safeguards*, must provide the basis for a projection that there is a high degree of likelihood of serious injury to the domestic industry in the very near future.[237]"[238]

153. With respect to the temporal focus of data used in a threat analysis, the Appellate Body on *US – Lamb* held:

> "[W]e note that the *Agreement on Safeguards* provides no particular methodology to be followed in making determinations of serious injury or threat thereof. However, whatever methodology is chosen, we believe that data relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis for a determination of a threat of serious injury. The likely state of the domestic industry in the very near future can best be gauged from data from the most recent past . . . [I]n principle, within the period of investigation as a whole, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry."[239]

154. The Appellate Body, also on *US – Lamb*, nevertheless cautioned against the use of recent data in isolation from data pertaining to the entire period of investigation:

> "However, we believe that, although data from the most recent past has special importance, competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation. The real significance of the short-term trends in the most recent data, evident at the end of the period of investigation, may only emerge when those short-term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation. If the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading. For instance, although the most recent data may indicate a decline in the domestic industry, that decline may well be a part of the normal cycle of the domestic industry rather than a precursor to clearly imminent serious injury. Likewise, a recent decline in economic performance could simply indicate that the domestic industry is returning to its normal situation after an unusually favourable period, rather than that the industry is on the verge of a precipitous decline into serious injury. Thus, we believe that, in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period.[240]"[241]

(vi) "Rate and amount" of the increase; "changes" in the level of sales

155. The Panel on *Argentina – Footwear (EC)*, subsequently upheld on this point by the Appellate Body, read the requirement under Article 4.2(a) to evaluate the rate and amount of the increase in imports to mean a requirement to analyse the *trends* of imports over the period of investigation:

> "[W]e recall Article 4.2(a)'s requirement that 'the rate and amount of the increase in imports' be evaluated.[242] In our view this constitutes a requirement that the intervening *trends* of imports over the period of investigation be analysed. We note that the term 'rate' connotes both speed and direction, and thus intervening trends (up or down) must be fully taken into consideration. Where these trends are mixed over a period of investigation, this may be decisive in determining whether an increase in imports in the sense of Article 2.1 has occurred. In practical terms, we consider that the best way to assess the significance of any such mixed trends in imports is by evaluating whether any downturn in imports is simply temporary, or instead reflects a longer-term change."[243]

156. The Appellate Body on *Argentina – Footwear (EC)* affirmed this interpretation of the words "rate and amount" in Article 4.2(a) by agreeing:

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[237] (*footnote original*) We observe that the projections made must relate to the overall state of the domestic industry, and not simply to certain relevant factors.

[238] Appellate Body Report on *US – Lamb*, para. 136.

[239] Appellate Body Report on *US – Lamb*, para. 137.

[240] (*footnote original*) We note that, at footnote 130 of our Report in *Argentina – Footwear Safeguard*, . . ., we said that "the relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the recent past." In this Report, we comment on the relative importance, within the period of investigation, of the data from the end of the period, as compared with the data from the beginning of the period. The period of investigation must, of course, be sufficiently long to allow appropriate conclusions to be drawn regarding the state of the domestic industry.

[241] Appellate Body Report on *US – Lamb*, para. 138.

[242] (*footnote original*) We recognize that Article 4.2(a) makes this reference in the specific context of the causation analysis, which in our view is inseparable from the requirement of imports in "*such* increased quantities" (emphasis added). Thus, we consider that in the context of both the requirement that imports have increased, and the analysis to determine whether these imports have caused or threaten to cause serious injury, the Agreement requires consideration not just of data for the end-points of an investigation period, but for the entirety of that period.

[243] Panel Report on *Argentina – Footwear (EC)*, para. 8.159.

> "[W]ith the Panel that the specific provisions of Article 4.2(a) require that 'the *rate* and *amount* of the increase in imports . . . in absolute and relative terms' . . . must be evaluated. Thus, we do not dispute the Panel's view and ultimate conclusion that the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a)."[244]

157. In *US – Line Pipe*, the Panel found, in a statement not reviewed by the Appellate Body, that "there is no need for a determination that imports are presently still increasing. Rather, imports could have 'increased' in the recent past, but not necessarily be increasing up to the end of the period of investigation or immediately preceding the determination."[245] The Panel thus ruled that "a determination of either an absolute or relative increase in imports causing serious injury is sufficient to authorize a Member to adopt safeguard measures, even if it found the absolute increased imports determination by the importing Member was incorrect".[246] For a detailed discussion, see paragraph 48 above.

158. With respect to the coincidence between trends in injury factors and import trends, see paragraphs 178–180 below.

(vii) "productivity"

159. The Panel on *US – Wheat Gluten* held that the term "productivity" may refer to the overall productivity of an industry and encompasses productivity of both labour and capital (the Appellate Body did not address this particular finding):

> "[T]he Agreement on Safeguards provides no precise definition of the term 'productivity' that appears in Article 4.2(a) SA. The context of this term includes the rest of the text of Article 4.2(a) – and in particular, the phrase 'all relevant factors of an objective and quantifiable nature having a bearing on the situation of that *industry*' . . . We consider that this term, read in its context, may refer to the overall productivity of the *industry*.
>
> It is apparent to us from the USITC Report that the USITC gathered and analysed data on capital investment in the industry as well as data pertaining to worker productivity. In these Panel proceedings, the United States asserts that 'it is simple mathematics that if production declines (as it did in 1996–1997 from 1995 levels), while the amount of capital in the industry increases (as it did from the capital projects adding capacity), the productivity of capital will correspondingly decline.' We would have preferred a more integrated examination in the USITC Report of 'productivity' that explicitly encompassed *overall* industry productivity – particularly in light of the acknowledgement by the USITC that 'production of wheat gluten is extremely capital intensive and requires very few production workers'. Nevertheless, we consider that the data and statements pertaining to worker productivity, in conjunction with those on capital investments, in the overall context of the USITC Report, indicate that the USITC considered industry productivity as required by Article 4.2(a)."[247]

(viii) Factors not listed in Article 4.2(a)

160. In *US – Wheat Gluten*, the Appellate Body disagreed with the interpretation by the Panel in that dispute that, with regard to factors not enumerated in Article 4.2(a), competent authorities are obliged only to evaluate factors "clearly raised" as relevant by interested parties in a domestic investigation.[248] The Appellate Body first established a link between the requirement, under Article 4.2(a), to evaluate "all relevant factors" and the obligation, under Article 3.1, to conduct an investigation:

> "The word 'all' has a broad meaning which, if read alone, would suggest that the scope of the obligation on the competent authorities to evaluate 'relevant factors' is without limits or exceptions.[249] However, the word cannot, of course, be read in isolation. . . . the text of Article 4.2(a) itself imposes certain explicit qualifications on the obligation to evaluate 'all relevant factors' as it states that competent authorities need only evaluate factors which are 'objective and quantifiable' and which '[have] a bearing on the situation of that industry'.
>
> The obligation to evaluate 'relevant factors' must also be interpreted in light of the duty of the competent authorities to conduct an 'investigation' under the *Agreement on Safeguards*. The competent authorities must base their evaluation of the relevance, if any, of a factor on evidence that is 'objective and quantifiable'. The competent authorities will, in principle, obtain this evidence during the investigation they must conduct, under Article 3.1, into the situation of the domestic industry. The scope of the obligation to evaluate 'all relevant factors' is, therefore, related to the scope of the obligation of competent authorities to conduct an investigation.
>
> We turn, therefore, for context, to Article 3.1 of the *Agreement on Safeguards*, which is entitled '*Investigation*'."[250]

161. The Appellate Body on *US – Wheat Gluten* then reversed the Panel's finding that the competent authorities are obliged only to evaluate factors "clearly raised"

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[244] Appellate Body Report on *Argentina – Footwear (EC)*, para. 129.
[245] Panel Report on *US – Line Pipe*, para. 7.207.
[246] Panel Report on *US – Line Pipe*, para. 7.211.
[247] Panel Report on *US – Wheat Gluten*, paras. 8.44–8.45.
[248] Panel Report on *US – Wheat Gluten*, paras. 8.69 and 8.121.
[249] (*footnote original*) *The New Shorter Oxford English Dictionary*, (Brown, ed.) (Clarendon Press, 1993), Vol. I, p. 52, indicates that, when the word "all" is used as an adjective preceding a noun in the plural form (as in "all . . . factors"), it means "The entire number of; the individual constituents of, without exception."
[250] Appellate Body Report on *US – Wheat Gluten*, paras. 51–53. See also paras. 90–92 of this Chapter.

as relevant by interested parties in a domestic investigation. Rather, the Appellate Body held that the investigating authorities must, where necessary, "undertake additional investigative steps . . . in order to fulfill their obligation to evaluate all relevant factors":

> "The competent authorities must, in every case, carry out a full investigation to enable them to conduct a proper evaluation of all of the relevant factors expressly mentioned in Article 4.2(a) of the *Agreement on Safeguards*. Moreover, Article 4.2(a) requires the competent authorities – and *not the interested parties* – to evaluate fully the relevance, if any, of 'other factors'. If the competent authorities consider that a particular 'other factor' may be relevant to the situation of the domestic industry, under Article 4.2(a), their duties of investigation and evaluation preclude them from remaining passive in the face of possible short-comings in the evidence submitted, and views expressed, by the interested parties. In such cases, where the competent authorities do not have sufficient information before them to evaluate the possible relevance of such an 'other factor', they must investigate fully that 'other factor', so that they can fulfill their obligations of evaluation under Article 4.2(a). In that respect, we note that the competent authorities' 'investigation' under Article 3.1 is *not limited* to the investigative steps mentioned in that provision, but must simply '*include*' these steps. Therefore, the competent authorities must undertake additional investigative steps, when the circumstances so require, in order to fulfill their obligation to evaluate all relevant factors.
>
> Thus, we disagree with the Panel's finding that the competent authorities need only examine 'other factors' which were '*clearly* raised before them as relevant by the interested parties in the domestic investigation.' (emphasis added) . . . However, as is clear from the preceding paragraph of this Report, we also reject the European Communities' argument that the competent authorities have an open-ended and unlimited duty to investigate all available facts that might possibly be relevant."[251]

(ix) Consideration of "all relevant factors" in the case of a segmented domestic industry

162. The Panel on *Korea – Dairy* held that while it is permissible to analyse distinct market segments in order to make a finding of serious injury to the whole domestic industry, the investigating authorities must nevertheless comply with certain requirements in this respect:

> "[T]he definition of the domestic industry in this case as comprising two different segments of the dairy products market has consequences for the evaluation of the situation of the industry. In assessing the serious injury to the whole domestic industry, we find that it is acceptable to analyse distinct market segments but, as stated above, all factors listed in Article 4.2 must be addressed. In considering each of the factors listed in Article 4.2, and any others found to be relevant by the authority, the investigating authority has two options: for each factor, the investigating authority can consider it either for all segments, or if it decides to examine it for only one or some segment(s), it must provide an explanation of how the segment(s) chosen is (are) objectively representative of the whole industry. . . . Our point here is that an analysis of only a segment of the domestic industry, without any explanation of its significance for the whole industry, will not satisfy the requirements of the Agreement on Safeguards."[252]

163. In *Argentina – Footwear (EC)*, the Panel addressed the argument that, since the investigation had been conducted on the basis of a division of the product under investigation into five product groups, the investigating authorities were required to prove serious injury in all segments in which safeguard measures were to be imposed:

> "We disagree with the European Communities that Argentina was required to conduct its injury and causation analysis on a disaggregated basis. In our view, since in this case the definition of the like or directly competitive product is not challenged, it is this definition that controls the definition of the 'domestic industry' in the sense of Article 4.1(c) as well as the manner in which the data must be analysed in an investigation. While Argentina could have considered the data on a disaggregated basis (and in fact did so in some instances), in our view, it was not required to do so. Rather, given the undisputed definition of the like or directly competitive product as all footwear, Argentina was required at a minimum to consider each injury factor with respect to all footwear.[253] By the same token the European Communities, having accepted Argentina's aggregate like product definition, has no basis to insist on a disaggregated analysis in which injury and causation must be proven with respect to each individual product segment.[254] Thus, in our review of the injury finding, we will consider the analysis and conclusions pertaining to the footwear industry in its entirety."[255]

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[251] Appellate Body Report on *US – Wheat Gluten*, paras. 55–56. The Appellate Body also found, based on an examination of the evidence of record, that the factor which the investigating authorities had allegedly failed to evaluate was not a particular relevant factor requiring evaluation under Article 4.2(a) of the *Agreement on Safeguards*. Appellate Body Report on *US – Wheat Gluten*, paras. 57–58.

[252] Panel Report on *Korea – Dairy*, para. 7.58.

[253] (*footnote original*) Or, to the extent that Argentina relied on data for particular product segments as the basis for conclusions pertaining to the entire industry, it was required to explain how its analysis regarding those segments related to or was representative of the industry as a whole.

[254] (*footnote original*) We note that in any case, only if serious injury or a threat thereof exists with respect to the product market segments accounting for the bulk of the industry's output will injury be evident with respect to the industry as a whole. The European Communities appears to acknowledge this, in indicating that the share of a given product category of the total industry is relevant for the injury analysis of the entire industry. . . .

[255] Panel Report on *Argentina – Footwear (EC)*, para. 8.137.

164. The Panel on *US – Lamb* found that an investigation of the injury factors with respect to particular industry segments is sufficient, provided an adequate explanation of certain issues is furnished:

> "An initial issue before us is whether, accepting *arguendo* the USITC's industry definition, all factors need to be investigated in detail for *all* identified industry *segments* (i.e., growers, feeders, packers and breakers) or whether an investigation of certain injury factors with respect to *particular* segments only would be sufficient to meet the requirements of SG Article 4.2(a). In the light of the general standard of review, as it applies to contingent trade remedy cases, we consider the latter as sufficient if there is an adequate explanation in the report published by the USITC, of (i) why conclusive inferences from the data concerning *one* industry segment can be drawn for *another* industry segment, or (ii) why the factual constellation in the particular industry segment in the given case does *not* permit data collection (i.e., *not* a 'factor of a *objective* and *quantifiable* nature'), or (iii) renders a certain injury factor not probative in the circumstances of a particular industry segment (i.e., *not* a factor '*having a bearing* on the situation of that industry' within the meaning of SG Article 4.2(a))."[256]

165. The Panel on *US – Lamb* then noted with respect to the investigation at issue:

> "[W]here the USITC did not collect data concerning a particular injury factor with respect to all industry segments, the USITC report provides an adequate explanation for that. Either the USITC report explains how inferences can be drawn from the data collected with regard to *one* segment for *another* segment for which data were not collected, or it explains why, in the circumstances of the particular industry segment at issue, the collection of data of an objective and quantifiable nature was not possible, or it explains why a specific injury factor is not probative for that segment."[257]

(x) Consideration of trends

166. The Panel on *Argentina – Footwear (EC)* considered inconsistent with the requirement of an evaluation of "all relevant factors" what it characterized as "the investigation's almost exclusive reliance on end-point-to-end-point comparisons in its analysis of the changes in the situation of the industry". The Panel observed in this respect:

> "[I]f intervening trends are not systematically considered and factored into the analysis, the competent authorities are not fulfilling Article 4.2(a)'s requirement to analyse 'all relevant factors', and in addition, the situation of the domestic industry is not ascertained in full. For example, the situation of an industry whose production drops drastically in one year, but then recovers steadily thereafter, although to a level still somewhat below the starting level, arguably would be quite different from the situation of an industry whose production drops continuously over an extended period. An end-point-to-end-point analysis might be quite similar in the two cases, whereas consideration of the year-to-year changes and trends might lead to entirely opposite conclusions."[258]

(xi) Allocation methodology

167. In *US – Wheat Gluten*, the Panel stressed the importance of sound allocation methodologies, but acknowledged that the *Agreement on Safeguards* does not provide for one particular methodology in this context:

> "We recognize the fundamental importance of assuring that data gathered in the course of a safeguards investigation is accurate and that any allocation of costs and revenues reflects, to the greatest extent possible, the realities of the domestic industry concerned. However, we note that the Agreement on Safeguards does not set out precise rules on the collection and analysis of data, nor does it require the use of any particular allocation methodology with respect to financial data gathered by the investigating authorities in the course of the investigation.
>
> We note that the USITC paid attention to the allocation methodologies used by all domestic producers and in the questionnaire requested firms that did not maintain separate records for wheat gluten to make allocations and explain the methodology used. We also note that the USITC conducted certain procedures, including internal analysis by its staff as well as an on-site verification by a USITC auditor, in order to verify the accuracy and the adequacy of the financial information provided. We believe that, in support of the USITC statement concerning the 'careful review' and the finding that the methodologies were 'appropriate', the USITC Report could have included a description of such procedures and a more detailed explanation as to how and why the USITC considered the allocations to be 'appropriate', in addition to a characterization of the redacted confidential information."[259]

(b) Relationship with Article 4.2(b)

168. With respect to the relationship with Article 4.2(b), see paragraphs 140 above and 212–213 below.

5. Article 4.2(b)

(a) General approach to the causation analysis

169. The Panel on *Korea – Dairy* set forth the basic approach for determining "causation":

> "In performing its causal link assessment, it is our view that the national authority needs to analyse and deter-

[256] Panel Report on *US – Lamb*, para. 7.141.
[257] Panel Report on *US – Lamb*, para. 7.177.
[258] Panel Report on *Argentina – Footwear (EC)*, para. 8.216.
[259] Panel Report on *US – Wheat Gluten*, paras. 8.63–8.64.

mine whether developments in the industry, considered by the national authority to demonstrate serious injury, have been caused by the increased imports. In its causation assessment, the national authority is obliged to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry. In addition, if the national authority has identified factors other than increased imports which have caused injury to the domestic industry, it shall ensure that any injury caused by such factors is not considered to have been caused by the increased imports.

To establish a causal link, Korea has to demonstrate that the injury to its domestic industry results from increased imports. In other words, Korea has to demonstrate that the imports of SMPP cause injury to the domestic industry producing milk powder and raw milk. In addition, having analysed the situation of the domestic industry, the Korean authority has the obligation not to attribute to the increased imports any injury caused by other factors."[260]

170. In *Argentina – Footwear (EC)*, the Panel set forth the following approach to the analysis of causation:

"Applying our standard of review, we will consider whether Argentina's causation analysis meets these requirements on the basis of (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition in the Argentine footwear market between imported and domestic footwear as analysed demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and (iii) whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports."[261]

171. Although the Appellate Body on *Argentina – Footwear (EC)* considered that the Panel should have exercised judicial economy as regards the causation-related claims, it saw no error in the Panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the *Agreement on Safeguards*:

"We are somewhat surprised that the Panel, having determined that there were no 'increased imports', and having determined that there was no 'serious injury', for some reason went on to make an assessment of causation. It would be difficult, indeed, to demonstrate a 'causal link' between 'increased imports' that did not occur and 'serious injury' that did not exist. Nevertheless, we see no error in the Panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the *Agreement on Safeguards*. Rather, we believe that Argentina has mischaracterized the Panel's interpretation and reasoning. Furthermore, we agree with the Panel's conclusions that 'the conditions of competition between the imports and the domestic product were not analysed or adequately explained (in particular price)'; and that 'other factors' identified by the CNCE in the investigation were not sufficiently evaluated, in particular, the tequila effect."[262]

172. The Panel on *US – Wheat Gluten* confirmed and repeated this general causation standard:

"We consider that an appropriate approach for a panel to take in assessing whether a Member has fulfilled the requirements of Article 4.2(a) and (b) SA with respect to causation consists of a consideration of: (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether an adequate, reasoned and reasonable explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition between the imported and domestic product as analysed demonstrate the existence of the causal link between the imports and any injury; and (iii) whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports."[263]

173. The Appellate Body on *US – Wheat Gluten* concluded that the contribution by increased imports must be sufficiently clear so as to establish the existence of "the causal link" required, but rejected the Panel's conclusion that the serious injury must be caused by the increased imports *alone* and that the increased imports had to be sufficient to cause "serious injury":

"In essence, the Panel has read Article 4.2(b) of the *Agreement on Safeguards* as establishing that increased imports must make a particular contribution to causing the serious injury sustained by the domestic industry. The level of the contribution the Panel requires is that increased imports, looked at '*alone*', '*in and of themselves*', or '*per se*', must be capable of causing injury that is 'serious'. It seems to us that the Panel arrived at this interpretation through the following steps of reasoning: first, under the first sentence of Article 4.2(b), there must be a 'causal link' between increased imports and serious injury; second, the non-'attribution' language of the last sentence of Article 4.2(b) means that the effects caused by increased imports must be *distinguished from* the effects caused by other factors; third, the effects caused by other factors must, therefore, be *excluded* totally from the determination of serious injury so as to ensure that these effects are not 'attributed' to the increased imports; fourth, the effects caused by

[260] Panel Report on *Korea – Dairy*, paras. 7.89–7.90.
[261] Panel Report on *Argentina – Footwear (EC)*, para. 8.229.
[262] (*footnote original*) Appellate Body Report on *Argentina – Footwear (EC)*, para. 145.
[263] Panel Report on *US – Wheat Gluten*, para. 8.91. See also Panel Report on *US – Lamb*, para. 7.232.

increased imports *alone*, excluding the effects caused by other factors, must, therefore, be capable of causing serious injury.

We begin our reasoning with the first sentence of Article 4.2(b). That sentence provides that a determination 'shall not be made unless [the] investigation demonstrates ... the existence of *the causal link* between increased imports ... and serious injury or threat thereof.' (emphasis added) Thus, the requirement for a determination, under Article 4.2(a), is that 'the causal link' exists. The word 'causal' means 'relating to a cause or causes', while the word 'cause', in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, 'brought about', 'produced' or 'induced' the existence of the second element. The word 'link' indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal 'connection' or 'nexus' between these two elements. Taking these words together, the term 'the causal link' denotes, in our view, a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury. Although that contribution must be sufficiently clear as to establish the existence of 'the causal link' required, the language in the first sentence of Article 4.2(b) does *not* suggest that increased imports be *the sole* cause of the serious injury, or that '*other* factors' causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2(b), as a whole, suggests that 'the causal link' between increased imports and serious injury may exist, *even though other factors are also contributing, 'at the same time', to the situation of the domestic industry*.

It is precisely because there may be several factors, besides increased imports, contributing simultaneously to the situation of the domestic industry that the last sentence of Article 4.2(b) states that competent authorities 'shall not ... attribute' to increased imports injury caused by other factors. The opening clause of that sentence indicates, to us, that this sentence provides rules that apply when 'increased imports' and certain 'other factors' are, together, 'causing injury' to the domestic industry 'at the same time'. The last clause of the sentence stipulates that, in that situation, the injury caused by other factors 'shall not be *attributed* to increased imports'. (emphasis added) Synonyms for the word 'attribute' include 'assign' or 'ascribe'. Under the last sentence of Article 4.2(b), we are concerned with the proper 'attribution', in this sense, of 'injury' caused to the domestic industry by 'factors other than increased imports'. Clearly, the process of attributing 'injury', envisaged by this sentence, can only be made following a separation of the 'injury' that must then be properly 'attributed'. What is important in this process is separating or distinguishing the *effects* caused by the different factors in bringing about the 'injury'.

Article 4.2(b) presupposes, therefore, as a first step in the competent authorities' examination of causation, that the injurious effects caused to the domestic industry by increased imports are *distinguished from* the injurious effects caused by other factors. The competent authorities can then, as a second step in their examination, attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all of these different factors, including increased imports. Through this two stage process, the competent authorities comply with Article 4.2(b) by ensuring that any injury to the domestic industry that was *actually* caused by factors other than increased imports is not 'attributed' to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, whether 'the causal link' exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the *Agreement on Safeguards*."[264]

174. The Appellate Body on *US – Wheat Gluten* further reviewed the relationship between Article 2.1 and Article 4.2 of the *Agreement on Safeguards* in order to support its view that the competent authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors, cause serious injury:

> "Article 2.1 reflects closely the 'basic principles'[265] in Article XIX:1(a) of the GATT 1994 and also sets forth 'the conditions for imposing a safeguard measure',[266] including those relating to causation. The rules on causation, which are elaborated further in the remainder of the *Agreement on Safeguards*, therefore, find their roots in Article 2.1. According to that provision, a safeguard measure may be applied if a 'product is being imported ... *in such increased quantities* ... *and under such conditions as to cause* ...' serious injury. Thus, under Article 2.1, the causation analysis embraces two elements: the first relating to increased 'imports' specifically and the second to the 'conditions' under which imports are occurring.
>
> Each of these two elements is, in our view, elaborated further in Article 4.2(a). While Article 2.1 requires account to be taken of the 'increased quantities' of imports, both in 'absolute' terms and 'relative to domestic production', Article 4.2(a) states, correspondingly, that 'the rate and amount of the increase in imports of the product concerned in absolute and relative terms, [and] the share of the domestic market taken by increased imports' are relevant.

[264] Appellate Body Report on *US – Wheat Gluten*, paras. 66–69.
[265] (*footnote original*) Preamble to the *Agreement on Safeguards*.
[266] (*footnote original*) Appellate Body Report, *Argentina – Footwear Safeguards*, para. 112.

As for the second element under Article 2.1, we see it as a complement to the first. While the first element refers to increased imports specifically, the second relates more generally to the 'conditions' in the marketplace for the product concerned that may influence the domestic industry. Thus, the phrase 'under such conditions' refers generally to the prevailing 'conditions', in the marketplace for the product concerned, when the increase in imports occurs. Interpreted in this way, the phrase 'under such conditions' is a shorthand reference to the remaining factors listed in Article 4.2(a), which relate to the overall state of the domestic industry and the domestic market, as well as to other factors 'having a bearing on the situation of [the] industry'. The phrase 'under such conditions', therefore, supports the view that, under Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards*, the competent authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors, cause serious injury.[267]"[268]

175. In *US – Lamb*, the Appellate Body concluded that Article 4.2(b) requires a "demonstration" of the "existence" of a causal link, and it requires that this demonstration must be based on "objective data".[269]

176. In *US – Steel Safeguards*, the Panel, in a finding not reviewed by the Appellate Body,[270] discussed the standard for the assessment of a "causal link":

"[I]f a number of factors have caused serious injury, a causal link may be demonstrated if the increased imports have, in some way, contributed to 'bringing about', 'producing' or 'inducing' the serious injury.

It is clear to the Panel that, in order to meet the causation requirements in Article 4.2(b), it is not necessary for the competent authority to show that increased imports *alone* must be capable of causing serious injury.[271] Rather, if a number of factors have caused serious injury, a causal link may be demonstrated if the increased imports have, in some way, contributed to 'bringing about', 'producing' or 'inducing' the serious injury. In this regard, the Appellate Body in *US – Wheat Gluten* concluded that the contribution must be sufficiently clear as to establish the existence of 'the causal link' required[272] but rejected the panel's conclusion that the serious injury must be caused by the increased imports alone and that the increased imports had to be sufficient to cause 'serious' injury.[273]

. . . . . .

In our view, what is important for this Panel is whether the test *applied* by the USITC for each of the safeguard measures at issue meets the standard or threshold prescribed by the requirement that there be a 'genuine and substantial' relationship of cause and effect between the increased imports and the serious injury. We will discuss this further in the measure-by-measure analysis, which we undertake below.

Finally, the Panel recalls that serious injury within the meaning of Article 4.2(a) of the *Agreement on Safeguards* is to be determined with reference to the 'overall impairment in the position of the domestic industry'. Similarly, as further developed below, we believe that pursuant to Articles 2 and 4 of the Agreement on Safeguards, a competent authority must determine whether 'overall', a genuine and substantial relationship of cause and effect exists between increased imports and serious injury suffered by the relevant domestic producers."[274]

177. In *US – Steel Safeguards*, the Appellate Body decided to exercise judicial economy over the Panel's conclusion with respect to the causation requirements of the US Steel Safeguard measures. Yet since the United States was asking for further guidance on how to comply with the causation determination, the Appellate Body summed up what it considered to be relevant jurisprudence:

"Guidance may be found in our previous rulings. In *US – Line Pipe*, for example, we interpreted Article 4.2(b) of the *Agreement on Safeguards* as establishing:

> [T]wo distinct legal requirements for competent authorities in the application of a safeguard measure. First, there must be a *demonstration* of the *'existence* of the causal link between increased imports of the product concerned and serious injury or threat thereof'. Second, the injury caused by factors other than the increased imports must not be attributed to increased imports.[275] (emphasis added)

Moreover, in *US – Lamb*, when examining the requirement of Article 4.2(b) that the determination as to increased imports must be 'on the basis of objective evidence', we explained that 'objective evidence' means 'objective data'.[276] Thus, Article 4.2(b) requires a 'demonstration' of the 'existence' of a causal link, and it requires that this demonstration must be based on 'objective data'. Further, this 'demonstration' must be included in the report of the investigation, which should 'set[ ] forth the findings and reasoned conclusions, as required by Articles 3.1 and 4.2(c)' of the *Agreement on Safeguards*.[277]

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[267] (*footnote original*) We do not, of course, exclude the possibility that "serious injury" could be caused by the effects of increased imports *alone*.
[268] Appellate Body Report, on *US – Wheat Gluten*, paras. 76–79.
[269] Appellate Body Report, *US – Lamb*, para. 130.
[270] The Appellate Body exercised judicial economy: see Appellate Body Report on *US – Steel Safeguards*, para. 483.
[271] (*footnote original*) Appellate Body Report, *US – Wheat Gluten*, para. 70.
[272] (*footnote original*) Appellate Body Report, *US – Wheat Gluten*, paras. 66 and 69.
[273] (*footnote original*) Appellate Body Report, *US – Wheat Gluten*, paras. 61 ff and 79.
[274] Panel Report on *US – Steel Safeguards*, paras. 10.290–293.
[275] (*footnote original*) Appellate Body Report, *US – Line Pipe*, para. 208.
[276] (*footnote original*) Appellate Body Report, *US – Lamb*, para. 130.
[277] (*footnote original*) Appellate Body Report, *US – Line Pipe*, para. 236.

In *US – Line Pipe*, we also found that, in the context of 'non-attribution', competent authorities: (i) 'must "establish explicitly" that imports from sources covered by the measure "satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*"';[278] and (ii) must provide a 'reasoned and adequate explanation of how the facts support their determination'.[279]

In *US – Wheat Gluten*, we found that 'the term "causal link" denotes . . . a relationship of cause and effect'[280] between 'increased imports' and 'serious injury'. The former – the purported cause – contributes to 'bringing about', 'producing' or 'inducing' the latter[281] – the purported effect. The 'link' must connect, in a 'genuine and substantial'[282] causal relationship, 'increased imports', and 'serious injury'.

In sum, the *Agreement on Safeguards* – in Article 2.1, as elaborated by Article 4.2, and in combination with Article 3.1 – requires that competent authorities demonstrate the *existence* of a 'causal link' between 'increased imports' and 'serious injury' (or the threat thereof) on the basis of 'objective evidence'. In addition, the competent authorities must provide a reasoned and adequate explanation of how facts (that is, the aforementioned 'objective evidence') support their determination. If these requirements are not met, the right to apply a safeguard measure does not arise.

In *EC – Tube or Pipe Fittings*, we found that the non-attribution language of Article 3.5 of the *Anti-Dumping Agreement* does not require, *in each and every case*, an examination of the *collective* effects of other causal factors, in addition to an examination of the *individual* effects of those causal factors.[283] We explained there that an assessment of the collective effects of other causal factors 'is *not always* necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors.'[284] We acknowledged, however, that 'there may be cases where, because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports'.[285] We explained further that 'an investigating authority is not required to examine the collective impact of other causal factors, *provided that*, under the specific factual circumstances of the case, it fulfils its obligation not to attribute to dumped imports the injuries caused by other causal factors'.[286]

Lastly, it may be useful to refer to our finding in *EC – Tube or Pipe Fittings* in respect of the relevance of factors that 'had effectively been found not to exist'.[287] In that case, the competent authority had found, contrary to the submissions of the exporters, that the difference in costs of production between the imported product and the domestic product was virtually non-existent and thus did not constitute a 'factor other than dumped imports' causing injury to the domestic industry under Article 3.5 of the *Anti-Dumping Agreement*. Consequently, we found that there was no reason for the investigating authority to undertake the analysis of whether the alleged 'other factor' had any *effect* on the domestic industry under Article 3.5[288] because the alleged 'other factor' 'had effectively been found *not* to exist'.[289] In other words, we did not rule that minimal (or not significant) factors need not be considered by the competent authorities in conducting non-attribution analyses. Rather, we ruled that only factors that have been found to exist need be taken into account in the non-attribution analysis."[290]

(i) Coincidence of trends

178. In *Argentina – Footwear (EC)*, both the Panel and Appellate Body considered that the "*relationship* between the *movements* in imports (volume and market share) and the *movements* in injury factors" must be central to a causation analysis and determination. The Panel on *Argentina – Footwear (EC)*, in a finding upheld by the Appellate Body, recalled that Article 4.2(a) requires national authorities to analyse trends in both injury factors and imports, and related this finding to the context of causation. Furthermore, with respect to a "coincidence" between an increase in imports and a decline in the relevant injury factors, the Panel noted that this should 'normally' occur if causation is present:

> "In making our assessment of the causation analysis and finding, we note in the first instance that Article 4.2(a) requires the authority to consider the 'rate' (i.e., direction and speed) and 'amount' of the increase in imports and the share of the market taken by imports, as well as the 'changes' in the injury factors (sales, production, produc-

[278] (*footnote original*) We first made this assertion in *US – Wheat Gluten*, in the context of a discussion on parallelism. (Appellate Body Report, *US – Wheat Gluten*, para. 98.) In *US – Line Pipe*, we explained that the same reasoning would apply to Article 4.2(b), last sentence. (Appellate Body Report, *US – Line Pipe*, para. 216.)

[279] (*footnote original*) We made this assertion originally in *US – Lamb* in the context of a discussion of a claim under Article 4.2(a) of the *Agreement on Safeguards*. (Appellate Body Report, *US – Lamb*, para. 103.) In *US – Line Pipe*, we explained that the same reasoning would apply to Article 4.2(b), last sentence. (Appellate Body Report, *US – Line Pipe*, para. 216.)

[280] (*footnote original*) Appellate Body Report, *US – Wheat Gluten*, para. 67.

[281] (*footnote original*) *Ibid.*

[282] (*footnote original*) *Ibid.*, para. 69.

[283] (*footnote original*) Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 190.

[284] (*footnote original*) *Ibid.*, para. 191. (emphasis added)

[285] (*footnote original*) Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 192.

[286] (*footnote original*) *Ibid.* (emphasis added)

[287] (*footnote original*) Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 178.

[288] (*footnote original*) *Ibid.*, para. 177.

[289] (*footnote original*) *Ibid.*, para. 178. (original emphasis)

[290] Appellate Body Report on *US – Steel Safeguards*, paras. 485–491.

tivity, capacity utilisation, profits and losses, and employment) in reaching a conclusion as to injury and causation. As noted above we consider that this language means that the *trends* – in both the injury factors and the imports – matter as much as their absolute levels. In the particular context of a causation analysis, we also believe that this provision means that it is the *relationship* between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination.

In practical terms, we believe therefore that this provision means that if causation is present, an increase in imports normally should coincide with a decline in the relevant injury factors. While such a coincidence by itself cannot *prove* causation (because, *inter alia*, Article 3 requires an explanation – i.e., 'findings and reasoned conclusions'), its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present."[291]

179. As noted above, the Appellate Body on *Argentina – Footwear (EC)* agreed with the Panel and observed:

"We see no reason to disagree with the Panel's interpretation that the words 'rate and amount' and 'changes' in Article 4.2(a) mean that 'the *trends* – in both the injury factors and the imports – matter as much as their absolute levels.' We also agree with the Panel that, in an analysis of causation, 'it is the *relationship* between the *movements* in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination.' . . . Furthermore, with respect to a 'coincidence' between an increase in imports and a decline in the relevant injury factors, we note that the Panel simply said that this should 'normally' occur if causation is present."[292]

180. Besides the finding that coincidence in movements in imports and the movements in injury factors would "ordinarily" tend to support a finding of causation, the Panel on *US – Wheat Gluten* concurred with the Appellate Body on *Argentina – Footwear (EC)*, and ruled that the "absence of such coincidence would ordinarily tend to detract from such a finding and would require a compelling explanation as to why a causal link is still present".[293] Particularly, the Panel on *US – Wheat Gluten* was of the view that "*overall coincidence*" is what matters and not whether coincidence or lack thereof can be shown in relation to a few select factors which the competent authority has considered:

"[I]n light of the *overall* coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation, the existence of slight absences of coincidence in the movement of *individual* injury factors in relation to imports would not preclude a finding by the USITC of a causal link between increased imports and serious injury."[294]

181. After quoting the Panel and the Appellate Reports on *Argentina – Footwear (EC)* (see paragraph 178 above), the Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, pronounced on the term "coincidence":

"Firstly, that the term 'coincidence' refers to the relationship between the movements in imports and the movements in injury factors. The panel and Appellate Body made it clear that, in considering movements in imports, it is necessary to look at movements in import volumes and import market shares.[295] In our view, the word 'coincidence' in the current context refers to the *temporal* relationship between the movements in imports and the movements in injury factors. In other words, upward movements in imports should normally occur at the same time as downward movements in injury factors in order for coincidence to exist. We note that, below, we qualify these comments to take account of cases where a lag exists between the influx of imports and the manifestation of the effects of injury suffered by the domestic industry.

Secondly, the above indicates that the Appellate Body considers that 'coincidence' between movements or trends in imports and movements or trends in the relevant injury factors plays a 'central' role in determining whether or not a causal link exists. Indeed, both the panel and the Appellate Body in *Argentina – Footwear (EC)* stated that the relationship between the movements in imports and the movements in injury factors *must* be central to a causation analysis. We also note that the same panel, supported by the Appellate Body,[296] went on to state that '[I]n practical terms, we believe therefore that [Article 4.2(a)] means that if causation is present, an increase in imports *normally* should coincide with a decline in the relevant injury factors.'[297]"[298]

182. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, discussed the relationship between "a coincidence analysis" and "a causation analysis":

"The Panel is of the view that since coincidence is 'central' to a causation analysis, a competent authority should 'normally' undertake a coincidence analysis when determining the existence of a causal link. We believe that in situations where the effects of injurious factors

[291] Panel Report on *Argentina – Footwear (EC)*, paras. 8.237–8.238.
[292] Appellate Body Report on *Argentina – Footwear (EC)*, para. 144.
[293] Panel Report on *US – Wheat Gluten*, para. 8.95.
[294] Panel Report on *US – Wheat Gluten*, para. 8.101.
[295] (*footnote original*) Significantly, no mention was made by the panel and the Appellate Body in *Argentina – Footwear (EC)* to movements in import prices. We will discuss the relevance of this in the succeeding section of our findings dealing with "conditions of competition".
[296] (*footnote original*) Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.
[297] (*footnote original*) Panel Report, *Argentina – Footwear (EC)*, para. 8.238.
[298] Panel Report on *US – Steel Safeguards*, paras. 10.299–10.300.

other than increased imports have not been attributed to increased imports,[299] overall clear coincidence between movements in imports and movements in injury factors will provide a competent authority with an adequate basis upon which to conclude that a genuine and substantial relationship of cause and effect between increased imports and serious injury exists.

As mentioned, the Panel is also of the view that *overall* coincidence is what matters and not whether coincidence or lack thereof can be shown in relation to a few select factors which the competent authority has considered. We refer in this regard to the panel's decision in *US – Wheat Gluten*, where it stated that:

> '[I]n light of the *overall* coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation, the existence of slight absences of coincidence in the movement of *individual* injury factors in relation to imports would not preclude a finding by the USITC of a causal link between increased imports and serious injury.'[300]"[301]

183. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, further addressed how a causal link must be established for the purposes of Article 4.2(b) in cases where there is an *absence of coincidence*:

> "By absence of coincidence we mean situations where coincidence does not exist or an analysis of coincidence has not been undertaken. In this regard, we agree with statements made by the panel and Appellate Body in *Argentina – Footwear (EC)* and the panel in *US – Wheat Gluten*, that coincidence in movements in imports and the movements in injury factors would ordinarily tend to support a finding of causation, while *the absence of such coincidence would ordinarily tend to detract from such a finding and would require a compelling explanation as to why a causal link is still present.*[302]
>
> We also recall that the panel in *Argentina – Footwear (EC)*, supported by the Appellate Body,[303] as well as the panel in *US – Wheat Gluten*,[304] noted that, in situations where a causal link exists, 'an increase in imports *normally* should coincide with a decline in the relevant injury factors' and 'coincidence . . . would *ordinarily* tend to support a finding of causation.' In our view, even when coincidence does not exist or an analysis of coincidence has not been undertaken, a competent authority may still be able to demonstrate the existence of a causal link if it can offer a compelling explanation that such causal link exists.
>
> The Panel emphasizes that the Appellate Body in *Argentina – Footwear (EC)* upheld the panel's statement that 'coincidence by itself *cannot prove* causation' (emphasis added).[305] The Panel considers that there are situations where a coincidence analysis may not suffice to prove causation or where the facts may not support a clear finding of coincidence and that, therefore, such situations may call for further demonstration of the existence of a causal link. Indeed, there may be situations where a competent authority, as part of its overall demonstration of the existence of a causal link, undertakes different analyses, with a view to proving that a genuine and substantial relationship of cause and effect exists between increased imports and serious injury."[306]

184. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, further elaborated four scenarios with regard to a coincidence analysis and how the competent authority should explain in order to satisfy the causal requirement under Article 4.2 of the *Agreement on Safeguards*:

> "In our view, there may be cases where: (i) a coincidence analysis has been undertaken and shows clear coincidence between movements in imports and movements in injury factors; (ii) as part of its overall demonstration of causal link, the competent authority has undertaken, *inter alia*, a coincidence analysis which, in and of itself, does not fully demonstrate the existence of a causal link and further analysis is undertaken; (iii) a coincidence analysis has been undertaken (with or without any other analysis) but it does not demonstrate any coincidence; and, finally, (iv) a coincidence analysis has not been undertaken but other analytical tools have been used with a view to proving a causal link.[307]
>
> We are of the view that in all cases, the competent authority must provide a reasoned and adequate explanation of its causal link findings. In the first case (i), assuming fulfilment of the non-attribution requirement, when clear coincidence exists, no further analysis is required of the competent authority and the Panel will confine its review to the coincidence analysis. In the second case (ii), the Panel will examine both the coincidence analysis and the other analysis undertaken by the competent authority with a view to assessing whether the competent authority has provided a reasoned and adequate explanation that, overall, a genuine and substantial relationship of cause and effects exists between increased imports and serious injury.

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[299] (*footnote original*) That is, in compliance with the non-attribution requirements as discussed in paras. 10.325–10.334 *infra*.

[300] (*footnote original*) Panel Report, *US – Wheat Gluten*, para. 8.101.

[301] Panel Report on *US – Steel Safeguards*, paras. 10.301–10.302.

[302] (*footnote original*) Panel Report, *US – Wheat Gluten*, para. 8.95; Panel Report, *Argentina – Footwear (EC)*, paras. 8.237–8.238; Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[303] (*footnote original*) Panel Report, *Argentina – Footwear (EC)*, para. 8.238; Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[304] (*footnote original*) Panel Report, *US – Wheat Gluten*, para. 8.95.

[305] (*footnote original*) Panel Report, *Argentina – Footwear (EC)*, paras. 8.237–8.238; Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[306] Panel Report on *US – Steel Safeguards*, para. 10.303–306.

[307] (*footnote original*) These are situations that the Panel has encountered in this case. This is not to say that other situations may not exist.

> In cases (iii) and (iv), the competent authority should explain the absence of coincidence or why a coincidence analysis was not undertaken and provide, in particular, a compelling explanation as to why a causal link exists notwithstanding the absence of coincidence. Ultimately, it is for the competent authority to decide upon the analytical tool it considers most appropriate to perform this compelling analysis in demonstrating the existence of a causal link."[308]

185. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, examined whether or not coincidence can be considered to exist in cases where there is a temporal lag between the influx of imports and the manifestation of the effects of such an influx on the domestic industry:

> "More particularly, the United States has argued that a lag or delay in the manifestation of certain injury factors may be attributed to the delayed effect of increased imports on certain factors, such as employment and bankruptcy.[309] A number of the complainants argue, on the other hand, that the nature of the markets involved in the present case is such that such a lag effect could not exist. They submit that the effect of the increased imports should be felt immediately and that a lag of two years, which they submit existed in the present case, is too long.[310]
>
> The Panel considers that the argument by the United States of a lag between the increased imports and the manifestation of the effects of such increased imports on the domestic industry may have merit in certain cases. More particularly, in our view, there may be instances in which injury may be suffered by an industry at the same point in time as the influx of increased imports. However, the injury that is caused at that point in time may not become apparent until some later point in time. In other words, there may be a lag between the influx of imports and the manifestation of the injurious effects on the domestic industry of such an influx.
>
> We find support for this view from the panel's decision in *Egypt – Steel Rebar*. There, the panel rejected Turkey's contention that there must be a strict temporal connection between the dumped imports and any injury being suffered by the industry,[311] noting that this argument:
>
> > '[R]est[ed] on the quite artificial assumption that the market instantly absorbs, and reacts to, imports the moment they enter the territory of the importing company. Such an assumption implicitly rests on the existence of so-called 'perfect information' in the market (i.e., that all actors in the market are instantly aware of all market signals.)'[312]
>
> Nevertheless, we note that, in that case, the lag between the effects of imports on a market that the panel suggested was acceptable was, at most, a year in duration.
>
> The Panel considers that there are limits in temporal terms on the length of lags between increased imports and the manifestation of the effects that are acceptable for the purposes of a coincidence analysis under Article 4.2(b) of the Agreement on Safeguards. The limits that apply would, undoubtedly, vary from industry to industry and factor to factor. Generally speaking, the more rigid the market structure associated with a particular industry, the more likely a lag in effects would exist, at least in relation to some factors. Conversely, the more competitive the market structure, the less tenable it is that lagged effects could be expected. In addition, the Panel considers that while lags may be expected in relation to some factors (for example, employment), lags in the manifestation of effects are less likely to exist in relation to other injury factors such as production, inventories and capacity utilization, which, ordinarily, would react relatively quickly to changes taking place in the market, such as an influx of imports if increased imports are causing serious injury. If the competent authority does rely upon a lag as between the increased imports and the injury factors, we consider that such a lag must be fully explained by the competent authority on the basis of objective data."[313]

(ii) Conditions of competition between imported and domestic products[314]

186. In examining whether in the case at issue conditions of competition had been analysed, the Panel on *Argentina – Footwear (EC)* observed that a juxtaposition of statistics on imports and injury factors did not constitute an analysis of the conditions of competition between the imports and the domestic product;[315] that, in the absence of price comparisons between imported and domestic products, there was no factual basis for the statement that imports were cheaper than domestic products;[316] and that there was no evidence that lower-priced imports had any injurious effects on the domestic industry.[317] In the latter regard, the Panel stated:

> "[T]he report on the investigation contains no evidence to indicate that the effect of the prices of imported footwear on domestic producers' prices, production, etc., was specifically analysed, in spite of the fact that the causation finding was fundamentally based on price

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[308] Panel Report on *US – Steel Safeguards*, para. 10.303–308.
[309] (*footnote original*) United States' first written submission, paras. 446, 448 and 449; United States' second written submission, paras. 119–122.
[310] (*footnote original*) Japan's written reply to Panel question No. 86 at the first substantive meeting; Korea's second written submission, para. 141; Brazil's written reply to Panel question No. 86 at the first substantive meeting.
[311] (*footnote original*) Panel Report, *Egypt – Steel Rebar*, paras. 7.127–7.132.
[312] (*footnote original*) Panel Report, *Egypt – Steel Rebar*, para. 7.129.
[313] Panel Report on *US – Steel Safeguards*, para. 10.309–312.
[314] See also paragraphs 49–57 above.
[315] Panel Report on *Argentina – Footwear (EC)*, para. 8.254.
[316] Panel Report on *Argentina – Footwear (EC)*, para. 8.259.
[317] Panel Report on *Argentina – Footwear (EC)*, para. 8.261.

considerations. Rather, aggregate trends in broad statistical indicators were compared and conclusory statements made (e.g., that 'the decline in output was replaced by imports, essentially cheap imports'). This is not an analysis of the conditions of competition that is called for by Articles 2 and 4.2. . . ."[318]

187. In a footnote to this paragraph, the Panel on *Argentina – Footwear (EC)* addressed the relationship between the determination of like or directly competitive products on the one hand and the parameters of causation analysis on the other:

"We note in this regard that there would seem to be a relationship between the depth of detail and degree of specificity required in a causation analysis and the breadth and heterogeneity of the like or directly competitive product definition. Where as here a very broad product definition is used, within which there is considerable heterogeneity, the analysis of the conditions of competition must go considerably beyond mere statistical comparisons for imports and the industry as a whole, as given their breadth, the statistics for the industry and the imports as a whole will only show averages, and therefore will not be able to provide sufficiently specific information on the locus of competition in the market. With regard to the present case, we do not disagree that a quite detailed investigation of the industry was conducted, in which a great deal of statistical and other information was amassed. What in our view was missing was a detailed analysis, on the basis of objective evidence, of the imports and of how in concrete terms those imports caused the injury found to exist in 1995. In this regard, we note that Act 338 contains a section entitled 'Conditions of competition between the domestic products and imports'. This section does not contain such a detailed analysis, however, but rather summarizes questionnaire responses from domestic producers about their strategies for 'fending off foreign competition', and from importers and domestic producers concerning 'the sales mix' of domestic products and imports, including their overall views about quality and other issues concerning domestic and imported footwear, with the importers stressing the benefits of imports. This summary of subjective statements by questionnaire respondents does not constitute an analysis of the 'conditions of competition' by the authority on the basis of objective evidence."[319]

188. With respect to the standards set forth in the preceding excerpt, the Panel on *Argentina – Footwear (EC)* concluded that "the conditions of competition between the imports and the domestic product were not analysed or adequately explained (in particular price)".[320] The Appellate Body affirmed this conclusion.[321]

189. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, was of the view that while coincidence plays a central role in determining whether or not a causal link exists, other analytical tools may also come into play, in particular with reference to the conditions of competition as between imports and domestic products:

"As mentioned above, there may be cases, for instance, where a competent authority does not undertake a coincidence analysis or does so, but the facts do not support a finding of causal link on the basis of such an analysis. In such situations, reference could be made to the conditions of competition as between imports and domestic products with a view to providing a compelling explanation, in the absence of coincidence, as to why a causal link nevertheless exists. Indeed, in our view, consideration of the conditions of competition of the market in which the relevant imported and domestic products are being sold may generally prove insightful in respect of the issue of the causal relationship between increased imports and serious injury.

There may also be cases where a competent authority considers that it is necessary to *support* its coincidence analysis with another analysis because, for example, coincidence cannot be established with a sufficient degree of certainty. In such situations, the competent authority may rely upon analysis of the conditions of competition to reinforce its causal link demonstration. In such situations, a panel will review the conditions of competition analysis performed by the competent authority with a view to assessing whether it provided a reasoned and adequate explanation that, overall, a genuine and substantial relationship of cause and effects exists between increased imports and serious injury."[322]

190. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, further concluded that Articles 2.1 and 4.2(a) and (b) confirm the relevance of conditions of competition when determining causation:

"We believe that Articles 2.1 and 4.2(a) and (b) confirm the relevance of conditions of competition when determining causation. Article 2.1 calls for a determination that increased imports are occurring '*under such conditions* as to cause or threaten to cause serious injury.' The Appellate Body on *US – Wheat Gluten* interpreted the meaning of 'under such conditions' in Article 2.1 as follows:

'[T]he phrase "under such conditions" refers generally to the prevailing "conditions", in the marketplace for the product concerned, when the increase in imports occurs. Interpreted in this way, the phrase

[318] Panel Report on *Argentina – Footwear (EC)*, para. 8.261.
[319] Panel Report on *Argentina – Footwear (EC)*, para. 8.261, footnote 557.
[320] Panel Report on *Argentina – Footwear (EC)*, para. 8.278.
[321] Appellate Body Report on *Argentina – Footwear (EC)*, para. 145.
[322] Panel Report on *US – Steel Safeguards*, para. 10.314–10.315.

> "under such conditions" is a shorthand reference to the remaining factors listed in Article 4.2(a), which relate to the overall state of the domestic industry and the domestic market, as well as to other factors "having a bearing on the situation of [the] industry". The phrase "under such conditions", therefore, supports the view that, under Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards*, the competent authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors, cause serious injury.'[323]

We also note that the panels in *Argentina – Footwear (EC)* and *US – Wheat Gluten* considered the conditions of competition in the market between imported and domestic footwear in reviewing whether a causal link existed between increased imports and injury.[324] The Appellate Body on *Argentina – Footwear (EC)* explicitly supported the panel's analysis, stating that: '[W]e agree with the Panel's conclusions that "the conditions of competition between the imports and the domestic product were not analysed or adequately explained (in particular price)".'[325]"[326]

191. With respect to the factors that should be considered in a conditions of competition analysis for the purposes of Article 4.2(b), the Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, pointed out:

> "The factors referred to in Article 4.2(a) are relevant in defining the conditions of competition for the purposes of the causation analysis under Article 4.2(b), in the Panel's view, volume of imports, imports' market share, changes in the level of sales and profit and losses are of particular interest. In addition, we note that the panel in *Argentina – Footwear (EC)* referred to physical characteristics, quality, service, delivery, technological developments, consumer tastes, and other supply and demand factors in the market as factors that could be taken into consideration in assessing the conditions of competition in a market for the purposes of a causation analysis.[327]"[328]

(iii) Factors other than increased imports (non-attribution requirement)

192. The Panel on *Argentina – Footwear (EC)* emphasized the importance of a sufficient consideration of "other factors" in order to satisfy the requirements of Article 4.2(b):

> "We recall that Article 4.2(b) requires that '[w]hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.' Thus, as part of the causation analysis, a sufficient consideration of 'other factors' operating in the market at the same time must be conducted, so that any injury caused by such other factors can be identified and properly attributed."[329]

193. The Panel on *Argentina – Footwear (EC)* found that, in the investigation at issue, factors other than imports had not been sufficiently evaluated, in particular the effect of a domestic recession.[330] The Appellate Body noted in general that it saw "no error in the Panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the *Agreement on Safeguards*" and agreed with the Panel's conclusion that the impact of the domestic recession had not been sufficiently evaluated.[331]

194. The Panel on *US – Wheat Gluten* interpreted the relationship between increased imports and "other factors" within the context of the causation analysis pursuant to Article 4.2(b) to mean that increased imports "in and of themselves" are causing serious injury. While not demanding that increased imports be the only factor present in a situation of serious injury, the Panel held that the increased imports must be "sufficient in and of themselves, to cause injury which achieves the threshold of 'serious' as defined in the Agreement".[332] The Panel then further clarified its approach to Article 4.2(b) by stating that "where a number of factors, one of which is increased imports, are sufficient *collectively* to cause a 'significant overall impairment of the position of the domestic industry', but increased imports alone are not causing injury that achieves the threshold of 'serious' within the meaning of Article 4.1(a) of the Agreement,[333] the conditions for imposing a safeguard measure are not satisfied."[334] Upon appeal, the Appellate Body reversed the interpretation of Article 4.2(b) by the Panel on *US – Wheat Gluten* that increased imports "alone", "in and of themselves", or "*per se*" must be capable of causing injury that is "serious".[335] According to the Appellate Body:

> "[T]he Panel arrived at this interpretation through the following steps of reasoning: first, under the first sentence of Article 4.2(b), there must be a 'causal link' between increased imports and serious injury; second,

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[323] (*footnote original*) Appellate Body Report, *US – Wheat Gluten*, para. 78.
[324] (*footnote original*) Panel Report, *Argentina – Footwear (EC)*, para. 8.250; Panel Report, *US – Wheat Gluten*, para. 8.108.
[325] (*footnote original*) Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.
[326] Panel Report on *US – Steel Safeguards*, para. 10.316–10.317.
[327] (*footnote original*) Panel Report, *Argentina – Footwear (EC)*, para. 8.251.
[328] Panel Report on *US – Steel Safeguards*, para. 10.318–10.319.
[329] Panel Report on *Argentina – Footwear (EC)*, para. 8.267.
[330] Panel Report on *Argentina – Footwear (EC)*, paras. 8.269 and 8.278.
[331] Appellate Body Report on *Argentina – Footwear (EC)*, para. 145.
[332] Panel Report on *US – Wheat Gluten*, para. 8.138.
[333] (*footnote original*) Article 4.1(a) . . . states: "'serious injury' shall be understood to mean a significant overall impairment in the position of a domestic industry."
[334] Panel Report on *US – Wheat Gluten*, para. 8.139.
[335] Appellate Body on *US – Wheat Gluten*, para. 79.

> the non-'attribution' language of the last sentence of Article 4.2(b) means that the effects caused by increased imports must be distinguished from the effects caused by other factors; third, the effects caused by other factors must, therefore, be excluded totally from the determination of serious injury so as to ensure that these effects are not 'attributed' to the increased imports; fourth, the effects caused by increased imports alone, excluding the effects caused by other factors, must, therefore, be capable of causing serious injury."[336]

195. The Appellate Body on *US – Wheat Gluten* first considered that the requirement of a "causal link" under Article 4.2(b) suggests a "clear contribution" and that, furthermore, increased imports need not be the sole cause of "serious injury":

> "The word 'causal' means 'relating to a cause or causes', while the word 'cause', in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, 'brought about', 'produced' or 'induced' the existence of the second element.[337] The word 'link' indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal 'connection'[338] or 'nexus' between these two elements. Taking these words together, the term 'the causal link' denotes, in our view, a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury. Although that contribution must be sufficiently clear as to establish the existence of 'the causal link' required, the language in the first sentence of Article 4.2(b) does *not* suggest that increased imports be *the sole* cause of the serious injury, or that '*other* factors' causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2(b), as a whole, suggests that 'the causal link' between increased imports and serious injury may exist, *even though other factors are also contributing, 'at the same time', to the situation of the domestic industry*."[339]

196. With respect to its finding that increased imports need not be the sole cause of the serious injury, the Appellate Body on *US – Wheat Gluten* referred, as support, to the "non-attribution" requirement in the last sentence of Article 4.2(b):

> "It is precisely because there may be several factors, besides increased imports, contributing simultaneously to the situation of the domestic industry that the last sentence of Article 4.2(b) states that competent authorities 'shall not . . . attribute' to increased imports injury caused by other factors. The opening clause of that sentence indicates, to us, that this sentence provides rules that apply when 'increased imports' and certain 'other factors' are, together, 'causing injury' to the domestic industry 'at the same time'. The last clause of the sentence stipulates that, in that situation, the injury caused by other factors 'shall not be attributed to increased imports'. . . . Synonyms for the word 'attribute' include 'assign' or 'ascribe'. Under the last sentence of Article 4.2(b), we are concerned with the proper 'attribution', in this sense, of 'injury' caused to the domestic industry by 'factors other than increased imports'. Clearly, the process of attributing 'injury', envisaged by this sentence, can only be made following a separation of the 'injury' that must then be properly 'attributed'. What is important in this process is separating or distinguishing the effects caused by the different factors in bringing about the 'injury'."[340]

197. The Appellate Body on *US – Wheat Gluten* subsequently set out a three-stage process under Article 4.2(b):

> "Article 4.2(b) presupposes, therefore, as a first step in the competent authorities' examination of causation, that the injurious effects caused to the domestic industry by increased imports are *distinguished from* the injurious effects caused by other factors. The competent authorities can then, as a second step in their examination, attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all of these different factors, including increased imports. Through this two stage process, the competent authorities comply with Article 4.2(b) by ensuring that any injury to the domestic industry that was *actually* caused by factors other than increased imports is not 'attributed' to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, whether 'the causal link' exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the *Agreement on Safeguards*.
>
> The need to ensure a proper attribution of 'injury' under Article 4.2(b) indicates that competent authorities must take account, in their determination, of the effects of increased imports *as distinguished from* the effects of other factors. However, the need to distinguish between the effects caused by increased imports and the effects caused by other factors does *not* necessarily imply, as the Panel said, that increased imports *on their own* must be capable of causing serious injury, nor that injury caused by other factors must be *excluded* from the determination of serious injury."[341]

198. The Appellate Body reiterated its above-quoted approach to the causation analysis under Article 4.2(b) in *US – Lamb*:

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[336] Appellate Body Report on *US – Wheat Gluten*, para. 66.
[337] (*footnote original*) The New Shorter Oxford English Dictionary, supra, footnote 43, Vol. I, pp. 355 and 356.
[338] (*footnote original*) Ibid., p. 1598.
[339] Appellate Body Report on *US – Wheat Gluten*, para. 67.
[340] Appellate Body Report on *US – Wheat Gluten*, para. 68.
[341] Appellate Body Report on *US – Wheat Gluten*, paras. 69–70.

> "As we held in *United States – Wheat Gluten Safeguard*, the *Agreement on Safeguards* does not require that increased imports be 'sufficient' to cause, or threaten to cause, serious injury. Nor does that Agreement require that increased imports 'alone' be capable of causing, or threatening to cause, serious injury."[342]

199. Also in *US – Lamb*, the Appellate Body again stressed the importance of the separation of injurious effects caused by increased imports on the one hand and other factors on the other hand:

> "Article 4.2(b) states expressly that injury caused to the domestic industry by factors other than increased imports 'shall not be attributed to increased imports.' In a situation where several factors are causing injury 'at the same time', a final determination about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it assumes that the other causal factors are not causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury.
>
> As we said in our Report in *United States – Wheat Gluten Safeguard*, the non-attribution language in Article 4.2(b) indicates that, logically, the final identification of the injurious effects caused by increased imports must follow a prior separation of the injurious effects of the different causal factors. If the effects of the different factors are not separated and distinguished from the effects of increased imports, there can be no proper assessment of the injury caused by that single and decisive factor. As we also indicated, the final determination about the existence of 'the causal link' between increased imports and serious injury can only be made *after* the effects of increased imports have been properly assessed, and this assessment, in turn, follows the separation of the effects caused by all the different causal factors."[343]

200. The Appellate Body acknowledged in *US – Lamb* that its methodology for complying with the non-attribution requirement was not expressly provided for in Article 4.2(b), emphasizing that these three steps

> "[s]imply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b). These steps are not legal 'tests' mandated by the text of the Agreement on Safeguards, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities. Indeed, these steps leave unanswered many methodological questions relating to the non-attribution requirement found in the second sentence of Article 4.2(b).
>
> . . . .
>
> We emphasize that the method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is not specified by the Agreement on Safeguards. What the Agreement requires is simply that the obligations in Article 4.2 must be respected when a safeguard measure is applied."[344]

201. In *US – Lamb*, the Appellate Body applied its standard under Article 4.2(b) to the findings of USITC and found that the latter's causation analysis incorrectly considered whether increased imports were "an important cause, and a cause no less important than any other cause, of the threat of serious injury". The Appellate Body considered this approach insufficient in the light of Article 4.2(b) because the USITC had not ascertained that the injury caused by other factors, whatever the magnitude of the injury, was not attributed to increased imports. The Appellate Body specifically held that it was "impossible to determine whether the USITC properly separated the injurious effects of these other factors from the injurious effects of the increased imports. It is, therefore, also impossible to determine whether injury caused by these other factors has been attributed to increased imports as it had not assessed the injurious effects of these other factors."[345]

202. In *US – Wheat Gluten*, the Appellate Body considered that the text of Article 4.2(a), the relationship between Articles 4.2(a) and 4.2(b) and the phrase "significant overall impairment" in Article 4.1(a) indicated that both factors specifically relating to imports and factors relating to the overall situation of the domestic industry must be included in a determination of serious injury. See paragraphs 139–140 above.

203. While it reversed the Panel's legal interpretation of Article 4.2(b), the Appellate Body in *US – Wheat Gluten* found that in the investigation at issue, the competent authorities had acted inconsistently with Article 4.2(b) as a consequence of an inadequate examination of the role of increases in average capacity. The Appellate Body noted that under Article 4.2(b), it is essential for the competent authorities to examine whether factors other than increased imports are simultaneously

[342] Appellate Body Report on *US – Lamb*, para. 170.
[343] Appellate Body Report on *US – Lamb*, paras. 179–180.
[344] Appellate Body Report on *US – Lamb*, paras. 178 and 181.
[345] Appellate Body Report on *US – Lamb*, para. 186.

causing injury: "If the competent authorities do not conduct this examination, they cannot ensure that injury caused by other factors is not 'attributed' to increased imports."[346] The Appellate Body then concluded that, in the case at hand, the competent authority had "*not* demonstrated adequately, as required by Article 4.2(b), that any injury caused to the domestic industry by increases in average capacity has not been 'attributed' to increased imports and, in consequence, the USITC could not establish the existence of 'the causal link' Article 4.2(b) requires between increased imports and serious injury".[347]

204. In *US – Line Pipe*, the Appellate Body reaffirmed its ruling in *US – Wheat Gluten* and *US – Lamb* that to fulfil the Article 4.2(b) requirement,[348] competent authorities must separate and distinguish the injurious effects of the increased imports from the injurious effects of other factors, and *establish explicitly*, with a *reasoned and adequate explanation*, that injury caused by factors other than the increased imports was not attributed to increased imports.[349] Specifically, the last sentence of Article 4.2(b) establishes a "procedural obligation", which requires competent authorities to "identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports":[350]

> "In addition, in *US – Wheat Gluten*, we stated in the context of parallelism that the competent authorities must 'establish explicitly' that imports from sources covered by the measure 'satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*.'[351] We explained further in *US – Lamb*, in the context of a claim under Article 4.2(a) of the *Agreement on Safeguards*, that the competent authorities must provide a '*reasoned and adequate explanation* of how the facts support their determination'. We are of the view that, by analogy, the requirements elaborated in *US – Wheat Gluten* and in *US – Lamb*, also apply to the exercise contemplated in Article 4.2(b), last sentence, since in all those cases, the competent authorities are under a procedural obligation to provide an explanation as regards a determination.
>
> Thus, to fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms."[352]

205. To complement its finding, the Appellate Body on *US – Line Pipe* found, although the text of the *Agreement on Safeguards* on causation is by no means identical to that of the *Anti-Dumping Agreement*, there are "considerable similarities between the two regarding non-attribution". Thus, the Appellate Body in *US – Line Pipe* ruled that its statements in *US – Hot-Rolled Steel* regarding Article 3.5 of the *Anti-Dumping Agreement* provide "guidance" in the interpretation of the similar language of the last sentence of Article 4.2(b):

> "Article 3.5 of the *Anti-Dumping Agreement* requires an identification of 'the nature and extent of the injurious effects of the other known factors'[353] as well as 'a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports.'[354]
>
> These statements in *US – Hot-Rolled Steel* provide guidance for us here. As we noted in that appeal: '[a]lthough the text of the *Agreement on Safeguards* on causation is by no means identical to that of the *Anti-Dumping Agreement*, there are considerable similarities between the two Agreements as regards the non-attribution language.'[355] We then went on to say that 'adopted panel and Appellate Body reports relating to the non-attribution language in the *Agreement on Safeguards* can provide guidance in interpreting the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement*.' We are of the view that this reasoning applies both ways. Our statements in *US – Hot-Rolled Steel* on Article 3.5 of the *Anti-Dumping Agreement* likewise provide guidance in interpreting the similar language in Article 4.2(b) of the *Agreement on Safeguards*."[356]

206. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, addressed the question of whether quantification and use of econometric models is required in order to satisfy the legal standard for causation (as well as for the appropriate remedy):

> "We note, first, that the text of the Agreement on Safeguards does not require quantification. However, in the Panel's view both the Agreement on Safeguards and relevant jurisprudence anticipate that quantification *may* occur. In addition, the Panel considers that quantification may be particularly desirable in cases involving complicated factual situations where qualitative analyses may

[346] Appellate Body Report on *US – Wheat Gluten*, para. 91.
[347] Appellate Body Report on *US – Wheat Gluten*, para. 91.
[348] Article 4.2(b), last sentence, requires that, when factors other than increased imports are causing injury at the same time as increased imports, competent authorities must ensure that injury caused to the domestic industry by other factors is not attributed to the increased imports.
[349] Appellate Body Report on *US – Line Pipe*, para. 217.
[350] Appellate Body Report on *US – Line Pipe*, para. 215.
[351] (*footnote original*) Appellate Body Report, *supra*, footnote 1, para. 98.
[352] Appellate Body Report on *US – Line Pipe*, paras. 216–217.
[353] (*footnote original*) Appellate Body Report, para. 227.
[354] (*footnote original*) Para. 226.
[355] (*footnote original*) Para. 230.
[356] Appellate Body Report on *US – Line Pipe*, paras. 213–214.

not suffice to more fully understand the dynamics of the relevant market.

In support, we note that Article 4.2(a) of the Agreement on Safeguards refers to 'factors of [a] quantifiable nature.' As explained in paragraph 10.318 above, we consider that Articles 4.2(a) and 4.2(b) must be read together and in a mutually consistent fashion. Therefore, the factors referred to in Article 4.2(a) must be taken into consideration in undertaking the non-attribution exercise (in addition to any other factors that may be relevant). In addition, the requirement in Article 4.2(a) that evaluated factors be of a 'quantifiable nature' implies that at least some of the factors assessed in the non-attribution exercise will be quantifiable and, in those circumstances, should be quantified.

. . .

The Panel considers that quantification could help in identifying the share of the overall injury caused by increased imports, as distinct from the injury caused by other factors, which would in turn yield a 'benchmark' for ensuring that the safeguard measure is imposed only to the extent necessary to prevent or remedy serious injury and allow for adjustments."[357]

207. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, determined that quantification may, in certain cases, be entailed in the obligation on competent authorities to establish non-attribution "explicitly" on the basis of a reasoned and adequate explanation:

"In addition, the Panel considers that quantification may, in certain cases, be entailed in the obligation on competent authorities to establish non-attribution 'explicitly' on the basis of a reasoned and adequate explanation.[358] In this regard, the Panel recalls that, as stated on several occasions by the Appellate Body, WTO Members are expected to interpret and apply their WTO obligations in good faith.[359] Moreover, in light of the obligations imposed on competent authorities to consider all plausible alternative explanations submitted by the interested parties, we believe that a competent authority may find itself in situations where quantification and some form of economic analysis are necessary to rebut allegedly plausible alternative explanations that have been put forward. While the wording of the provisions of the Agreement on Safeguards does not require quantification in the causal link analysis *per se*, the circumstances of a specific dispute may call for quantification."[360]

208. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, determined that quantification may not necessarily be determinative:

"Having said that quantification may be desirable, useful and sometimes necessary depending on the circumstances of a case, the Panel recognizes that quantification may be difficult and is less than perfect. Therefore, the Panel is of the view that the results of such quantification may not necessarily be determinative. We consider that an overall qualitative assessment that takes into account all relevant information, must always be performed. Nevertheless, in the Panel's view, even the most simplistic of quantitative analyses may yield useful insights into the overall dynamics of a particular industry and, in particular, into the nature and extent of injury being caused by factors other than increased imports to a domestic industry."[361]

209. As for the sequence of assessment of the various elements in the non-attribution analysis, the Panel on *US – Steel Safeguards*, in a finding subsequently not reviewed by the Appellate Body, was of the view that the *Agreement on Safeguards* does not prescribe any order:

"The Panel recalls the Appellate Body's comments in *US – Lamb*, where, in defining the steps that might be undertaken in the non-attribution analysis, it stated that 'these steps are not legal "tests" mandated by the text of the *Agreement on Safeguards*, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities.'[362]

Accordingly, the Panel does not consider that the non-attribution exercise need necessarily precede a consideration of coincidence between the increased imports and the injury factors and the conditions of competition or *vice versa*. The Panel is of the view that the wording of Articles 2.1 and 4.2 does not require that non-attribution be undertaken in advance of or following any other analysis that may be undertaken with a view to establishing the existence of a causal link. Provided that the various elements entailed in a causation analysis are considered and analysed in coming to a conclusion on the existence or otherwise of a 'causal link', this should suffice. This much is clear from the Appellate Body's comments in *US – Wheat Gluten* and *US – Lamb*:

> '[L]ogically, the final identification of the injurious effects caused by increased imports must follow a prior separation of the injurious effects of the different causal factors. If the effects of the different factors are not separated and distinguished from the effects of increased imports, there can be no proper assessment of the injury caused by that single and decisive factor. As we also indicated, the final determination about the existence of 'the causal link'

[357] Panel Report on *US – Steel Safeguards*, para. 10.336–10.339.
[358] (*footnote original*) The Appellate Body in *US – Line Pipe* stated that a mere assertion that injury caused by other factors has not been attributed to increased imports does not establish explicitly with a reasoned and adequate explanation that injury caused by factors other than increased imports was not attributed to increased imports: Appellate Body Report, *US – Line Pipe*, para. 220.
[359] (*footnote original*) See, for example, Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 297 *et seq.*
[360] Panel Report on *US – Steel Safeguards*, para. 10.340.
[361] Panel Report on *US – Steel Safeguards*, para. 10.341.
[362] (*footnote original*) Appellate Body Report, *US – Lamb*, para. 178.

between increased imports and serious injury can only be made *after* the effects of increased imports have been properly assessed, and this assessment, in turn, follows the separation of the effects caused by all the different causal factors.'[363]"[364]

(b) Relationship with other Articles

210. See paragraphs 49–57 above concerning the relationship with Article 2.1.

211. The Panel on *US – Lamb*, after making findings of inconsistency with Article XIX:1(a) of *GATT 1994* and with Articles 2.1, 4.1(c), and 4.2(b) of the *Agreement on Safeguards*, exercised judicial economy with respect to claims raised under Articles 2.2, 3.1, 5.1, 8, 11 and 12 of the *Agreement on Safeguards*.[365]

212. The Panel on *Korea – Dairy*, after finding that the determination of the existence of serious injury at issue in that dispute was inconsistent with Article 4.2, noted that, as a consequence, it was not necessary for the Panel to reach any findings as to whether Korea had demonstrated that increased imports were causing serious injury to the domestic industry. However, referring to the Appellate Body findings in *Australia – Salmon*, the Panel opted for offering "some general comments relevant to an analysis of a causal link between increased imports and injury, in the context of the Korean investigation".[366]

213. In *Argentina – Footwear (EC)*, the Appellate Body expressed its surprise that the Panel "having determined that there were no 'increased imports', and having determined that there was no 'serious injury', for some reason went on to make an assessment of causation". The Appellate Body found difficulty in understanding a "causal link" between "increased imports" that did not occur and "serious injury" that did not exist.[367]

(c) Relationship with other WTO Agreements

(i) Anti-Dumping Agreement

214. The Appellate Body on *US – Line Pipe* ruled that its statements in *US – Hot-Rolled Steel* regarding Article 3.5 of the *Anti-Dumping Agreement* provide guidance in the interpretation of the similar language of the last sentence of Article 4.2(b). See paragraph 205 above.

6. Article 4.2(c)

(a) Relationship with other Articles

215. In *Argentina – Footwear (EC)*, the Appellate Body rejected an argument that, in referring to Article 3, in the context of its reasoning on Article 4.2(a) and 4.2(c), the Panel had exceeded its terms of reference:[368]

"We have examined the specific paragraphs in the Panel Report cited by Argentina, and we see no finding by the Panel that Argentina acted inconsistently with Article 3 of the Agreement on Safeguards. In one instance, the Panel referred to Article 3 parenthetically in support of its reasoning on Article 4.2(a) of the Agreement on Safeguards. Every other reference to Article 3 cited by Argentina was made by the Panel in conjunction with the Panel's reasoning and findings relating to Article 4.2(c) of the Agreement on Safeguards. None of these references constitutes a legal finding or conclusion by the Panel regarding Article 3 itself.

We note that the very terms of Article 4.2(c) of the Agreement on Safeguards expressly incorporate the provisions of Article 3. Thus, we find it difficult to see how a panel could examine whether a Member had complied with Article 4.2(c) without also referring to the provisions of Article 3 of the Agreement on Safeguards. More particularly, given the express language of Article 4.2(c), we do not see how a panel could ignore the publication requirement set out in Article 3.1 when examining the publication requirement in Article 4.2(c) of the Agreement on Safeguards. And, generally, we fail to see how the Panel could have interpreted the requirements of Article 4.2(c) without taking into account in some way the provisions of Article 3. What is more, we fail to see how any panel could be expected to make an "objective assessment of the matter", as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims.

Consequently, we conclude that the Panel did not exceed its terms of reference by referring in its reasoning to the provisions of Article 3 of the Agreement *on* Safeguards. On the contrary, we find that the Panel was obliged by the terms of Article 4.2(c) to take the provisions of Article 3 into account. Thus, we do not believe that the Panel erred in its reasoning relating to the provisions of Article 3 of the *Agreement on Safeguards* in making its findings under Article 4.2(c) of that Agreement."[369]

216. See paragraphs 99 and 105 above in respect of the relationship with Article 3.1.

217. The Panel on *US – Wheat Gluten* considered the relationship between Article 4.2(c) and the confidentiality requirements of Article 3.2.[370]

"Given that the very terms of Article 4.2(c) expressly incorporate the provisions of Article 3, and given the

[363] (*footnote original*) Appellate Body Report, *US – Lamb*, para. 180; Appellate Body Report, *US – Wheat Gluten*, para. 69.
[364] Panel Report on *US – Steel Safeguards*, para. 10.335–342.
[365] Panel Report on *US – Lamb*, para. 7.280.
[366] Panel Report on *Korea – Dairy*, paras. 7.87. The Panel's "general comments" can be found in paras. 7.89–7.96.
[367] Appellate Body Report on *Argentina – Footwear (EC)*, para. 145.
[368] With respect to terms of reference in general, see Chapter on the *DSU*, Section VII.
[369] Appellate Body Report on *Argentina – Footwear (EC)*, paras. 73–75.
[370] With respect to confidentiality in general, see Chapter on the *DSU*, Section XXXVI.C(h).

specific and mandatory language of Article 3.2 dealing with the required treatment of information that is by nature confidential or is submitted on a confidential basis, the requirement in Article 4.2(c) to publish a 'detailed analysis of the case under investigation' and 'demonstration of the relevance of the factors examined' cannot entail the publication of 'information which is by nature confidential or which is provided on a confidential basis' within the meaning of Article 3.2 SA."[371]

218. With respect to this issue, see also paragraphs 108–109 above.

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5
Application of Safeguard Measures

1. A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

2. (a) In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

(b) A Member may depart from the provisions in subparagraph (a) provided that consultations under paragraph 3 of Article 12 are conducted under the auspices of the Committee on Safeguards provided for in paragraph 1 of Article 13 and that clear demonstration is provided to the Committee that (*i*) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (*ii*) the reasons for the departure from the provisions in subparagraph (a) are justified, and (*iii*) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of any such measure shall not be extended beyond the initial period under paragraph 1 of Article 7. The departure referred to above shall not be permitted in the case of threat of serious injury.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. Article 5.1

(a) Scope of requirement to explain the necessity of a safeguard measure

219. In *Korea – Dairy*, the Appellate Body upheld the finding by the Panel in that dispute that the first sentence of Article 5.1 imposes an obligation on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and facilitating adjustment of the domestic industry, and that this obligation applies irrespective of the particular form of the safeguard measure.[372] However, the Appellate Body reversed the Panel's finding regarding the scope of the requirement to explain the necessity of a safeguard measure.[373] In this respect, the Appellate Body stated:

> "[The second sentence of Article 5.1] requires a 'clear justification' if a Member takes a safeguard measure in the form of a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years for which statistics are available. We agree with the Panel that this 'clear justification' has to be given by a Member applying a safeguard measure *at the time of the decision*, *in its recommendations or determinations on the application of the safeguard measure*.
>
> However, we do not see anything in Article 5.1 that establishes such an obligation for a safeguard measure *other* than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. In particular, a Member is *not* obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with 'the average of imports in the last three representative years for which statistics are available'.
>
> For these reasons, we do not agree with the Panel's broad finding in paragraph 7.109 that:
>
> > 'Members are required, in their recommendations or determinations on the application of a safeguard measure, to explain how they considered the facts before them and why they concluded, at the time of the decision, that the measure to be applied was necessary to remedy serious injury and facilitate the adjustment of the industry.'"[374]

[371] Panel Report on *US – Wheat Gluten*, para. 8.21.
[372] Appellate Body Report on *Korea – Dairy*, paras. 96 and 103.
[373] Appellate Body Report on *Korea – Dairy*, para. 103.
[374] Appellate Body Report on *Korea – Dairy*, paras. 98–100.

220. In *US – Line Pipe*, the Appellate Body reiterated its finding in *Korea – Dairy*, that Article 5.1 imposes a general "substantive obligation" to apply safeguard measures only to the "permissible extent", and a particular "procedural obligation" to provide a "clear justification" only in the specific case of quantitative restrictions reducing the volume of imports below the average of imports in the last three representative years.[375] The Appellate Body also reaffirmed its interpretation in *Korea – Dairy* that Article 5.1 does not establish a "general procedural obligation" to demonstrate compliance with Article 5.1, first sentence, at the time of application, in its recommendations or determinations on the application of the safeguard measure:

> "It is clear, therefore, that, apart from one exception, Article 5.1, including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied 'only to the extent necessary'. The exception we identified in *Korea – Dairy* lies in the second sentence of Article 5.1. That exception concerns safeguard measures in the form of quantitative restrictions, which reduce the quantity of imports below the average of imports in the last three representative years. That exception does not apply to the line pipe measure."[376]

221. Regarding the "permissible extent" of the application of a safeguard measure under Article 5.1,[377] the Appellate Body in *US – Line Pipe*, in the context of Article 4.2[378] and the objective and purpose of the Agreement, concluded that although the "serious injury" in Article 5.1 and Article 4.2 was "one and the same",[379] the phrase "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment" in Article 5.1, first sentence, must be read as requiring that safeguard measures may be applied "only to the extent that they address serious injury attributed to increased imports,[380] not "*all* serious injury".[381] The Appellate Body, in particular, ruled that Article 4.2(b), as the context for Article 5.1, seeks to prevent investigating authorities from inferring a causal link between serious injury and increased imports as a result of injurious effects from other sources, and it is "a benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports":

> "We observe here that the non-attribution language of the second sentence of Article 4.2(b) is an important part of the architecture of the *Agreement on Safeguards* and thus serves as necessary context in which Article 5.1, first sentence, must be interpreted. In our view, the non-attribution language of the second sentence of Article 4.2(b) has two objectives. First, it seeks, in situations where several factors cause injury at the same time, to prevent investigating authorities from inferring the required 'causal link' between increased imports and serious injury or threat thereof on the basis of the injurious effects caused by factors other than increased imports. Second, it is a benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports. As we read the Agreement, this latter objective, in turn, informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1, first sentence. Indeed, as we see it, this is the only possible interpretation of the obligation set out in Article 4.2(b), last sentence, that ensures its consistency with Article 5.1, first sentence. It would be illogical to require an investigating authority to ensure that the 'causal link' between increased imports and serious injury not be based on the share of injury attributed to factors other than increased imports while, at the same time, permitting a Member to apply a safeguard measure addressing injury caused by all factors.
>
> . . . .
>
> For all these reasons, we conclude that the phrase 'only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment' in Article 5.1, first sentence, must be read as requiring that safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports."[382]

222. In addition, the Appellate Body on *US – Line Pipe* referred to the object and purpose of the *Agreement on Safeguards* and the rules of general international law on state responsibility to support its conclusion that the phrase "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment" in Article 5.1, first sentence, must be read as requiring that safeguard measures may be applied "only to the extent that they address serious injury attributed to increased imports":

> "If the pain inflicted on exporters by a safeguard measure were permitted to have effects beyond the share of injury caused by increased imports, this would imply that an exceptional remedy, which is not meant to protect the industry of the importing country from unfair or illegal

[375] Appellate Body Report on *US – Line Pipe*, paras. 231 and 234. Since the safeguard measure in *US – Line Pipe* is a tariff, not a quantitative restriction, the Appellate Body upheld the panel's conclusion that an importing Member is not required to demonstrate, at the time of imposition, that the line pipe measure was "necessary to prevent or remedy serious injury and to facilitate adjustment". Appellate Body Report on *US – Line Pipe*, para. 235.

[376] Appellate Body Report on *US – Line Pipe*, para. 233.

[377] In specific, the issue is whether the permissible extent of a safeguard measure is limited to the injury that can be attributed to increased imports, or whether a safeguard measure may also address the injurious effects caused by other factors. Appellate Body Report on *US – Line Pipe*, para. 241.

[378] Article 4.2(b) requires exclusion of the impact of causes of injury other than increased imports.

[379] Appellate Body Report on *US – Line Pipe*, para. 249.

[380] Appellate Body Report on *US – Line Pipe*, para. 260.

[381] Appellate Body Report on *US – Line Pipe*, para. 250.

[382] Appellate Body Report on *US – Line Pipe*, para. 260.

trade practices, could be applied in a more trade-restrictive manner than countervailing and anti-dumping duties.

The object and purpose of the *Agreement on Safeguards* support this reading of the context of Article 5.1, first sentence. The *Agreement on Safeguards* deals only with *imports*. It deals only with measures that, under certain conditions, can be applied to *imports*. The title of Article XIX of the GATT 1994 is 'Emergency Action on *Imports* of Particular Products'. (emphasis added) It seems apparent to us that the object and purpose of both Article XIX of the GATT 1994 and the *Agreement on Safeguards* support the conclusion that safeguard measures should be applied so as to address only the consequences of *imports*. And, therefore, it seems apparent to us as well that the limited objective of Article 5.1, first sentence, is limited by the consequences of *imports*.

We recalled there that the rules of general international law on state responsibility require that countermeasures in response to breaches by States of their international obligations be proportionate to such breaches. Article 51 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that 'countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'.

For all these reasons, we conclude that the phrase 'only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment' in Article 5.1, first sentence, must be read as requiring that safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports."[383]

(b) Adjustment plans

223. The Panel on *Korea – Dairy* rejected the view that Article 5.1 imposes an obligation to consider adjustment plans:

"We wish to make it clear that we do not interpret Article 5.1 as requiring the consideration of an adjustment plan by the authorities . . . The Panel finds no specific requirement that an adjustment plan as such must be requested and considered in the text of the *Agreement on Safeguards*. Although there are references to industry adjustment in two of its provisions, nothing in the text of the Agreement on Safeguards suggests that consideration of a specific adjustment plan is required before a measure can be adopted. Rather, we believe that the question of adjustment, along with the question of preventing or remedying serious injury, must be a part of the authorities' reasoned explanation of the measure it has chosen to apply. Nonetheless, we note that examination of an adjustment plan, within the context of the application of a safeguard measure, would be strong evidence that the authorities considered whether the measure was commensurate with the objective of preventing or remedying serious injury and facilitating adjustment."[384]

(c) Relationship with other Articles

224. The Panel on *Argentina – Footwear (EC)*, after finding that the safeguard investigation and determination leading to the imposition of the definitive safeguard measure at issue were inconsistent with Articles 2 and 4, exercised judicial economy with respect to claims under Article 5.[385]

225. The Panel on *US – Wheat Gluten*, after finding the measure at issue to be inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*, exercised judicial economy with respect to claims under Article 5 of the *Agreement on Safeguards* (and under Articles I and XIX of the *GATT 1994*).[386] The Appellate Body upheld this exercise of judicial economy by the Panel. In so doing, the Appellate Body referred to its statements on judicial economy in *US – Wool Shirts and Blouses* and in *Australia – Salmon*, and recalled that in *Argentina – Footwear (EC)* it had found that, since inconsistency with Articles 2 and 4 deprived the measure at issue in that case of its legal basis, it was not necessary to complete the analysis of the Panel relating to Article XIX:1 of the *GATT 1994*.[387] Similarly, the Appellate Body also upheld the Panel's exercise of judicial economy with respect to the claims under Article I of the *GATT 1994* and Article 5 of the *Agreement on Safeguards*.[388]

226. The Panel on *US – Lamb*, after making findings of inconsistency with Articles 2.1, 4.1(c), and 4.2(b) of the *Agreement on Safeguards* (and with Article XIX:1(a) of the *GATT 1994*), exercised judicial economy with respect to claims raised under Article 5.1 (and Articles 2.2, 3.1, 8, 11 and 12) of the *Agreement on Safeguards*.[389] The Appellate Body upheld this exercise of judicial economy.[390]

(d) Relationship with other WTO Agreements

(i) GATT 1994

227. As regards the relationship with Article XIII of the *GATT 1994*, the Panel on *US – Line Pipe* held, in a statement not reviewed by the Appellate Body, that Article XIII does applies to tariff quota safeguard measures. In its view, "[i]f Article XIII did not apply to tariff quota safeguard measures, such safeguard measures would

[383] Appellate Body Report on *US – Line Pipe*, paras. 257 and 260.
[384] Panel Report on *Korea – Dairy*, para. 7.108.
[385] Panel Report on *Argentina – Footwear (EC)*, para. 8.289.
[386] Panel Report on *US – Wheat Gluten*, para. 8.220.
[387] Appellate Body Report on *US – Wheat Gluten*, paras. 179–182.
[388] Appellate Body Report on *US – Wheat Gluten*, paras. 184–185.
[389] Panel Report on *US – Lamb*, para. 7.280.
[390] Appellate Body Report, *US – Lamb*, paras. 193–195.

escape the majority of the disciplines set forth in Article 5":

> "[I]t is the paucity of disciplines governing the application of tariff quota safeguard measures in Article 5 of the Safeguards Agreement that supports our interpretation of Article XIII. If Article XIII did not apply to tariff quota safeguard measures, such safeguard measures would escape the majority of the disciplines set forth in Article 5. This is an important consideration, given the quantitative aspect of a tariff quota. For example, if Article XIII did not apply, quantitative criteria regarding the availability of lower tariff rates could be introduced in a discriminatory manner, without any consideration to prior quantitative performance.[391] In our view, the potential for such discrimination is contrary to the object and purpose of both the Safeguards Agreement, and the WTO Agreement. In this regard, the preamble of the Safeguards Agreement refers to the "need to clarify and reinforce the disciplines of GATT 1994" in the context of safeguards. We consider that the "disciplines of GATT 1994" surely include those providing for non-discrimination. In any event "the elimination of discriminatory treatment in international trade relations" is referred to explicitly in the preamble to the WTO Agreement. We further note that the preamble of the Safeguards Agreement also mentions that one of the objectives of the Safeguards Agreement is to "establish multilateral control over safeguards and eliminate measures that escape such control". We are of the view that non-application of Article XIII in the context of safeguards would result in tariff quota safeguard measures partially escaping the control of multilateral disciplines. This result would be contrary to the objectives set out in the preamble of the Safeguards Agreement."[392]

228. The Panel on *US – Lamb*, after making findings of inconsistency with Article XIX:1(a) of the *GATT 1994* (and with Articles 2.1, 4.1(c), and 4.2(b) of the *Agreement on Safeguards*), exercised judicial economy with respect to claims raised under Article 5.1 (and Articles 2.2, 3.1, 8, 11 and 12) of the *Agreement on Safeguards*.[393] The Appellate Body upheld this exercise of judicial economy.[394]

2. Article 5.2

(a) Article 5.2(b)

(i) "the departure referred to above shall not be permitted in the case of threat of serious injury"

229. In *US – Line Pipe*, the Appellate Body ruled that Article 5.2(b) is an "exception" to the general rule, and not relevant to the non-discrete determination of injury or threat thereof in the safeguard measure in *US – Line Pipe*:

> "Article 5.2(b) excludes quota modulation in the case of threat of serious injury. It is, in our view, the only provision in the *Agreement on Safeguards* that establishes a difference in the legal effects of 'serious injury' and 'threat of serious injury'. Under Article 5.2(b), in order for an importing Member to adopt a safeguard measure in the form of a quota to be allocated in a manner departing from the general rule contained in Article 5.2(a), that Member must have determined that there is 'serious injury'. A Member cannot engage in quota modulations if there is only a 'threat of serious injury'. This is an exception that must be respected. But we do not think it appropriate to generalize from such a limited exception to justify a general rule. In any event, this exceptional circumstance is not relevant to the line pipe measure. We find nothing in Article 5.2(b), viewed as part of the context of Article 2.1, that would support a finding that, in this case, the USITC acted inconsistently with the *Agreement on Safeguards* by making a non-discrete determination in this case."[395]

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6
Provisional Safeguard Measures

In critical circumstances where delay would cause damage which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. The duration of the provisional measure shall not exceed 200 days, during which period the pertinent requirements of Articles 2 through 7 and 12 shall be met. Such measures should take the form of tariff increases to be promptly refunded if the subsequent investigation referred to in paragraph 2 of Article 4 does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry. The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraphs 1, 2 and 3 of Article 7.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

1. Relationship with other Articles

230. The Panel on *Argentina – Footwear (EC)* considered that, in light of its findings "concerning the investigation and the definitive measure" (the Panel had

[391] (*footnote original*) The same concern does not arise in respect of tariff measures – which also appear not to be covered by all Article 5 disciplines – because tariff measures affect all exporting Members equally.
[392] Panel Report on *US – Line Pipe*, para. 7.49
[393] Panel Report on *US – Lamb*, para. 7.280.
[394] Appellate Body Report, *US – Lamb*, paras. 193–195.
[395] Appellate Body Report on *US – Line Pipe*, para. 173.

found a violation of Articles 2.1, 4.2(a), 4.2(b) and 4.2(c)), it was not necessary to make a finding concerning a claim under Article 6.[396]

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7
Duration and Review of Safeguard Measures

1. A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years, unless it is extended under paragraph 2.

2. The period mentioned in paragraph 1 may be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in Articles 2, 3, 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting, and provided that the pertinent provisions of Articles 8 and 12 are observed.

3. The total period of application of a safeguard measure including the period of application of any provisional measure, the period of initial application and any extension thereof, shall not exceed eight years.

4. In order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year, the Member applying the measure shall progressively liberalize it at regular intervals during the period of application. If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization. A measure extended under paragraph 2 shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalized.

5. No safeguard measure shall be applied again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, for a period of time equal to that during which such measure had been previously applied, provided that the period of non-application is at least two years.

6. Notwithstanding the provisions of paragraph 5, a safeguard measure with a duration of 180 days or less may be applied again to the import of a product if:

(a) at least one year has elapsed since the date of introduction of a safeguard measure on the import of that product; and

(b) such a safeguard measure has not been applied on the same product more than twice in the five-year period immediately preceding the date of introduction of the measure.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. Article 7.4

231. In dismissing a claim under Article 12 regarding an alleged failure to notify modifications of a definitive safeguard measure which increased the restrictiveness of that measure, the Panel Report in *Argentina – Footwear (EC)* observed:

> "[T]he *only* modifications of safeguard measures that Article 7.4 contemplates are those that *reduce* its restrictiveness (i.e., to eliminate the measure or to increase their pace of its liberalisation pursuant to a mid-term review). The Agreement does not contemplate modifications that *increase* the restrictiveness of a measure, and thus contains no notification requirement for such restrictive modifications.
>
> We note that the modifications of the definitive safeguard measure made by Argentina are not contemplated by Article 7, and thus Article 12 does not foresee notification requirements with respect to such modifications. Any *substantive* issues pertaining to these subsequent Resolutions would need to be addressed under Article 7, but the European Communities made no such claim."[397]

232. With respect to a failure to notify a modification of a safeguard measure that increased the restrictiveness of that measure, see paragraph 275 below.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8
Level of Concessions and Other Obligations

1. A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

2. If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written

[396] Panel Report on *Argentina – Footwear (EC)*, para. 8.292.
[397] Panel Report on *Argentina – Footwear (EC)*, paras. 8.303–8.304.

notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.

3. The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

1. Article 8.1

(a) "in accordance with the provisions of paragraph 3 of Article 12"

233. In *US – Wheat Gluten*, the Appellate Body upheld a finding by the Panel in that dispute that the United States had failed to endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under *GATT 1994* between it and the exporting Members which would be affected by such a measure, in accordance with Article 12.3:

> "Article 8.1 imposes an obligation on Members to 'endeavour to maintain' equivalent concessions with affected exporting Members. The efforts made by a Member to this end must be 'in accordance with the provisions of ' Article 12.3 of the *Agreement on Safeguards*.
>
> In view of this explicit link between Articles 8.1 and 12.3 of the *Agreement on Safeguards*, a Member cannot, in our view, 'endeavour to maintain' an adequate balance of concessions unless it has, as a first step, provided an adequate opportunity for prior consultations on a proposed measure. We have upheld the Panel's findings that the United States did not provide an adequate opportunity for consultations, as required by Article 12.3 of the *Agreement on Safeguards*. For the same reasons, we also uphold the Panel's finding, in paragraph 8.219 of its Report, that the United States acted inconsistently with its obligations under Article 8.1 of the *Agreement on Safeguards*."[398]

234. In *US – Line Pipe*, the Appellate Body, referring to its Report in *US – Wheat Gluten*, upheld the Panel's finding that the obligation under Article 8.1 to "maintain a substantially equivalent level of concessions" is linked with the Members' consultation obligation under Article 12.3:

> "As we stated in *US – Wheat Gluten*, there must be sufficient time 'to allow for the possibility . . . for a meaningful exchange'.[399] This requirement presupposes that exporting Members will obtain the relevant information sufficiently in advance to permit analysis of the measure, and assumes further that exporting Members will have an adequate opportunity to consider the likely consequences of the measure before the measure takes effect. For it is only in such circumstances that an exporting Member will be in a position, as required by Article 12.3, to 'reach[] an understanding on ways to achieve the objective set out in paragraph 1 of Article 8' of 'maintain[ing] a substantially equivalent level of concessions and other obligations to that existing under GATT 1994'. We see this specific textual link between Article 12.3 and paragraph 1 of Article 8 as especially significant.
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> . . .
>
> In our view, our reasoning in *US – Wheat Gluten* is also applicable in this case. Therefore, we agree with the Panel that the United States, 'by failing to comply with its obligations under Article 12.3, has also acted inconsistently with its obligations under Article 8.1 to endeavour to maintain a substantially equivalent level of concessions. . . .' We, therefore, uphold the Panel's finding that the United States acted inconsistently with its obligations under Article 8.1 of the *Agreement on Safeguards*."[400]

(b) Relationship with other Articles

235. With respect to the relationship with Article 12.3, see also paragraphs 269–270 below.

236. The Panel on *US – Lamb*, after making findings of inconsistency with Articles 2.1, 4.1(c), and 4.2(b) of the *Agreement on Safeguards* (and with Article XIX:1(a) of *GATT 1994*), exercised judicial economy with respect to claims raised under Article 8 (and Articles 2.2, 3.1, 5.1, 11 and 12) of the *Agreement on Safeguards*.[401]

(c) Relationship with other WTO Agreements

237. The Panel on *US – Lamb*, after making findings of inconsistency with Article XIX:1(a) of the *GATT 1994* (and with Articles 2.1, 4.1(c), and 4.2(b) of the *Agreement on Safeguards*), exercised judicial economy with respect to claims raised under Article 8 (and Articles 2.2, 3.1, 5.1, 11 and 12) of the *Agreement on Safeguards*.[402]

X. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9
Developing Country Members

1. Safeguard measures shall not be applied against a product originating in a developing country Member as

[398] Appellate Body Report on *US – Wheat Gluten*, paras. 145–146.
[399] (*footnote original*) Appellate Body Report, *US – Wheat Gluten*, para. 136.
[400] Appellate Body Report on *US – Line Pipe*, paras. 108 and 119.
[401] Panel Report on *US – Lamb*, para. 7.280.
[402] Panel Report on *US – Lamb*, para. 7.280.

long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.[2]

(*footnote original*) [2] A Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards.

2. A developing country Member shall have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for in paragraph 3 of Article 7. Notwithstanding the provisions of paragraph 5 of Article 7, a developing country Member shall have the right to apply a safeguard measure again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non-application is at least two years.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

1. Article 9.1

(a) Exclusion of developing country exporting less than "*de minimis*" levels

238. In *US – Line Pipe*, based upon the statistical evidence, the Appellate Body upheld the Panel's findings[403] and concluded that the importing Member acted inconsistently with Article 9.1 by failing to "take all reasonable steps it could, and exclude developing countries exporting less than *de minimis* levels in Article 9.1".[404] However, the Appellate Body in *US – Line Pipe* held that Article 9.1 does not indicate how a Member must comply with an obligation to provide specifically for "non-application" of a safeguard measure, and it is possible to comply with Article 9.1 "without providing a specific list of the Members excluded from the safeguard measure":

> "There is nothing, for example, in the text of Article 9.1 to the effect that countries to which the measure will not apply must be expressly excluded from the measure. Although the Panel may have a point in saying that it is 'reasonable to expect' an express exclusion, we see nothing in Article 9.1 that requires one.
>
> We agree also with the United States that it is possible to comply with Article 9.1 without providing a specific list of the Members that are either included in, or excluded from, the measure. Although such a list could, and would, be both useful and helpful by providing transparency for the benefit of all Members concerned, we see nothing in Article 9.1 that mandates one."[405]

239. In *US – Line Pipe*, concerning the safeguard measure which took the form of a supplemental duty, the Appellate Body clarified that "duties are 'applied [against a product] irrespective of whether they result in making imports more expensive, in discouraging imports because they become more expensive, or in preventing imports together". In this case, no evidence had been presented before the Panel that the importing Member made an effort "to make certain that *de minimis* imports from developing countries were excluded from the application of the measures":

> "On this point, we start by observing that Article 9.1 obliges Members not to *apply* a safeguard measure against *products* originating in developing countries whose individual exports are below a *de minimis* level of three percent of the imports of that product, provided that the collective import share of such developing countries does not account for more than nine percent of the total imports of that product. . . . . However, we note that Article 9.1 is concerned with the application of a safeguard measure on a *product*. And we note, too, that a duty, such as the supplemental duty imposed by the line pipe measure, does not need actually to be enforced and collected to be 'applied' to a product. In our view, duties are 'applied against a *product* ' when a Member imposes conditions under which that product can enter that Member's market – including when that Member establishes, as the United States did here, a duty to be imposed on over-quota imports. Thus, in our view, duties are 'applied' irrespective of whether they result in making imports more expensive, in discouraging imports because they become more expensive, or in preventing imports altogether.
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> . . .
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> [T]he available documents reveal no efforts whatsoever by the United States – apart from the claimed 'automatic' structure of the measure itself – to make certain that *de minimis* imports from developing countries were excluded from the application of the measure."[406]

[403] The Panel found that the safeguard measure did not contain any "express exclusion" of those developing countries which fit the description of *de minimis* imports in Article 9.1; and "in the absence of any other relevant documentation," the safeguard measure applied to developing countries with *de minimis* imports. The Panel also concluded that Article 9.1 contains an obligation not to apply a measure, while the safeguard measure in the *US – Line Pipe* "applies" to all developing countries in principle. Thus the United States had not complied with its obligations under Article 9.1 of the Agreement on Safeguards. Panel Report on *US – Line Pipe*, paras. 7.180–7.181.

[404] Appellate Body Report on *US – Line Pipe*, para. 132.

[405] Appellate Body Report on *US – Line Pipe*, paras. 127–128.

[406] Appellate Body Report on *US – Line Pipe*, paras. 129 and 132.

XI. ARTICLE 10

A. TEXT OF ARTICLE 10

Article 10
Pre-existing Article XIX Measures

Members shall terminate all safeguard measures taken pursuant to Article XIX of GATT 1947 that were in existence on the date of entry into force of the WTO Agreement not later than eight years after the date on which they were first applied or five years after the date of entry into force of the WTO Agreement, whichever comes later.

B. INTERPRETATION AND APPLICATION OF ARTICLE 10

No jurisprudence or decision by a competent WTO body.

XII. ARTICLE 11

A. TEXT OF ARTICLE 11

Article 11
Prohibition and Elimination of Certain Measures

1. (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

(b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.[3,4] These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.

(*footnote original*) [3] An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member.
(*footnote original*) [4] Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.

(c) This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.

2. The phasing out of measures referred to in paragraph 1(b) shall be carried out according to timetables to be presented to the Committee on Safeguards by the Members concerned not later than 180 days after the date of entry into force of the WTO Agreement. These timetables shall provide for all measures referred to in paragraph 1 to be phased out or brought into conformity with this Agreement within a period not exceeding four years after the date of entry into force of the WTO Agreement, subject to not more than one specific measure per importing Member,[5] the duration of which shall not extend beyond 31 December 1999. Any such exception must be mutually agreed between the Members directly concerned and notified to the Committee on Safeguards for its review and acceptance within 90 days of the entry into force of the WTO Agreement. The Annex to this Agreement indicates a measure which has been agreed as falling under this exception.

(*footnote original*) [5] The only such exception to which the European Communities is entitled is indicated in the Annex to this Agreement.

3. Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1.

B. INTERPRETATION AND APPLICATION OF ARTICLE 11

1. Article 11.1(a)

(a) Relationship with Article XIX of the *GATT 1994*

240. With respect to the relationship with Article XIX of the *GATT 1994*, see paragraphs 4–9 above.

(b) Relationship with other Articles

241. The Panel on *US – Lamb*, after making findings of inconsistency with Articles 2.1, 4.1(c), and 4.2(b) of the *Agreement on Safeguards* (and with Article XIX:1(a) of *GATT 1994*), exercised judicial economy with respect to claims raised under Article 11 (and Articles 2.2, 3.1, 5.1, 8 and 12) of the *Agreement on Safeguards*.[407]

(c) Relationship with other WTO Agreements

242. The Panel on *US – Lamb*, after making findings of inconsistency with Article XIX:1(a) of *GATT 1994* (and with Articles 2.1, 4.1(c), and 4.2(b) of the *Agreement on Safeguards*), exercised judicial economy with respect to claims raised under Article 11 (and Articles 2.2, 3.1, 5.1, 8 and 12) of the *Agreement on Safeguards*.[408]

2. Article 11.2

243. At its meeting on 24 February 1995, the Committee on Safeguards decided that the information required

[407] Panel Report on *US – Lamb*, para. 7.280.
[408] Panel Report on *US – Lamb*, para. 7.280.

in the notifications of the exception under Article 11.2 of the *Agreement on Safeguards* should also be provided by signatories that were eligible to become original Members of the WTO within the same time-limits as those which apply to WTO Members.[409] The Committee also adopted a format for notifications of the exception under Article 11.2 of the *Agreement on Safeguards*[410] as well as a format for notifications on timetables for phasing out measures referred to in Article 11.1(b) or for bringing them into conformity with the *Agreement on Safeguards*.[411]

XIII. ARTICLE 12

A. TEXT OF ARTICLE 12

Article 12
Notification and Consultation

1. A Member shall immediately notify the Committee on Safeguards upon:

(a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;

(b) making a finding of serious injury or threat thereof caused by increased imports; and

(c) taking a decision to apply or extend a safeguard measure.

2. In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.

3. A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

4. A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure referred to in Article 6. Consultations shall be initiated immediately after the measure is taken.

5. The results of the consultations referred to in this Article, as well as the results of mid-term reviews referred to in paragraph 4 of Article 7, any form of compensation referred to in paragraph 1 of Article 8, and proposed suspensions of concessions and other obligations referred to in paragraph 2 of Article 8, shall be notified immediately to the Council for Trade in Goods by the Members concerned.

6. Members shall notify promptly the Committee on Safeguards of their laws, regulations and administrative procedures relating to safeguard measures as well as any modifications made to them.

7. Members maintaining measures described in Article 10 and paragraph 1 of Article 11 which exist on the date of entry into force of the WTO Agreement shall notify such measures to the Committee on Safeguards not later than 60 days after the date of entry into force of the WTO Agreement.

8. Any Member may notify the Committee on Safeguards of all laws, regulations, administrative procedures and any measures or actions dealt with in this Agreement that have not been notified by other Members that are required by this Agreement to make such notifications.

9. Any Member may notify the Committee on Safeguards of any non-governmental measures referred to in paragraph 3 of Article 11.

10. All notifications to the Council for Trade in Goods referred to in this Agreement shall normally be made through the Committee on Safeguards.

11. The provisions on notification in this Agreement shall not require any Member to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

B. INTERPRETATION AND APPLICATION OF ARTICLE 12

1. Notification formats adopted by the Committee on Safeguards

244. Formats for certain notifications under the *Agreement on Safeguards*, including notifications under Article 12, were approved by the Committee on Safeguards on 24 February 1995.[412] The Panel on *Korea – Dairy* noted that it was clear that the provisions of Article 12 prevailed over the notification formats adopted by the Committee:

[409] G/SG/M/1, Section E. With respect to the clarification made by the Chairman concerning the implication of the decision, see G/SG/M/1, para. 28.
[410] G/SG/M/1, Section H. The text of the adopted format can be found in G/SG/N/4.
[411] G/SG/M/1, Section H. The text of the adopted format can be found in G/SG/N/5.
[412] G/SG/1.

"It is clear that the provisions of Article 12 of the *Agreement on Safeguards* prevail over the Guidance issued by the Committee on Safeguards (which contains a disclaimer to that effect) and the Technical Cooperation Handbook on Notification Requirements (prepared by the Secretariat but which explicitly states that it 'does not constitute a legal interpretation of the notification obligations under the respective agreement(s)'). At issue in this case are the notifications required under Articles 12.1(a), (b) and (c)."[413]

2. Article 12.1

(a) "shall immediately notify"

245. The Panel on *Korea – Dairy* read a notion of "urgency" into the phrase "shall immediately notify . . ." in Article 12.1, but acknowledged that there is a need under this provision to balance the requirement for some minimum level of information in a notification against the requirement for "immediate" notification:

"The ordinary meaning of the term 'immediately'[414] introduces a certain notion of urgency. As discussed above, we believe that the text of Article 12.1, 12.2 and 12.3 makes clear that the notifications on the finding of serious injury and on the proposed measure shall in all cases precede the consultations referred to in Article 12.3. We note finally that no specific number of days is mentioned in Article 12. For us this implies that there is a need under the agreement to balance the requirement for some minimum level of information in a notification against the requirement for 'immediate' notification. The more detail that is required, the less 'instantly' Members will be able to notify. In this context we are also aware that Members whose official language is not a WTO working language, may encounter further delay in preparing their notifications."[415]

246. The same Panel also notes that:

"There is no basis in the wording of Article 12.1 to interpret the term 'immediately' to mean 'as soon as practically possible'."[416]

247. The Panel on *US – Wheat Gluten* quoted the above passage from the Panel Report in *Korea – Dairy* and emphasized the need of all Members to be kept informed, in a timely manner, of the different steps in a safeguard investigation:

"We consider that the text of Article 12.1 SA is clear and requires no further interpretation. The ordinary meaning of the requirement for a Member to notify immediately its decisions or findings prohibits a Member from unduly delaying the notification of the decisions or findings mentioned in Article 12.1 (a) through (c) SA. Observance of this requirement is all the more important considering the nature of a safeguards investigation. A safeguard measure is imposed on imports of a product irrespective of its source and potentially affects all Members. All Members are therefore entitled to be kept informed, without delay, of the various steps of the investigation."[417]

248. The Appellate Body on *US – Wheat Gluten* confirmed the above approach adopted by panels and added that "immediate notification" is notification that allows the Committee on Safeguards as well as WTO Members the "fullest possible period" to consider and react to a safeguard investigation:

"As regards the meaning of the word 'immediately' in the chapeau to Article 12.1, we agree with the Panel that the ordinary meaning of the word 'implies a certain urgency'. The degree of urgency or immediacy required depends on a case-by-case assessment, account being taken of the administrative difficulties involved in preparing the notification, and also of the character of the information supplied. As previous panels have recognized, relevant factors in this regard may include the complexity of the notification and the need for translation into one of the WTO's official languages. Clearly, however, the amount of time taken to prepare the notification must, in all cases, be kept to a minimum, as the underlying obligation is to notify 'immediately'.

'Immediate' notification is that which allows the Committee on Safeguards, and Members, the *fullest possible period* to reflect upon and react to an ongoing safeguard investigation. Anything less than 'immediate' notification curtails this period. We do not, therefore, agree . . . that the requirement of '*immediate*' notification is satisfied as long as the Committee on Safeguards and Members of the WTO have *sufficient* time to review that notification. In our view, whether a Member has made an 'immediate' notification does not depend on evidence as to how the Committee on Safeguards and individual Members of the WTO actually use that notification. Nor can the requirement of 'immediate' notification depend on an *ex post facto* assessment of whether individual Members suffered actual prejudice through an insufficiency in the notification period."[418]

(i) "Immediate" notification under Article 12.1(a)

249. Two panels have had the opportunity to make findings on whether notifications have amounted to "immediate" notifications under Article 12.1.(a). In *Korea – Dairy*, the Panel found that:

"[T]he 14-day period between Korea's initiation of the investigation and its presentation of the notification

[413] Panel Report on *Korea – Dairy*, para. 7.116.
[414] (*footnote original*) The New Webster Encyclopedic Dictionary defines immediately as "without delay, straightaway"; the New Shorter Oxford Dictionary defines it as "without delay, at once, instantly".
[415] Panel Report on *Korea – Dairy*, para. 7.128.
[416] Panel Report on *Korea – Dairy*, para. 7.134.
[417] Panel Report on *US – Wheat Gluten*, para. 8.194.
[418] Appellate Body Report on *US – Wheat Gluten*, paras. 105–106.

related thereto, does not respect the requirements for 'immediate' notification and is in violation of Article 12.1 of the *Agreement on Safeguards*."[419]

250. Similarly, the Panel on *US – Wheat Gluten* determined that:

"[T]he delay of 16 days between the initiation of the investigation and the notification thereof does not satisfy the requirement of immediate notification of Article 12.1(a) SA."[420]

251. The Appellate Body upheld the finding of the Panel on *US – Wheat Gluten*, but did not pronounce itself on the Panel's determination in *Korea – Dairy*.[421]

(ii) "Immediate" notification under Article 12.1(b)

252. In respect of a notification of a determination of serious injury, the Panel on *Korea – Dairy* states:

"[A] delay of 40 days . . . between the domestic publication of the injury finding and the date of that notification to the Committee on Safeguards . . . does not satisfy the requirements for an immediate notification and therefore is in violation of Article 12.1 of the Agreement on Safeguards."[422]

253. The Panel on *US – Wheat Gluten* found that:

"[T]he delay of 26 days between the finding of serious injury and the notification thereof does not satisfy the requirement of immediate notification of Article 12.1(b) SA."[423]

254. The Appellate Body upheld the finding of the Panel on *US – Wheat Gluten*, but did not pronounce itself on the Panel's determination on *Korea – Dairy*.[424]

(iii) "Immediate" notification under Article 12.1(c)

255. As regards a notification of a proposed safeguard measure, the Panel Report in *Korea – Dairy* stated:

"[W]e note that this notification took place more than 6 weeks after the decision on the proposed measure was taken . . . We consider that this delay does not meet the requirements for an 'immediate' notification and therefore is in violation of Article 12.1 of the Agreement on Safeguards."[425]

256. In respect of a notification of a final decision to take a safeguard measure, the Panel on *Korea – Dairy* stated:

"[W]e note that Korea notified on 24 March 1997 that on 1 March 1997 a final decision had been taken to impose a quota as a safeguard measure. We fail to see how this can be viewed as an immediate notification. As far as it covers Korea's final decision to take a safeguard measure, we find that the timing of the Korean notification of 24 March 1997 does not meet the requirements of Article 12.1 of the *Agreement on Safeguards*."[426]

257. The Appellate Body on *US – Wheat Gluten* reversed a Panel finding that a notification of a decision to apply a safeguard measure after the implementation of that decision was inconsistent with Article 12.1(c) of the *Agreement on Safeguards*.[427] The Panel had considered that Article 12.2 provides relevant context in determining the timeliness of notifications under Article 12.1(c), and reasoned that a notification under Article 12.1(c) must be of a "proposed measure" and its "proposed date of introduction". On this basis, the Panel concluded that a notification under Article 12.1(c) must be made before the implementation of the "proposed" safeguard measure. The Appellate Body reasoned as follows:

"In examining the ordinary meaning of Article 12.1(c), we observe that the relevant triggering event is the '*taking*' of a decision. To us, Article 12.1(c) is focused upon whether a 'decision' has *occurred*, or has been 'taken', and not on whether that decision has been *given effect*. On the face of the text, the timeliness of a notification under Article 12.1(c) depends only on whether the notification was immediate.

. . .

Article 12.2 is related to, and complements, Article 12.1 of the *Agreement on Safeguards*. Whereas Article 12.1 sets forth *when* notifications must be made during an investigation, Article 12.2 clarifies *what* detailed information must be contained in the notifications under Articles 12.1(b) and 12.1(c). We do not, however, see the content requirements of Article 12.2 as prescribing *when* the notification under 12.1(c) must take place. Rather, in our view, timeliness under 12.1(c) is determined by whether a decision to apply or extend a safeguard measure is notified 'immediately'. A *separate* question arises as to whether notifications made by the Member satisfy the content requirements of Article 12.2. Answering this separate question requires examination of whether, in its notifications under *either* Article 12.1(b) *or* Article 12.1(c), the Member proposing to apply a safeguard measure has notified 'all pertinent information', including the 'mandatory components' specifically enumerated in Article 12.2."[428]

258. The Appellate Body on *US – Wheat Gluten* then found that although the obligations under Article

[419] Panel Report on *Korea – Dairy*, para. 7.134.
[420] Panel Report on *US – Wheat Gluten*, para. 8.197.
[421] Appellate Body Report on *US – Wheat Gluten*, para. 112.
[422] Panel Report on *Korea – Dairy*, para. 7.137.
[423] Panel Report on *US – Wheat Gluten*, para. 8.199.
[424] Appellate Body Report on *US – Wheat Gluten*, para. 116.
[425] Panel Report on *Korea – Dairy*, para. 7.140.
[426] Panel Report on *Korea – Dairy*, para. 7.145.
[427] Panel Report on *US – Wheat Gluten*, paras. 8.200–8.207.
[428] Appellate Body Report on *US – Wheat Gluten*, paras. 120 and 123.

12.1(b), 12.1(c) and 12.2. were "related", they constituted "discrete obligations":

> "Thus, the obligations set forth under Articles 12.1(b), 12.1(c) and 12.2 relate to different aspects of the notification process. Although related, these obligations are discrete. A Member could notify 'all pertinent information' in its Articles 12.1(b) and 12.1(c) notifications, and thereby satisfy Article 12.2, but still act inconsistently with Article 12.1 because the relevant notifications were not made 'immediately'. Similarly, a Member could satisfy the Article 12.1 requirement of 'immediate' notification, but act inconsistently with Article 12.2 if the content of its notifications was deficient.
>
> In our view, in finding that the United States acted inconsistently with Article 12.1(c) *solely because* the decision to apply a safeguard measure was notified after that decision had been implemented, the Panel confused the separate obligations imposed on Members pursuant to Article 12.1(c) and Article 12.2 and, thereby, added another layer to the timeliness requirements in Article 12.1(c). Instead of insisting on 'immediate' notification, as stipulated by Article 12.1(c), the Panel required notification to be made *both* 'immediately' *and* before implementation of the safeguard measure. We see no basis in Article 12.1(c) for this conclusion."[429]

259. The Appellate Body on *US – Wheat Gluten* then found that the notification at issue was consistent with the requirement of immediate notification under Article 12.1(c). The United States had made the notification only five days after the President of the United States had "taken the decision" to apply the safeguard measure, a period the Appellate Body considered sufficient, also taking into account that the notification was made the day after the decision of the President of the United States had been published in the United States Federal Register.[430]

(b) Content of notifications under Article 12.1(a)

260. At its meeting on 24 February 1995, the Committee on Safeguards adopted a format for notifications under Article 12.1(a) of the *Agreement on Safeguards* on initiation of an investigation and the reasons for it.[431] The Committee also adopted formats for notifications required under Articles 12.1(b) and (c).[432]

261. At its meeting on 6 May 1996, the Committee on Safeguards adopted a format for notification of termination of a safeguards investigation where no safeguard measure is imposed.[433]

262. The Panel on *Korea – Dairy* noted the limited explicit requirements of Article 12.1(a) with respect to the content of notifications:

> "Regarding the 'content' of notifications under Article 12.1, we note that with regard to the notification of the initiation of an investigation, the terms of Article 12.1(a) only refer to the obligation to notify 'initiating an investigatory process relating to serious injury or threat thereof and the reasons for it'."[434]

263. In examining the conformity with Article 12.1(a) of the notification at issue, the Panel on *Korea – Dairy* rejected an argument "that such notification should necessarily include a discussion of all of the legal requirements for a safeguard action to be taken such as a discussion of the conditions of the markets, etc.":

> "We note that initiation is the beginning of the process, and the Agreement on Safeguards does not establish specific standards for the decision to initiate, as do Article 5 of the Agreement on the Implementation of Article VI of GATT 1994 and Article 11 of the Agreement on Subsidies and Countervailing Measures. Thus, to require a discussion in the notification of initiation of evidence regarding the elements that must be found to exist to impose a measure at the end of the investigation would impose a requirement at the initiation stage that is not required by the Agreement on Safeguards itself. We note in the first instance that whatever the relationship between the requirements of Article 12.2 regarding the contents of notifications and the contents of the investigation reports published pursuant to Articles 3.1 and 4.2, this question is not relevant to Article 12.1(a) notifications, as Article 12.2 specifically and exclusively addresses 'notifications referred to in paragraphs [12.]1(b) and [12.]1(c)'.
>
> The format agreed by the Committee for notifications under Article 12.1(a) is not legally binding, although helpful. The guidance in the format is general as to the kind of information to be provided, referring simply to examples of information on the reasons for initiation, and saying nothing about the level of detail of that information.
>
> Although Korea's notification could usefully have included a reference to allegations of serious injury and a cross-reference to any domestic publication(s) in Korea, we think that this notification was sufficient to inform WTO Members adequately of Korea's initiation of an investigation concerning a particular product, so that Members having an interest in the product could avail themselves of their right to participate in the domestic investigation process."[435]

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[429] Appellate Body Report on *US – Wheat Gluten*, paras. 124–125.
[430] Appellate Body Report on *US – Wheat Gluten*, paras. 128–130.
[431] G/SG/M/1, Section H. The text of the adopted format can be found in G/SG/N/6.
[432] G/SG/M/1, Section H. The text of the adopted format can be found in G/SG/W/1, Annex, Item VI.
[433] G/SG/M/6, Section C. The text of the adopted format can be found in G/SG/2.
[434] Panel Report on *Korea – Dairy*, para. 7.122.
[435] Panel Report on *Korea – Dairy*, paras. 7.131–7.133.

3. Article 12.2

(a) "all pertinent information"

264. The Panel on *Korea – Dairy* while analysing the meaning of the expression "all pertinent information" in Article 12.2 of the *Agreement on Safeguards*, *inter alia*, observed that the standard of what must be notified to the Committee under Article 12 of the *Agreement on Safeguards* differed from what must be published domestically pursuant to Articles 3 and 4.[436] The Panel found that the information contained in the notifications at issue was in conformity with Article 12.2.[437] In respect of one of these notifications, the Panel noted that "this notification contains sufficient information on what Korea considered to be evidence of injury caused by increased imports ...."[438] The Appellate Body, however, reversed the finding by the Panel that a notification provided by Korea under Article 12.1(b) of a determination of serious injury met the requirements of Article 12.2.[439] In this context, the Appellate Body interpreted Article 12.2 as follows:

> "[I]tems listed . . . as mandatory components of 'all pertinent information', constitute a minimum notification requirement that must be met if a notification is to comply with the requirements of Article 12.
>
> We do not agree with the Panel that 'evidence of serious injury' in Article 12.2 is determined by what the notifying Member considers to be sufficient information. What constitutes 'evidence of serious injury' is spelled out in Article 4.2(a) of the *Agreement on Safeguards* . . .
>
> . . .
>
> We believe that 'evidence of serious injury' in the sense of Article 12.2 should refer, at a minimum, to the injury factors required to be evaluated under Article 4.2(a). In other words, according to the text and the context of Article 12.2, a Member must, *at a minimum*, address in its notifications, pursuant to paragraphs 1(b) and 1(c) of Article 12, all the items specified in Article 12.2 as constituting 'all pertinent information', as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation. We believe that the standard set by Article 12 with respect to the content of 'all pertinent information' to be notified to the Committee on Safeguards is an objective standard independent of the subjective assessment of the notifying Member."[440]

265. While it had found that the standard for determining "all pertinent information" could not be a subjective assessment by the notifying Member, the Appellate Body in *Korea – Dairy* emphasized at the same time that it did not interpret "evidence of serious injury" to mean that all details contained in the report of the national authorities should be included:

> "In concluding that there is a minimum objective standard, we do not mean to suggest that 'evidence of serious injury' should include all the details of the recommendations and reasoning to be found in the report of the competent authorities. We agree with the Panel that, if such had been the intention of the drafters of the *Agreement on Safeguards*, they would have simply referred back to Articles 3 and 4 when requiring 'evidence of serious injury' in Article 12.2. There is, however, an intermediate position between notifying the full content of the report of the competent authorities and giving the notifying Member the discretion to determine what may be included in a notification. To comply with the requirements of Article 12.2, the notifications pursuant to paragraphs 1(b) and 1(c) of Article 12 must, *at a minimum*, address all the items specified in Article 12.2 as constituting 'all pertinent information', as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation.
>
> We are aware that the last sentence of Article 12.2 provides that the Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply a safeguard measure. . . . Contrary to what Korea argued and the Panel reasoned, such a request is not meant to fill in gaps created by omitting elements required under 'all relevant information' or 'evidence of serious injury'."[441]

266. The Appellate Body on *Korea – Dairy* accordingly reversed the Panel on this point and made the following concluding general statement regarding the object and purpose of the notification requirements at issue:

> "We believe that the purpose of notification is better served if it includes all the elements of information specified in Articles 12.2 and 4.2. In this way, exporting Members with a substantial interest in the product subject to a safeguard measure will be in a better position to engage in meaningful consultations, as envisaged by Article 12.3, than they would otherwise be if the notification did not include all such elements. And, the Committee on Safeguards can more effectively carry out its surveillance function set out in Article 13 of the *Agreement on Safeguards*. At the same time, providing the requisite information to the Committee on Safeguards does not place an excessive burden on a Member proposing to apply a safeguard measure as such information is, or should be, readily available to it."[442]

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[436] Panel Report on *Korea – Dairy*, paras. 7.125–7.127.
[437] Panel Report on *Korea – Dairy*, paras. 7.136, 7.139 and 7.144.
[438] Panel Report on *Korea – Dairy*, para. 7.136.
[439] Appellate Body Report on *Korea – Dairy*, para. 113.
[440] Appellate Body Report on *Korea – Dairy*, paras. 107–108.
[441] Appellate Body Report on *Korea – Dairy*, paras. 109–110.
[442] Appellate Body Report on *Korea – Dairy*, para. 111.

(b) Notification of a proposed safeguard measure

267. The Panel on *Korea – Dairy* found that Article 12.1, 12.2 and 12.3, taken together, impose the obligation upon a Member to notify the details of a proposed safeguard measure before it is applied, so that affected Members may consult about it before it takes effect.[443]

268. The Appellate Body Report on *US – Wheat Gluten* subsequently found to the contrary. See paragraphs 257–259 above.

4. Article 12.3

(a) "adequate opportunity for prior consultations"

269. The Panel on *Korea – Dairy* rejected a claim that, by not providing "all pertinent information" in its notifications in advance of consultations, a Member had failed to provide "adequate opportunity for prior consultations" within the meaning of Article 12.3. The Panel had found the content of Korea's notifications in conformity with Article 12 (the Appellate Body subsequently reversed this latter finding, but did not address any of the following issues). The Panel then opined that consultations may be "adequate" even if prior notifications are incomplete,[444] since it considered that one of the purposes of consultations is to review the content of the relevant notifications. The Panel further noted that whether parties eventually reach a mutually agreed solution is not the only criterion for assessing the adequacy of consultations:[445]

> "In the present case we note that parties exchanged questions and answers. The European Communities claims that it has always been unsatisfied with the Koreans' answers and notifications (together with Korea's determination). This may be the case and would explain why it decided to pursue dispute settlement proceedings, but it does not prove that Korea did not consult in good faith for the purpose of informing interested Members of its investigation, its conclusion and its proposed actions. We note also that Korea did impose a measure at a level and for a duration different, and less restrictive, than initially proposed. Consultations were certainly fruitful in this respect, albeit not sufficient to satisfy the European Communities.
>
> We reject therefore the EC claim that Korea failed to provide adequate opportunity to consult. Moreover, it seems to us that such consultations have led to an important revision of the initial notification and that parties, at some point, entered into very serious negotiations and considered serious elements of a mutually agreed solution. The fact that this proposed settlement was not formalized through the acceptance by the relevant internal authorities of the European Communities is immaterial. What is relevant for the purpose of this EC claim, is the fact that the parties to these consultations were able to negotiate quite effectively, which, in our view, demonstrates that the consultations were adequate. For us, this is the purpose of any consultation process and the scope of the obligation contained in Article 12.3 of the *Agreement on Safeguards*, i.e. to favour efforts by the parties to reach a mutually agreed solution of their disagreement."[446]

270. In *US – Wheat Gluten*, the Appellate Body held that the Panel had erred in concluding that the United States had acted inconsistently with Article 12.3 insofar as the Panel had based this conclusion on an erroneous interpretation of Article 12.1(c),[447] but upheld the finding on the basis that there had been no opportunity for consultations on the final proposed measure. In this connection, the Appellate Body first considered that Article 12.3 provides that information on a proposed measure must be provided in advance of the consultation:

> "We note, first, that Article 12.3 requires a Member proposing to apply a safeguard measure to provide an 'adequate opportunity for prior consultations' with Members with a substantial interest in exporting the product concerned. Article 12.3 states that an 'adequate opportunity' for consultations is to be provided 'with a view to': reviewing the information furnished pursuant to Article 12.2; exchanging views on the measure; and reaching an understanding with exporting Members on an equivalent level of concessions. In view of these objectives, we consider that Article 12.3 requires a Member proposing to apply a safeguard measure to provide exporting Members with sufficient information and time to allow for the possibility, through consultations, for a meaningful exchange on the issues identified. To us, it follows from the text of Article 12.3 itself that information on the *proposed* measure must be provided in *advance* of the consultations, so that the consultations can adequately address that measure. Moreover, the reference, in Article 12.3, to 'the information provided under' Article 12.2, indicates that Article 12.2 identifies the information that is needed to enable meaningful consultations to occur under Article 12.3. Among the list of 'mandatory components' regarding information identified in Article 12.2 are: a precise description of the *proposed* measure, and its *proposed* date of introduction.
>
> Thus, in our view, an exporting Member will not have an 'adequate opportunity' under Article 12.3 to negotiate overall equivalent concessions through consultations unless, prior to those consultations, it has obtained, *inter alia*, sufficiently detailed information on the form

[443] See Panel Report on *Korea – Dairy*, para. 7.120.
[444] Panel Report on *Korea – Dairy*, para. 7.150.
[445] Panel Report on *Korea – Dairy*, para. 7.151.
[446] Panel Report on *Korea – Dairy*, paras. 7.152–7.153.
[447] Appellate Body Report on *US – Wheat Gluten*, para. 133.

of the proposed measure, including the nature of the remedy."[448]

271. The Panel on *US – Wheat Gluten* had found that no consultations had been held between the United States and the European Communities on the final measure that was approved by the President of the United States.[449] The Appellate Body noted:

"[T]he USITC Report set out a number of 'recommendations' to the President of the United States . . .

We note that the recommendations made by the USITC did *not* include specific numerical quota shares for the individual exporting Members concerned, and the recommendations imply, without providing details, that the individual quota shares could be less favourable to imports from the European Communities. We consider that these 'recommendations' did not allow the European Communities to assess accurately the likely impact of the measure being contemplated, nor to consult adequately on overall equivalent concessions with the United States.

Accordingly, we see no error in the Panel's conclusion that the United States notifications under Article 12.1(b) did not provide a description of the measure under consideration sufficiently precise as to allow the European Communities to conduct meaningful consultations with the United States, as required by Article 12.3 of the *Agreement on Safeguards*.[450]"[451]

272. The Appellate Body on *US – Line Pipe* reaffirmed its interpretation in *US – Wheat Gluten* that the appropriate inquiry for the obligation to provide adequate opportunity for prior consultation is whether the importing Member provided the exporting Members with "sufficient time" to allow for a "meaningful exchange" on the information and that the amount of time needed for a meaningful exchange must be addressed on a case-by-case basis.[452] The Appellate Body also found that failure of the exporting Member to request consultations during an inadequate time period does not excuse the importing Member's obligation to provide adequate opportunity for prior consultation:

"The obligation of an importing Member under Article 12.3 is to 'provide adequate opportunity for *prior* consultations'. (emphasis added) That obligation cannot be met if there is insufficient time prior to the application of the measure to have a *meaningful* exchange. The importing Member's failure to provide information about a safeguard measure to an exporting Member sufficiently in advance of that measure taking effect is not excused by the fact that the exporting Member did not request consultations during that inadequate time-period."[453]

5. Relationship with other Articles

(a) Articles 2 and 4

273. The Panel on *Argentina – Footwear (EC)* rejected the view that non-compliance with Article 12 *ipso facto* constitutes a basis for finding a violation of the substantive requirements of Articles 2 and 4, and *vice versa:*

"In our view, the notification requirements of Article 12 are separate from, and in themselves do not have implications for, the question of substantive compliance with Articles 2 and 4. Similarly, we consider that the substantive requirements of Articles 2 and 4 do not have implications for the question of compliance with Article 12. Article 12 serves to provide transparency and information concerning the safeguard-related actions taken by Members. We note in this context that notification under Article 12 is just the first step in a process of transparency that can include, *inter alia*, review by the Committee as part of its surveillance functions (Article 13.1(f)), requests for additional information by the Council for Trade in Goods or the Committee on Safeguards (Article 12.2), and/or eventual bilateral consultations with affected Members if application of a measure is proposed (Article 12.3). In this regard, the important point is that the notifications be sufficiently descriptive of the actions that have been taken or are proposed to be taken, and of the basis for those actions, that Members with an interest in the matter can decide whether and how to pursue it further.

. . .

Articles 12.2 and 12.3 in our view confirm that Members are not required to notify the full detail of their investigations and findings. Article 12.2 specifically provides for the possibility of requests for further information by the Council for Trade in Goods or the Committee on Safeguards. Article 12.3 provides, *inter alia*, for consultations, upon request, with other Members, to review the information contained in the notifications. Thus,

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[448] Appellate Body Report on *US – Wheat Gluten*, paras. 136–137.
[449] Panel Report on *US – Wheat Gluten*, para. 8.217.
[450] (*footnote original*) We note that, in so finding, we do not consider it necessary to determine whether the United States notified a "proposed measure" to the European Communities as required by Article 12.2 of the *Agreement on Safeguards*, as the European Communities did not argue specifically that the United States had acted inconsistently with Article 12.2.
[451] Appellate Body Report on *US – Wheat Gluten*, paras. 140–142.
[452] Appellate Body Report on *US – Line Pipe*, para. 107. In particular, the Appellate Body addressed the issue whether the period from the initial Article 12.1(b) notification to the day the measure takes effect is relevant for assessing whether an adequate opportunity was provided for prior consultations. The Appellate Body found that notifications under Article 12.1(b) in this case were not sufficiently precise to allow the exporting Member to conduct meaningful consultation on the measure at issue. The Appellate Body concurred with the Panel's finding, that, as a matter of fact, these proposed measures "*differed substantially*" from the one announced and eventually applied in *US – Line Pipe*.
[453] Appellate Body Report on *US – Line Pipe*, para. 112.

these provisions specifically create opportunities for further information to be provided, upon request, concerning the details of the actions summarised in the notifications. Ultimately, should a violation of Articles 2 and 4 be alleged, it would be the more detailed information from the record of the investigation, and in particular the published report(s) on the findings and reasoned conclusions of that investigation, that would form the basis for evaluation of such an allegation."[454]

274. In *Korea – Dairy*, the Appellate Body interpreted the notification requirement of "all pertinent information" as requiring a "minimum objective standard" for such notification so as to reflect "an intermediate position between notifying the full content of the report of the competent authorities and giving the notifying Member the discretion to determine what may be included in a notification". The Appellate Body specifically identified the mandatory factors of all pertinent information as well as factors listed in Article 4.2 of the *Agreement on Safeguards* that should be covered in the notification:

"In order to determine the appropriate meaning of 'all pertinent information', we must examine this phrase in the light of the text and the context of Article 12 as well as the object and purpose of that Article. The text of Article 12.2 makes it clear that a Member proposing to apply a safeguard measure is required to provide the Committee on Safeguards with *all* pertinent, not just *any* pertinent, information. Moreover, it provides that such information *shall* include certain items listed immediately after the phrase 'all pertinent information', namely, evidence of serious injury or threat thereof caused by increased imports, a precise description of the product involved and the proposed measure, the proposed date of introduction, the expected duration of the measure and a timetable for progressive liberalization. These items, which are listed as mandatory components of 'all pertinent information', constitute a minimum notification requirement that must be met if a notification is to comply with the requirements of Article 12.

We do not agree with the Panel that 'evidence of serious injury' in Article 12.2 is determined by what the notifying Member considers to be sufficient information. What constitutes 'evidence of serious injury' is spelled out in Article 4.2(a) of the *Agreement on Safeguards* which provides:

'. . . the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.'

We believe that 'evidence of serious injury' in the sense of Article 12.2 should refer, at a minimum, to the injury factors required to be evaluated under Article 4.2(a). In other words, according to the text and the context of Article 12.2, a Member must, *at a minimum*, address in its notifications, pursuant to paragraphs 1(b) and 1(c) of Article 12, all the items specified in Article 12.2 as constituting 'all pertinent information', as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation. We believe that the standard set by Article 12 with respect to the content of 'all pertinent information' to be notified to the Committee on Safeguards is an objective standard independent of the subjective assessment of the notifying Member.

In concluding that there is a minimum objective standard, we do not mean to suggest that 'evidence of serious injury' should include all the details of the recommendations and reasoning to be found in the report of the competent authorities. We agree with the Panel that, if such had been the intention of the drafters of the *Agreement on Safeguards*, they would have simply referred back to Articles 3 and 4 when requiring 'evidence of serious injury' in Article 12.2. There is, however, an intermediate position between notifying the full content of the report of the competent authorities and giving the notifying Member the discretion to determine what may be included in a notification. To comply with the requirements of Article 12.2, the notifications pursuant to paragraphs 1(b) and 1(c) of Article 12 must, *at a minimum*, address all the items specified in Article 12.2 as constituting 'all pertinent information', as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation."[455]

(b) Article 7

275. The Panel on *Argentina – Footwear (EC)* concluded that it could not examine under Article 12 a claim regarding a failure to notify a modification of a safeguard measure that increased the restrictiveness of that measure:

"We note that the modifications of definitive safeguard measures foreseen in the Agreement (namely early elimination or faster liberalization potentially resulting from mid-term reviews under Article 7.4, and extension of measures beyond the initial period of application under Article 7. [sic] and 7.4), all are subject to notification requirements under Articles 12.5 and 12.1(c)/12.2, respectively.

In this context, we note that the *only* modifications of safeguard measures that Article 7.4 contemplates are those that *reduce* its restrictiveness (i.e., to eliminate the measure or to increase the pace of its liberalisation pursuant to a mid-term review). The Agreement does not

[454] Panel Report on *Argentina – Footwear (EC)*, paras. 8.298 and 8.300.

[455] Appellate Body Report on *Korea – Dairy*, paras. 107–109.

contemplate modifications that *increase* the restrictiveness of a measure, and thus contains no notification requirement for such restrictive modifications.

We note that the modifications of the definitive safeguard measure made by Argentina are not contemplated by Article 7, and thus Article 12 does not foresee notification requirements with respect to such modifications. Any *substantive* issues pertaining to these subsequent Resolutions would need to be addressed under Article 7, but the European Communities made no such claim. Where the situation at issue is primarily one of substance, i.e., modification of a measure in a way not foreseen by the Safeguards Agreement, we believe that we cannot address the alleged procedural violation concerning notification arising therefrom, as no explicit procedural obligation is foreseen. Therefore, we see no possibility for a ruling on this aspect of the European Communities' claim under Article 12."[456]

6. Article 12.6

276. At its meeting of 24 February 1995, the Committee adopted a format for notifications of laws, regulations and administrative procedures relating to safeguard measures.[457] Further, the Committee decided that all Members that had available relevant legislation and/or regulations which apply to safeguard measures covered by the Agreement should notify the full and integrated text of that legislation and/or those regulations to the Committee by 15 March 1995, with the understanding that if such legislation and/or regulations did not exist or were not yet available, the Member would inform the Committee of this fact, would explain the reasons therefor, and would provide an indicative date by which time a notification was expected.[458] Also, the Committee decided that notification of modifications to legislation should be submitted within 30 days after domestic publication of the modifications, with the understanding that if the deadline could not be met, the reason would be notified by the deadline, with an indication of when the modification would be notified.[459]

277. At its meeting on 6 May 1996, the Committee on Safeguards adopted procedures for future reviews of legislative notifications.[460]

278. As of 31 December 2004, 133 Members[461] had notified the Committee on Safeguards of their domestic safeguards legislation and/or regulations or made communications in this regard to the Committee.[462, 463] Thirty-one Members had not, as of that date, made such a notification. The extent of the non-compliance with this notification obligation, and the implications of this situation, were raised by the Chairman at the regular meetings of the Committee.[464]

7. Article 12.7

279. At its meeting on 24 February 1995, the Committee on Safeguards decided that the information required in the notifications under Article 12.7 of the *Agreement on Safeguards* should also be provided by signatories that were eligible to become original Members of the WTO within the same time-limits as those which apply to WTO Members.[465]

280. At its meeting on 24 February 1995, the Committee on Safeguards adopted a format for notifications of pre-existing Article XIX measures described in Article 10.[466] At the same meeting, the Committee also adopted a format for notifications of measures subject to the prohibition and elimination of certain measures under Article 11.1 of the *Agreement on Safeguards*.[467] With respect to reporting by Members regarding their progress in phasing out the pre-existing Article XIX measures and measures prohibited under Article 11, see paragraph 283 below.

XIV. ARTICLE 13

A. TEXT OF ARTICLE 13

Article 13
Surveillance

1. A Committee on Safeguards is hereby established, under the authority of the Council for Trade in Goods, which shall be open to the participation of any Member indicating its wish to serve on it. The Committee will have the following functions:

(a) to monitor, and report annually to the Council for Trade in Goods on, the general implementation of this Agreement and make recommendations towards its improvement;

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[456] Panel Report on *Argentina – Footwear (EC)*, paras. 8.302–8.304.
[457] G/SG/M/1, Section H. The text of the adopted format can be found in G/SG/N/1. The Committee agreed that these notifications would be distributed as unrestricted documents. G/SG/M/1, Section I, paras. 37–38.
[458] G/SG/M/1, Section I, paras. 64–65.
[459] G/SG/M/1, Section I, paras. 64–65.
[460] G/SG/M/6, Section G. The text of the adopted format can be found in G/SG/W/116.
[461] There are currently 149 WTO Members, counting the EC and all its Member States separately. This figure is reduced to 124 if the EC and its 25 Member States are counted as a single Member.
[462] G/SG/N/1 and addenda.
[463] Section XVIII of this Chapter lists the status of notifications under Article 12.6 of the Agreement.
[464] G/SG/M/25 and G/SG/M/26.
[465] G/SG/M/1, Section E. With respect to the clarification made by the Chairman concerning the implication of the decision, see G/SG/M/1, para. 28.
[466] G/SG/M/1. Section H. The text of the adopted format can be found in G/SG/N/2.
[467] G/SG/M/1, Section H. The text of the adopted format can be found in G/SG/N/3.

(b) to find, upon request of an affected Member, whether or not the procedural requirements of this Agreement have been complied with in connection with a safeguard measure, and report its findings to the Council for Trade in Goods;

(c) to assist Members, if they so request, in their consultations under the provisions of this Agreement;

(d) to examine measures covered by Article 10 and paragraph 1 of Article 11, monitor the phase-out of such measures and report as appropriate to the Council for Trade in Goods;

(e) to review, at the request of the Member taking a safeguard measure, whether proposals to suspend concessions or other obligations are "substantially equivalent", and report as appropriate to the Council for Trade in Goods;

(f) to receive and review all notifications provided for in this Agreement and report as appropriate to the Council for Trade in Goods; and

(g) to perform any other function connected with this Agreement that the Council for Trade in Goods may determine.

2. To assist the Committee in carrying out its surveillance function, the Secretariat shall prepare annually a factual report on the operation of this Agreement based on notifications and other reliable information available to it.

B. INTERPRETATION AND APPLICATION OF ARTICLE 13

1. General

(a) Rules of procedure

281. At its meeting on 6 May 1996, the Committee on Safeguards adopted rules of procedure for its meetings, based on the rules of the General Council and the Council for Trade in Goods, and incorporating relevant changes to make them applicable to the Committee.[468] The Council for Trade in Goods subsequently approved the Committee's rules of procedure at its meeting of 22 May 1996.[469]

(b) Observers

282. At its meeting on 24 February 1995, the Committee on Safeguards decided that observer governments should provide the Committee with any information the observer government considers relevant to matters within the purview of the Agreement, including the text of laws and regulations regarding safeguard measures, and information regarding any safeguard measures taken by the observer government.[470]

2. Article 13.1

283. At its meeting on 24 February 1995, the Committee on Safeguards agreed that, in order to perform the task under Article 13.1(d), Members be asked to report at the end of each year on their progress in phasing out pre-existing Article XIX measures and measures subject to prohibition and elimination under Article 11.1 of the Agreement.[471]

284. At its meeting on 6 November 1995, the Committee on Safeguards decided that, in order to comply with the provisions of Articles 13.1 (b), (c) and (e), under which the Committee has to provide assistance to Members upon request, the Committee would address these matters on an *ad hoc* basis, if and when a request in these matters is received, rather than attempt to establish a procedure in advance of any requests for assistance.[472]

XV. ARTICLE 14

A. TEXT OF ARTICLE 14

Article 14
Dispute Settlement

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes arising under this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 14

285. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the *Agreement on Safeguards* were invoked:

Case Name	Case Number	Invoked Articles
1 *Korea – Dairy*	WT/DS98	Articles 2.1, 4.2(a), 4.2(b), 5.1 and 12.1–12.3
2 *Argentina – Footwear (EC)*	WT/DS121	Articles 2.1, 4.2(a), 4.2(b), 5.1, 6, 12.1 and 12.2
3 *US – Wheat Gluten*	WT/DS166	Articles 2.1, 4.2(a), 4.2(b), 8.1, 12.1(a), 12.1(b), 12.1(c), 12.2 and 12.3
4 *US – Lamb*	WT/DS177, WT/DS178	Articles 2.2, 3.1, 4.1, 4.1(a), 4.1(b), 4.2, 4.2(a), 8.1, 11.1(a), 12.2 and 12.6

[468] G/SG/M/6, Section I. The text of the adopted document can be found in G/SG/4.
[469] G/C/M/10, Section 1.
[470] G/SG/M/1, Section F.
[471] G/SG/M/1, Section J.
[472] G/SG/M/3, Section E.

Table (*cont.*)

Case Name	Case Number	Invoked Articles
5 *US – Line Pipe*	WT/DS202	Articles 2, 2.1, 2.2, 3, 3.1, 4, 4.1(b), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 5, 5.1, 7, 7.1, 8, 8.1, 9, 9.1, 11, 12.1, 12.3, 14
6 *Chile – Price Band System*	WT/DS207	Articles 2.1, 3.1, 3.2, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c), 5.1, 6, 7, 12
7 *Argentina – Preserved Peaches*	WT/DS238	Article 2.1, 3.1, 4.1(b), 4.2(a), 4.2(b), 5.1, and 12.2
8 *US – Steel Safeguards*	WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258, WT/DS259	Article 2.1, 2.2, 3, 3.1, 4.2(a), 4.2(b), 4.1(c), 5.1, 5.2, 7.1, 8.1, 9.1, 12.1, 12.2, and 12.3

XVI. ANNEX

A. TEXT OF THE ANNEX

ANNEX
EXCEPTION REFERRED TO IN PARAGRAPH 2 OF ARTICLE 11

Members concerned	Product	Termination
EC/Japan	Passenger cars, off road vehicles, light commercial vehicles, light trucks (up to 5 tonnes), and the same vehicles in wholly knocked-down form (CKD sets).	31 December 1999

B. INTERPRETATION AND APPLICATION OF THE ANNEX

No jurisprudence or decision by a competent WTO body.

XVII. STATUS OF SAFEGUARDS LEGISLATIVE NOTIFICATIONS

Member	Notification provided
Albania	None
Angola	None
Antigua and Barbuda	None
Argentina	G/SG/N/1/ARG/3 + Suppl.1 (*)
Armenia	G/SG/N/1/ARM/1
Australia	G/SG/N/1/AUS/2

Table (*cont.*)

Member	Notification provided
Bahrain	G/SG/N/1/BHR/1 (*)
Bangladesh	G/SG/N/1/BGD/1
Barbados	G/SG/N/1/BRB/1 (*)
Belize	None
Benin	G/SG/N/1/BEN/1 + Corr.1 (Corr.1–French only) (*)
Bolivarian Republic of Venezuela	G/SG/N/1/VEN/2
Bolivia	G/SG/N/1/BOL/1 + Suppl.1 (*)
Botswana	G/SG/N/1/BWA/1 (*)
Brazil	G/SG/N/1/BRA/3 + Suppl.1
Brunei Darussalam	G/SG/N/1/BRN/1 (*)
Bulgaria	G/SG/N/1/BGR/1
Burkina Faso	None
Burundi	G/SG/N/1/BUR/1 (*)
Cambodia	None
Cameroon	None
Canada	G/SG/N/1/CAN/3
Central African Republic	None
Chad	G/SG/N/1/TCD/1 (*)
Chile	G/SG/N/1/CHL/2
China	G/SG/N/1/CHN/2 + Suppl.1 & Suppl.2
Colombia	G/SG/N/1/COL/2
Congo	None
Costa Rica	G/SG/N/1/CRI/3
Côte d'Ivoire	G/SG/N/1/CIV/1 (*)
Croatia	G/SG/N/1/HRV/2
Cuba	G/SG/N/1/CUB/1
Cyprus	G/SG/N/1/CYP/1 (*)
Czech Republic	G/SG/N/1/CZE/3
Democratic Republic of the Congo	None
Djibouti	None
Dominica	G/SG/N/1/DMA/1 (*)
Dominican Republic	G/SG/N/1/DOM/2 + Corr.1 (Corr.1–Spanish only)
Ecuador	G/SG/N/1/ECU/3
Egypt	G/SG/N/1/EGY/2
El Salvador	G/SG/N/1/SLV/2
Estonia	G/SG/N/1/EST/2
European Communities	G/SG/N/1/EEC/1 + Suppl.1
Fiji	G/SG/N/1/FJI/1 (*)
Former Yugoslav Republic of Macedonia	None
Gabon	None
The Gambia	None
Georgia	G/SG/N/1/GEO/1 (*)
Ghana	G/SG/N/1/GHA/1 (*)
Grenada	None

Table (*cont.*)

Member	Notification provided
Guatemala	G/SG/N/1/GTM/2
Guinea	G/SG/N/1/GIN/1 (*)
Guinea Bissau	None
Guyana	None
Haiti	G/SG/N/1/HTI/1 (*)
Honduras	G/SG/N/1/HND/2
Hong Kong, China	G/SG/N/1/HKG/1 (*)
Hungary	G/SG/N/1/HUN/2 + Add.1 + Suppl.1 & 2
Iceland	G/SG/N/1/ISL/1 (*)
India	G/SG/N/1/IND/2 + Suppl.1
Indonesia	G/SG/N/1/IDN/2
Israel	G/SG/N/1/ISR/1 + Corr. 1
Jamaica	G/SG/N/1/JAM/2 + Corr. 1
Japan	G/SG/N/1/JPN/2 + Corr.1 & Suppl.1 G/SG/N/1/JPN/3
Jordan	G/SG/N/1/JOR/2 + Corr. 1
Kenya	G/SG/N/1/KEN/1 (*)
Korea	G/SG/N/1/KOR/5
Kuwait	None
Kyrgyz Republic	G/SG/N/1/KGZ/1
Latvia	G/SG/N/1/LVA/1/Suppl.3
Lesotho	G/SG/N/1/LSO/1 (*)
Liechtenstein	G/SG/N/1/LIE/1 (*)
Lithuania	G/SG/N/1/LTU/2
Macao, China	G/SG/N/1/MAC/2
Madagascar	G/SG/N/1/MDG/1 (*)
Malawi	G/SG/N/1/MWI/1 (*)
Malaysia	G/SG/N/1/MYS/1 (*)
Maldives	G/SG/N/1/MDV/1 (*)
Mali	None
Malta	G/SG/N/1/MLT/1 (*)
Mauritania	None
Mauritius	G/SG/N/1/MUS/1 (*)
Mexico	G/SG/N/1/MEX/1 + Suppl.1 & Corr.1
Moldova	G/SG/N/1/MDA/1
Mongolia	G/SG/N/1/MNG/1 (*)
Morocco	G/SG/N/1/MAR/1 (*)
Mozambique	None
Myanmar	G/SG/N/1/MYM/1 (*)
Namibia	G/SG/N/1/NAM/2 (*)
Nepal	None
New Zealand	G/SG/N/1/NZL/1
Nicaragua	G/SG/N/1/NIC/1
Niger	None
Nigeria	G/SG/N/1/NGA/1 (*)
Norway	G/SG/N/1/NOR/3
Oman	G/SG/N/1/OMN/1 (*)
Pakistan	G/SG/N/1/PAK/3

Table (*cont.*)

Member	Notification provided
Panama	G/SG/N/1/PAN/1
Papua New Guinea	None
Paraguay	G/SG/N/1/PRY/2
Peru	G/SG/N/1/PER/2 + Suppl. 1 & 2
Philippines	G/SG/N/1/PHL/2
Poland	G/SG/N/1/POL/3
Qatar	G/SG/N/1/QAT/1 (*)
Romania	G/SG/N/1/ROM/1
Rwanda	None
Saint Kitts and Nevis	None
Saint Lucia	G/SG/N/1/LCA/1 (*)
Saint Vincent and Grenadines	None
Senegal	G/SG/N/1/SEN/1 (*)
Sierra Leone	None
Singapore	G/SG/N/1/SGP/1 (*)
Slovak Republic	G/SG/N/1/SVK/2
Slovenia	G/SG/N/1/SVN/2
Solomon Islands	None
South Africa	G/SG/N/1/ZAF/1
Sri Lanka	G/SG/N/1/LKA/1 (*)
Suriname	G/SG/N/1/SUR/1 (*)
Swaziland	None
Switzerland	G/SG/N/1/CHE/1 (*)
Chinese Taipei	G/SG/N/1/TPKM/2 + Suppl.1
Tanzania	None
Thailand	G/SG/N/1/THA/2
Togo	None
Trinidad and Tobago	G/SG/N/1/TTO/1 (*)
Tunisia	G/SG/N/1/TUN/2
Turkey	G/SG/N/1/TUR/3
Uganda	G/SG/N/1/UGA/1 (*)
United Arab Emirates	G/SG/N/1/ARE/1 (*)
United States of America	G/SG/N/1/USA/1
Uruguay	G/SG/N/1/URY/1 + Supp.1 & Corr.1 (Corr.1–Spanish only)
Zambia	G/SG/N/1/ZMB/1 (*)
Zimbabwe	G/SG/N/1/ZWE/2 (*)

– Notification accompanied with the mark * is a "nil" notification.
– "None" means that no notification has been submitted.
– This annual report includes a period when Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia were not Member States of the European Communities (i.e. prior to May 2004), as well as a period following the accession of these countries to the European Communities. Therefore, these Members' separate notifications are listed herein. See document G/SG/N/1//EEC/1/Suppl.2 for updated information on the current status of laws and regulations of the above-mentioned countries.

General Agreement on Trade in Services

I. PREAMBLE 964
A. TEXT OF THE PREAMBLE 964
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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Recognizing the growing importance of trade in services for the growth and development of the world economy;

Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;

Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;

Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;

Desiring to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness;

Taking particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs;

Hereby *agree* as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

No jurisprudence or decision of a competent WTO body.

PART I
SCOPE AND DEFINITION

II. ARTICLE I

A. TEXT OF ARTICLE I

Article I
Scope and Definition

1. This Agreement applies to measures by Members affecting trade in services.

2. For the purposes of this Agreement, trade in services is defined as the supply of a service:

(a) from the territory of one Member into the territory of any other Member;

(b) in the territory of one Member to the service consumer of any other Member;

(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

3. For the purposes of this Agreement:

(a) "measures by Members" means measures taken by:

(i) central, regional or local governments and authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

(b) "services" includes any service in any sector except services supplied in the exercise of governmental authority;

(c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

B. INTERPRETATION AND APPLICATION OF ARTICLE I

1. Scope of GATS

(a) Measures relating to judicial and administrative assistance

1. With respect to measures relating to judicial and administrative assistance in the context of Article II of *GATS*, as referenced in paragraph 20 below, at its meeting of 1 March 1995, the Council for Trade in Services agreed to adopt the conclusion of the Sub-Committee on Services concerning measures relating to judicial and administrative assistance.[1] The adopted conclusion, *inter alia*, states that none of the provisions of the *GATS* would apply to such measures.[2]

(b) Measures relating to the entry and stay of natural persons

2. With respect to the basis for drawing the distinction between "temporary" and "permanent" residency in the context of *GATS*, see paragraph 150 below.

(c) Electronic commerce

3. At its meeting of 25 September 1998, the General Council adopted the Work Programme on Electronic Commerce, which mandated the Council for Trade in Services to examine and report on the treatment of electronic commerce in the *GATS* legal framework.[3]

2. Article I:1

(a) "measures affecting trade in services"

4. The Panel on *EC – Bananas III* defined the scope of application of the *GATS* in the following terms:

> "[N]o measures are excluded *a priori* from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services."[4]

5. Based on its interpretation of the scope of the *GATS* set out in paragraph 4 above, the Panel on *EC – Bananas III* concluded that there was "no legal basis for an *a priori* exclusion of measures within the EC banana

[1] S/C/M/1, paras. 14–15.
[2] S/C/1, para. 6.
[3] WT/GC/M/30, section 4. The adopted Work Programme can be found in WT/L/274. With respect to the 1999 Interim Report to the General Council, see S/C/M/34, Section A. With respect to the 1999 Progress Report, which discusses, *inter alia*, the issue of public telecommunications transport networks and services within the context of the Work Programme on Electronic Commerce, see S/L/74.
[4] Panel Report on *EC – Bananas III*, para. 7.285.

import licensing regime from the scope of the GATS".[5] The Appellate Body upheld this finding and held that no provision of the Agreement "suggest[s] a limited scope of application for the GATS":

> "In addressing this issue, we note that Article I:1 of the GATS provides that '[t]his Agreement applies to measures by Members affecting trade in services'. In our view, the use of the term 'affecting' reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term 'affecting' in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing'. . . . We also note that Article I:3(b) of the GATS provides that '"services" includes *any service* in *any sector* except services supplied in the exercise of governmental authority' (emphasis added), and that Article XXVIII(b) of the GATS provides that the '"supply of a service" includes the production, distribution, marketing, sale and delivery of a service'. There is nothing at all in these provisions to suggest a limited scope of application for the GATS. . . . For these reasons, we uphold the Panel's finding that there is no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS."[6]

6. In *Canada – Autos*, the Panel reiterated the statement of the Panel on *EC – Bananas III* that Article I of the *GATS* does not *a priori* exclude any measure from the scope of application of the Agreement. The Panel on *Canada – Autos* then went on to state that a determination of whether the measures at issue in the case before it were measures "affecting trade in services" within the meaning of Article I of *GATS* "should be done on the basis of the determination of whether these measures constitute less favourable treatment for the services and service suppliers of some Members as compared to those of others (Article II) and/or for services and service suppliers of other Members as compared to domestic ones (Article XVII)".[7] The Appellate Body reversed this finding, holding that whether a measure "affects" trade in services must be assessed before any further consistency of this measure with other *GATS* provisions is considered:

> "[T]he fundamental structure and logic of Article I:1, in relation to the rest of the GATS, require that determination of whether a measure is, in fact, covered by the GATS must be made before the consistency of that measure with any substantive obligation of the GATS can be assessed.
>
> Article II:1 of the GATS states expressly that it applies only to 'any measure covered by this Agreement'. This explicit reference to the scope of the GATS confirms that the measure at issue must be found to be a measure 'affecting trade in services' within the meaning of Article I:1, and thus covered by the GATS, *before* any further examination of consistency with Article II can logically be made. We find, therefore, that the Panel should have inquired, as a threshold question, into whether the measure is within the scope of the GATS by examining whether the import duty exemption is a measure 'affecting trade in services' within the meaning of Article I. In failing to do so, the Panel erred in its interpretative approach.
>
> . . .
>
> [W]e believe that at least two key legal issues must be examined to determine whether a measure is one 'affecting trade in services': first, whether there is 'trade in services' in the sense of Article I:2; and, second, whether the measure in issue 'affects' such trade in services within the meaning of Article I:1."[8]

7. After rejecting the notion that the question whether a measure "affected" trade in services could be ascertained by examining whether such a measure violated Article II or Article XVII of *GATS*, the Appellate Body in *Canada – Autos* then indicated the criteria which it considered relevant for determining whether a measure "affected" trade in services:

> "[T]he Panel . . . never examined whether or how the import duty exemption affects *wholesale trade service suppliers in their capacity as service suppliers*. Rather, the Panel simply stated:
>
> > 'Like the measures at issue in the *EC – Bananas III* case, the import duty exemption granted only to *manufacturer beneficiaries* bears upon conditions of competition in the supply of distribution services, regardless of whether it directly governs or indirectly affects the supply of such services.'[9] (emphasis added)
>
> We do not consider this statement of the Panel to be a sufficient basis for a legal finding that the import duty exemption 'affects' wholesale trade services of motor vehicles *as services*, or wholesale trade service suppliers *in their capacity as service suppliers*. The Panel failed to analyze the evidence on the record relating to the provision of wholesale trade services of motor vehicles in the Canadian market. It also failed to articulate what it understood Article I:1 to require by the use of the term 'affecting'. Having interpreted Article I:1, the Panel should then have examined all the relevant facts, including *who* supplies wholesale trade services of motor vehicles through commercial presence in Canada, and *how*

[5] Panel Report on *EC – Bananas III*, para. 7.286.
[6] Appellate Body Report on *EC – Bananas III*, para. 220.
[7] Panel Report on *Canada – Autos*, para. 10.234.
[8] Appellate Body Report on *Canada – Autos*, paras. 151–152 and 155.
[9] (*footnote original*) Panel Report, para. 10.239.

such services are supplied. It is not enough to make assumptions. Finally, the Panel should have applied its interpretation of 'affecting trade in services' to the facts it should have found.

The European Communities and Japan may well be correct in their assertions that the availability of the import duty exemption to certain manufacturer beneficiaries of the United States established in Canada, and the corresponding unavailability of this exemption to manufacturer beneficiaries of Europe and of Japan established in Canada, has an effect on the operations in Canada of wholesale trade service suppliers of motor vehicles and, therefore, 'affects' those wholesale trade service suppliers in their capacity as service suppliers. However, the Panel did not examine this issue. The Panel merely asserted its conclusion, without explaining how or why it came to its conclusion. This is not good enough."[10]

3. Article I:2(a)

(a) Relevance of where the supplier operates, or is present

8. The Panel on *Mexico – Telecoms* found that "the services at issue, in which United States suppliers link their networks at the border with those of Mexican suppliers for termination within Mexico, without United States' suppliers operating, or being present in some way, in Mexico, are services which are supplied cross-border within the meaning of Article I:2(a) of the GATS".[11] In examining Article I:2(a), the Panel found that this provision does not require that the service supplier must itself operate, or be present, in the territory into which the service is supplied:

"Subparagraph (a) describes what is referred to as 'cross-border', or 'mode 1', supply of trade in services. The ordinary meaning of the words of this provision indicate that the *service* is supplied from the territory of one Member into the territory of another Member. Subparagraph (a) is silent as regards the *supplier* of the service. The words of this provision do not address the service supplier or specify where the service supplier must operate, or be present in some way, much less imply any degree of presence of the supplier in the territory into which the service is supplied.

If we look at the wording of the other modes of supply, we note that the silence in subparagraph (a) as regards the presence of the supplier of the service is in marked contrast to the modes of supply described in subparagraphs (c) ('commercial presence') and (d) ('presence of natural persons'). In both cases, the presence of the service supplier within the territory where the service is supplied is specifically mentioned. The context provided by subparagraphs (c) and (d) therefore suggests that, where the presence of the service supplier was required to define a particular mode of supply, the drafters of the GATS expressed this clearly."[12]

(b) Relevance of ownership and control of the infrastructure used to supply the service

9. The Panel on *Mexico – Telecoms*, in examining the definition of basic telecommunications services contained in the GATS, found that the definition does not imply that the supplier of such services must itself own or control the entire network infrastructure over which the cross-border service is supplied:

"According to the definition, basic telecommunications services are services supplied 'between two or more points'. The definition nowhere indicates that a *single* supplier must undertake the transmission between the 'points'. The words 'between two or more points' suggest, in fact, the contrary. Transmission to the various 'points' requested by a customer requires ownership of or access to an expansive transmission infrastructure. It would be unreasonable to assume that the definition of telecommunications services applies only where a telecommunications supplier itself owns or controls a complete global infrastructure allowing it to reach every potential 'point' requested by its customers. Had WTO Members intended this to be the case, they surely would have made it explicit in the definition."[13]

10. The Panel on *Mexico – Telecoms* found further support for this view by examining the meaning of "public long-distance voice telephone services", contained in the UN 1991 Provisional Central Product Classification, and referenced in the GATS Sectoral List (W/120) used by Mexico and many other Members in scheduling their telecommunications commitments:

"This definition makes clear that the service of long-distance telephony consists of giving a customer access to both 'the supplier's and connecting operator's entire telephone network' (emphasis added). The definition of voice telephony services thus anticipates interworking of both operating networks in order for the service to be performed. No element of the definition implies or requires 'end-to-end' service by one and the same operator. Moreover, when more than one operator is involved, the service supplied to customers includes access to the 'entire networks' of both operators. The service supplied is not therefore the simple transmission of a voice message 'up to' a connecting operator's network; rather, the service is defined as spanning both operators' networks. It therefore follows that supply of the service involves call completion spanning both operators' networks."[14]

11. The Panel on *Mexico – Telecoms* specified that the cross-border supply of telecommunications services

[10] Appellate Body Report on *Canada – Autos*, paras. 164–166.
[11] Panel Report on *Mexico – Telecoms*, para. 7.45.
[12] Panel Report on *Mexico – Telecoms*, paras. 7.30–7.31.
[13] Panel Report on *Mexico – Telecoms*, para. 7.34.
[14] Panel Report on *Mexico – Telecoms*, para. 7.36.

could take place even if elements of the service were subcontracted or carried out with assets owned by another firm:

> "More generally, a supplier of services under the GATS is no less a supplier solely because elements of the service are subcontracted to another firm, or are carried out with assets owned by another firm. What counts is the service that the supplier offers and has agreed to supply to a customer. In the case of a basic telecommunications service, whether domestic or international, or supplied cross-border or through commercial presence, the supplier offers its customer the service of completing the customer's communications. Having done so, the supplier is responsible for making any necessary subsidiary arrangements to ensure that the communications are in fact completed. The customer typically pays its supplier the price of the end-to-end service, regardless of whether the supplier contracts with, or uses the assets of, another firm to supply the service."[15]

(c) Relevance of degree of interaction between different operators

12. Referring again to the definition of "public long-distance voice telephone services" in the UN 1991 Provision Central Product Classification, the Panel on *Mexico – Telecoms* stated that the reference in this definition to services "necessary to establish and maintain communications" suggested a high degree of interaction between operators in the cross-border supply of a telecommunications service:

> "We observe that basic telecommunications services supplied between Members do require, during the delivery of the service, a high degree of interaction between each other's networks, since the service typically involves a continuous, rapid and often two-way flow of intangible customer and operator data. The interaction results in a seamless service between the originating and terminating segments, which suggests that the service be considered as a single, cross-border service."[16]

(d) Relevance of supply by means of "linking" to another operator

13. In arriving at the conclusion discussed in paragraph 8 above, the Panel on *Mexico – Telecoms* considered Mexico's claim that the supplier itself must transmit the customer data from one Member to another Member:

> "If linking with another operator implied that the originating operator were no longer 'supplying' the service, an absurd consequence would result. Not only would telecommunications services delivered in this manner not be 'supplied' cross-border in the sense of Article I:2(a), they would also not be 'supplied' under any of the other modes of supply under the GATS. Nearly all telecommunications services currently supplied across borders would then fall outside the scope of the GATS. Present and future liberalization of this form of international telecommunications trade would not be possible within the WTO, without a new or amended treaty. Such an interpretation would be inconsistent with the fact that the GATS 'applies to . . . trade in services' (Article I:1), and that 'trade in services' is defined comprehensively as the supply of services through four modes of supply. The GATS creates a wide-ranging agreement covering all services and modes of supply, in order to allow progressive liberalization of trade in services between Members. This suggests that the supply of basic telecommunications services – the 'transmission of customer supplied information' – must include supply by means which involve or require linking to another operator to complete the service."[17]

4. Article I:2(c)

(a) Supply by a firm commercially present in one Member into the territory of another Member

14. The Panel on *Mexico – Telecoms* examined whether international services supplied by a firm in Mexico fell within the definition of services supplied through commercial presence. It found that there was no territorial requirement contained in paragraph 2(c) other than a commercial presence in the territory of any other Member:

> "The definition of services supplied through a commercial presence makes explicit the location of the service supplier. It provides that a service supplier has a commercial presence – any type of business or professional establishment – *in the territory* of any other Member. The definition is silent with respect to any other territorial requirement (as in cross-border supply under mode 1) or nationality of the service consumer (as in consumption abroad under mode 2). Supply of a service through commercial presence would therefore not exclude a service that originates in the territory in which a commercial presence is established (such as Mexico), but is delivered into the territory of any other Member (such as the United States).[18]

5. Relationship with the GATT 1994

15. In *Canada – Periodicals*, the Panel, in a finding subsequently not addressed by the Appellate Body, rejected the argument by Canada that Article III of the *GATT 1994* does not apply to a measure which is within the purview of the *GATS*:

> "Canada's argument is essentially that since Canada has made no specific commitments for advertising services

[15] Panel Report on *Mexico – Telecoms*, para. 7.42.
[16] Panel Report on *Mexico – Telecoms*, para. 7.38.
[17] Panel Report on *Mexico – Telecoms*, para. 7.41.
[18] Panel Report on *Mexico – Telecoms*, para. 7.375.

under GATS, the United States should not be allowed to 'obtain benefits under a covered agreement that have been expressly precluded under another covered agreement'. . . . Put another way, Canada seems to argue that if a Member has not undertaken market-access commitments in a specific service sector, that non-commitment should preclude all the obligations or commitments undertaken in the goods sector to the extent that there is an overlap between the non-commitment in services and the obligations or commitments in the goods sector. Canada claims that because of the existence of the two instruments – GATT 1994 and GATS – both of which may apply to a given measure, 'it is necessary to interpret the scope of application of each such as to avoid any overlap'.

We are not fully convinced by Canada's characterization of the Excise Tax as a measure intended to regulate trade in advertising services, in view of the fact that there is no comparable regulation on advertisements through other media and the fact that the tax is imposed on a 'per issue' basis. However, assuming that Canada intended to carve out Part V.1 of the Excise Tax Act from the coverage of its GATS commitments by not inscribing advertising services in its Schedule. . ., does that exonerate Canada from the Panel's scrutiny regarding the alleged violation of its obligations and commitments under GATT 1994?

In order to answer this question, we need to examine the structure of the WTO Agreement including its annexes. Article II:2 of the WTO Agreement is the relevant provision, which reads as follows:

> 'The agreements and associated legal instruments included in Annexes 1, 2 and 3 . . . are integral parts of this Agreement, binding on all Members' . . . ."[19]

16. Recalling the principle of effective treaty interpretation, the Panel then found that "obligations under *GATT 1994* and *GATS* can co-exist and that one does not override the other":

"According to Article 31(1) of the 1969 Vienna Convention on the Law of Treaties ('Vienna Convention'), a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Furthermore, as the Appellate Body has repeatedly pointed out, 'one of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.'. . .[20] The ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other. If the consequences suggested by Canada were intended, there would have been provisions similar to Article XVI:3 of the WTO Agreement or the General Interpretative Note to Annex 1A in order to establish hierarchical order between GATT 1994 and GATS. The absence of such provisions between the two instruments implies that GATT 1994 and GATS are standing on the same plane in the WTO Agreement, without any hierarchical order between the two."[21]

17. The Panel on *Canada – Periodicals* finally rejected the notion that overlaps between the subject-matter of the *GATT 1994* and *GATS* should be avoided. Rather, it noted that certain types of services have long been associated with GATT disciplines, as evidenced, *inter alia*, by certain GATT Panel Reports:

"In this connection, Canada also argues that overlaps between GATT 1994 and GATS should be avoided. . . . We disagree. Overlaps between the subject matter of disciplines in GATT 1994 and in GATS are inevitable, and will further increase with the progress of technology and the globalization of economic activities. We do not consider that such overlaps will undermine the coherence of the WTO system. In fact, certain types of services such as transportation and distribution are recognized as a subject-matter of disciplines under Article III:4 of GATT 1994. It is also noteworthy in this respect that advertising services have long been associated with the disciplines under GATT Article III. As early as 1970, the Working Party on Border Tax Adjustment made the following observation:

'The Working Party noted that there was a divergence of views with regard to the eligibility for adjustment of certain categories of tax and that these could be subdivided into

> (a) 'Taxes occultes' which the OECD defined as consumption taxes on capital equipment, auxiliary materials and *services* used in the transportation and production of other taxable goods. Taxes on *advertising*, energy, machinery and transport were among the more important taxes which might be involved. . . . ;
>
> (b) Certain other taxes, . . .'. . .[22]

We also note that there are several adopted panel reports that examined the issue of services in the context of GATT Article III. For instance, the panel on *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* addressed the issues of access to points of sale and restrictions on private

[19] Panel Report on *Canada – Periodicals*, paras. 5.14–5.16.
[20] (*footnote original*) Appellate Body Report on *United States – Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/AB/R, p. 23. Also cited in the Appellate Body Report on *Japan – Taxes on Alcoholic Beverages*, p. 12.
[21] Panel Report on *Canada – Periodicals*, para. 5.17.
[22] (*footnote original*) "Border Tax Adjustments", Report of the Working Party adopted on 2 December 1970 (L/3464), BISD 18S/97, para. 15 (emphasis added).

delivery of beer. . . . The panel on *United States – Measures Affecting Alcoholic and Malt Beverages* also dealt with the issues of distribution of wine and beer. . . . More to the point, the panel on *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* specifically addressed the question of advertising . . .

In any event, since Canada admits that in the present case there is no conflict between its obligations under GATS and under GATT 1994. . ., there is no reason why both GATT and GATS obligations should not apply to the Excise Tax Act. Thus, we conclude that Article III of GATT 1994 is applicable to Part V.1 of the Excise Tax Act."[23]

18. On appeal, the Appellate Body on *Canada – Periodicals* did not find it necessary "to pronounce on the issue of whether there can be potential overlaps between the GATT 1994 and the GATS, as both participants agreed that it is not relevant in this appeal". The Appellate Body then held that the Canadian measure at issue, as an excise tax on certain periodicals, clearly applied to goods. The Appellate Body subsequently examined the measure under Article III:2 of the *GATT 1994*.[24]

19. While in *Canada – Periodicals* the Appellate Body did not find it necessary to pronounce on the question whether there could be overlaps between the scope of application of the *GATT 1994* and *GATS*, in *EC – Bananas III* the Appellate Body confirmed the approach of the Panel on *Canada – Periodicals*. The Appellate Body rejected the notion that the *GATT 1994* and *GATS* are "mutually exclusive agreements" and held that there was a "category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS":

"The second issue is whether the GATS and the GATT 1994 are mutually exclusive agreements. The GATS was not intended to deal with the same subject matter as the GATT 1994. The GATS was intended to deal with a subject matter not covered by the GATT 1994, that is, with trade in services. Thus, the GATS applies to the supply of services. It provides, *inter alia*, for both MFN treatment and national treatment for services and service suppliers. Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis. This was also our conclusion in the Appellate Body Report in *Canada – Periodicals*."[25]

PART II
GENERAL OBLIGATIONS AND DISCIPLINES

III. ARTICLE II

A. TEXT OF ARTICLE II

Article II
Most-Favoured-Nation Treatment

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

B. INTERPRETATION AND APPLICATION OF ARTICLE II

1. Scope

(a) Measures relating to judicial and administrative assistance

20. At its meeting of 1 March 1995, the Council for Trade in Services agreed to adopt the following conclusion of the Sub-Committee on Services concerning measures relating to judicial and administrative assistance:[26]

"At the end of the Uruguay Round it had been agreed by participants that Article II of the GATS (MFN) would

[23] Panel Report on *Canada – Periodicals*, paras. 5.18–5.19.
[24] Appellate Body Report on *Canada – Periodicals*, pp. 21–22.
[25] Appellate Body Report on *EC – Bananas III*, para. 221.
[26] S/C/M/1, para. 14.

not apply to measures relating to judicial and administrative assistance. This agreement was reflected in document MTN.GNS/W/177/Rev.1/Add.1 which states:

> 'It is agreed by participants that the provisions of Article II (Most-Favoured National Treatment) do not apply to measures relating to judicial and administrative assistance. In the light of this agreement, the former footnote to Article II has been deleted.'

The agreement was based on the view that discrimination between service suppliers of different Members arising from judicial and administrative assistance measures, apart from what is already stipulated by the provisions of the GATS, would not have any significant effect on conditions of competition between service suppliers. In the subsequent consultations it was agreed that the same logic could be applied to the whole of the GATS and that therefore none of the provisions of the GATS would apply to such measures."[27]

(b) Electronic commerce

21. With respect to the application of Article III to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.[28]

2. Interpretation

22. In *Canada – Autos*, the Appellate Body explained how a Panel should proceed when examining the consistency of a measure with Article II:1 of the *GATS*. After determining whether the measure under examination affects trade in services, the examiner should make "factual findings as to treatment of wholesale trade services and service suppliers of motor vehicles of different Members commercially present" and, as the last step, apply Article II:1 to these facts:

> "The wording of this provision suggests that analysis of the consistency of a measure with Article II:1 should proceed in several steps. First, as we have seen, a threshold determination must be made under Article I:1 that the measure is covered by the GATS. This determination requires that there be 'trade in services' in one of the four modes of supply, and that there be also a measure which 'affects' this trade in services. We have already held that the Panel failed to undertake this analysis.
>
> If the threshold determination is that the measure is covered by the GATS, appraisal of the consistency of the measure with the requirements of Article II:1 is the next step. The text of Article II:1 requires, in essence, that treatment by one Member of 'services and service suppliers' of any other Member be compared with treatment of 'like' services and service suppliers of 'any other country'. Based on these core legal elements, the Panel should first have rendered its interpretation of Article II:1. It should then have made factual findings as to treatment of wholesale trade services and service suppliers of motor vehicles of different Members commercially present in Canada. Finally, the Panel should have applied its interpretation of Article II:1 to the facts as it found them."[29]

23. The Appellate Body on *Canada – Autos* subsequently disapproved of the Panel's application of Article II of *GATS* to the facts in the case before it. Specifically, the Appellate Body objected to what it considered to be the Panel's assumption that the application of an import duty exemption to manufacturers automatically affected "competition among wholesalers in their capacity as service suppliers":

> "Clearly, here the Panel is confusing the application of the import duty exemption to manufacturers with its possible effect on wholesalers. In our view, the Panel has conducted a 'goods' analysis of this measure, and has simply extrapolated its analysis of how the import duty exemption affects manufacturers to wholesale trade service suppliers of motor vehicles. The Panel surmised, without analysing the effect of the measure on wholesalers as service suppliers, that the import duty exemption, granted to a limited number of manufacturers, ipso facto affects conditions of competition among wholesalers in their capacity as service suppliers. As we stated earlier in respect of whether the measure at issue 'affects trade in services', the Panel failed to demonstrate how the import duty exemption granted to certain manufacturers, but not to other manufacturers, affects the supply of wholesale trade services and the suppliers of wholesale trade services of motor vehicles. In reaching its conclusions under Article II:1 of the GATS, the Panel has neither assessed the relevant facts – we see no analysis of any evidence relating to the supply of wholesale trade services of motor vehicles – nor has it interpreted Article II of the GATS and applied that interpretation to the facts it found."[30]

3. Article II:1

(a) "no less favourable treatment"

24. In *EC – Bananas III*, the European Communities argued that Article II of the *GATS* did not cover de facto discrimination; the European Communities claimed that if the drafters of the *GATS* had wished to make the "modification of competitive conditions" requirement an integral part of the "no less favourable treatment" test under the most-favoured-nation clause, they would have done so explicitly. The Panel rejected this argument, noting that Article XVII "is meant to provide for no less favourable conditions of competition regardless

[27] S/C/1, para. 6.
[28] S/L/74, para. 9.
[29] Appellate Body Report on *Canada – Autos*, paras. 170–171.
[30] Appellate Body Report on *Canada – Autos*, para. 181.

of whether that is achieved through the application of formally identical or formally different measures ... The absence of similar language in Article II is not, in our view, a justification for giving a different ordinary meaning in terms of Article 31(1) of the Vienna Convention to the words 'treatment no less favourable', which are identical in both Articles II:1 and XVII:1."[31] The Panel also opined that "if the standard of 'no less favourable treatment' in Article II were to be interpreted narrowly to require only formally identical treatment, that could lead in many situations to the frustration of the objective behind Article II which is to prohibit discrimination between like services and service suppliers of other Members".[32] The Appellate Body did not agree with this reasoning of the Panel, but reached the same conclusion as regards the applicability of Article II of *GATS* to de facto discrimination:

> "We find the Panel's reasoning on this issue to be less than fully satisfactory. The Panel interpreted Article II of the GATS in the light of panel reports interpreting the national treatment obligation of Article III of the GATT. The Panel also referred to Article XVII of the GATS, which is also a national treatment obligation. But Article II of the GATS relates to MFN treatment, not to national treatment. Therefore, provisions elsewhere in the GATS relating to national treatment obligations, and previous GATT practice relating to the interpretation of the national treatment obligation of Article III of the GATT 1994 are not necessarily relevant to the interpretation of Article II of the GATS. The Panel would have been on safer ground had it compared the MFN obligation in Article II of the GATS with the MFN and MFN-type obligations in the GATT 1994.
>
> Articles I and II of the GATT 1994 have been applied, in past practice, to measures involving *de facto* discrimination. . . .
>
> The GATS negotiators chose to use different language in Article II and Article XVII of the GATS in expressing the obligation to provide 'treatment no less favourable'. The question naturally arises: if the GATS negotiators intended that 'treatment no less favourable' should have exactly the same meaning in Articles II and XVII of the GATS, why did they not repeat paragraphs 2 and 3 of Article XVII in Article II? But that is not the question here. The question here is the meaning of 'treatment no less favourable' with respect to the MFN obligation in Article II of the GATS. There is more than one way of writing a *de facto* non-discrimination provision. Article XVII of the GATS is merely one of many provisions in the *WTO Agreement* that require the obligation of providing 'treatment no less favourable'. The possibility that the two Articles may not have exactly the same meaning does *not* imply that the intention of the drafters of the GATS was that a *de jure*, or formal, standard should apply in Article II of the GATS. If that were the intention, why does Article II not say as much? The obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude *de facto* discrimination. Moreover, if Article II was not applicable to *de facto* discrimination, it would not be difficult – and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods – to devise discriminatory measures aimed at circumventing the basic purpose of that Article.
>
> For these reasons, we conclude that 'treatment no less favourable' in Article II:1 of the GATS should be interpreted to include *de facto*, as well as *de jure*, discrimination. We should make it clear that we do not limit our conclusion to this case. We have some difficulty in understanding why the Panel stated that its interpretation of Article II of the GATS applied '*in casu*'."[33]

25. In *Canada – Autos*, Canada argued that it was not possible to establish whether treatment no less favourable had been granted or not, due to vertical integration and exclusive distribution arrangements existing in the motor vehicle industry between manufacturers and wholesale trade service suppliers; Canada argued that these circumstances excluded any actual or potential competition at the wholesale trade level. The Panel found that these factual elements did not rule out the possibility of less favourable treatment:

> "We therefore *find* that vertical integration and exclusive distribution arrangements between manufacturers and wholesalers in the motor vehicle industry do not rule out the possibility that treatment less favourable may be granted to suppliers of wholesale trade services for motor vehicles. We also *find* that vertical integration and exclusive distribution arrangements do not preclude potential competition among wholesalers for the procurement of vehicles from manufacturers and actual inter-brand competition for sales to retailers."[34]

(b) "like services and service suppliers"

26. The Panel on *EC – Bananas III*, in a finding subsequently not reviewed by the Appellate Body, addressed the issue of likeness under Article II:

> "[I]n our view, the nature and the characteristics of wholesale transactions as such, as well as of each of the different subordinated services mentioned in the headnote to section 6 of the CPC, are 'like' when supplied in connection with wholesale services, irrespective of whether these services are supplied with respect to bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other. Indeed, it seems that each of the different service activities taken

[31] Panel Report on *EC – Bananas III*, para. 7.301.
[32] Panel Report on *EC – Bananas III*, para. 7.303.
[33] Appellate Body Report on *EC – Bananas III*, paras. 231–234.
[34] Panel Report on *Canada – Autos*, para. 10.254.

individually is virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service activity is being performed. Similarly, in our view, to the extent that entities provide these like services, they are like service suppliers."[35]

27. The Panel on *Canada – Autos* reiterated this approach:

"We agree that to the extent that the service suppliers concerned supply the same services, they should be considered 'like' for the purpose of this case."[36]

(c) "aims-and-effects" test

28. In *EC – Bananas III*, the Appellate Body rejected the application of the so-called "aims-and-effects" test, which had been previously adopted by several GATT panels in interpreting GATT Article III, to the national treatment requirement contained in Article II or Article VII of *GATS*. See paragraph 76 below.

29. With respect to the "aims-and-effects" test under GATT Article III, see Chapter on the *GATT 1994*, Section IV.C.1(c).

4. Exemptions from Article II

(a) Annex on Article II Exemptions

30. See Section XXXIV.B.

(b) Exemptions in financial services

31. With respect to exemptions from Article II of *GATS* concerning financial services, see the Fifth Protocol to the *GATS*,[37] adopted by the Committee on Trade in Financial Services on 14 November 1997.[38]

(c) Exemptions in maritime transport services

32. With respect to this issue, see the Decision on Maritime Transport Services adopted by the Council for Trade in Services at its meeting of 28 June 1996, which suspends negotiations on maritime transport services; the Decision further states that such negotiations will resume with "the commencement of comprehensive negotiations on Services" and that Article II of *GATS* will enter into force with respect to "international shipping, auxiliary services and access to and use of port facilities" when these negotiations have been concluded.[39]

(d) Exemptions in basic telecommunications

33. With respect to this issue, see the Fourth Protocol to the *GATS*, adopted by the Council for Trade in Services at its meeting of 30 April 1996.[40]

IV. ARTICLE III

A. TEXT OF ARTICLE III

Article III
Transparency

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.

3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.

4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.

5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.[41]

[35] Panel Report on *EC – Bananas III*, para. 7.322.
[36] Panel Report on *Canada – Autos*, para. 10.248.
[37] S/L/45.
[38] S/L/44.
[39] S/L/24, para. 4.
[40] S/L/19, para. 3.
[41] Paragraph 4 of the Annex on Telecommunications sets forth special provisions with regard to the application of Article III with respect to telecommunication services.

B. INTERPRETATION AND APPLICATION OF ARTICLE III

1. General

(a) Electronic commerce

34. With respect to the applicability of Article III to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.[42]

(b) Accountancy services

35. With respect to transparency in domestic regulations in the field of accountancy services, see the Disciplines on Domestic Regulation in the Accountancy Sector, adopted by the Council for Trade in Services at its meeting of 14 December 1998.[43]

2. Article III:3

(a) Format for notifications

36. On 1 March 1995, the Council for Trade in Service approved the "Guidelines for Notifications under the General Agreement on Trade in Services".[44]

3. Article III:4

(a) Enquiry points

37. On 28 May 1996, the Council for Trade in Services adopted the "Decision on the Notification of the Establishment of Enquiry and Contact Points", which calls upon Members to notify the establishment of enquiry points pursuant to Paragraph 4 of Article III.[45]

V. ARTICLE III *BIS*

A. TEXT OF ARTICLE III *BIS*

Article III bis
Disclosure of Confidential Information

Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

B. INTERPRETATION AND APPLICATION OF ARTICLE III BIS

No jurisprudence or decision of a competent WTO body.

VI. ARTICLE IV

A. TEXT OF ARTICLE IV

Article IV
Increasing Participation of Developing Countries

1. The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to:

(a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis;

(b) the improvement of their access to distribution channels and information networks; and

(c) the liberalization of market access in sectors and modes of supply of export interest to them.

2. Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning:

(a) commercial and technical aspects of the supply of services;

(b) registration, recognition and obtaining of professional qualifications; and

(c) the availability of services technology.

3. Special priority shall be given to the least-developed country Members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

B. INTERPRETATION AND APPLICATION OF ARTICLE IV

1. General

38. With respect to application of Article IV to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.[46]

[42] S/L/74, para. 9.
[43] S/L/64.
[44] S/C/M/1, paras. 10–11. The approved Guidelines can be found in S/L/5.
[45] S/C/M/10, paras. 9–10. The decision can be found in S/L/23.
[46] S/L/74, para. 10.

2. Article IV:3

(a) Contact points

(i) General

39. With respect to the contact points provided for in paragraph 2, see the "Decision on the Notification of the Establishment of Enquiry and Contact Points" referenced in paragraph 37 above.

(ii) Accountancy services

40. With respect to contact points in accountancy services, see the Disciplines on Domestic Regulation in the Accountancy Sector, adopted by the Council for Trade in Services on 14 December 1998.[47]

VII. ARTICLE V

A. TEXT OF ARTICLE V

Article V
Economic Integration

1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

(a) has substantial sectoral coverage,[1] and

(*footnote original*) [1] This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply.

(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:

(i) elimination of existing discriminatory measures, and/or

(ii) prohibition of new or more discriminatory measures,

either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

2. In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.

3. (a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

5. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.

6. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

7. (a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.

(b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.

(c) Based on the reports of the working parties referred to in subparagraphs (a) and (b), the Council may make recommendations to the parties as it deems appropriate.

8. A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation

[47] S/L/64, paras. 3–4.

for trade benefits that may accrue to any other Member from such agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE V

1. Article V:1

41. The Panel on *Canada – Autos*, in a finding subsequently not addressed by the Appellate Body, considered that, with respect to an import duty exemption available to only a limited number of firms, Canada could not claim an exemption from its MFN obligation under Article II by invoking Article V:1. The Panel noted that the Canadian measures at issue did not grant more favourable treatment to *all* services and service suppliers of members of NAFTA:

> "Even assuming that the [Canadian measures at issue] could be brought within the scope of the services liberalization provisions of NAFTA, we note that the import duty exemption under the [measures at issue] is accorded to a small number of manufacturers/wholesalers of the United States to the exclusion of all other manufacturers/wholesalers of the United States and of Mexico. The [measures at issue], therefore, provide more favourable treatment to only some and not all services and service suppliers of Members of NAFTA, while, according to Article V:1(b), an economic integration agreement has to provide for 'the absence or elimination of substantially all discrimination, in the sense of Article XVII', in order to be eligible for the exemption from Article II of the GATS.
>
> Although the requirement of Article V:1(b) is to provide non-discrimination in the sense of Article XVII (National Treatment), we consider that once it is fulfilled it would also ensure non-discrimination between all service suppliers of other parties to the economic integration agreement. It is our view that the object and purpose of this provision is to eliminate all discrimination among services and service suppliers of parties to an economic integration agreement, including discrimination between suppliers of other parties to an economic integration agreement. In other words, it would be inconsistent with this provision if a party to an economic integration agreement were to extend more favourable treatment to service suppliers of one party than that which it extended to service suppliers of another party to that agreement.
>
> Moreover, it is worth recalling that Article V provides legal coverage for measures taken pursuant to economic integration agreements, which would otherwise be inconsistent with the MFN obligation in Article II. Paragraph 1 of Article V refers to 'an agreement liberalizing trade in services'. Such economic integration agreements typically aim at achieving higher levels of liberalization between or among their parties than that achieved among WTO Members. Article V:1 further prescribes a certain minimum level of liberalization which such agreements must attain in order to qualify for the exemption from the general MFN obligation of Article II. In this respect, the purpose of Article V is to allow for ambitious liberalization to take place at a regional level, while at the same time guarding against undermining the MFN obligation by engaging in minor preferential arrangements. However, in our view, it is not within the object and purpose of Article V to provide legal coverage for the extension of more favourable treatment only to a few service suppliers of parties to an economic integration agreement on a selective basis, even in situations where the maintenance of such measures may explicitly be provided for in the agreement itself."[48]

2. Article V:7

(a) Format for notifications

42. With respect to the format for notifications under paragraph 7, see the Guidelines for Notifications under the General Agreement on Trade in Services.[49]

(b) Reporting on the operation of regional trade agreements

43. On 20 February 1998, the Committee on RTAs made recommendations to the Council for Trade in Services with respect to the reporting on the operation of regional trade agreements to the Committee.[50] On 23 and 24 November 1998, the Council for Trade in Services took note of the recommended procedures, as general guidelines with respect to reports/information on regional trade agreements submitted to it.[51]

(c) Examination of specific agreements

(i) General

44. With respect to the procedures for the examination of specific agreements, see Section V.B.7(iv) of the Chapter on the *WTO Agreement.*

45. At its meeting on 29–30 March 2004, the Committee on RTAs agreed on a way forward regarding services agreements transmitted to it for examination: their factual examination would start once specific commitments had been agreed upon.[52]

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[48] Panel Report on *Canada – Autos,* paras. 10.269–10.272.
[49] S/L/5.
[50] WT/REG/M/16, section B, in particular, paras. 4–39. The adopted recommendations can be found in WT/REG/5.
[51] S/C/M/31, section E. The procedures can be found in S/C/W/92.
[52] WT/REG/M/36, para.10. See the Committee's annual report (2004) for a list of such agreements: WT/REG/14 and WT/REG/14/Corr.1/Rev.1.

(ii) European Union

46. With respect to the enlargement of the European Union as a result of the accession of Austria, Finland and Sweden on 1 January 1995,[53] the Council for Trade in Services agreed that two issues, namely the Treaty of Accession of Austria, Finland and Sweden to the European Union and the Treaties establishing the European Union should be discussed separately. With respect to the first issue, the Council for Trade in Services on 30 March 1995 agreed to establish the Working Party on the Enlargement of the European Union.[54] With respect to the second issue, the Council for Trade in Services, at its meeting of 23 September 1996, decided to refer the Treaties establishing the European Union to the Committee on RTAs for examination pursuant to paragraph 7 of Article V of the *GATS*.[55]

(iii) Other agreements

47. Between 1 January 1995 and 31 December 2004, a total of 36 economic integration agreements had been notified to the Council for Trade in Services. The Council has adopted terms of reference for examination of all these agreements, to be carried out by the Committee on RTAs pursuant to paragraph 7(a) of Article V of the GATS. By 31 December 2004, 26 agreements were at various stages of examination in the Committee on RTAs; two agreements were yet to be considered by the Council for Trade in Services (see lists included in annex I below); and eight agreements had been terminated as a consequence of the enlargement of the European Union to include 10 new member States on 1 May 2004 (see Chapter on the *GATT 1994*, Article XXIX, and annex ii below):

C. ANNEX I

1. List of RTAs notified under Article V of the GATS for which factual examination has been completed

Agreement	Date	Terms of Reference for the Examination	Document series
Agreement Amending the Convention Establishing the European Free Trade Association	3-Dec-02	S/C/M/64	WT/REG154 S/C/N/207
Agreement between Japan and Singapore for a New-Age Economic Partnership	14-Nov-02	S/C/M/64	WT/REG140 S/C/N/206
Free Trade Agreement between Chile and Costa Rica	24-May-02	S/C/M/60	WT/REG136 S/C/N/191
Agreement between New Zealand and Singapore on a Closer Economic Partnership	19-Sep-01	S/C/M/56	WT/REG127 S/C/N/169
Free Trade Agreement between Chile and Mexico	14-Mar-01	S/C/M/52	WT/REG125 S/C/N/142
Free Trade Agreement between Canada and Chile	13-Nov-97	S/C/M/52	WT/REG38 S/C/N/65
European Economic Area	10-Oct-96	S/C/M/52	WT/REG138 S/C/N/28
Australia and New Zealand Closer Economic Relations Trade Agreement (Services)	22-Nov-95	S/C/M/14 S/C/M/52	WT/REG40 S/C/N/7, S/C/N/66
North American Free Trade Agreement	1-Mar-95	S/C/M/3	WT/REG4 S/C/N/4
Enlargement of the European Union – Accession of Austria, Finland and Sweden	20-Jan-95	S/C/M/6	WT/REG3 S/C/N/6

[53] Notified in WT/L/7.
[54] S/C/M/2, paras. 9–10.
[55] S/C/M/13, paras. 29–30.

2. List of RTAs notified under Article V of the GATS under factual examination

Agreement	Date	Terms of Reference for the Examination	Document series
Singapore-Australia Free Trade Agreement	1-Oct-03	S/C/M/69	WT/REG158 S/C/N/233
Caribbean Community Common Market	19-Feb-03	S/C/M/65	WT/REG155 S/C/N/229
Free Trade Agreement between the EFTA States and Singapore	24-Jan-03	S/C/M/65	WT/REG148 S/C/N/226
Free Trade Agreement between the United States and Jordan	18-Oct-02	S/C/M/63	WT/REG134 S/C/N/193
Free Trade Agreement between the European Communities and Mexico	21-Jun-02	S/C/M/61	WT/REG109 S/C/N/192
Free Trade Agreement between the EFTA States and Mexico	22-Aug-01	S/C/M/55	WT/REG126 S/C/N/166
Europe Agreement between the European Communities and Bulgaria	25-Apr-97	S/C/M/52	WT/REG1 S/C/N/55
Europe Agreement between the European Communities and Romania	9-Oct-96	S/C/M/52	WT/REG2 S/C/N/27
Treaties Establishing the European Union	10-Nov-95	S/C/M/14	WT/REG39 S/C/N/6

3. List of RTAs notified under Article V of the GATS for which factual examination has not yet commenced

Agreement	Date	Terms of Reference for the Examination	Document series
Enlargement of the European Union	28-Apr-04	S/C/M/73	WT/REG170 S/C/N/303
Free Trade Agreement between the Republic of Korea and Chile	19-Apr-04	S/C/M/73	WT/REG169 S/C/N/302
Free-Trade Agreement between Chile and El Salvador	17-Mar-04	S/C/M/72	WT/REG165 S/C/N/299
Closer Economic Partnership Arrangement between China and Macao, China	12-Jan-04	S/C/M/72	WT/REG163 S/C/N/265
Closer Economic Partnership Arrangement between China and Hong Kong, China	12-Jan-04	S/C/M/72	WT/REG162 S/C/N/264
Free Trade Agreement between the United States and Singapore	19-Dec-03	S/C/M/72	WT/REG161 S/C/N/263
Free Trade Agreement between the United States and Chile	19-Dec-03	S/C/M/72	WT/REG160 S/C/N/262

4. List of RTAs notified under Article V of the GATS which have not yet been considered by the Council for Trade in Services

Agreement	Date	Document series
Free Trade Agreement between the United States and Australia	23-Dec-04	WT/REG184 S/C/N/310
Free Trade Agreement between the EFTA States and Chile	10-Dec-04	WT/REG179 S/C/N/309

D. ANNEX II

1. RTAs notified under Article V of the GATS which have been terminated following the enlargement of the European Union on 1 May 2004

Agreement	Terms of Reference for the Examination	Notification of Termination	WTO Document series
Europe Agreement between the European Communities and Hungary	S/C/M/14	WT/REG/GEN/N/3	WT/REG50
Europe Agreement between the European Communities and Poland	S/C/M/14	WT/REG/GEN/N/3	WT/REG51
Europe Agreement between the European Communities and Slovak Republic	S/C/M/14	WT/REG/GEN/N/3	WT/REG52
Europe Agreement between the European Communities and Czech Republic	S/C/M/52	WT/REG/GEN/N/3	WT/REG139
European Communities – Estonia Europe Agreement	S/C/M/60	WT/REG/GEN/N/3	WT/REG144
European Communities – Latvia Europe Agreement	S/C/M/60	WT/REG/GEN/N/3	WT/REG143
European Communities – Lithuania Europe Agreement	S/C/M/60	WT/REG/GEN/N/3	WT/REG145
European Communities – Slovenia Europe Agreement	S/C/M/60	WT/REG/GEN/N/3	WT/REG146

VIII. ARTICLE V *BIS*

A. TEXT OF ARTICLE V *BIS*

Article V bis
Labour Markets Integration Agreements

This Agreement shall not prevent any of its Members from being a party to an agreement establishing full integration[2] of the labour markets between or among the parties to such an agreement, provided that such an agreement:

(*footnote original*) [2] Typically, such integration provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay, other conditions of employment and social benefits.

(a) exempts citizens of parties to the agreement from requirements concerning residency and work permits;

(b) is notified to the Council for Trade in Services.

B. INTERPRETATION AND APPLICATION OF ARTICLE V *BIS*

1. Article V *bis*:(b)

(a) Format for notifications

48. With respect to the format for notifications under subparagraph (b), see the Guidelines for Notifications under the General Agreement on Trade in Services.[56]

IX. ARTICLE VI

A. TEXT OF ARTICLE VI

Article VI
Domestic Regulation

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

2. (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

(b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall

[56] S/L/5.

provide, without undue delay, information concerning the status of the application.

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

(i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and

(ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations[3] applied by that Member.

(*footnote original*) [3] The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

B. INTERPRETATION AND APPLICATION OF ARTICLE VI

1. General

(a) Electronic commerce

49. With respect to application of Article VI to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.[57]

2. Article V:4

(a) Professional services/domestic regulation

50. With respect to the Working Party on Professional Services and its successor, the Working Party on Domestic Regulation, see paragraphs 132–134 below.

(b) Disciplines in accountancy services

51. On 14 December 1998, with a view to ensuring that domestic regulations affecting trade in accountancy services met the requirements of Article VI:4, the Council for Trade in Services adopted the Disciplines on Domestic Regulation in the Accountancy Sector,[58] which had been recommended by the Working Party on Professional Services. These Disciplines contain, *inter alia*, the following provision under the heading "General Provisions":

> "Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures, are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, *inter alia*, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession."[59]

(c) Relationship with Articles XVI and XVII

52. On 10 December 1998, the Working Party on Professional Services submitted a report to the Council for Trade in Services on the development of Disciplines on Domestic Regulation in the Accountancy Sector, including the informal note by the Chairman entitled "Discussion of Matters Relating to Articles XVI and XVII of the *GATS* in Connection with the Disciplines on Domestic Regulation in the Accountancy Sector".[60]

X. ARTICLE VII

A. TEXT OF ARTICLE VII

Article VII
Recognition

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization,

[57] S/L/74, para. 11.
[58] S/C/M/32, section A. The adopted Disciplines can be found in S/L/64.
[59] S/WPPS/W/21, para. 2.
[60] S/WPPS/4.

licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licences or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licences, or certifications obtained or requirements met in that other Member's territory should be recognized.

3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

4. Each Member shall:

(a) within 12 months from the date on which the WTO Agreement takes effect for it, inform the Council for Trade in Services of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1;

(b) promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;

(c) promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.

5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.[61]

B. INTERPRETATION AND APPLICATION OF ARTICLE VII

1. General

53. With respect to application of Article VII to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.[62]

2. Article VII:4

(a) Format for notifications

54. With respect to the format for notifications under paragraph 4, see the Guidelines for Notifications under the General Agreement on Trade in Services.[63]

3. Article VII:5

(a) Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector

55. On 29 May 1997, the Council for Trade in Services approved the voluntary Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector.[64]

XI. ARTICLE VIII

A. TEXT OF ARTICLE VIII

Article VIII
Monopolies and Exclusive Services Suppliers

1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.

2. Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.

3. The Council for Trade in Services may, at the request of a Member which has a reason to believe that a monopoly supplier of a service of any other Member is acting in a manner inconsistent with paragraph 1 or 2,

[61] Paragraph 3 of the Annex on Financial Services relates to recognition in financial services.
[62] S/L/74, para. 11.
[63] S/L/5.
[64] S/C/M/19, paras. 4–7. The text of the approved Guidelines can be found in S/L/38.

request the Member establishing, maintaining or authorizing such supplier to provide specific information concerning the relevant operations.

4. If, after the date of entry into force of the WTO Agreement, a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, that Member shall notify the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights and the provisions of paragraphs 2, 3 and 4 of Article XXI shall apply.

5. The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (*a*) authorizes or establishes a small number of service suppliers and (*b*) substantially prevents competition among those suppliers in its territory.[65]

B. INTERPRETATION AND APPLICATION OF ARTICLE VIII

1. General

(a) Electronic commerce

56. With respect to application of Article VIII to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.[66]

2. Article VIII:4

(a) Format for notifications

57. With respect to the format for notifications under paragraph 4, see the Guidelines for Notifications under the General Agreement on Trade in Services.[67]

XII. ARTICLE IX

A. TEXT OF ARTICLE IX

Article IX
Business Practices

1. Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.

2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of a satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.

B. INTERPRETATION AND APPLICATION OF ARTICLE IX

1. General

(a) Electronic commerce

58. With respect to application of Article IX to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.[68]

XIII. ARTICLE X

A. TEXT OF ARTICLE X

Article X
Emergency Safeguard Measures

1. There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.

2. In the period before the entry into effect of the results of the negotiations referred to in paragraph 1, any Member may, notwithstanding the provisions of paragraph 1 of Article XXI, notify the Council on Trade in Services of its intention to modify or withdraw a specific commitment after a period of one year from the date on which the commitment enters into force; provided that the Member shows cause to the Council that the modification or withdrawal cannot await the lapse of the three-year period provided for in paragraph 1 of Article XXI.

3. The provisions of paragraph 2 shall cease to apply three years after the date of entry into force of the WTO Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE X

1. Working Party on GATS Rules

(a) Article X:1: first sentence

59. Negotiations on the question of emergency safeguard measures have been carried out in the Working Party on GATS Rules, established on 30 March 1995 by

[65] Paragraph 5 of the Annex on Telecommunications relates to the access to and use of public telecommunications transport networks and services.
[66] S/L/74, paras. 12–13.
[67] S/L/5.
[68] S/L/74, para. 12–13.

the Council for Trade in Services.[69] Members have postponed five times the deadline referred to in Article X:1. On 15 March 2004 in relation to the Fifth Decision on Negotiations on Emergency Safeguard Measures, Members decided the following:[70]

"1. The first sentence of paragraph 1 of Article X shall continue to apply.

2. Subject to the outcome of the mandate in paragraph 1, the results of such negotiations shall enter into effect on a date not later than the date of entry into force of the results of the current round of services negotiations.

3. Notwithstanding paragraph 3 of Article X, until the entry into effect of the results of the negotiations mandated under paragraph 1 of Article X, the provisions of paragraph 2 of that Article shall continue to apply."

(b) Identification, elaboration and consolidation of common elements for an emergency safeguard measure

60. On 14 March 2003, the Report by the Chairperson of the Working Party on GATS Rules[71] summarized the results of negotiations, noting that there had been some progress in the identification of issues relevant to the consideration and formulation of an emergency safeguard measure.

XIV. ARTICLE XI

A. TEXT OF ARTICLE XI

Article XI
Payments and Transfers

1. Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

2. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund.

B. INTERPRETATION AND APPLICATION OF ARTICLE XI

No jurisprudence or decision of a competent WTO body.

XV. ARTICLE XII

A. TEXT OF ARTICLE XII

Article XII
Restrictions to Safeguard the Balance-of-Payment

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia,* the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

2. The restrictions referred to in paragraph 1:

(a) shall not discriminate among Members;

(b) shall be consistent with the Articles of Agreement of the International Monetary Fund;

(c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;

(d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;

(e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.

3. In determining the incidence of such restrictions, Members may give priority to the supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector.

4. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the General Council.

5. (a) Members applying the provisions of this Article shall consult promptly with the Committee on Balance-of-Payments Restrictions on restrictions adopted under this Article.

(b) The Ministerial Conference shall establish procedures[4] for periodic consultations with the objective of enabling such recommendations to be made to the Member concerned as it may deem appropriate.

(*footnote original*) [4] It is understood that the procedures under paragraph 5 shall be the same as the GATT 1994 procedures.

[69] S/C/M/2, paras. 23–25. See also the Reports of the Working Party on GATS Rules to the Council for Trade in Services: S/WPGR/1–6, S/WPGR/8, S/WPGR/12–13.
[70] S/L/159.
[71] S/WPGR/9.

(c) Such consultations shall assess the balance-of-payment situation of the Member concerned and the restrictions adopted or maintained under this Article, taking into account, *inter alia,* such factors as:

(i) the nature and extent of the balance-of-payments and the external financial difficulties;

(ii) the external economic and trading environment of the consulting Member;

(iii) alternative corrective measures which may be available.

(d) The consultations shall address the compliance of any restrictions with paragraph 2, in particular the progressive phase-out of restrictions in accordance with paragraph 2(e).

(e) In such consultations, all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments, shall be accepted and conclusions shall be based on the assessment by the Fund of the balance-of-payments and the external financial situation of the consulting Member.

6. If a Member which is not a member of the International Monetary Fund wishes to apply the provisions of this Article, the Ministerial Conference shall establish a review procedure and any other procedures necessary.

B. INTERPRETATION AND APPLICATION OF ARTICLE XII

1. Article XII:4

(a) Format for notifications

61. With respect to the format for notifications under paragraph 4, see the Guidelines for Notifications under the General Agreement on Trade in Services.[72]

XVI. ARTICLE XIII

A. TEXT OF ARTICLE XIII

Article XIII
Government Procurement

1. Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

2. There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIII

1. Working Party on GATS Rules

62. Negotiations on government procurement in services have been carried out in the Working Party on GATS Rules, established on 30 March 1995 by the Council for Trade in Services.[73] A Report by the Chairperson was circulated on 30 June 2003[74] taking account of the progress made in the negotiations.

XVII. ARTICLE XIV

A. TEXT OF ARTICLE XIV

Article XIV
General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;[5]

(*footnote original*) [5] The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective[6] imposition or collec-

[72] S/L/5.
[73] S/C/M/2, paras. 23–25. See also the Reports of the Working Party on GATS Rules to the Council for Trade in Services, S/WPGR/1–13.
[74] S/WPGR/11.

tion of direct taxes in respect of services or service suppliers of other Members;

(*footnote original*) [6] Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:

(i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or

(ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or

(iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or

(iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or

(v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or

(vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base.

Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIV

1. General

(a) Electronic commerce

63. With respect to application of Article XIV to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.[75]

(b) Trade in services and the environment

64. On 1 March 1995, the Council for Trade in Services, pursuant to the Ministerial Decision on Trade in Services and the Environment, adopted the Decision on Trade in Services and the Environment.[76] The Decision stipulates, *inter alia*:

"In order to determine whether any modification of Article XIV of the Agreement is required to take account of such measures, [Ministers] request the Committee on Trade and Environment to examine and report, with recommendations if any, on the relationship between services trade and the environment including the issue of sustainable development. The Committee shall also examine the relevance of inter-governmental agreements on the environment and their relationship to the Agreement."[77]

XVIII. ARTICLE XIV *BIS*

A. TEXT OF ARTICLE XIV *BIS*

Article XIV bis
Security Exceptions

1. Nothing in this Agreement shall be construed:

(a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:

(i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;

(ii) relating to fissionable and fusionable materials or the materials from which they are derived;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

[75] S/L/74, para. 14.
[76] S/C/M/1. The adopted Decision can be found in S/L/4.
[77] S/L/4, para. 1.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIV *BIS*

1. Article XIV *bis*:2

(a) Format for notifications

65. With respect to the format for notifications under paragraph 2, see the Guidelines for Notifications under the General Agreement on Trade in Services.[78]

XIX. ARTICLE XV

A. TEXT OF ARTICLE XV

Article XV
Subsidies

1. Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects.[7] The negotiations shall also address the appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area. For the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.

(*footnote original*) [7] A future work programme shall determine how, and in what time-frame, negotiations on such multilateral disciplines will be conducted.

2. Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration.

B. INTERPRETATION AND APPLICATION OF ARTICLE XV

1. Working Party on GATS Rules

(a) Report by the Chairperson

66. Negotiations on subsidies have been carried out in the Working Party on GATS Rules, established on 30 March 1995 by the Council for Trade in Services.[79] A Report by the Chairperson was circulated on 30 June 2003[80] summarizing the progress made in the negotiations.

(b) Checklist on subsidies

67. The Report[81] draws attention to a Checklist of Issues,[82] prepared by the Chairperson at the request of the Working Party, in order to help Members to address in a more systematic manner relevant questions under this agenda item. Members proceeded on the basis of the Checklist until July 2001, taking one item at each successive meeting. On 17 March 2003, the Chairperson circulated a revised version of the Checklist on Subsidies, as agreed by the Working Party at its February meeting.[83] The Chairperson invited Members to continue using the revised Checklist as a guide for identifying the content of possible disciplines.

PART III
SPECIFIC COMMITMENTS

XX. ARTICLE XVI

A. TEXT OF ARTICLE XVI

Article XVI
Market Access

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.[8]

(*footnote original*) [8] If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory.

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

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[78] S/L/5.
[79] S/C/M/2, paras. 23–25. See also the Reports of the Working Party on GATS Rules to the Council for Trade in Services, S/WPGR/1–14.
[80] S/WPGR/10.
[81] S/WPGR/10.
[82] *Checklist on Subsidies*, Note from the Chairperson, Job No. 4519 (17 July 2000) and 4519/Rev.1 (6 October 2000).
[83] *Checklist on Subsidies*, Note from the Chairperson, JOB(03)/57.

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;[9]

(*footnote original*) [9] Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment.

B. INTERPRETATION AND APPLICATION OF ARTICLE XVI

1. General

(a) Electronic commerce

68. With respect to application of Article XVI to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.[84]

2. Article XVI:2

(a) "Temporal" qualifications

69. The Panel on *Mexico – Telecoms*, in examining a market access commitment made subject to a permit which would not be granted "until the corresponding regulations are issued", found:

> "The wording of the limitation, that 'permits for the establishment of a commercial agency [will not be issued] until the corresponding regulations are issued', does not specify that a numerical *quota* was to be imposed on the issuance of permits. Rather, the sentence seems to introduce a *temporal* qualification as to *when* establishment will be permitted – namely, after the issuance of the regulations.
>
> The six categories of measures in Article XVI:2 refer to the types of market access limitations that can be imposed on the supply of a service. However, none of the six categories relate to *temporal* limitations – such as dates for entry into force or for the implementation of commitments. This suggests that temporal limitations cannot constitute limitations on market access under Article XVI:2 of the GATS."[85]

70. The Panel on *Mexico – Telecoms* went on to say that the temporal qualifications in Mexico's scheduled commitments did not meet the requirements under Article XX:1(d) and (e), because a time frame was not specified.[86] In this regard, see Section XXIV.B.2 below.

(b) Routing requirement in telecommunications

71. The Panel on *Mexico – Telecoms*, observing that Mexico's GATS Schedule required that international telecommunications traffic "must be routed through the facilities" of a Mexican concessionaire, found that this "refers not to a requirement simply to use the equipment or physical assets of a Mexican concessionaire, but to supply the service on a facilities-basis, and not through capacity leased to the cross-border supplier".[87] With respect to the cross-border supply of telecommunications services, therefore:

> "This element of the routing restriction means, therefore, that supply of the service by means of one of the categories (over leased capacity) within Mexico is prohibited, and is subject to a zero quota in the sense of Article XVI:2(a), (b) and (c). We note that, while this limitation prohibits services that originate on a facilities basis from being terminated over leased circuits, it does not prevent these services from being supplied when they fall within the facilities-based category with respect to termination."[88]

72. Likewise, with respect to non-facilities-based services supplied cross-border, the Panel on *Mexico – Telecoms* found that the routing requirement "prohibits the cross-border supply upon termination within Mexico by means of the very 'leased capacity' which defines this type of service". The Panel therefore found:

> "While this element of the routing restriction does not expressly prohibit cross-border supply over leased capacity on the originating segment, it means that supply over leased capacity on the terminating segment is prohibited. Therefore, this element of the routing restriction prohibits end-to-end International Simple Resale (ISR), and effectively eliminates the possibility of any cross-border supply of services over leased capacity. In this sense, with respect to cross border services supplied by commercial agencies, the routing restriction falls within the scope of Article XVI:2(a), (b) and (c)."[89]

[84] S/L/74, paras. 15–16.
[85] Panel Report on *Mexico – Telecoms*, paras. 7.357–7.358.
[86] Panel Report on *Mexico – Telecoms*, para. 7.361.
[87] Panel Report on *Mexico – Telecoms*, para. 7.85.
[88] Panel Report on *Mexico – Telecoms*, para. 7.85.
[89] Panel Report on *Mexico – Telecoms*, para. 7.86.

3. Relationship with Article VI:4

73. With respect to the relationship between Articles VI:4 and XVI, see paragraph 52 above.

XXI. ARTICLE XVII

A. TEXT OF ARTICLE XVII

Article XVII
National Treatment

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[10]

(*footnote original*) [10] Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

B. INTERPRETATION AND APPLICATION OF ARTICLE XVII

1. General

(a) Electronic commerce

74. With respect to application of Article XVII to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.[90]

2. Likeness of services and service suppliers

75. The Panel on *EC – Bananas III*, in a finding not reviewed by the Appellate Body, addressed the issue of likeness under Article XVII:

> "[T]he nature and the characteristics of wholesale transactions as such, as well as of each of the different subordinated services mentioned in the headnote to section 6 of the CPC, are 'like' when supplied in connection with wholesale services, irrespective of whether these services are supplied with respect to bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other. Indeed, it seems that each of the different service activities taken individually is virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service activity is being performed. Similarly, in our view, to the extent that entities provide these like services, they are like service suppliers."[91]

3. "aims-and-effects" test

76. In *EC – Bananas III*, the Appellate Body rejected the alleged relevance of the so-called "aims-and-effects" test in the context of Article XVII:

> "We see no specific authority either in Article II or in Article XVII of the GATS for the proposition that the 'aims and effects' of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions. In the GATT context, the 'aims and effects' theory had its origins in the principle of Article III:1 that internal taxes or charges or other regulations 'should not be applied to imported or domestic products so as to afford protection to domestic production'. There is no comparable provision in the GATS. Furthermore, in our Report in *Japan – Alcoholic Beverages* the Appellate Body rejected the 'aims and effects' theory with respect to Article III:2 of the GATT 1994. The European Communities cites an unadopted panel report dealing with Article III of the GATT 1947, *United States – Taxes on Automobiles*, as authority for its proposition, despite our recent ruling."[92]

4. Footnote 10

77. In *Canada – Autos*, one of the measures at issue was the so-called Canada Value Added (CVA) requirement, according to which a tax duty exemption was granted, *inter alia*, only if the amount of Canadian value added in a manufacturer's local production of motor vehicles exceeded a certain level. One component of this CVA requirement was "maintenance and repair work executed in Canada on buildings, machinery and equipment used for production purposes". Canada argued that there can be no discrimination against these services supplied through modes 1 and 2, as cross-border supply and consumption abroad of these services are not technically feasible. Further, Canada pointed out that "the competitive disadvantage in the foreign provision of many services listed by the complainants as being affected by the CVA requirements is inherent in the foreign character of these services and, as stated in footnote 10 to Article XVII, should not be regarded as a national treatment restriction".[93] The Panel, in a finding

[90] S/L/74, paras. 17–18.
[91] Panel Report on *EC – Bananas III*, para. 7.322.
[92] Appellate Body Report on *EC – Bananas III*, para. 241.
[93] Panel Report on *Canada – Autos*, para. 10.298.

not reviewed by the Appellate Body, disagreed with Canada:

> "We consider that, although the supply of some repair and maintenance services on machinery and equipment through modes 1 and 2 might not be technically feasible, as they require the physical presence of the supplier, all other services listed by the complainants as being affected by the CVA requirements, including some consulting and advisory services relating to repair and maintenance of machinery, can be supplied through modes 1 and 2. We further consider that treatment less favourable granted to services supplied outside Canada cannot be justified on the basis of inherent disadvantages due to their foreign character. Footnote 10 to Article XVII only exempts Members from having to compensate for disadvantages due to foreign character in the application of the national treatment provision; it does not provide cover for actions which might modify the conditions of competition against services and service suppliers which are already disadvantaged due to their foreign character.
>
> We therefore find that lack of technical feasibility only excludes the supply of some repair and maintenance services on machinery and equipment through modes 1 and 2 from Canada's national treatment obligation. We also find that any eventual inherent disadvantages due to the foreign character of services supplied through modes 1 and 2 do not exempt Canada from its national treatment obligation with respect to the CVA requirements."[94]

5. Relationship with Article VI:4

78. With respect to the relationship with Article VI:4, see paragraph 52 above.

XXII. ARTICLE XVIII

A. TEXT OF ARTICLE XVIII

Article XVIII
Additional Commitments

Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

B. INTERPRETATION AND APPLICATION OF ARTICLE XVIII

1. "Reference Paper" on Basic Telecommunications

79. Special GATS negotiations in basic telecommunications, in which Members made commitments in market access and national treatment, were concluded in 1997. Many Members also took additional commitments under Article XVIII, by drawing upon the provisions of a negotiated "Reference Paper" containing pro-competitive regulatory principles applicable to the telecommunications sector. In the negotiations, Members could elect to insert any or all of the provisions of the model Reference Paper in their schedules, and could also insert modified versions of these provisions. The Reference Paper provisions contained in the schedules of individual Members may therefore differ from the model provisions below.

(a) Text of model Reference Paper

"Reference Paper

Scope

The following are definitions and principles on the regulatory framework for the basic telecommunications services.

Definitions

Users mean service consumers and service suppliers.

Essential facilities mean facilities of a public telecommunications transport network or service that

(a) are exclusively or predominantly provided by a single or limited number of suppliers; and

(b) cannot feasibly be economically or technically substituted in order to provide a service.

A major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

(a) control over essential facilities; or

(b) use of its position in the market.

1. Competitive safeguards

1.1 Prevention of anti-competitive practices in telecommunications

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

1.2 Safeguards

The anti-competitive practices referred to above shall include in particular:

(a) engaging in anti-competitive cross-subsidization;

(b) using information obtained from competitors with anti-competitive results; and

[94] Panel Report on *Canada – Autos*, paras. 10.300–10.301.

(c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

2. Interconnection

2.1 This section applies to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.

2.2 Interconnection to be ensured

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided:

(a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;

(b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and

(c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

2.3 Public availability of the procedures for interconnection negotiations

The procedures applicable for interconnection to a major supplier will be made publicly available.

2.4 Transparency of interconnection arrangements

It is ensured that a major supplier will make publicly available either its interconnection agreements or a reference interconnection offer.

2.5 Interconnection: dispute settlement

A service supplier requesting interconnection with a major supplier will have recourse, either:

(a) at any time or

(b) after a reasonable period of time which has been made publicly known

to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.

3. Universal service

Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.

4. Public availability of licensing criteria

Where a licence is required, the following will be made publicly available:

(a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a licence and

(b) the terms and conditions of individual licences.

The reasons for the denial of a licence will be made known to the applicant upon request.

5. Independent regulators

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.

6. Allocation and use of scarce resources

Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required."

(b) Section 1.1 – Anti-competitive practices

(i) Concept of "anti-competitive practices"

80. In examining the meaning of "anti-competitive practices", the Panel on *Mexico – Telecoms* stated that, on its own, the term is "broad in scope, suggesting actions that lessen rivalry or competition in the market".[95] Referring to the three examples ((a)–(c)) of such practices set out in Section 1.2 of the model Reference Paper, the Panel stated:

"All three examples show that 'anti-competitive practices' may also include action by a major supplier *with-*

[95] Panel Report on *Mexico – Telecoms*, para. 7.230.

out collusion or agreement with other suppliers. Cross-subsidization, misuse of competitor information, and withholding of relevant technical and commercial information are all practices which a major supplier can, and might normally, undertake on its own."[96]

81. The Panel on *Mexico – Telecoms* also supported its reasoning in paragraph 80 above by considering the concept of "major supplier":

"The use of the term 'major supplier' in Section 1, examined in the light of the definition of this term, suggests that the focus of 'anti-competitive practices' is on a supplier's 'ability to materially affect the terms of participation (having regard to price and supply)' – in other words, on monopolization or the abuse of a dominant position in ways that affect prices or supply. The definition of a major supplier in terms of suppliers 'alone or together' and the requirement in Section 1.1 of 'preventing suppliers from engaging in or continuing anti-competitive practices' also suggests that *horizontal coordination* of suppliers may be relevant. This is supported by the requirement in Section 1.1 of 'preventing suppliers from engaging in or continuing anti-competitive practices'."[97]

82. The Panel on *Mexico – Telecoms* was thus able to find that the term "anti-competitive practices" in Section 1 of Mexico's Reference Paper "includes practices in addition to those listed in Section 1.2, in particular horizontal practices related to price-fixing and market-sharing agreements".[98]

(ii) Practices required under a Member's law

83. In determining whether or not the actions by the major supplier of telecommunications services in Mexico constituted "anti-competitive practices" because it was required under national law to act in this way, the Panel on *Mexico – Telecoms* found that Section 1.2 contains an explicit example of an anti-competitive practice, cross-subsidization, which has typically been a government requirement. The Panel stated:

"Cross-subsidization was and is a common practice in monopoly regimes, whereby the monopoly operator is required by a government to cross subsidize, either explicitly or in effect, usually through government determination or approval of rates or rate structures. Once monopoly rights are terminated in particular services sectors, however, such cross-subsidization assumes an anti-competitive character. This provision, therefore, provides an example of a practice, sanctioned by measures of a government, that a WTO Member should no longer allow an operator to 'continue'. Accordingly, to fulfil its commitments with respect to 'competitive safeguards' in Section 1 of the Reference Paper, a Member would be obliged to revise or terminate the measures leading to the cross-subsidization. This example clearly suggests that not all acts required by a Member's law are excluded from the scope of anti-competitive practices."[99]

84. The Panel on *Mexico – Telecoms* pointed out further that obligations in the Reference Paper could and did refer to practices that were not dependent on their consistency with a Member's national law. The Panel stated:

"Section 2.1 illustrates that Members did not hesitate to undertake obligations, with respect to a major supplier, that defined an objective outcome – 'cost-oriented' interconnection. There is no reason to suppose, and no language to suggest, that the desired outcome in Section 1 – preventing major suppliers from engaging in anti-competitive practices – should depend entirely on whether a Member's own laws made such practices legal."[100]

85. The Panel on *Mexico – Telecoms* observed further that, although legal doctrines applicable under national law might protect a firm in compliance with a specific legislative requirement from the application of national competition law, these doctrines did not provide cover from international obligations. The Panel stated that:

"[P]ursuant to doctrines applicable under the competition laws of some Members, a firm complying with a specific legislative requirement of such a Member (e.g. a trade law authorizing private market-sharing agreements) may be immunized from being found in violation of the general domestic competition law. The reason for these doctrines is that, in most jurisdictions, domestic legislatures have the legislative power to limit the scope of competition legislation. International commitments made under the GATS 'for the purpose of preventing suppliers ... from engaging in or continuing anti-competitive practices'[101] are, however, designed to limit the regulatory powers of WTO Members. Reference Paper commitments undertaken by a Member are international obligations owed to all other Members of the WTO in all areas of the relevant GATS commitments. In accordance with the principle established in Article 27 of the Vienna Convention,[102] a requirement imposed by a Member under its internal law on a major supplier cannot unilaterally erode its international commitments made in its schedule to other WTO Members to prevent major suppliers from 'continuing anti-competitive practices'.[103] The pro-competitive obligations in Section 1 of the Reference Paper do not reserve any such unilateral

[96] Panel Report on *Mexico – Telecoms*, para. 7.232.
[97] Panel Report on *Mexico – Telecoms*, para. 7.234.
[98] Panel Report on *Mexico – Telecoms*, para. 7.238.
[99] Panel Report on *Mexico – Telecoms*, para. 7.242.
[100] Panel Report on *Mexico – Telecoms*, para. 7.243.
[101] (*footnote original*) Section 1.1 of the Reference Paper.
[102] (*footnote original*) See the Vienna Convention on the Law of Treaties, 1969, Art. 27. See also Ian Brownlie, *Principles of Public International Law* (Clarendon Press, 1998, 5th ed.), page 34.
[103] (*footnote original*) Section 1.1 of the Reference Paper.

right of WTO Members to maintain anti-competitive measures."[104]

86. The Panel on *Mexico – Telecoms* emphasized, however, that particular measures addressed in the case were exceptional, and that the autonomy of Members under Section 1 was not unduly circumscribed:

"Although we find that measures required by a Member under its internal laws may fall within the scope of Section 1, the measures addressed in the case before us are exceptional, and require a major supplier to engage in acts which are tantamount to anti-competitive practices which are condemned in domestic competition laws of most WTO Members, and under instruments of international organizations to which both parties are members. Section 1 is a voluntary, additional commitment to maintain certain 'appropriate' measures, which reserves a degree of flexibility for Members in accepting and implementing such an additional commitment."[105]

(iii) Types of measures constituting "anti-competitive practices"

Setting of uniform price by the major supplier

87. The Panel on *Mexico – Telecoms*, in examining the specific practices of the major supplier, stated that:

"the removal of price competition by the Mexican authorities, combined with the setting of the uniform price by the major supplier, has effects tantamount to those of a price-fixing cartel. We have previously found that horizontal practices such as price-fixing among competitors are 'anti-competitive practices' under Section 1 of Mexico's Reference Paper."[106]

Proportionate return system

88. The Panel on *Mexico – Telecoms*, in further examining the specific practices of the major supplier, found that "the allocation of market share between Mexican suppliers imposed by the Mexican authorities, combined with the authorization of Mexican operators to negotiate financial compensation between them instead of physically transferring surplus traffic, has effects tantamount to those of a market sharing arrangement between suppliers".

(iv) Maintaining "appropriate measures"

89. The Panel on *Mexico – Telecoms* described the meaning of "appropriate measures" in the following terms:

"We recognize that measures that are 'appropriate' in the sense of Section 1 of Mexico's Reference Paper would not need to forestall in every case the occurrence of anti-competitive practices of major suppliers. However, at a minimum, if a measure *legally requires* certain behaviour, then it cannot logically be 'appropriate' in *preventing* that same behaviour."

(c) Section 2.1 – Interconnection

(i) "on the basis of the specific commitments undertaken"

90. The Panel on *Mexico – telecoms*, in examining whether certain commitments triggered the interconnection obligation, found that:

"The wording of Section 2 of the Reference Paper as a whole suggests that the purpose of the interconnection obligation is to enable suppliers supplying a basic telecommunications service committed by a Member in its schedule not to be restricted by unduly onerous interconnection terms, conditions and rates imposed by a major supplier. It would not appear to be the purpose of Section 2 to provide the benefits of the interconnection to a supplier in any telecommunications subsector or mode of supply, simply because other subsectors and modes of supply have been committed. It would seem reasonable to conclude, therefore, that the right to interconnect accorded by Section 2.2 should apply where, *with respect to a particular subsector and mode of supply*, a Member's market access and national treatment commitments specifically accords the right to supply that service."[107]

(ii) Applicability to cross-border supply

91. The Panel on *Mexico – Telecoms* found that there was no language in Section 2 to suggest that interconnection obligations did not apply to the cross-border supply of international telecommunications services. The Panel noted that in Section 2 there is

"no reference to the entity that is entitled to be linked to the public telecommunications transport networks or services; no language thus exists that would circumscribe the scope, geographic or otherwise, of the basic telecommunications suppliers to be linked. This provision therefore could not be read to exclude suppliers outside of Mexico from 'linking' to public telecommunications transport networks and services in Mexico."[108]

92. The Panel on *Mexico – Telecoms* supported the above observation by noting that from legislative, commercial, contractual or technical points of view, there was no fundamental difference between national and international interconnection:

"In sum the ordinary meaning, in the heading of Section 2 of Mexico's Reference Paper, of the term 'interconnection' – that it does not distinguish between domestic and international interconnection, including through accounting rate regimes – is confirmed by an examination of any 'special meaning' that the term 'intercon-

[104] Panel Report on *Mexico – Telecoms*, para. 7.244.
[105] Panel Report on *Mexico – Telecoms*, para. 7.267.
[106] Panel Report on *Mexico – Telecoms*, para. 7.262.
[107] Panel Report on *Mexico – Telecoms*, para. 7.94.
[108] Panel Report on *Mexico – Telecoms*, para. 7.105.

nection' may have in telecommunications legislation, or by taking into account potential commercial, contractual or technical differences inherent in international interconnection. We find that any 'special meaning' of the term 'interconnection' in Section 2 of Mexico's Reference Paper does not justify a restricted interpretation of interconnection, or of the term 'linking', which would exclude international interconnection, including accounting rate regimes, from the scope of Section 2 of the Reference Paper."[109]

93. Further, the Panel on *Mexico – Telecoms* considered that the object and purpose of the *GATS* supported the inclusion of international interconnection within the disciplines of the Reference Paper:

"Trade in services is defined in Article I:2 to include the cross-border supply of a service 'from the territory of one Member into the territory of any other Member'. This mode of supply, together with supply through commercial presence, is particularly significant for trade in international telecommunications services. There is no reason to suppose that provisions that ensure interconnection on reasonable terms and conditions for telecommunications services supplied through the commercial presence should not benefit the cross-border supply of the same service, in the absence of clear and specific language to that effect."[110]

94. The Panel on *Mexico – Telecoms* found also that the existence of an explicitly non-binding understanding on accounting rates contained in the Report of the negotiating group report did not support the notion that international interconnection was excluded from the scope of the interconnection obligations in the Reference Paper. The Panel stated:

"In sum, the Understanding seeks to exempt a very limited category of measures, temporarily, and on a non-binding basis, from the scope of WTO dispute settlement. Simply because Members wished to shield a *certain type* of cross-border interconnection from dispute settlement, because of *possible* MFN inconsistencies (with respect to differential rates), it does not follow that they wished to shield *all* forms of cross-border interconnection from dispute settlement. The clear intention to do so is not expressed in the Understanding. This suggests that the content and purpose of the Understanding is of limited assistance in interpreting the scope of application of the term 'interconnection' in Section 2.1 of Mexico's Reference Paper."[111]

(iii) "major supplier"

95. In examining whether Telmex was a "major supplier", the Panel on *Mexico – Telecoms* analysed first whether there was a "relevant market":

"The fact that arrangements for interconnection and termination may take the form of 'joint service' agreements, and may not be price-oriented, does not change the fact that the market exists. Nor is it pertinent to the determination of the 'relevant market', as Mexico suggests, that most WTO Members have not undertaken market access commitments specifically in 'termination services'; facilities for the termination and interconnection are *essential* to the supply of the services at issue in this case.

Is this market for termination the 'relevant' market? For the purposes of this case, we accept the evidence put forward by the United States, and uncontested by Mexico, that the notion of demand substitution – simply put, whether a consumer would consider two products as 'substitutable' – is central to the process of market definition as it is used by competition authorities. Applying that principle, we find no evidence that a domestic telecommunications service is substitutable for an international one, and that an outgoing call is considered substitutable for an incoming one. One is not a practical alternative to the other. Even if the price difference between domestic and international interconnection would change, such a price change would not make these different services substitutable in the eyes of a consumer. We accept, therefore, that the 'relevant market for telecommunications services' for the services at issue – voice, switched data and fax – is the termination of these services in Mexico."[112]

(iv) "the ability to materially affect the terms of participation (having regard to price and supply)"

96. In examining further whether Telmex could affect the market to the extent required to be a major supplier, the Panel on *Mexico – Telecoms* found:

"[S]ince Telmex is *legally* required to negotiate settlement rates for the entire market for termination of the services at issue from the United States, we find that it has patently met the definitional requirement in Mexico's Reference Paper that it have 'the ability to materially affect the terms of participation', particularly 'having regard to price'."[113]

(v) "control over essential facilities" or "use of its position in the market"

97. The Panel on *Mexico – Telecoms* found that "The ability to impose uniform settlement rates on its competitors is the 'use' by Telmex of its special 'position in the market', which is granted to it under the ILD Rules."[114]

[109] Panel Report on *Mexico – Telecoms*, para. 7.117.
[110] Panel Report on *Mexico – Telecoms*, para. 7.121.
[111] Panel Report on *Mexico – Telecoms*, para. 7.138.
[112] Panel Report on *Mexico – Telecoms*, para. 7.151.
[113] Panel Report on *Mexico – Telecoms*, para. 7.155.
[114] Panel Report on *Mexico – Telecoms*, para. 7.159.

(d) Section 2.2(b) – Interconnection rates

(i) "cost-oriented"

98. In examining the ordinary meaning of the term "cost-oriented", the Panel on *Mexico – Telecoms* stated:

> "Rates that are 'cost-oriented' thus suggest rates that are *brought into a defined relation to known costs or cost principles*. Rates that are 'cost-oriented' would not need to equate exactly to cost, but should be founded on cost. The degree of flexibility inherent in the term 'cost-oriented' suggests, moreover, that more than one *costing methodology* could be used to calculate 'cost-oriented' rates."[115]

99. The Panel on *Mexico – Telecoms* found that the ordinary meaning of the phrase "cost-oriented" was confirmed by its special meaning in the telecommunications sector, in particular as expressed in a key ITU recommendation. The Panel stated:

> "In sum, Recommendation D.140 requires in its present form that the cost *elements* and the cost *model* both be clearly related to the cost of delivering the service. This special meaning of 'cost-orientated', in the context of the ITU, is thus consistent with the ordinary meaning of the term as it appears in Section 2.2(b) of Mexico's Reference Paper. As both parties to this dispute as well as most WTO Members are also members of the ITU, the special definition adds precision to the ordinary meaning by classifying allowable cost *elements*, and establishing the causality between the cost elements and the services provided. While leaving a margin of discretion to national authorities to choose the precise cost method by which to arrive at 'cost-oriented' rates, the ITU recommendations indicate that the term 'cost-oriented rates' can be understood as rates related to the cost *incurred in providing the service*."[116]

100. The Panel on *Mexico – Telecoms* further noted that the ITU stated in a report that "incremental cost methodologies are becoming the de facto standard for interconnection pricing around the world".[117] The Panel explained:

> "These methods focus on the additional future fixed and variable costs that are attributable to the service. Setting rates in line with long run incremental costs reflects the view that the regulator should require prices from dominant or major suppliers that most closely imitate a fully competitive market, where prices are driven down towards marginal or incremental costs.[118] The increasing use of incremental cost methodologies indicates the special meaning that the term 'cost-oriented' is acquiring among WTO Members."[119]

(ii) "reasonable"

101. In examining the further requirement that cost-oriented rates be "reasonable", the Panel on *Mexico – Telecoms* found that this term suggested something "judged to be *appropriate or suitable to the circumstances or purpose*".[120] The Panel explained that this meant that interconnection rates should

> "[r]eflect the overall objectives of the provision that the rates represent the costs incurred in providing the service. The word 'reasonable' thus emphasizes that the application of the cost model chosen by the Member reflects the costs incurred for the interconnection service. Flexibility and balance are also part of the notion of 'reasonable'."[121, 122]

(iii) "having regard to economic feasibility"

102. The Panel on *Mexico – Telecoms* found that the phrase "having regard to economic feasibility", which qualifies "cost-oriented rates",

> "[s]erves merely to underline that the major supplier is entitled to rates that allow it to undertake interconnection on an 'economic' basis, that is, to make a reasonable rate of return."[123]

(iv) Evaluating whether rates are "cost-oriented"

103. In evaluating whether in fact the rates were "cost-oriented", the Panel on *Mexico – Telecoms* found:

> "We think it is justified to presume that the aggregate price charged by Telmex for the use of network components, when used for purely domestic traffic, is an indication of the cost-oriented rate, in the sense of Section 2.2(b) of Mexico's Reference Paper, for the use of these same network components in terminating an international call."[124]

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[115] Panel Report on *Mexico – Telecoms*, para. 7.168.
[116] Panel Report on *Mexico – Telecoms*, para. 7.174.
[117] (*footnote original*) *ITU, Trends in Telecommunications Reform: Interconnection Regulation*, 3rd edition, sec. 4.2.1.2, p. 40. This paragraph also states that countries that apply long run incremental cost methodologies include the United States, Australia, EC, Colombia, and South Africa, and that "numerous developing countries have adopted or proposed" some form of this model.
[118] (*footnote original*) *ITU, Trends in Telecommunications Reform: Interconnection Regulation*, 3rd edition, sec. 4.2.1.2, p. 40.
[119] Panel Report on *Mexico – Telecoms*, para. 7.175.
[120] Panel Report on *Mexico – Telecoms*, para. 7.182.
[121] (*footnote original*) The Appellate Body in *US – Hot-Rolled Steel* stated: ". . .The word 'reasonable' implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is 'reasonable' in one set of circumstances may prove to be less than 'reasonable' in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time, under Article 6.8 and Annex II of the *Anti-Dumping Agreement*, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation. In sum, a 'reasonable period' must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of 'reasonableness', and in a manner that allows for account to be taken of the particular circumstances of each case. This was in the context of the *Anti-Dumping Agreement*, but we believe it is equally pertinent in the context of GATS." *See* Appellate Body Report, *US – Hot-Rolled Steel*, paragraphs 84–85.
[122] Panel Report on *Mexico – Telecoms*, para. 7.182.
[123] Panel Report on *Mexico – Telecoms*, para. 7.184.
[124] Panel Report on *Mexico – Telecoms*, para. 7.191.

104. Applying this methodology (the difference between the aggregate price charged for the use of network components when used for purely domestic traffic, and the price charged for the use of these same network components in terminating an international call), the Panel on *Mexico – Telecoms* found:

> "The evidence reveals that the blended average difference in costs is in the order of 77%. Mindful of the fact that the cost-ceiling figures used are conservative (since they are based in part on *retail* rates for private lines, and Telmex's interconnection rates to cities without competition in call origination), we find that a difference of over 75% above Telmex's demonstrated cost-ceiling is unlikely to be within the scope of regulatory flexibility allowed by the notion of 'cost-oriented' rates, in the sense of Section 2.2(b) of Mexico's Reference Paper."[125]

105. In examining other methodologies for determining whether interconnection rates were "cost-oriented", the Panel on *Mexico – Telecoms* was not convinced that a comparison of international grey-market rates was "fully warranted". It reasoned that "such capacity may be priced at short-term incremental cost (well below long-term incremental cost as required under Mexican law for calculating interconnection charges) and may also result in lower service reliability and quality", even though any "substantial difference in costs" could go some way to support findings under other methodologies.[126] On the other hand, the Panel found that benchmarking which involved a "comparison of the market for wholesale transportation and termination of international calls" in different countries was a "valid method" for examining whether interconnection rates were cost-oriented.[127]

PART IV
PROGRESSIVE LIBERALIZATION

XXIII. ARTICLE XIX

A. TEXT OF ARTICLE XIX

Article XIX
Negotiations on Specific Commitments

1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

2. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.

3. For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV.

4. The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIX

1. Article XIX:1

(a) Information exchange

106. On 9–13 December 1996 in Singapore, the Ministerial Conference endorsed the recommendation that the Council for Trade in Services would develop an information exchange programme,[128] as part of the requisite work to facilitate the negotiations of progressive liberalization of trade in services as mandated by paragraph 1 of Article XIX.[129] On 11 May 1998, the Council on Trade in Services agreed, on an *ad referendum* basis, on certain aspects concerning the structure and content of the exchange of information exercise.[130]

(b) GATS 2000 negotiations

107. At its meeting on 7–8 February 2000, the General Council took note of a statement by the Chairman recalling that the mandated negotiations had begun on

[125] Panel Report on *Mexico – Telecoms*, para. 7.203.
[126] Panel Report on *Mexico – Telecoms*, para. 7.207.
[127] Panel Report on *Mexico – Telecoms*, para. 7.208.
[128] S/C/3, para. 47.
[129] WT/MIN(96)/DEC, para. 19. See also S/C/M/17, para. 14.
[130] S/C/M/27, para. 3.

1 January 2000. The Council agreed that the negotiations be conducted in Special Sessions of the Council for Trade in Services.[131]

(c) Doha Declaration

108. On 9–14 November 2001 in Doha Ministers took note that work had already been undertaken in the negotiations, initiated in January 2000. They agreed that the conduct, conclusion and entry into force of the services negotiations would be treated as one part of the single undertaking.[132]

2. Article XIX:3

(a) GATS 2000 negotiations

109. At its meeting on 28 March 2001, the Council for Trade in Services adopted the Guidelines and Procedures for the Negotiations on Trade in Services,[133] which were subsequently reaffirmed by Ministers meeting in Doha on 9–14 November 2001.[134]

(b) Assessment of trade in services

110. At its meeting on 25 February 2000, the Council decided that the assessment of trade in services should be moved to the agenda of the Special Session. It was agreed that the assessment should be regarded as an ongoing process rather than a one-off exercise.[135]

3. Negotiations in specific services sectors

(a) Movement of natural persons

111. At its meeting of 21 July 1995,[136] the Council for Trade in Services decided to adopt the Third Protocol to the General Agreement on Trade in Services,[137] which had been proposed by the Negotiating Group on Movement of Natural Persons.

(b) Financial services

112. At its meeting of 21 July 1995, the Committee on Trade in Financial Services decided to adopt the Second Protocol to the General Agreement on Trade in Services.[138] Following the adoption of the Second Protocol, at its meeting of 21 July 1995, the Council for Trade in Services, so as to address the situation where the Second Protocol would not enter into force, adopted the Decision on Commitments in Financial Services[139] and the Second Decision on Financial Services,[140] both of which had been proposed by the Committee on Trade in Financial Services.[141]

113. On 12 and 14 November 1997, the Committee on Trade in Financial Services approved the final results of the negotiations on financial services, and adopted the Fifth Protocol to the General Agreement on Trade in Services.[142] Following the adoption of the Fifth Protocol, the Council for Trade in Services, at its meeting of 12 December 1997, so as to address the situation where the Fifth Protocol would not enter into force, adopted the Decision of December 1997 on Commitments in Financial Services,[143] which had been proposed by the Committee on Trade in Financial Services. The Fifth Protocol entered into force on 1 March 1999 and remained open for acceptance by the Members concerned until 15 June 1999.[144] However, some of those Members failed to accept the Protocol by that date. In order to allow for the acceptance of the Protocol after the expiry of the deadline, the Council for Trade in Services has periodically opened the Fifth Protocol for acceptance upon request by a Member. From September 1999 until 31 December 2004, nine WTO Members have accepted the Protocol.[145]

(c) Maritime transport services

114. At its meeting of 28 June 1996, the Council for Trade in Services adopted a Decision to suspend the negotiations on maritime transport services and to resume them with the commencement of comprehensive negotiations on services, in accordance with Article XIX of *GATS*, and to conclude them no later than at the end of this first round of progressive liberalization.[146]

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[131] WT/GC/M/53, paras. 13 and 39. See also S/CSS/M/1, Section A. For the reports by the Chairman of the Special Session to the TNC, see the document series TN/S/-.

[132] WT/MIN(01)/DEC/1, paras. 15 and 47. See also TN/C/M/1.

[133] S/L/93.

[134] WT/MIN(01)/DEC/1, para. 15.

[135] S/CSS/3, Section II.

[136] S/C/M/5, para. 4.

[137] S/C/M/5, paras. 4–5. The Decision can be found in S/L/10, and the text of the adopted Third Protocol can be found in S/L/12.

[138] S/FIN/M/8, para. 4. The text of the Second Protocol can be found in S/L/11. Also, the text of the decision to adopt the Second Protocol can be found in S/L/13.

[139] The text of the adopted Decision can be found in S/L/8.

[140] The text of the adopted Second Decision can be found in S/L/9.

[141] S/C/M/5, paras. 2–3.

[142] S/FIN/M/18, para. 25. The text of the Fifth Protocol can be found in S/L/45. Also, the text of the decision to adopt the Fifth Protocol can be found in S/L/44.

[143] S/C/M/22, para. 2. The text of the decision can be found in S/L/50.

[144] S/L/68.

[145] Costa Rica and Nigeria (S/L/76); Ghana (S/L/87); Kenya and Nigeria (S/L/89) and Bolivia (S/L/108), Dominican Republic (S/L/111); Uruguay (S/L/112); Poland (S/L/130).

[146] S/C/M/11, paras. 12–13. The text of the Decision can be found in S/L/24. The Council for Trade in Services noted in its report to the General Council, (S/C/3) paras. 32–33, dated 6 November 1996:

> "After the suspension of the negotiations, two Members, Iceland and Norway, consolidated their best offers, i.e. transformed their offers into specific commitments to be inscribed in their schedules. Two Members, Austria (in the context of its accession to the European Union) and the Dominican Republic, withdrew their commitments, while two Members, Canada and Malaysia, modified their commitments slightly. Currently, 35 Members have commitments on maritime transport services. This includes: 29 Members who made commitments in the Uruguay Round, 4 Members

The Group was to resume "with the commencement of comprehensive negotiations on Services".[147] A Special Session of the Council for Trade in Services formally launched the new negotiations on services on 25 February 2000.[148]

(d) Basic telecommunications

115. On 30 April 1996, the Council for Trade in Services decided to adopt the Decision on Commitments in Basic Telecommunications and the Fourth Protocol to the General Agreement on Trade in Services,[149] both of which had been proposed by the Negotiating Group on Basic Telecommunications.

(e) Professional services

116. With respect to the establishment of the Working Party on Professional Services, and its successor, the Working Party on Domestic Regulation, see paragraphs 132–134 below.

(i) Disciplines on domestic regulation

117. With respect to disciplines on domestic regulation, see paragraph 51 above.

XXIV. ARTICLE XX

A. TEXT OF ARTICLE XX

Article XX
Schedule of Specific Commitments

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:

(a) terms, limitations and conditions on market access;

(b) conditions and qualifications on national treatment;

(c) undertakings relating to additional commitments;

(d) where appropriate the time-frame for implementation of such commitments; and

(e) the date of entry into force of such commitments.

2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

B. INTERPRETATION AND APPLICATION OF ARTICLE XX

1. General

(a) Committee on Specific Commitments

118. With regard to the establishment and terms of reference of the Committee on Specific Commitments under the *GATS*, see paragraph 137 below.

(b) Guidelines for Scheduling of Specific Commitments

119. At its meeting of 23 March 2001, the Council for Trade in Services adopted the Guidelines for the Scheduling of Specific Commitments.[150]

2. Article XX:1(d)

120. The Panel on *Mexico – Telecoms*, in examining a market access commitment made subject to a permit that would not be granted "until the corresponding regulations are issued", explained the role and application of paragraph (d):

> "We therefore consider that subparagraph (d) of Article XX:1 requires the specification of a time-frame for implementation should a Member wish to implement a commitment *after* its entry into force. Where a Member does not specify a time-frame, implementation must be deemed to be concurrent with the entry into force of the commitment."[151]

121. Referring to the circumstances of the case, the Panel on *Mexico – Telecoms* then pointed out that:

> "[E]ven if Mexico had needed time to complete the issuance of the regulations beyond the time of entry into force of its commitment on 5 February 1998, Mexico should, at the very minimum, have initiated that process leading to the issuance of the regulations. There is no evidence, however, that Mexico has taken *any* steps to comply with its commitment."[152]

(Papua New Guinea, Saint Christopher and Nevis, Sierra Leone and Slovenia) who acceded subsequently, and 2 Members (Iceland and Norway) who made commitments after the extended negotiations.

At the time of suspension of the negotiations, 56 governments (including the European Communities and their Member States) had elected to participate fully in the negotiations. Another 16 governments were participating in the process as observers. By that time 24 conditional offers had been submitted."

147 S/L/24.

148 S/CSS/M/1, paras. 4–35. The decision to hold the negotiations in Special Sessions of the Council for Trade in Services was tabled by the General Council on 7 February 2000. The text of the decision can be found in WT/GC/M/53.

149 S/C/M/9, paras. 2–3. The text of the adopted Fourth Protocol can be found in S/L/19. Also, the text of the adopted Fourth Protocol can be found in S/L/20.

150 S/C/M/52, para. 11. The text of the adopted Guidelines can be found in S/L/92.

151 Panel Report on *Mexico – Telecoms*, para. 7.371.

152 Panel Report on *Mexico – Telecoms*, para. 7.371.

122. With respect to the length of time in which implementation by Mexico could reasonably have been concluded, the Panel on *Mexico – Telecoms* stated:

> "We do not consider it necessary to rule on the length of a time period within which the implementation of Mexico's commitment might reasonably have been concluded, as more than five years have passed since the entry into force of Mexico's commitment, and Mexico still has indicated no date by which it intends to issue the relevant regulations and permits."[153]

123. The Panel on *Mexico – Telecoms* found that Mexico's refusal to authorize the supply of services by commercial agencies was inconsistent with the market access commitment inscribed in its schedule.

XXV. ARTICLE XXI

A. TEXT OF ARTICLE XXI

Article XXI
Modification of Schedules

1. (a) A Member (referred to in this Article as the "modifying Member") may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.

(b) A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.

2. (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.

(b) Compensatory adjustments shall be made on a most-favoured-nation basis.

3. (a) If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.

(b) If no affected Member has requested arbitration, the modifying Member shall be free to implement the proposed modification or withdrawal.

4. (a) The modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.

(b) If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings. Notwithstanding Article II, such a modification or withdrawal may be implemented solely with respect to the modifying Member.

5. The Council for Trade in Services shall establish procedures for rectification or modification of Schedules. Any Member which has modified or withdrawn scheduled commitments under this Article shall modify its Schedule according to such procedures.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXI

1. Article XXI:1(b)

(a) Format for notifications

124. With respect to the format for notifications under paragraph 1(b), see the Guidelines for Notifications under the General Agreement on Trade in Services.[154]

2. Article XXI:5

(a) Procedures for the rectification or modification of schedules

125. Since the conclusion of the Uruguay Round, an *ad hoc* certification procedure had been applied for the purpose of introducing changes or adding new commitments to Members' schedules, pending the adoption of a formal set of procedures under Article XXI (Modification of Schedules). On 20 July 1999, the Council for Trade in Services adopted the Procedures for the Implementation of Article XXI upon the recommendation of the Committee on Specific Commitments.[155] The Procedures are to be used whenever a Member intends to modify or withdraw a scheduled commitment.

126. On 14 April 2000, upon a recommendation of the Committee on Specific Commitments, the Council for Trade in Services adopted the Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments.[156] These Procedures are to be

[153] Panel Report on *Mexico – Telecoms*, para. 7.371.
[154] S/L/5.
[155] S/C/M/38, section D. The text of the adopted Procedures can be found in S/L/80. The text of the decision to adopt the Procedures can be found in S/L/79.
[156] S/C/M/42, para. 38–41. The text of the adopted Procedures can be found in S/L/84. The text of the decision to adopt the Procedures can be found in S/L/83.

used whenever a Member intends to undertake new commitments, improve existing ones, or introduce rectifications or changes of a purely technical nature that do not alter the scope or the substance of the existing commitments.

PART V
INSTITUTIONAL ARRANGEMENTS

XXVI. ARTICLE XXII

A. TEXT OF ARTICLE XXII

Article XXII
Consultation

1. Each Member shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding such representations as may be made by any other Member with respect to any matter affecting the operation of this Agreement. The Dispute Settlement Understanding (DSU) shall apply to such consultations.

2. The Council for Trade in Services or the Dispute Settlement Body (DSB) may, at the request of a Member, consult with any Member or Members in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

3. A Member may not invoke Article XVII, either under this Article or Article XXIII, with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services.[11] The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.

(*footnote original*) [11] With respect to agreements on the avoidance of double taxation which exist on the date of entry into force of the WTO Agreement, such a matter may be brought before the Council for Trade in Services only with the consent of both parties to such an agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXII

No jurisprudence or decision of a competent WTO body.

XXVII. ARTICLE XXIII

A. TEXT OF ARTICLE XXIII

Article XXIII
Dispute Settlement and Enforcement

1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.

2. If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of obligations and specific commitments in accordance with Article 22 of the DSU.

3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.[157, 158]

B. INTERPRETATION AND APPLICATION OF ARTICLE XXIII

1. Article XXIII:1

(a) Relationship with Article 3.8 of the DSU

127. In *EC – Bananas III*, the Appellate Body considered that the Panel had erred in extending the scope of the presumption of nullification or impairment in Article 3.8 of the *DSU* to violation claims made under the *GATS*:

> "We observe, first of all, that the European Communities attempts to rebut the presumption of nullification or impairment with respect to the Panel's findings of violations of the GATT 1994 on the basis that the United States has never exported a single banana to the European Community, and therefore could not possibly suffer any trade damage. The attempted rebuttal by the European Communities applies only to one complainant, the United States, and to only one agreement, the GATT 1994. In our view, the Panel erred in extending the scope of the presumption in Article 3.8 of the DSU to claims made under the GATS as well as to claims made by the Complaining Parties other than the United States."[159]

2. Disputes under GATS

128. The following table lists the disputes in which Panel and/or Appellate Body reports have been adopted where the provisions of *GATS* were invoked:

[157] Paragraph 4 of Annex on Air Transport Services relates to the dispute settlement in air transport services.
[158] Paragraph 4 of Annex on Financial Services relates to the dispute settlement in financial services.
[159] Appellate Body Report on *EC – Bananas III*, para. 250.

Case Name	Case Number	Invoked Articles
1 *EC – Bananas III*	WT/DS27	Articles II and XVII
2 *Canada – Autos*	WT/DS139, WT/DS142	Articles II, V and XVII
3 *Mexico – Telecoms*	WT/DS204	Articles I:2(a), I:2(c), XVI XVIII, XX, Annex on Telecommunications

3. Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services

129. On 1 March 1995, pursuant to the Ministers' Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services, the Council for Trade in Services adopted the Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services,[160] which called for the establishment of a roster of panellists.[161] The text of the decision is as follows:

"Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services

Ministers,

Decide to recommend that the Council for Trade in Services at its first meeting adopt the decision set out below.

The Council for Trade in Services,

Taking into account the specific nature of the obligations and specific commitments of the Agreement, and of trade in services, with respect to dispute settlement under Articles XXII and XXIII,

Decides as follows:

1. A roster of panellists shall be established to assist in the selection of panellists.

2. To this end, Members may suggest names of individuals possessing the qualifications referred to in Paragraph 3 for inclusion on the roster, and shall provide a curriculum vitae of their qualifications including, if applicable, indication of sector-specific expertise.

3. Panels shall be composed of well-qualified governmental and/or non-governmental individuals who have experience in issues related to the General Agreement on Trade in Services and/or trade in services, including associated regulatory matters. Panellists shall serve in their individual capacities and not as representatives of any government or organisation.

4. Panels for disputes regarding sectoral matters shall have the necessary expertise relevant to the specific services sectors which the dispute concerns.

5. The Secretariat shall maintain the roster and shall develop procedures for its administration in consultation with the Chairman of the Council."

130. On 4 October 1995, the Council for Trade in Services decided that, given the comprehensive nature of the indicative list established by the DSB pursuant to Article 8(4) of the DSU, there was no need for the Council to establish a separate roster of serving panellists.[162]

XXVIII. ARTICLE XXIV

A. TEXT OF ARTICLE XXIV

Article XXIV
Council for Trade in Services

1. The Council for Trade in Services shall carry out such functions as may be assigned to it to facilitate the operation of this Agreement and further its objectives. The Council may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.

2. The Council and, unless the Council decides otherwise, its subsidiary bodies shall be open to participation by representatives of all Members.

3. The Chairman of the Council shall be elected by the Members.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXIV

1. Article XXIV.1

(a) Establishment of subsidiary bodies

(i) Committee on Trade in Financial Services

131. On 1 March 1995, pursuant to the Ministers' Decisions in Marrakesh, the Council for Trade in Services adopted the Decision on Institutional Arrangements for the General Agreement on Trade in Services,[163] thereby establishing the Committee on Trade in Financial Services.[164] Its responsibilities are listed in paragraph 2 of the Decision and comprise, *inter alia*, the duty:

"(a) to keep under continuous review and surveillance the application of the Agreement with respect to the sector concerned;

(b) to formulate proposals or recommendations for consideration by the Council in connection with any matter relating to trade in the sector concerned;

[160] S/C/M/1. The text of the adopted Decision can be found in S/L/2.
[161] S/L/2, para. 1.
[162] S/C/M/6, paras. 41–42.
[163] S/C/M/1, paras. 6–7. The text of the adopted Decision can be found in S/L/1.
[164] See Annual Reports S/FIN 1–6, 8–10, 14.

(c) if there is an annex pertaining to the sector, to consider proposals for amendment of that sectoral annex, and to make appropriate recommendations to the Council;

(d) to provide a forum for technical discussions, to conduct studies on measures of Members and to conduct examinations of any other technical matters affecting trade in services in the sector concerned;

(e) to provide technical assistance to developing country Members and developing countries negotiating accession to the Agreement Establishing the World Trade Organization in respect of the application of obligations or other matters affecting trade in services in the sector concerned; and

(f) to cooperate with any other subsidiary bodies established under the General Agreement on Trade in Services or any international organizations active in any sector concerned."[165]

(ii) Working Party on Professional Services and Working Party on Domestic Regulation

132. On 1 March 1995, pursuant to paragraph 2 of the Decision on Professional Services, the Council for Trade in Services established a Working Party on Professional Services.[166] With respect to disciplines on domestic regulation and mutual recognition guidelines, see paragraph 51 above.

133. The Working Party reported to the Council for Trade in Services on an annual basis.[167]

134. On 26 April 1999, the Council for Trade in Services discussed the issue of how to manage the two overlapping mandates under Article VI:4 which called upon the Council to develop disciplines on domestic regulation in all services sectors, and the Decision on Professional Services which called upon the Working Party on Professional Services (WPPS) to fulfill the same task for professional services.[168] For this purpose, at the same meeting, the Council for Trade in Services adopted a decision establishing the Working Party on Domestic Regulation (WPDR).[169] The WPDR would replace the WPPS and would be responsible for carrying out all the work foreseen under Article VI:4. It would give priority to the development of horizontal disciplines applicable to all services sectors, while retaining the possibility of developing further disciplines applicable to specific sectors or groups of sectors, including the development of general disciplines for professional services.[170]

135. The WPDR reports to the Council for Trade in Services on an annual basis.[171]

(iii) Working Party on GATS Rules

136. At its meeting of 30 March 1995, the Council for Trade in Services established a Working Party on GATS Rules to carry out the negotiating mandates contained in the *GATS* on "Emergency Safeguard Measures" (Article X), "Government Procurement" (Article XIII) and "Subsidies" (Article XV).[172]

(iv) Committee on Specific Commitments

137. On 4 October 1995, the Council for Trade in Services established the Committee on Specific Commitments.[173] At its meeting on 22 November 1995, the Council for Trade in Services adopted the Decision on the Terms of Reference for the Committee on Specific Commitments.[174]

(v) Negotiating Groups on Natural Persons, Maritime Transport Services and Basic Telecommunications

138. The Negotiating Group on Natural Persons, the Negotiating Group on Maritime Transport Services and the Negotiating Group on Basic Telecommunications were established by Ministerial Decisions at Marrakesh.

2. Rules of procedure of the Council for Trade in Services

(a) Rules of procedure

139. On 4 October 1995, the Council for Trade in Services adopted[175] the Rules of Procedure of the General Council, along with appropriate modifications.[176] See also the Chapter on the *WTO Agreement*, Section V.B.5(b).

(b) Observer status

140. At its meeting of 1 March 1995, the Council for Trade in Services took note of the decision by the General Council of 31 January 1995[177] in which it granted observer status to a number of governments and separate territories and also covered observership to the subsidiary bodies to the General Council, including the Council for Trade in Services.[178] The Council for

[165] S/L/1, para. 1.
[166] S/L/3.
[167] The reports are numbered S/WPPS/1–4.
[168] S/C/M/35, paras. 18–22.
[169] S/L/70.
[170] S/C/10, para. 25. Report (1999) of the Council for Trade in Services to the General Council.
[171] S/WPDR 1–7.
[172] S/C/M/2, paras. 22–25.
[173] S/C/M/6, paras. 22–25.
[174] S/L/16.
[175] S/L/15.
[176] S/C/M/6.
[177] WT/GC/M/1.
[178] S/C/M/1.

Trade in Services also took note of the decision of the General Council which agreed on an *ad hoc* arrangement whereby the IMF, the World Bank, the UN and UNCTAD were invited to participate as observers in the first meetings of the General Council and its subsidiary Councils.[179]

141. At its meeting on 14 April 2000, the Council for Trade in Services agreed to grant the World Health Organization and the World Tourism Organization observer status on an *ad hoc* basis.[180]

C. DECISION ON INSTITUTIONAL ARRANGEMENTS FOR THE GENERAL AGREEMENT ON TRADE IN SERVICES

142. With respect to institutional arrangements for the *GATS*, Ministers at the 1994 Marrakesh Ministerial conference adopted the following Decision:

"Decision on Institutional Arrangements for the General Agreement on Trade in Services

Ministers,

Decide to recommend that the Council for Trade in Services at its first meeting adopt the decision on subsidiary bodies set out below.

The Council for Trade in Services,

Acting pursuant to Article XXIV with a view to facilitating the operation and furthering the objectives of the General Agreement on Trade in Services,

Decides as follows:

1. Any subsidiary bodies that the Council may establish shall report to the Council annually or more often as necessary. Each such body shall establish its own rules of procedure, and may set up its own subsidiary bodies as appropriate.

2. Any sectoral committee shall carry out responsibilities as assigned to it by the Council, and shall afford Members the opportunity to consult on any matters relating to trade in services in the sector concerned and the operation of the sectoral annex to which it may pertain. Such responsibilities shall include:

(a) to keep under continuous review and surveillance the application of the Agreement with respect to the sector concerned;

(b) to formulate proposals or recommendations for consideration by the Council in connection with any matter relating to trade in the sector concerned;

(c) if there is an annex pertaining to the sector, to consider proposals for amendment of that sectoral annex, and to make appropriate recommendations to the Council;

(d) to provide a forum for technical discussions, to conduct studies on measures of Members and to conduct examinations of any other technical matters affecting trade in services in the sector concerned;

(e) to provide technical assistance to developing country Members and developing countries negotiating accession to the Agreement Establishing the World Trade Organization in respect of the application of obligations or other matters affecting trade in services in the sector concerned; and

(f) to cooperate with any other subsidiary bodies established under the General Agreement on Trade in Services or any international organizations active in any sector concerned."

XXIX. ARTICLE XXV

A. TEXT OF ARTICLE XXV

Article XXV
Technical Cooperation

1. Service suppliers of Members which are in need of such assistance shall have access to the services of contact points referred to in paragraph 2 of Article IV.

2. Technical assistance to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided upon by the Council for Trade in Services.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXV

No jurisprudence or decision of a competent WTO body.

XXX. ARTICLE XXVI

A. TEXT OF ARTICLE XXVI

Article XXVI
Relationship with Other International Organizations

The General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services.

[179] S/C/M/1.
[180] S/C/M/42, paras. 68–69.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXVI

1. Agreement between the International Telecommunication Union and the World Trade Organization

143. On 26 May 2000, the Council for Trade in Services adopted the Cooperation Agreement between the International Telecommunication Union and the World Trade Organization.[181] At its meeting on 10 October 2000, the General Council approved the Agreement between the ITU and WTO contained in document S/C/11 and consequently authorized the WTO Director-General to sign this Agreement.[182]

144. With respect to the relationship of the WTO with other international organizations in general, see the Chapter on the *WTO Agreement*, Section VI.B.

PART V
FINAL PROVISIONS

XXXI. ARTICLE XXVII

A. TEXT OF ARTICLE XXVII

Article XXVII
Denial of Benefits

A Member may deny the benefits of this Agreement:

(a) to the supply of a service, if it establishes that the service is supplied from or in the territory of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;

(b) in the case of the supply of a maritime transport service, if it establishes that the service is supplied:

  (i) by a vessel registered under the laws of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement, and

  (ii) by a person which operates and/or uses the vessel in whole or in part but which is of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;

(c) to a service supplier that is a juridical person, if it establishes that it is not a service supplier of another Member, or that it is a service supplier of a Member to which the denying Member does not apply the WTO Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXVII

No jurisprudence or decision of a competent WTO body.

XXXII. ARTICLE XXVIII

A. TEXT OF ARTICLE XXVIII

Article XXVIII
Definitions

For the purpose of this Agreement:

(a) "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;

(b) "supply of a service" includes the production, distribution, marketing, sale and delivery of a service;

(c) "measures by Members affecting trade in services" include measures in respect of

  (i) the purchase, payment or use of a service;

  (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;

  (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member;

(d) "commercial presence" means any type of business or professional establishment, including through

  (i) the constitution, acquisition or maintenance of a juridical person, or

  (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service;

(e) "sector" of a service means,

  (i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,

  (ii) otherwise, the whole of that service sector, including all of its subsectors;

(f) "service of another Member" means a service which is supplied,

  (i) from or in the territory of that other Member, or in the case of maritime transport, by a vessel registered under the laws of that other Member, or by a person of that other Member which supplies the service through the operation of a vessel and/or its use in whole or in part; or

  (ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Member;

[181] The text is contained in document S/C/9/Rev.1.
[182] WT/GC/M/58, pp. 14–15.

(g) "service supplier" means any person that supplies a service;[12]

(*footnote original*) [12] Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied.

(h) "monopoly supplier of a service" means any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service;

(i) "service consumer" means any person that receives or uses a service;

(j) "person" means either a natural person or a juridical person;

(k) "natural person of another Member" means a natural person who resides in the territory of that other Member or any other Member, and who under the law of that other Member:

(i) is a national of that other Member; or

(ii) has the right of permanent residence in that other Member, in the case of a Member which:

1. does not have nationals; or

2. accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services, as notified in its acceptance of or accession to the WTO Agreement, provided that no Member is obligated to accord to such permanent residents treatment more favourable than would be accorded by that other Member to such permanent residents. Such notification shall include the assurance to assume, with respect to those permanent residents, in accordance with its laws and regulations, the same responsibilities that other Member bears with respect to its nationals;

(l) "juridical person" means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;

(m) "juridical person of another Member" means a juridical person which is either:

(i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or

(ii) in the case of the supply of a service through commercial presence, owned or controlled by:

1. natural persons of that Member; or

2. juridical persons of that other Member identified under subparagraph (i);

(n) a juridical person is:

(i) "owned" by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;

(ii) "controlled" by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;

(iii) "affiliated" with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;

(o) "direct taxes" comprise all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXVIII

1. Article XXVIII(k)(ii)2

145. On 1 March 1995, the Council for Trade in Services took note of four communications to the effect that the concerned Members accord substantially the same treatment to their permanent residents as they accord to their nationals with respect to measures affecting trade in services and that they assume, with respect to those permanent residents, the same responsibilities that other members bear with respect to their nationals.[183] At its meeting of 2, 9 and 24 October 2003 the Council took note of a similar notification.[184]

XXXIII. ARTICLE XXIX

A. TEXT OF ARTICLE XXIX

Article XXIX
Annexes

The Annexes to this Agreement are an integral part of this Agreement.

[183] S/C/N/1, S/C/N/2, S/C/N/3 and S/C/N/5.
[184] S/C/N/232.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXIX

No jurisprudence or decision of a competent WTO body.

XXXIV. ANNEX ON ARTICLE II EXEMPTIONS

A. TEXT OF THE ANNEX ON ARTICLE II EXEMPTIONS

Annex on Article II Exemptions

Scope

1. This Annex specifies the conditions under which a Member, at the entry into force of this Agreement, is exempted from its obligations under paragraph 1 of Article II.

2. Any new exemptions applied for after the date of entry into force of the WTO Agreement shall be dealt with under paragraph 3 of Article IX of that Agreement.

Review

3. The Council for Trade in Services shall review all exemptions granted for a period of more than 5 years. The first such review shall take place no more than 5 years after the entry into force of the WTO Agreement.

4. The Council for Trade in Services in a review shall:

(a) examine whether the conditions which created the need for the exemption still prevail; and

(b) determine the date of any further review.

Termination

5. The exemption of a Member from its obligations under paragraph 1 of Article II of the Agreement with respect to a particular measure terminates on the date provided for in the exemption.

6. In principle, such exemptions should not exceed a period of 10 years. In any event, they shall be subject to negotiation in subsequent trade liberalizing rounds.

7. A Member shall notify the Council for Trade in Services at the termination of the exemption period that the inconsistent measure has been brought into conformity with paragraph 1 of Article II of the Agreement.

List of Article II *Exemptions*

[The agreed list of exemptions under paragraph 2 of Article II is omitted.]

B. INTERPRETATION AND APPLICATION OF THE ANNEX ON ARTICLE II EXEMPTIONS

1. Paragraph 3

146. At the meeting of the Council for Trade in Services of 18 October 1999, it was agreed that the first review of Article II (MFN) Exemptions had begun.[185]

2. Paragraph 4

147. The Council conducted a review of MFN exemptions at meetings held on 29 May 2000, 5 July 2000 and 5 October 2000.[186] The Council decided that a further review of MFN exemptions should take place no later than June 2004.[187]

3. Paragraph 7

148. With respect to the format for notifications required under paragraph 7 of the Annex on Article II Exemptions, see the Guidelines for Notifications under the *General Agreement on Trade in Services*.[188]

4. Terminations, reductions and rectifications of MFN exemptions

149. At its meeting of 5 June 2002, the Council for Trade in Services adopted Procedures for the Certification of Terminations, Reductions and Rectifications of Article II (MFN) Exemptions.[189]

XXXV. ANNEX ON MOVEMENT OF NATURAL PERSONS SUPPLYING SERVICES UNDER THE AGREEMENT

A. TEXT OF THE ANNEX ON MOVEMENT OF NATURAL PERSONS SUPPLYING SERVICES UNDER THE AGREEMENT

Annex on Movement of Natural Persons Supplying Services under the Agreement

1. This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.

2. The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.

3. In accordance with Parts III and IV of the Agreement, Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.

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[185] S/C/M/40, para. 53.
[186] See S/C/M/44, S/C/M/45 and S/C/M/47.
[187] S/C/M/53, Section A.
[188] S/C/M/1, paras. 10–11. The approved Guidelines can be found in S/L/5.
[189] S/L/106.

4. The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.[13]

(*footnote original*) [13] The sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.

B. INTERPRETATION AND APPLICATION OF THE ANNEX ON MOVEMENT OF NATURAL PERSONS SUPPLYING SERVICES UNDER THE AGREEMENT

1. Measures relating to the entry and stay of natural persons

150. At its meeting of 1 March 1995, the Council for Trade in Services adopted a conclusion of the Sub-Committee on Services concerning measures relating to the entry and stay of natural persons.[190] The Sub-Committee had dealt with the question on what basis a distinction between "temporary" and "permanent" residency and employment should be made. The Sub-Committee, however, ultimately decided that the commitments set out in the individual countries' schedules were sufficiently clear, so that there was no need for further multilateral work on this issue.[191]

XXXVI. ANNEX ON AIR TRANSPORT SERVICES

A. TEXT OF THE ANNEX ON AIR TRANSPORT SERVICES

Annex on Air Transport Services

1. This Annex applies to measures affecting trade in air transport services, whether scheduled or non-scheduled, and ancillary services. It is confirmed that any specific commitment or obligation assumed under this Agreement shall not reduce or affect a Member's obligations under bilateral or multilateral agreements that are in effect on the date of entry into force of the WTO Agreement.

2. The Agreement, including its dispute settlement procedures, shall not apply to measures affecting:

(a) traffic rights, however granted; or

(b) services directly related to the exercise of traffic rights, except as provided in paragraph 3 of this Annex.

3. The Agreement shall apply to measures affecting:

(a) aircraft repair and maintenance services;

(b) the selling and marketing of air transport services;

(c) computer reservation system (CRS) services.

4. The dispute settlement procedures of the Agreement may be invoked only where obligations or specific commitments have been assumed by the concerned Members and where dispute settlement procedures in bilateral and other multilateral agreements or arrangements have been exhausted.

5. The Council for Trade in Services shall review periodically, and at least every five years, developments in the air transport sector and the operation of this Annex with a view to considering the possible further application of the Agreement in this sector.

6. Definitions:

(a) 'Aircraft repair and maintenance services' mean such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance.

(b) 'Selling and marketing of air transport services' mean opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions.

(c) 'Computer reservation system (CRS) services' mean services provided by computerised systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued.

(d) 'Traffic rights' mean the right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control.

B. INTERPRETATION AND APPLICATION OF THE ANNEX ON AIR TRANSPORT SERVICES

1. Paragraph 5

151. The Council conducted the review mandated under paragraph 5 of the Air Transport Annex at meet-

[190] S/C/M/1, para. 14.
[191] G/C/1, para. 6.

ings held on 28–29 September 2000, 4 December 2000, 9 October 2001 and 18 March 2002.[192] The Council decided at its meeting of 2, 9 and 24 October 2003 on the conclusion of the review and the start-date for the next one:

"The Council decides to conclude the first review mandated under paragraph 5 of the Annex on Air Transport Services. While noting that the Annex requires that a review be conducted at least every five years, the Council decides that the formal commencement of the second review shall take place at the last regular meeting of the Council for Trade in Services of 2005. This shall not prejudge Members' interpretation of paragraph 5 of the Annex."[193]

XXXVII. ANNEX ON FINANCIAL SERVICES

A. TEXT OF THE ANNEX ON FINANCIAL SERVICES

Annex on Financial Services

1. *Scope and Definition*

(a) This Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service in this Annex shall mean the supply of a service as defined in paragraph 2 of Article I of the Agreement.

(b) For the purposes of subparagraph 3(b) of Article I of the Agreement, 'services supplied in the exercise of governmental authority' means the following:

(i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;

(ii) activities forming part of a statutory system of social security or public retirement plans; and

(iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

(c) For the purposes of subparagraph 3(b) of Article I of the Agreement, if a Member allows any of the activities referred to in subparagraphs (b) (ii) or (b) (iii) of this paragraph to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier, 'services' shall include such activities.

(d) Subparagraph 3(c) of Article I of the Agreement shall not apply to services covered by this Annex.

2. *Domestic Regulation*

(a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

(b) Nothing in the Agreement shall be construed to require a Member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.

3. *Recognition*

(a) A Member may recognize prudential measures of any other country in determining how the Member's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

(b) A Member that is a party to such an agreement or arrangement referred to in subparagraph (a), whether future or existing, shall afford adequate opportunity for other interested Members to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that such circumstances exist.

(c) Where a Member is contemplating according recognition to prudential measures of any other country, paragraph 4(b) of Article VII shall not apply.

4. *Dispute Settlement*

Panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service under dispute.

5. *Definitions*

For the purposes of this Annex:

(a) A financial service is any service of a financial nature offered by a financial service supplier of a Member. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). Financial services include the following activities:

[192] S/C/M/49, S/C/M/50, S/C/M/57 and S/C/M/62.
[193] S/C/M/68, paras. 115–116.

Insurance and insurance-related services

(i) Direct insurance (including co-insurance) :

(A) life

(B) non-life

(ii) Reinsurance and retrocession;

(iii) Insurance intermediation, such as brokerage and agency;

(iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

Banking and other financial services (excluding insurance)

(v) Acceptance of deposits and other repayable funds from the public;

(vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transactions;

(vii) Financial leasing;

(viii) All payment and money transmission services, including credit, charge and debit cards, travellers' cheques and bankers' drafts;

(ix) Guarantees and commitments;

(x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:

(A) money market instruments (including cheques, bills, certificates of deposits);

(B) foreign exchange;

(C) derivative products including, but not limited to, futures and options;

(D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;

(E) transferable securities;

(F) other negotiable instruments and financial assets, including bullion.

(xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;

(xii) Money broking;

(xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;

(xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;

(xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;

(xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

(b) A financial service supplier means any natural or juridical person of a Member wishing to supply or supplying financial services but the term 'financial service supplier' does not include a public entity.

(c) 'Public entity' means:

(i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or

(ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.

B. INTERPRETATION AND APPLICATION OF THE ANNEX ON FINANCIAL SERVICES

No jurisprudence or decision of a competent WTO body.

XXXVIII. SECOND ANNEX ON FINANCIAL SERVICES

A. TEXT OF THE SECOND ANNEX ON FINANCIAL SERVICES

Second Annex on Financial Services

1. Notwithstanding Article II of the Agreement and paragraphs 1 and 2 of the Annex on Article II Exemptions, a Member may, during a period of 60 days beginning four months after the date of entry into force of the WTO Agreement, list in that Annex measures relating to financial services which are inconsistent with paragraph 1 of Article II of the Agreement.

2. Notwithstanding Article XXI of the Agreement, a Member may, during a period of 60 days beginning four months after the date of entry into force of the WTO Agreement, improve, modify or withdraw all or part of the specific commitments on financial services inscribed in its Schedule.

3. The Council for Trade in Services shall establish any procedures necessary for the application of paragraphs 1 and 2.

B. INTERPRETATION AND APPLICATION OF THE SECOND ANNEX ON FINANCIAL SERVICES

No jurisprudence or decision of a competent WTO body.

XXXIX. ANNEX ON NEGOTIATIONS ON MARITIME TRANSPORT SERVICES

A. TEXT OF THE ANNEX ON NEGOTIATIONS ON MARITIME TRANSPORT SERVICES

Annex on Negotiations on Maritime Transport Services

1. Article II and the Annex on Article II Exemptions, including the requirement to list in the Annex any measure inconsistent with most-favoured-nation treatment that a Member will maintain, shall enter into force for international shipping, auxiliary services and access to and use of port facilities only on:

(a) the implementation date to be determined under paragraph 4 of the Ministerial Decision on Negotiations on Maritime Transport Services; or,

(b) should the negotiations not succeed, the date of the final report of the Negotiating Group on Maritime Transport Services provided for in that Decision.

2. Paragraph 1 shall not apply to any specific commitment on maritime transport services which is inscribed in a Member's Schedule.

3. From the conclusion of the negotiations referred to in paragraph 1, and before the implementation date, a Member may improve, modify or withdraw all or part of its specific commitments in this sector without offering compensation, notwithstanding the provisions of Article XXI.

B. INTERPRETATION AND APPLICATION OF THE ANNEX ON NEGOTIATIONS ON MARITIME TRANSPORT SERVICES

No jurisprudence or decision of a competent WTO body.

XL. ANNEX ON TELECOMMUNICATIONS

A. TEXT OF THE ANNEX ON TELECOMMUNICATIONS

Annex on Telecommunications

1. *Objectives*

Recognizing the specificities of the telecommunications services sector and, in particular, its dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities, the Members have agreed to the following Annex with the objective of elaborating upon the provisions of the Agreement with respect to measures affecting access to and use of public telecommunications transport networks and services. Accordingly, this Annex provides notes and supplementary provisions to the Agreement.

2. *Scope*

(a) This Annex shall apply to all measures of a Member that affect access to and use of public telecommunications transport networks and services.[14]

(*footnote original*) [14] This paragraph is understood to mean that each Member shall ensure that the obligations of this Annex are applied with respect to suppliers of public telecommunications transport networks and services by whatever measures are necessary.

(b) This Annex shall not apply to measures affecting the cable or broadcast distribution of radio or television programming.

(c) Nothing in this Annex shall be construed:

(i) to require a Member to authorize a service supplier of any other Member to establish, construct, acquire, lease, operate, or supply telecommunications transport networks or services, other than as provided for in its Schedule; or

(ii) to require a Member (or to require a Member to oblige service suppliers under its jurisdiction) to establish, construct, acquire, lease, operate or supply telecommunications transport networks or services not offered to the public generally.

3. *Definitions*

For the purposes of this Annex:

(a) 'Telecommunications' means the transmission and reception of signals by any electromagnetic means.

(b) 'Public telecommunications transport service' means any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally. Such services may include, *inter alia*, telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied

information between two or more points without any end-to-end change in the form or content of the customer's information.

(c) 'Public telecommunications transport network' means the public telecommunications infrastructure which permits telecommunications between and among defined network termination points.

(d) 'Intra-corporate communications' means telecommunications through which a company communicates within the company or with or among its subsidiaries, branches and, subject to a Member's domestic laws and regulations, affiliates. For these purposes, 'subsidiaries', 'branches' and, where applicable, 'affiliates' shall be as defined by each Member. 'Intra-corporate communications' in this Annex excludes commercial or non-commercial services that are supplied to companies that are not related subsidiaries, branches or affiliates, or that are offered to customers or potential customers.

(e) Any reference to a paragraph or subparagraph of this Annex includes all subdivisions thereof.

4. *Transparency*

In the application of Article III of the Agreement, each Member shall ensure that relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available, including: tariffs and other terms and conditions of service; specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registration or licensing requirements, if any.

5. *Access to and Use of Public Telecommunications Transport Networks and Services*

(a) Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule. This obligation shall be applied, *inter alia*, through paragraphs (b) through (f).[15]

(*footnote original*) [15] The term 'non-discriminatory' is understood to refer to most-favoured-nation and national treatment as defined in the Agreement, as well as to reflect sector-specific usage of the term to mean 'terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances'.

(b) Each Member shall ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network or service offered within or across the border of that Member, including private leased circuits, and to this end shall ensure, subject to paragraphs (e) and (f), that such suppliers are permitted:

(i) to purchase or lease and attach terminal or other equipment which interfaces with the network and which is necessary to supply a supplier's services;

(ii) to interconnect private leased or owned circuits with public telecommunications transport networks and services or with circuits leased or owned by another service supplier; and

(iii) to use operating protocols of the service supplier's choice in the supply of any service, other than as necessary to ensure the availability of telecommunications transport networks and services to the public generally.

(c) Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.

(d) Notwithstanding the preceding paragraph, a Member may take such measures as are necessary to ensure the security and confidentiality of messages, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.

(e) Each Member shall ensure that no condition is imposed on access to and use of public telecommunications transport networks and services other than as necessary:

(i) to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally;

(ii) to protect the technical integrity of public telecommunications transport networks or services; or

(iii) to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Member's Schedule.

(f) Provided that they satisfy the criteria set out in paragraph (e), conditions for access to and use of public telecommunications transport networks and services may include:

(i) restrictions on resale or shared use of such services;

(ii) a requirement to use specified technical interfaces, including interface protocols, for inter-connection with such networks and services;

(iii) requirements, where necessary, for the inter-operability of such services and to encourage the achievement of the goals set out in paragraph 7(a);

(iv) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks;

(v) restrictions on inter-connection of private leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier; or

(vi) notification, registration and licensing.

(g) Notwithstanding the preceding paragraphs of this section, a developing country Member may, consistent with its level of development, place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services. Such conditions shall be specified in the Member's Schedule.

6. *Technical Cooperation*

(a) Members recognize that an efficient, advanced telecommunications infrastructure in countries, particularly developing countries, is essential to the expansion of their trade in services. To this end, Members endorse and encourage the participation, to the fullest extent practicable, of developed and developing countries and their suppliers of public telecommunications transport networks and services and other entities in the development programmes of international and regional organizations, including the International Telecommunication Union, the United Nations Development Programme, and the International Bank for Reconstruction and Development.

(b) Members shall encourage and support telecommunications cooperation among developing countries at the international, regional and sub-regional levels.

(c) In cooperation with relevant international organizations, Members shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector.

(d) Members shall give special consideration to opportunities for the least-developed countries to encourage foreign suppliers of telecommunications services to assist in the transfer of technology, training and other activities that support the development of their telecommunications infrastructure and expansion of their telecommunications services trade.

7. *Relation to International Organizations and Agreements*

(a) Members recognize the importance of international standards for global compatibility and inter-operability of telecommunication networks and services and undertake to promote such standards through the work of relevant international bodies, including the International Telecommunication Union and the International Organization for Standardization.

(b) Members recognize the role played by intergovernmental and non-governmental organizations and agreements in ensuring the efficient operation of domestic and global telecommunications services, in particular the International Telecommunication Union. Members shall make appropriate arrangements, where relevant, for consultation with such organizations on matters arising from the implementation of this Annex.

B. INTERPRETATION AND APPLICATION OF THE ANNEX ON TELECOMMUNICATIONS

1. Application to access and use by scheduled suppliers of basic telecommunications services

152. In examining which suppliers and services are entitled to access and use public telecommunications transport networks and services, the Panel on *Mexico – Telecoms* observed that:

> "[T]he wording of Section 2(a) does not specify that the provision is limited to measures affecting access to and use of public telecommunications transport networks and services by only *certain* services or service sectors. The ordinary meaning of the words in Section 2(a) suggests therefore that the scope of the Annex includes *all* measures that affect access to or use of public telecommunications transport networks and services with regard to *all* services, including basic telecommunications services."[194]

153. Likewise, referring to Section 5(a) of the Annex, the Panel on *Mexico – Telecoms* stated that:

> "Section 5 (a) of the Annex states that the obligation to ensure access to and use of public telecommunications transport networks and services shall apply for the

[194] Panel Report on *Mexico – Telecoms*, para. 7.278.

benefit of 'any service supplier of any other Member' for the supply of 'a service included in its schedule'. This language does not explicitly exclude suppliers of basic telecommunications services. On the contrary, Section 5(a) speaks of 'any' service supplier. It also speaks of a 'service included' in a Member's schedule which, in the case of any Member, can, and for many Members does, include basic telecommunications services. We consider this to be a further indication that the Annex is not limited in its application to exclude measures ensuring the access to and use of public telecommunications transport networks and services for the supply of any service, including basic telecommunications services."[195]

154. The Panel on *Mexico – Telecoms* observed further that it would be "unreasonable to suppose that the access and use of public telecommunications transport networks and services that is essential to the international supply of basic telecommunications services was not intended to be covered by the Annex". The Panel noted:

"If the Annex did not apply to measures affecting access to and use of public telecommunications transport networks and services for basic telecommunications services, Members could effectively prohibit any supply other than that which originated and terminated within the same suppliers' network, even where commitments were undertaken, thereby rendering most basic telecommunications commitments without economic value."[196]

2. Section 5(a)

(a) Relationship of paragraph (a) to the other parts of Section 5

155. The Panel on *Mexico – Telecoms*, in assessing the relationship between paragraph (a) and the other paragraphs of Section 5, stated:

"We note that the obligation in paragraph (a) 'shall be applied, *inter alia*, through paragraphs (b) through (f)'. . . . An obligation cannot be applied 'through' another provision if that obligation is read in isolation from that provision. For an obligation in one provision to be applied 'through' another provision, it is evident that the two provisions must be interrelated and must inform each other. We read paragraph (a), in other words, as containing an obligation that *informs* paragraphs (b) through (f), and must be read taking into account paragraphs (b) through (f)."[197]

156. In examining further the relationship between paragraph (a) and the other paragraphs of Section 5, the Panel on *Mexico – Telecoms* determined that the "reasonable and non-discriminatory" standard in paragraph (a) applies only to measures that are permissible under paragraph (e):

"We determined earlier that paragraph (a) should be read together with the other paragraphs of Section 5. We note that paragraph (a) addresses 'terms and conditions' for access to public telecommunications transport networks and services, which must be 'reasonable and non-discriminatory'. Paragraph (e) requires that no condition other than as necessary to achieve any of three policy objectives contained in subparagraphs (e)(i) to (iii) shall be imposed by a Member. We infer that whenever a condition is 'necessary' under paragraph (e), it must, in addition, be 'reasonable and non-discriminatory' under paragraph (a). Conversely, if a condition is not 'necessary' to fulfil at least one of the three policy objectives set out under subparagraphs (i) to (iii), paragraph (e) *prohibits* the imposition of such a condition, which suggests that there may be no need to analyse in that case whether that condition would otherwise be 'reasonable and non-discriminatory'.

. . .

We conclude that the obligation contained in Section 5(a) informs the other paragraphs of Section 5, and is likewise informed by elements of these paragraphs. We cannot therefore examine what constitutes 'reasonable terms and conditions' for access to and use of public telecommunications transport networks and services in isolation from the question of whether or not a particular condition may be imposed, an issue that is addressed in paragraph (e)."[198]

(b) Access and use "on reasonable . . . terms and conditions"

(i) Whether rates for access and use constitute "terms"

157. The Panel on *Mexico – Telecoms* stated that "the ordinary meaning of the word 'terms' suggests that it would include pricing elements, including rates charged for access to and use of public telecommunications transport networks and services".[199]

(ii) Whether rates for access and use are subject to examination as "reasonable" terms

158. The Panel on *Mexico – Telecoms* found that rates for access and use can be examined under Section 5 to establish whether or not they constitute "reasonable" terms. The Panel also found that "access to and use of public telecommunications transport networks and services on 'reasonable' terms includes questions of *pricing* of that access and use".[200]

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[195] Panel Report on *Mexico – Telecoms*, para. 7.281.
[196] Panel Report on *Mexico – Telecoms*, para. 7.286.
[197] Panel Report on *Mexico – Telecoms*, para. 7.302.
[198] Panel Report on *Mexico – Telecoms*, paras. 7.306 and 7.309.
[199] Panel Report on *Mexico – Telecoms*, para. 7.325.
[200] Panel Report on *Mexico – Telecoms*, para. 7.333; see also paras. 7.331–7.332, and para. 164 of this Chapter.

(iii) Rates for access and use that are "reasonable"

159. The Panel on *Mexico – Telecoms*, in examining when rates for access and use are "reasonable", and applying the criterion to the facts of the case, stated:

> "We have previously noted that Mexico's Reference Paper contains obligations additional to those in the Annex. We consider therefore that rates charged for access to and use of public telecommunications transport networks and services may still be 'reasonable', even if generally higher than rates for interconnection that are cost-oriented in terms of Section 2.2(b) of Mexico's Reference Paper. . . .
>
> We have already determined in part B of these findings that the rates charged to interconnect United States suppliers of the services at issue to public telecommunications transport networks and services in Mexico exceed cost-oriented rates by a substantial margin.[201] We find that rates which exceed cost-based rates to this extent, and whose uniform nature excludes price competition in the relevant market of the telecommunications services bound under Mexico's Schedule, do not provide access to and use of public telecommunications transport networks and services in Mexico 'on reasonable . . . terms'."[202]

3. Section 5(b)

(a) Relationship of paragraph (b) to the other parts of Section 5

160. Recognizing that the relationship of paragraph (b) with the other parts of Section 5 was more "straightforward" than that of paragraph (a),[203] the Panel on *Mexico – Telecoms* stated:

> "The obligations in paragraph (b) apply 'subject to paragraphs (e) and (f)'. We understand this to mean that the obligations in paragraph (b) are *subordinated to*, and are, therefore, *qualified by*, paragraphs (e) and (f). The obligations in paragraph (b) are therefore *subject to* any condition that a Member may impose that is necessary to achieve one of the policy objectives set out in paragraph (e)(i) to (iii).[204] We recall that paragraph (b) is informed also by paragraph (a), and that the obligation in the latter provision to ensure reasonable and non-discriminatory access also applies to paragraph (b).
>
> (. . .)
>
> We conclude that an obligation arises for a Member under paragraph 5(b) subject to any term or condition that a Member may impose in a manner consistent with the provisions of paragraphs (a) and (e)."[205]

(b) Obligation to provide access to and use of private leased circuits

161. The Panel on *Mexico – Telecoms* stated that it

> "considers Mexico to have undertaken commitments on the supply of the services at issue by commercial agencies through commercial presence, for which access to and use of private leased circuits is not only relevant but, by Mexico's own definition in its schedule, is essential. Therefore, we find that Mexico has failed to ensure access to and use of private leased circuits for the supply of the committed services in a manner consistent with Section 5(b) of the Annex on Telecommunications."[206]

4. Sections 5(e) and (f)

(a) Whether rates for access and use constitute "conditions"

162. The Panel on *Mexico – Telecoms* noted that Section 5 (f), which lists examples of "conditions", does not refer to specific pricing measures.[207] It concluded that, since "whether or not to charge, or the existence of a price, does not appear to fit within the meaning of the language of 5(f) and its subparagraphs", pricing measures such as rates are not "conditions" within the meaning of Section 5(e).[208]

(b) Meaning of "necessary" in paragraph (e)

163. The Panel on *Mexico – Telecoms*, in considering the alternative case that rates for access and use were "conditions" as well as "terms", examined the meaning of the term "necessary". It noted that the meaning of "necessary" could range from "indispensable" to achieving a policy goal, to merely "making a contribution" to that policy goal.[209] The Panel found:

> "The interpretation of the word 'necessary' in Section 5(e) as meaning 'indispensable' would however leave no room for an analysis of whether terms were 'reasonable'. If cost-based rates were 'indispensable' to reach the policy objective, then these rates surely could not also be unreasonable. Such an interpretation would empty the 'reasonable' standard in Section 5(a) of much of its meaning."[210]

164. The Panel therefore concluded that the meaning of "necessary" in paragraph (e) was closer to "making a contribution" to a policy goal, since then "an examination under paragraph (a) of whether that rate was also 'reasonable' would still have meaning".[211]

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[201] (*footnote original*) See para. 7.216.
[202] Panel Report on *Mexico – Telecoms*, paras. 7.334–7.335.
[203] Panel Report on *Mexico – Telecoms*, para. 7.307.
[204] (*footnote original*) For an interpretation of the words "subject to", see also Appellate Body Report, *Canada – Dairy*, paragraph 134.
[205] Panel Report on *Mexico – Telecoms*, paras. 7.308–7.309.
[206] Panel Report on *Mexico – Telecoms*, para. 7.381.
[207] Panel Report on *Mexico – Telecoms*, para. 7.326.
[208] Panel Report on *Mexico – Telecoms*, para. 7.327.
[209] Panel Report on *Mexico – Telecoms*, para. 7.338.
[210] Panel Report on *Mexico – Telecoms*, para. 7.341.
[211] Panel Report on *Mexico – Telecoms*, para. 7.342.

(c) Measures to prevent supply of an unscheduled service in paragraph (e)

165. The Panel on *Mexico – Telecoms* found that paragraph (e)(iii), permitting conditions to be imposed "to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Members' Schedule", does not apply to a measure that simply prevents the supply of a service on which a scheduled commitment has been made.[212]

5. Section 5(g)

166. In response to the argument that Section 5(g) allowed Mexico as a developing country to place reasonable conditions on access and use, the Panel on *Mexico – Telecoms* observed:

> "Section 5(g) recognizes the *right* of developing countries *to inscribe* limitations in their schedules for the objectives recognized in Section 5(g). The Panel notes that Mexico's Schedule of Specific Commitments does not include any limitations referring to Section 5(g) or to the development objectives mentioned therein. Without such limitations in Mexico's Schedule, Section 5(g) does not permit a departure from specific commitments which Mexico has voluntarily and explicitly scheduled."[213]

6. Relationship between Annex obligations and Reference Paper commitments

167. The Panel on *Mexico – Telecoms* compared Annex obligations and Reference Paper commitments in the following terms:

> "The Panel noted that, although the obligations in the Annex and the Reference Paper may overlap in certain respects, there are clear differences between the two instruments. First, the Annex sets out general obligations for access to and use of public telecommunications transport networks and services, applicable to *all* Members and *all* sectors in which specific commitments have been undertaken. Reference Paper obligations, as additional commitments, are applicable only by Members that have included them in their schedules, and they apply only to basic telecommunications. Second, while the Annex applies to all operators of public telecommunications transport networks and services within a Member, regardless of their competitive situation, the Reference Paper obligations on interconnection apply only with respect to 'major suppliers'. Third, the Annex broadly deals with 'access to and use of' public telecommunications transport networks and services, while the Reference Paper focuses on specific 'competitive safeguards' and on 'interconnection'.[214]
>
> In spite of these differences, the Annex recognizes that its provisions relate to and build upon the obligations and disciplines contained in the Articles of the GATS – the Annex states expressly that it 'provides notes and supplementary provisions to the Agreement'.[215] Similarly, many of the provisions of the Reference Paper also draw from and add to existing obligations of the GATS, such as Articles III, VI, VIII and IX and the Annex on Telecommunications. Accordingly, there is a degree of overlap between the obligations of the Annex and the Reference Paper, despite their differences in scope, level of obligations, and specific detail provided. To the extent that the Reference Paper requires cost-oriented interconnection on reasonable terms and conditions, it supplements Annex Section 5, requiring additional obligations as regards 'major suppliers'. The Reference Paper commitments do not in this sense subtract from the Annex or render it redundant."[216]

XLI. ANNEX ON NEGOTIATIONS ON BASIC TELECOMMUNICATIONS

A. TEXT OF THE ANNEX ON NEGOTIATIONS ON BASIC TELECOMMUNICATIONS

Annex on Negotiations on Basic Telecommunications

1. Article II and the Annex on Article II Exemptions, including the requirement to list in the Annex any measure inconsistent with most-favoured-nation treatment that a Member will maintain, shall enter into force for basic telecommunications only on:

(a) the implementation date to be determined under paragraph 5 of the Ministerial Decision on Negotiations on Basic Telecommunications; or,

(b) should the negotiations not succeed, the date of the final report of the Negotiating Group on Basic Telecommunications provided for in that Decision.

2. Paragraph 1 shall not apply to any specific commitment on basic telecommunications which is inscribed in a Member's Schedule.

B. INTERPRETATION AND APPLICATION OF THE ANNEX ON NEGOTIATIONS ON BASIC TELECOMMUNICATIONS

No jurisprudence or decision of a competent WTO body.

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[212] Panel Report on *Mexico – Telecoms*, para. 7.385.
[213] Panel Report on *Mexico – Telecoms*, para. 7.388.
[214] Panel Report on *Mexico – Telecoms*, para. 7.331.
[215] (*footnote original*) For example, footnote 2 of the Annex expressly refers to most favoured nation treatment (Article II) and national treatment (Article XVII). Section 4 (Transparency) builds upon Article III (Transparency). The Annex further elaborates on concepts contained in Articles VI (Domestic Regulation), VIII (Monopolies and exclusive service suppliers), and IX (Business practices).
[216] Panel Report on *Mexico – Telecoms*, paras. 7.331–7.332.

XLII. UNDERSTANDING ON COMMITMENTS IN FINANCIAL SERVICES

A. TEXT OF THE UNDERSTANDING ON COMMITMENTS IN FINANCIAL SERVICES

Understanding on Commitments in Financial Services

Participants in the Uruguay Round have been enabled to take on specific commitments with respect to financial services under the General Agreement on Trade in Services (hereinafter referred to as the 'Agreement') on the basis of an alternative approach to that covered by the provisions of Part III of the Agreement. It was agreed that this approach could be applied subject to the following understanding:

(i) it does not conflict with the provisions of the Agreement;

(ii) it does not prejudice the right of any Member to schedule its specific commitments in accordance with the approach under Part III of the Agreement;

(iii) resulting specific commitments shall apply on a most-favoured-nation basis;

(iv) no presumption has been created as to the degree of liberalization to which a Member is committing itself under the Agreement.

Interested Members, on the basis of negotiations, and subject to conditions and qualifications where specified, have inscribed in their schedule specific commitments conforming to the approach set out below.

A. Standstill

Any conditions, limitations and qualifications to the commitments noted below shall be limited to existing non-conforming measures.

B. Market Access

Monopoly Rights

1. In addition to Article VIII of the Agreement, the following shall apply:

Each Member shall list in its schedule pertaining to financial services existing monopoly rights and shall endeavour to eliminate them or reduce their scope. Notwithstanding subparagraph 1(b) of the Annex on Financial Services, this paragraph applies to the activities referred to in subparagraph 1(b)(iii) of the Annex.

Financial Services purchased by Public Entities

2. Notwithstanding Article XIII of the Agreement, each Member shall ensure that financial service suppliers of any other Member established in its territory are accorded most-favoured-nation treatment and national treatment as regards the purchase or acquisition of financial services by public entities of the Member in its territory.

Cross-border Trade

3. Each Member shall permit non-resident suppliers of financial services to supply, as a principal, through an intermediary or as an intermediary, and under terms and conditions that accord national treatment, the following services:

(a) insurance of risks relating to:

(i) maritime shipping and commercial aviation and space launching and freight (including satellites), with such insurance to cover any or all of the following: the goods being transported, the vehicle transporting the goods and any liability arising therefrom; and

(ii) goods in international transit;

(b) reinsurance and retrocession and the services auxiliary to insurance as referred to in subparagraph 5(a)(iv) of the Annex;

(c) provision and transfer of financial information and financial data processing as referred to in subparagraph 5(a)(xv) of the Annex and advisory and other auxiliary services, excluding intermediation, relating to banking and other financial services as referred to in subparagraph 5(a)(xvi) of the Annex.

4. Each Member shall permit its residents to purchase in the territory of any other Member the financial services indicated in:

(a) subparagraph 3(a);

(b) subparagraph 3(b); and

(c) subparagraphs 5(a)(v) to (xvi) of the Annex.

Commercial Presence

5. Each Member shall grant financial service suppliers of any other Member the right to establish or expand within its territory, including through the acquisition of existing enterprises, a commercial presence.

6. A Member may impose terms, conditions and procedures for authorization of the establishment and expansion of a commercial presence in so far as they do not circumvent the Member's obligation under paragraph 5 and they are consistent with the other obligations of the Agreement.

New Financial Services

7. A Member shall permit financial service suppliers of any other Member established in its territory to offer in its territory any new financial service.

Transfers of Information and Processing of Information

8. No Member shall take measures that prevent transfers of information or the processing of financial information, including transfers of data by electronic means, or that, subject to importation rules consistent with international agreements, prevent transfers of equipment, where such transfers of information, processing of financial information or transfers of equipment are necessary for the conduct of the ordinary business of a financial service supplier. Nothing in this paragraph restricts the right of a Member to protect personal data, personal privacy and the confidentiality of individual records and accounts so long as such right is not used to circumvent the provisions of the Agreement.

Temporary Entry of Personnel

9. (a) Each Member shall permit temporary entry into its territory of the following personnel of a financial service supplier of any other Member that is establishing or has established a commercial presence in the territory of the Member:

(i) senior managerial personnel possessing proprietary information essential to the establishment, control and operation of the services of the financial service supplier; and

(ii) specialists in the operation of the financial service supplier.

(b) Each Member shall permit, subject to the availability of qualified personnel in its territory, temporary entry into its territory of the following personnel associated with a commercial presence of a financial service supplier of any other Member:

(i) specialists in computer services, telecommunication services and accounts of the financial service supplier; and

(ii) actuarial and legal specialists.

Non-discriminatory Measures

10. Each Member shall endeavour to remove or to limit any significant adverse effects on financial service suppliers of any other Member of:

(a) non-discriminatory measures that prevent financial service suppliers from offering in the Member's territory, in the form determined by the Member, all the financial services permitted by the Member;

(b) non-discriminatory measures that limit the expansion of the activities of financial service suppliers into the entire territory of the Member;

(c) measures of a Member, when such a Member applies the same measures to the supply of both banking and securities services, and a financial service supplier of any other Member concentrates its activities in the provision of securities services; and

(d) other measures that, although respecting the provisions of the Agreement, affect adversely the ability of financial service suppliers of any other Member to operate, compete or enter the Member's market;

provided that any action taken under this paragraph would not unfairly discriminate against financial service suppliers of the Member taking such action.

11. With respect to the non-discriminatory measures referred to in subparagraphs 10(a) and (b), a Member shall endeavour not to limit or restrict the present degree of market opportunities nor the benefits already enjoyed by financial service suppliers of all other Members as a class in the territory of the Member, provided that this commitment does not result in unfair discrimination against financial service suppliers of the Member applying such measures.

C. National Treatment

1. Under terms and conditions that accord national treatment, each Member shall grant to financial service suppliers of any other Member established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This paragraph is not intended to confer access to the Member's lender of last resort facilities.

2. When membership or participation in, or access to, any self-regulatory body, securities or futures exchange or market, clearing agency, or any other organization or association, is required by a Member in order for financial service suppliers of any other Member to supply financial services on an equal basis with financial service suppliers of the Member, or when the Member provides directly or indirectly such entities, privileges or advantages in supplying financial services, the Member shall ensure that such entities accord national treatment to financial service suppliers of any other Member resident in the territory of the Member.

D. Definitions

For the purposes of this approach:

1. A non-resident supplier of financial services is a financial service supplier of a Member which supplies a financial service into the territory of another Member from an establishment located in the territory of another Member, regardless of whether such a financial service supplier has or has not a commercial presence in the territory of the Member in which the financial service is supplied.

2. 'Commercial presence' means an enterprise within a Member's territory for the supply of financial services

and includes wholly- or partly-owned subsidiaries, joint ventures, partnerships, sole proprietorships, franchising operations, branches, agencies, representative offices or other organizations.

3. A new financial service is a service of a financial nature, including services related to existing and new products or the manner in which a product is delivered, that is not supplied by any financial service supplier in the territory of a particular Member but which is supplied in the territory of another Member.

B. INTERPRETATION AND APPLICATION OF THE UNDERSTANDING ON COMMITMENTS IN FINANCIAL SERVICES

No jurisprudence or decision of a competent WTO body.

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;

Recognizing, to this end, the need for new rules and disciplines concerning:

(a) the applicability of the basic principles of GATT 1994 and of relevant international intellectual property agreements or conventions;

(b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;

(c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;

(d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments; and

(e) transitional arrangements aiming at the fullest participation in the results of the negotiations;

Recognizing the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods;

Recognizing that intellectual property rights are private rights;

Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;

Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;

Emphasizing the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures;

Desiring to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization (referred to in this Agreement as "WIPO") as well as other relevant international organizations;

Hereby agree as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

1. In *India – Patents (US)*, addressing the US claim that the Indian legal regime for patent protection for certain products was inconsistent with the *TRIPS Agreement*, the Appellate Body referred to a part of the preamble in its interpretation of Article 70.8(a):

> "The Panel's interpretation here [of Article 70.8(a)] is consistent also with the object and purpose of the TRIPS Agreement. The Agreement takes into account, inter alia, 'the need to promote effective and adequate protection of intellectual property rights'."[1]

PART I
GENERAL PROVISIONS AND BASIC PRINCIPLES

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1
Nature and Scope of Obligations

1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

2. For the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.

3. Members shall accord the treatment provided for in this Agreement to the nationals of other Members.[1] In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those conventions.[2] Any Member availing itself of the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights (the "Council for TRIPS").

(*footnote original*) [1] When "nationals" are referred to in this Agreement, they shall be deemed, in the case of a separate

[1] Appellate Body Report on *India – Patents (US)*, para. 57.

customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.
(*footnote original*) [2] In this Agreement, "Paris Convention" refers to the Paris Convention for the Protection of Industrial Property; "Paris Convention (1967)" refers to the Stockholm Act of this Convention of 14 July 1967. "Berne Convention" refers to the Berne Convention for the Protection of Literary and Artistic Works; "Berne Convention (1971)" refers to the Paris Act of this Convention of 24 July 1971. "Rome Convention" refers to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on 26 October 1961. "Treaty on Intellectual Property in Respect of Integrated Circuits" (IPIC Treaty) refers to the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted at Washington on 26 May 1989. "WTO Agreement" refers to the Agreement Establishing the WTO.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. Article 1.1

(a) "free to determine the appropriate method of implementing"

2. In *India – Patents (US)*, the Appellate Body reviewed the Panel's decision that India did not meet its obligations under the *TRIPS Agreement* in that it failed to provide "a sound legal basis to preserve novelty and priority" of certain patent applications:

> "[W]hat constitutes such a sound legal basis in Indian law? To answer this question, we must recall first an important general rule in the *TRIPS Agreement*. Article 1.1 of the *TRIPS Agreement* states, in pertinent part:
>
> > 'Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.'
>
> Members, therefore, are free to determine how best to meet their obligations under the *TRIPS Agreement* within the context of their own legal systems. And, as a Member, India is 'free to determine the appropriate method of implementing' its obligations under the *TRIPS Agreement* within the context of its own legal system."[2]

3. In *Canada – Patent Term*, the Panel examined Canada's argument that Article 1.1 permitted it to maintain a term for patent protection of 17 years counting from the date of grant of a patent, in spite of the minimum requirement, under Articles 33 and 70, of granting patent protection for a period expiring 20 years from the date of filing of such application. The Panel noted the discretion of Members, under Article 1.1, to determine the appropriate method of implementing their obligations under the *TRIPS Agreement*, but emphasized that such discretion did not extend to choosing which obligation to comply with:

> ". . . Article 33 contains an obligation concerning the earliest available date of expiry of patents, and Article 62.2 contains a separate obligation prohibiting acquisition procedures which lead to unwarranted curtailment of the period of protection. We recognize that some curtailment is permitted by the text of these two provisions. However, Article 1.1 gives Members the freedom to determine the appropriate method of implementing those two specific requirements, but not to ignore either requirement in order to implement another putative obligation concerning the length of effective protection."[3]

2. Article 1.2

4. In *US – Section 211 Appropriations Act*, the Panel concluded that the categories of intellectual property covered by the *TRIPS Agreement* are those referred to in Article 1.2. The Appellate Body considered that the categories of intellectual property are not simply those that appear in the titles of Sections 1 through 7 of Part II but other subjects as well,:

> "The Panel interpreted the phrase '"intellectual property" refers to all categories of intellectual property that are the *subject* of Sections 1 through 7 of Part II' (emphasis added) as if that phrase read 'intellectual property means those categories of intellectual property appearing in the *titles* of Sections 1 through 7 of Part II.' To our mind, the Panel's interpretation ignores the plain words of Article 1.2, for it fails to take into account that the phrase 'the subject of Sections 1 through 7 of Part II' deals not only with the categories of intellectual property indicated in each section *title*, but with other *subjects* as well. For example, in Section 5 of Part II, entitled 'Patents', Article 27.3(b) provides that Members have the option of protecting inventions of plant varieties by *sui generis* rights (such as breeder's rights) instead of through patents. . . ."[4]

III. ARTICLE 2 AND INCORPORATED PROVISIONS OF THE PARIS CONVENTION (1967)

A. TEXT OF ARTICLE 2

Article 2
Intellectual Property Conventions

1. In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).[5]

2. Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have

[2] Appellate Body Report on *India – Patents (US)*, para. 59.
[3] Panel Report on *Canada – Patent Term*, para. 6.94.
[4] Appellate Body Report on *US – Section 211 Appropriations Act*, para. 335.
[5] The text of Articles 1–12 and 19 of the Paris Convention appears in Section LXXV.

to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2 AND INCORPORATED PROVISIONS OF THE PARIS CONVENTION (1967)

1. Article 2.1 of the TRIPS Agreement

5. In *US – Section 211 Appropriations Act*, the Appellate Body disagreed with the Panel's interpretation that Article 2.1 obliged Members to comply with Articles 1 through 12 and 19 of the Paris Convention (1967) only "in respect" of what is covered by Parts II, III and IV of the *TRIPS Agreement*. Instead, it found that Members do have an obligation to provide protection to trade names in accordance with Article 8 of the Paris Convention (1967) as incorporated by Article 2.1 of the TRIPS Agreement:

> "Article 2.1 explicitly incorporates Article 8 of the Paris Convention (1967) into the *TRIPS Agreement*.
>
> The Panel was of the view that the words 'in respect of' in Article 2.1 have the effect of 'conditioning' Members' obligations under the Articles of the Paris Convention (1967) incorporated into the *TRIPS Agreement*, with the result that trade names are not covered. We disagree.
>
> . . .
>
> [W]e reverse the Panel's finding in paragraph 8.41 of the Panel Report that trade names are not covered under the *TRIPS Agreement* and find that WTO Members do have an obligation under the *TRIPS Agreement* to provide protection to trade names."[6]

2. Article 2 of the Paris Convention (1967) as incorporated in the TRIPS Agreement

6. With respect to the national treatment obligation in Article 2(1) of the Paris Convention (1967) as incorporated in the *TRIPS Agreement*, see the discussion of the national treatment obligation in Article 3.1 of the *TRIPS Agreement* from *US – Section 211 Appropriations Act* in paragraphs 19–24 below.

3. Article 6 of the Paris Convention (1967) as incorporated in the TRIPS Agreement

7. In *US – Section 211 Appropriations Act*, in the course of considering claims under Article 6*quinquies* A(1) of the Paris Convention (1967) as incorporated in the *TRIPS Agreement*, and under Article 15.2 of the TRIPS Agreement, the Appellate Body explained that the general rule in Article 6(1) of the Paris Convention as incorporated in the *TRIPS Agreement* reserves considerable discretion to WTO Members but that that discretion must be exercised consistently with internationally agreed grounds for refusing – and not refusing – trademark registration:

> "In this respect, we recall, once again, that Article 6(1) of the Paris Convention (1967) reserves to each country of the Paris Union the right to determine *conditions for the filing and registration* of trademarks by its domestic legislation. The authority to determine such conditions by domestic legislation must, however, be exercised consistently with the obligations that countries of the Paris Union have under the Paris Convention (1967). These obligations include internationally agreed grounds for *refusing* registration, as stipulated in the Paris Convention (1967).
>
> The right of each country of the Paris Union to determine conditions for filing and registration of trademarks by its domestic legislation is also constrained by internationally agreed grounds for *not* denying trademark registration. This means, by implication, that the right reserved to each country of the Paris Union to determine, under Article 6(1), conditions for the filing and registration of trademarks includes the right to determine by domestic legislation conditions to *refuse* acceptance of filing and registration on grounds other than those explicitly prohibited by the Paris Convention (1967)."[7]

4. Article 6*bis* of the Paris Convention (1967) as incorporated in the TRIPS Agreement

8. In the same report, the Panel found that the obligation in paragraph 1 of Article 6*bis* to prohibit the use of a well-known trademark in certain situations did not apply to assertions of rights by an entity which had confiscated the well-known trademark, or its successor-in-interest, who was not considered the proper owner under national law:

> "We agree with the parties that a WTO Member is not required to give the benefit of Article 6*bis* to the confiscating entity or its successor-in-interest; the competent authority of a WTO Member may consider the well-known trademark as being the mark of the person who owned the trademark prior to the confiscation."[8]

5. Article 6*ter* of the Paris Convention (1967) as incorporated in the TRIPS Agreement

9. At its meeting of 11 December 1995, the Council for TRIPS decided on arrangements that apply with respect to implementation of the obligations under the TRIPS Agreement stemming from the incorporation of the provisions of Article 6*ter* of the Paris Convention (1967) which contains certain prohibitions relating to the registration and use as trademarks of state emblems,

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[6] Appellate Body Report on *US – Section 211 Appropriations Act*, paras. 336, 337 and 341.
[7] Appellate Body Report on *US – Section 211 Appropriations Act*, paras. 175–176.
[8] Panel Report on *US – Section 211 Appropriations Act*, para. 8.120.

official hallmarks and emblems of intergovernmental organizations.[9]

10. Article 3 of the Agreement between the World Intellectual Property Organization and the World Trade Organization, done on 22 December 1995 (the "WIPO-WTO Agreement"), provides for procedures relating to communication of emblems and transmittal of objections under Article 6*ter* of the Paris Convention for the purposes of the *TRIPS Agreement*.[10]

6. Article 6*quinquies* of the Paris Convention (1967) as incorporated in the TRIPS Agreement

11. In *US – Section 211 Appropriations Act* the Appellate Body considered an argument that Article 6*quinquies* A(1) applied to more than merely the form of a trademark, and found that:

> "We also agree that the obligation of countries of the Paris Union under Article 6*quinquies* A(1) to accept for filing and protect a trademark duly registered in the country of origin 'as is' does not encompass matters related to ownership."[11]

7. Article 8 of the Paris Convention (1967) as incorporated in the TRIPS Agreement

12. In *US – Section 211 Appropriations Act*, the Appellate Body disagreed with the Panel's interpretation that Article 2.1 obliged Members to comply with Articles 1 through 12 and 19 of the Paris Convention (1967) only "in respect" of what is covered by Parts II, III and IV of the *TRIPS Agreement*. Instead, it found that Members do have an obligation to provide protection to trade names in accordance with Article 8 of the Paris Convention (1967) as incorporated by Article 2.1 of the TRIPS Agreement:

> "Article 8 of the Paris Convention (1967) covers only the protection of trade names; Article 8 has no other subject. If the intention of the negotiators had been to exclude trade names from protection, there would have been no purpose whatsoever in including Article 8 in the list of Paris Convention (1967) provisions that were specifically incorporated into the *TRIPS Agreement*. To adopt the Panel's approach would be to deprive Article 8 of the Paris Convention (1967), as incorporated into the *TRIPS Agreement* by virtue of Article 2.1 of that Agreement, of any and all meaning and effect. . . .
>
> . . .
>
> [W]e reverse the Panel's finding in paragraph 8.41 of the Panel Report that trade names are not covered under the *TRIPS Agreement* and find that WTO Members do have an obligation under the *TRIPS Agreement* to provide protection to trade names."[12]

13. In *US – Section 211 Appropriations Act*, the Appellate Body found that Article 8 of the Paris Convention (1967) as incorporated in the TRIPS Agreement does not determine who does or does not own a trade name:

> "We recall further our conclusion in . . . the section addressing Article 16.1 of the *TRIPS Agreement* that neither the Paris Convention (1967) nor the *TRIPS Agreement* determines who owns or who does not own a trademark. We believe that the Paris Convention (1967) and the *TRIPS Agreement* also do not determine who owns or does not own a trade name. Given our view that Sections 211(a)(2) and (b) relate to ownership, we conclude that these Sections are not inconsistent with Article 2.1 of the *TRIPS Agreement* in conjunction with Article 8 of the Paris Convention (1967)."[13]

8. Article 2.2 of the TRIPS Agreement

14. In *EC – Bananas (Article 22.6)*, the Arbitrators followed Ecuador's request under Article 22.2 of the *DSU* for suspension of concessions and obligations, including certain obligations under the *TRIPS Agreement*. In their award, the Arbitrators addressed, *inter alia*, the relationship between the WTO Agreement and the obligations of WTO Members to each other arising under the four conventions listed in Article 2:

> "This provision can be understood to refer to the obligations that the contracting parties of the Paris, Berne and Rome Conventions and the IPIC Treaty, who are also WTO Members, have between themselves under these four treaties. This would mean that, by virtue of the conclusion of the WTO Agreement, e.g. Berne Union members cannot derogate from existing obligations between each other under the Berne Convention. For example, the fact that Article 9.1 of the TRIPS Agreement incorporates into that Agreement Articles 1–21 of the Berne Convention with the exception of Article 6*bis* does not mean that Berne Union members would henceforth be exonerated from this obligation to guarantee moral rights under the Berne Convention."[14]

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3
National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection[3]

[9] Decision of the Council for TRIPS, document IP/C/7.
[10] The text of the Agreement can be found in IP/C/6.
[11] Appellate Body Report on *US – Section 211 Appropriations Act*, para. 147.
[12] Appellate Body Report on *US – Section 211 Appropriations Act*, paras. 338 and 341.
[13] Appellate Body Report on *US – Section 211 Appropriations Act*, para. 359.
[14] Decision by the Arbitrators on *EC – Bananas (Ecuador) (Article 22.6 – EC)*, para. 149.

of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

(*footnote original*) [3] For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. Article 3.1

(a) "treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property"

15. *Indonesia – Autos* concerned the consistency of Indonesia's National Car Programme with several WTO agreements, including claims that the provisions of the programme discriminated against nationals of other WTO Members with respect to trademarks, in violation of Article 3.1 (the Panel Report was not appealed). With respect to the claim relating to the acquisition of trademarks, the Panel rejected the United States' claim that Indonesian law was according less favourable treatment to foreign nationals than to Indonesian nationals. The Panel saw the Indonesian law as merely stipulating, in a non-discriminatory manner, that only certain signs could be used as trademarks:

> "The issue to be examined therefore in regard to the United States' claim relating to the 'acquisition' of trademarks is whether, under the Indonesian law and practice which is before us, the treatment accorded to foreign nationals in respect of the acquisition of trademark rights, through the applicable procedures, is less favourable than that accorded to the Indonesian company in the National Car Programme. We do not consider that any evidence has been produced in this case to support such a claim. . . . The fact that only certain signs can be used as trademarks for meeting the relevant qualifications under the National Car Programme, and many others not, does not mean that trademark rights, as stipulated in Indonesian trademark law, cannot be acquired for these other signs in a non-discriminatory manner."[15]

16. Equally, with respect to the argument that less favourable treatment was being accorded by the regulations pertaining to the maintenance of trademarks, the Panel could not discern any less favourable treatment under Indonesian law for foreign nationals:

> "We do not accept this argument for the following reasons. First, no evidence has been put forward to refute the Indonesian statement that the system, in requiring a new, albeit Indonesian-owned, trademark to be created, applies equally to pre-existing trademarks owned by Indonesian nationals and foreign nationals. Second, if a foreign company enters into an arrangement with a Pioneer company, it would do so voluntarily, with knowledge of any consequent implications for its ability to maintain pre-existing trademark rights, as indeed the United States itself has acknowledged in its submissions to the Panel."[16]

17. The Panel in *Indonesia – Autos* also cautioned against construing the national treatment obligation under Article 3 of the *TRIPS Agreement* as addressing also issues of tariffs, subsidies or other measures with respect to domestic companies which could have an indirect impact on the maintenance of trademark rights by foreign nationals:

> "In considering this argument, we note that any customs tariff, subsidy or other governmental measure of support could have a 'de facto' effect of giving such an advantage to the beneficiaries of this support. We consider that considerable caution needs to be used in respect of 'de facto' based arguments of this sort, because of the danger of reading into a provision obligations which go far beyond the letter of that provision and the objectives of the Agreement. It would not be reasonable to construe the national treatment obligation of the TRIPS Agreement in relation to the maintenance of trademark rights as preventing the grant of tariff, subsidy or other measures of support to national companies on the grounds that this would render the maintenance of trademark rights by foreign companies wishing to export to that market relatively more difficult."[17]

18. The following passage in *Indonesia – Autos* illustrates the Panel's approach to the relationship

[15] Panel Report on *Indonesia – Autos*, para. 14.268.
[16] Panel Report on *Indonesia – Autos*, para. 14.271.
[17] Panel Report on *Indonesia – Autos*, para. 14.273.

between Article 3 and other provisions of the *TRIPS Agreement*:

> "As is made clear by the footnote to Article 3 of the TRIPS Agreement, the national treatment rule set out in that Article does not apply to use of intellectual property rights generally but only to 'those matters affecting the use of intellectual property rights specifically addressed in this Agreement'. In putting forward its claim on this point, the United States has developed arguments relating to the use of trademarks specifically addressed by Article 20 of the TRIPS Agreement. It is the first sentence of this Article, which is entitled 'Other Requirements', to which the United States has made reference. . . .
>
> The main issues before us in examining this claim of the United States are therefore: first, is the use of a trademark to which the Indonesian law and practices at issue relates 'specifically addressed' by Article 20; and, second, if so, does this aspect of the system discriminate in favour of Indonesian nationals and against those of other WTO Members."[18]

19. In *US – Section 211 Appropriations Act*, the Appellate Body considered a measure that, on a plain reading, afforded "differential treatment" between a Member's own nationals and nationals of other countries, and quoted from the GATT panel report in *US – Section 337*:

> "That panel reasoned that 'the mere fact that imported products are subject under Section 337 to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4 [of GATT].'
>
> That panel stated further that:
>
> > '[I]t would follow . . . that any unfavourable elements of treatment of imported products could be offset by more favourable elements of treatment, provided that the results, as shown in past cases, have not been less favourable. *[E]lements of less and more favourable treatment could thus only be offset against each other to the extent that they always would arise in the same cases and necessarily would have an offsetting influence on the other*.' (emphasis added)
>
> And that panel, importantly for our purposes, concluded that:
>
> > '. . . while the likelihood of having to defend imported products in two fora is small, the existence of the possibility is inherently less favourable than being faced with having to conduct a defence in only one of those fora'. (emphasis added)"[19]

20. In *US – Section 211 Appropriations Act*, the Appellate Body accepted that discriminatory treatment imposed by a measure could be offset in practice:

> "Yet, to fulfill the national treatment obligation, less favourable treatment must be offset, and thereby eliminated, in *every* individual situation that exists under a measure. Therefore, for this argument by the United States to succeed, it must hold true for *all* Cuban original owners of United States trademarks, and not merely for *some* of them."[20]

21. In the same report, the Appellate Body dismissed an argument that certain discriminatory treatment was offset in practice by another measure which provided unfavourable treatment to the Member's own nationals:

> "We disagree. We do not believe that Section 515.201 of the CACR would *in every case* offset the discriminatory treatment imposed by Sections 211(a)(2) and (b). For this argument by the United States to hold true in each and every situation, the scope of the phrase 'having an interest in' in Section 515.201 would necessarily have to overlap in coverage with the scope of the phrase 'used in connection with' in Sections 211(a)(2) and (b). However, the United States was unable to point to evidence substantiating that the different standards used in Section 515.201 and in Sections 211(a)(2) and (b) overlap completely. We are, therefore, not satisfied that Section 515.201 would offset the inherently less favourable treatment present in Sections 211(a)(2) and (b) in each and every case. And, because it has not been shown by the United States that it would do so in each and every case, the less favourable treatment that exists under the measure cannot be said to have been offset and, thus, eliminated."[21]

22. In the same report, the Appellate Body dismissed an argument that certain discriminatory treatment was offset in practice by the availability of a particular administrative procedure:

> "This [procedure] could eliminate less favourable treatment *in practice*. Yet, the very existence of the additional 'hurdle' that is imposed by requiring application to OFAC is, in itself, inherently less favourable. Sections 211(a)(2) and (b) do not apply to United States original owners; no application to OFAC is required. But Cuban original owners residing in the 'authorized trade territory' must apply to OFAC. Thus, such Cuban original owners must comply with an administrative requirement that does not apply to United States original owners. By virtue alone of having to apply to OFAC, even Cuban original owners that reside in the 'authorized trade territory' described in Section 515.332 are treated less favourably than United

[18] Panel Report on *Indonesia – Autos*, paras. 14.275–14.276.
[19] Appellate Body Report on *US – Section 211 Appropriations Act*, paras. 261–263, quoting from GATT Panel Report, *US – Section 337*, paras. 5.11, 5.12 and 5.19.
[20] Appellate Body Report on *US – Section 211 Appropriations Act*, para. 286.
[21] Appellate Body Report on *US – Section 211 Appropriations Act*, para. 294.

States original owners. So, in this second situation, the discrimination remains."[22]

23. In the same report, the Appellate Body dismissed an argument that a discretionary measure applicable only to nationals of foreign countries, but which had been consistently applied in a way which offset any discrimination, did not provide less favourable treatment. Although the Appellate Body agreed with the Panel that it could not assume that the discretionary executive authority would be exercised inconsistently with WTO obligations, it found that this measure violated the national treatment obligation in Article 2(1) of the Paris Convention (1967) (as incorporated in the *TRIPS Agreement*) and Article 3.1 of the *TRIPS Agreement*, for the following reason:

"The United States may be right that the likelihood of having to overcome the hurdles of both Section 515.201 of Title 31 CFR and Section 211(a)(2) may, echoing the panel in *US – Section 337*, be *small*. But, again echoing that panel, even the *possibility* that non-United States successors-in-interest face two hurdles is *inherently less favourable* than the undisputed fact that United States successors-in-interest face only one."[23]

24. In the same report, the Appellate Body applied to trade names its findings with regard to trademarks in respect of Article 2.1 of the *TRIPS Agreement* in conjunction with Article 2(1) of the Paris Convention, and Article 3.1 of the *TRIPS Agreement*.[24]

(b) Notification requirements

25. At its meeting of 27 February 1997, the Council for TRIPS referred to three options for meeting obligations to notify laws and regulations that correspond to the obligations of Articles 3, 4 and 5 of the *TRIPS Agreement*. It circulated a format as a practical aid in respect of one of those options.[25]

2. Relationship with other Articles

26. With respect to the relationship with Article 65.2, see the excerpt from the panel report referenced in paragraph 144 below.

3. Relationship with other WTO Agreements

27. In *US – Section 211 Appropriations Act*, the Appellate Body referred to GATT jurisprudence in interpreting Article 3 of the *TRIPS Agreement* for the following reason:

"As we see it, the national treatment obligation is a fundamental principle underlying the *TRIPS Agreement*, just as it has been in what is now the GATT 1994. The Panel was correct in concluding that, as the language of Article 3.1 of the *TRIPS Agreement*, in particular, is similar to that of Article III:4 of the GATT 1994, the jurisprudence on Article III:4 of the GATT 1994 may be useful in interpreting the national treatment obligation in the *TRIPS Agreement*."[26]

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4
Most-Favoured-Nation Treatment

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

(a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;

(b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;

(c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;

(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

1. General

28. In *US – Section 211 Appropriations Act*, the Appellate Body applied analogous reasoning to claims under Articles 3.1 and 4 of the *TRIPS Agreement* in respect of the same measure. The measure, on its face, discriminated as

[22] Appellate Body Report on *US – Section 211 Appropriations Act*, para. 289.
[23] Appellate Body Report on *US – Section 211 Appropriations Act*, para. 265.
[24] Appellate Body Report on *US – Section 211 Appropriations Act*, paras. 352–356.
[25] IP/C/M/12, paras. 10–16. The format can be found in IP/C/9.
[26] Appellate Body Report on *US – Section 211 Appropriations Act*, para. 242.

between the nationals of one other Member, and the nationals of all other countries. The Appellate Body dismissed an argument that the discrimination could be eliminated through an administrative procedure:

> "Cuban nationals that reside in a country that is part of the 'authorized trade territory', such as the Member States of the European Communities, can apply to OFAC to be 'unblocked'. This implies that Cuban nationals that reside in the 'authorized trade territory' face an additional administrative procedure that does not apply to non-Cuban foreign nationals who are original owners, because the latter are not 'designated nationals'. Therefore, as we stated earlier, treatment that is inherently less favourable persists."[27]

29. In *US – Section 211 Appropriations Act*, the Appellate Body dismissed an argument that certain discriminatory treatment applied to the nationals of one other Member was offset in practice by another measure that could provide unfavourable treatment to the nationals of all other countries:

> "The fact that Section 515.201 of Title 31 CFR *could* also apply to a non-Cuban foreign national does not mean, however, that it would offset *in each and every case* the discriminatory treatment imposed by Sections 211(a)(2) and (b) on Cuban original owners."[28]

30. In the same report, the Appellate Body applied to trade names its findings with regard to trademarks in respect of Article 4 of the *TRIPS Agreement*.[29]

2. Article 4(d)

(a) Notification requirements

31. At its meeting of 27 February 1997, the Council for TRIPS referred to three options for meeting obligations to notify laws and regulations that correspond to the obligations of Articles 3, 4 and 5 of the *TRIPS Agreement*. It circulated a format as a practical aid in respect of one of those options.[30]

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5
Multilateral Agreements on Acquisition or Maintenance of Protection

The obligations under Articles 3 and 4 do not apply to procedures provided in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. Notification

32. With respect to notifications of laws and regulations relating to Articles 3, 4 and 5 of the *TRIPS Agreement*, see paragraph 25 above.

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6
Exhaustion

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

33. With respect to the exhaustion of intellectual property rights, see the Declaration on the TRIPS Agreement and Public Health, reproduced in Section LXXVIII below.

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7
Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. Relationship with other Articles

34. With respect to the relationship with Article 30, see the excerpt from the panel report referenced in paragraph 101 below.

35. With respect to the objectives and principles of the *TRIPS Agreement*, see the Declaration on the TRIPS

[27] Appellate Body Report on *US – Section 211 Appropriations Act*, para. 314.
[28] Appellate Body Report on *US – Section 211 Appropriations Act*, para. 317.
[29] Appellate Body Report on *US – Section 211 Appropriations Act*, paras. 352, 353 and 357.
[30] See document IP/C/9.

Agreement and Public Health, reproduced in Section LXXVIII below.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8
Principles

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

1. Relationship with other Articles

36. With respect to the relationship with Article 30, see paragraph 101 below.

37. With respect to the objectives and principles of the *TRIPS Agreement*, see the Declaration on the TRIPS Agreement and Public Health, reproduced in Section LXXVIII below.

PART II
STANDARDS CONCERNING THE AVAILABILITY, SCOPE AND USE OF INTELLECTUAL PROPERTY RIGHTS

Section 1: Copyright and Related Rights

X. ARTICLE 9 AND INCORPORATED PROVISIONS OF THE BERNE CONVENTION (1971)

A. TEXT OF ARTICLE 9

Article 9
Relation to the Berne Convention

1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.

2. Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

The text of Articles 1–21 of the Berne Convention and Appendix, other than Article 6bis *appears in Section LXXVI below.*

B. INTERPRETATION AND APPLICATION OF ARTICLE 9 AND INCORPORATED PROVISIONS OF THE BERNE CONVENTION (1971)

1. Relationship with the Berne Convention (1971)

38. In *US – Section 110(5) Copyright Act*, in examining the consistency of certain provisions of the US Copyright Act with the *TRIPS Agreement*, the Panel made a finding on the relationship between the *TRIPS Agreement* and the Berne Convention (1971):

> "Articles 9–13 of Section 1 of Part II of the TRIPS Agreement entitled 'Copyright and Related Rights' deal with the substantive standards of copyright protection. Article 9.1 of the TRIPS Agreement obliges WTO Members to comply with Articles 1–21 of the Berne Convention (1971) (with the exception of Article 6*bis* on moral rights and the rights derived therefrom) and the Appendix thereto. . . .
>
> We note that through their incorporation, the substantive rules of the Berne Convention (1971), including the provisions of its Articles 11*bis*(1)(iii) and 11(1)(ii), have become part of the TRIPS Agreement and as provisions of that Agreement have to be read as applying to WTO Members."[31]

39. The Panel also considered a provision of the Vienna Convention on the Law of the Treaties with respect to the *TRIPS Agreement* and the Berne Convention (1971).

> "We note that Article 30 of the Vienna Convention on the application of successive treaties is not relevant in this respect, because all provisions of the TRIPS Agreement – including the incorporated Articles 1–21 of the Berne Convention (1971) – entered into force at the same point in time."[32]

40. With respect to the relationship of the minor exceptions doctrine under the Berne Convention (1971) and the *TRIPS Agreement*, see also the excerpt from the panel report referenced in paragraph 52 below.

41. In *US – Section 110(5) Copyright Act*, the Panel emphasized the need, in the light of general principles of interpretation, to harmoniously interpret provisions

[31] Panel Report on *US – Section 110(5) Copyright Act*, paras. 6.17–6.18.
[32] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.41.

of the *TRIPS Agreement* and the Berne Convention (1971):

> "In the area of copyright, the Berne Convention and the TRIPS Agreement form the overall framework for multilateral protection. Most WTO Members are also parties to the Berne Convention. We recall that it is a general principle of interpretation to adopt the meaning that reconciles the texts of different treaties and avoids a conflict between them. Accordingly, one should avoid interpreting the TRIPS Agreement to mean something different than the Berne Convention except where this is explicitly provided for. This principle is in conformity with the public international law presumption against conflicts, which has been applied by WTO panels and the Appellate Body in a number of cases. We believe that our interpretation of the legal status of the minor exceptions doctrine under the TRIPS Agreement is consistent with these general principles."[33]

42. The Panel adopted the same approach to the interpretation of the *TRIPS Agreement* and the WIPO Copyright Treaty ("WCT") as it had applied with respect to the *TRIPS Agreement* and the Berne Convention (1971). The Panel stated as follows:

> "In paragraph 6.66 we discussed the need to interpret the Berne Convention and the TRIPS Agreement in a way that reconciles the texts of these two treaties and avoids a conflict between them, given that they form the overall framework for multilateral copyright protection. The same principle should also apply to the relationship between the TRIPS Agreement and the WCT. The WCT is designed to be compatible with this framework, incorporating or using much of the language of the Berne Convention and the TRIPS Agreement. The WCT was unanimously concluded at a diplomatic conference organized under the auspices of WIPO in December 1996, one year after the WTO Agreement entered into force, in which 127 countries participated. Most of these countries were also participants in the TRIPS negotiations and are Members of the WTO. For these reasons, it is relevant to seek contextual guidance also in the WCT when developing interpretations that avoid conflicts within this overall framework, except where these treaties explicitly contain different obligations."[34]

2. Article 11 of the Berne Convention (1971) as incorporated in the TRIPS Agreement

(a) Scope of Article 11

43. In *US – Section 110(5) Copyright Act*, the Panel was called upon to interpret Article 11 of the Berne Convention (1971). The Panel considered the scope of Article 11 as follows:

> "As in the case of Article 11*bis*(1) of the Berne Convention (1971), which concerns broadcasting to the public and communication of a broadcast to the public, the exclusive rights conferred by Article 11 cover public performance; private performance does not require authorization. Public performance includes performance by any means or process, such as performance by means of recordings (e.g., CDs, cassettes and videos).[35] It also includes communication to the public of a performance of the work."[36]

(b) Paragraph 1

44. In *US – Section 110(5) Copyright Act*, the Panel agreed with the parties that a particular type of communication was covered by the exclusive rights set forth in Article 11(1) of the Berne Convention (1971):

> "We share the understanding of the parties that a communication to the public by loudspeaker of a performance of a work transmitted by means other than hertzian waves is covered by the exclusive rights conferred by Article 11(1) of the Berne Convention (1971)."[37]

45. In *US – Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators emphasized the difference between Members' respective obligations under Article 11(1)(ii) of the Berne Convention (1971) and right holders' exercise or exploitation of rights:

> "For purposes of the present dispute, this means that the United States is under an obligation to make available to EC right holders the exclusive rights set forth in Articles 11*bis*(1)(iii) and 11(1)(ii).[38] It is important to bear in mind, however, that, while it is for the *United States* to *provide* EC right holders with the exclusive rights set forth in Articles 11*bis*(1)(iii) and 11(1)(ii), it is for *EC right holders* to determine whether and how to *exercise* or *exploit* those rights."[39]

(c) Relationship between Article 11 of the Berne Convention (1971) and other Articles of this Convention.

46. In *US – Section 110(5) Copyright Act*, the Panel found Article 11 to be a *general* rule concerning the

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[33] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.66.
[34] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.70.
[35] (*footnote original*) However, public performance by means of cinematographic works is separately covered in Article 14(1)(ii) of the Berne Convention. Public performance of a literary work or communication to the public of the recitation is covered by Article 11*ter* of the Berne Convention.
[36] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.24.
[37] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.51.
[38] (*footnote original*) Article 1.1 of the TRIPS Agreement makes clear that "Members shall give effect to the provisions of the [TRIPS] Agreement." Members must, therefore, implement in their domestic law the protection required by the TRIPS Agreement. Moreover, Article 1.3 of the TRIPS Agreement provides in relevant part that "Members shall accord the treatment provided for in this Agreement to the nationals of other Members." (footnote omitted) This confirms that the exclusive rights conferred by Articles 11*bis*(1)(iii) and 11(1)(ii) must be granted to EC right holders.
[39] Award of the Arbitrator on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 3.15.

communication of performances of works, while Article 11*bis* provided a *specific* rule concerning a particular type of communication:

> "Regarding the relationship between Articles 11 and 11*bis*, we note that the rights conferred in Article 11(1)(ii) concern the communication to the public of performances of works in general. Article 11*bis*(1)(iii) is a specific rule conferring exclusive rights concerning the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of a work."[40]

3. Article 11*bis* of the Berne Convention (1971) as incorporated in the TRIPS Agreement

(a) Paragraph 1

47. In *US – Section 110(5) Copyright Act*, in interpreting Article 11*bis*(1), the Panel addressed the three "separate exclusive" rights provided by Article 11*bis*(1) subparagraphs (i) through (iii):

> "In the light of Article 2 of the Berne Convention (1971), 'artistic' works in the meaning of Article 11*bis*(1) include non-dramatic and other musical works. Each of the subparagraphs of Article 11*bis*(1) confers a separate exclusive right; exploitation of a work in a manner covered by any of these subparagraphs requires an authorization by the right holder. For example, the communication to the public of a broadcast creates an additional audience and the right holder is given control over, and may expect remuneration from, this new public performance of his or her work.
>
> The right provided under subparagraph (i) of Article 11*bis*(1) is to authorize the broadcasting of a work and the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images. It applies to both radio and television broadcasts. Subparagraph (ii) concerns the subsequent use of this emission; the authors' exclusive right covers any communication to the public by wire or by rebroadcasting of the broadcast of the work, when the communication is made by an organization other than the original one.
>
> Subparagraph (iii) provides an exclusive right to authorize the public communication of the broadcast of the work by loudspeaker, on a television screen, or by other similar means. Such communication involves a new public performance of a work contained in a broadcast, which requires a licence from the right holder."[41]

48. In *US – Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators emphasized the difference between Members' respective obligations under Article 11*bis*(1)(iii) of the Berne Convention (1971) and right holders' exercise or exploitation of rights as follows:

> "For purposes of the present dispute, this means that the United States is under an obligation to make available to EC right holders the exclusive rights set forth in Articles 11*bis*(1)(iii) and 11(1)(ii).[42] It is important to bear in mind, however, that, while it is for the *United States* to *provide* EC right holders with the exclusive rights set forth in Articles 11*bis*(1)(iii) and 11(1)(ii), it is for *EC right holders* to determine whether and how to *exercise* or *exploit* those rights."[43]

(b) Paragraph 2

49. In *US – Section 110(5) Copyright Act*, the Panel addressed the authorization, provided by Article 11*bis*(2), to substitute a compulsory licence for an exclusive right under Article 11*bis* (1):

> "We also conclude that Article 11*bis*(2) of the Berne Convention (1971) as incorporated into the TRIPS Agreement allows Members to substitute a compulsory licence for an exclusive right under Article 11*bis*(1), or determine other conditions provided that they are not prejudicial to the right holder's right to obtain an equitable remuneration. Article 11*bis*(2) is not relevant for the case at hand, because the United States has not provided a right in respect of the uses covered by the present Section 110(5), the exercise of which would have been subjected to conditions determined in its legislation."[44]

(c) Relationship between Article 11*bis* of the Berne Convention (1971) and other Articles of the Convention

50. With respect to the relationship between Articles 11 and 11*bis* of the Berne Convention (1971) as incorporated in the *TRIPS Agreement*, see paragraph 46 above.

(d) Minor exceptions doctrine

51. In *US – Section 110(5) Copyright Act*, the Panel addressed the question whether the "minor exceptions doctrine" in the context of copyrights applied under the *TRIPS Agreement*. The Panel decided first to examine to what extent this doctrine formed part of the Berne Convention (1971) *acquis* and second, to assess whether that

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[40] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.25.

[41] Panel Report on *US – Section 110(5) Copyright Act*, paras. 6.20–6.22.

[42] (*footnote original*) Article 1.1 of the TRIPS Agreement makes clear that "Members shall give effect to the provisions of the [TRIPS] Agreement." Members must, therefore, implement in their domestic law the protection required by the TRIPS Agreement. Moreover, Article 1.3 of the TRIPS Agreement provides in relevant part that "Members shall accord the treatment provided for in this Agreement to the nationals of other Members." (footnote omitted) This confirms that the exclusive rights conferred by Articles 11*bis*(1)(iii) and 11(1)(ii) must be granted to EC right holders.

[43] Award of the Arbitrator on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 3.15.

[44] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.95.

doctrine had been incorporated into the *TRIPS Agreement*. With respect to the scope of the minor exceptions doctrine under the Berne Convention (1971), the Panel held:

> "The General Report of the Brussels Conference of 1948 refers to 'religious ceremonies, military bands and the needs of the child and adult education' as examples of situations in respect of which minor exceptions may be provided. The Main Committee I Report of the Stockholm Conference of 1967 refers also to 'popularization' as one example. When these references are read in their proper context, it is evident that the given examples are of an illustrative character. . . .
>
> . . . On the basis of the information provided to us, we are not in a position to determine that the minor exceptions doctrine justifies only exclusively non-commercial use of works and that it may under no circumstances justify exceptions to uses with a more than negligible economic impact on copyright holders. On the other hand, non-commercial uses of works, e.g., in adult and child education, may reach a level that has a major economic impact on the right holder. At any rate, in our view, a non-commercial character of the use in question is not determinative provided that the exception contained in national law is indeed *minor*. . . ."[45]

52. As the second step in its "minor exceptions analysis", the Panel examined to what extent this doctrine under the Berne Convention (1971) had been incorporated into the *TRIPS Agreement*:

> "Having concluded that the minor exceptions doctrine forms part of the 'context' of, at least, Articles 11*bis* and 11 of the Berne Convention (1971) by virtue of an agreement within the meaning of Article 31(2)(a) of the Vienna Convention, which was made between the Berne Union members in connection with the conclusion of the respective amendments to that Convention, we next address the second step of our analysis . . .
>
> . . .
>
> . . . we conclude that, in the absence of any express exclusion in Article 9.1 of the *TRIPS Agreement*, the incorporation of Articles 11 and 11*bis* of the Berne Convention (1971) into the Agreement includes the entire *acquis* of these provisions, including the possibility of providing minor exceptions to the respective exclusive rights."[46]

(e) Relationship between Article 11*bis*(2) of the Berne Convention (1971) and Article 13 of the TRIPS Agreement

53. With respect to the relationship between Article 11*bis*(2) of the Berne Convention (1971) and Article 13 of the *TRIPS Agreement*, see paragraphs 59–61 below.

4. Article 20 of the Berne Convention (1971) as incorporated in the TRIPS Agreement

54. In *US – Section 110(5) Copyright Act*, the Panel declined to address Article 20 of the Berne Convention (1971), because – contrary to the European Communities' argument – the United States was not claiming that the *TRIPS Agreement* authorizes exceptions inconsistent with the Berne Convention (1971):

> "In regard to the argument of the European Communities that the US interpretation of Article 13 is incompatible with Article 20 of the Berne Convention (1971) and Article 2.2 of the TRIPS Agreement because it treats Article 13 of the TRIPS Agreement as providing a basis for exceptions that would be inconsistent with those permitted under the Berne Convention (1971), we note that the United States is not arguing this but rather that Article 13 clarifies and articulates the standards applicable to minor exceptions under the Berne Convention (1971). Since the EC arguments in relation to these provisions would only be relevant if a finding that would involve inconsistency with the Berne Convention (1971) were being advocated, we do not feel it is necessary to examine them further."[47]

5. Appendix to the Berne Convention (1971) as incorporated in the TRIPS Agreement

55. At its meeting of 16 July 1998, the Council for TRIPS took note of the following statement by its Chairperson, in the light of informal consultations on the calculation of renewable periods of ten years under Article I(2) of the Appendix to the Berne Convention (1971):

> "The provisions of Article I(2) of the Appendix as incorporated into the TRIPS Agreement can be understood so that, for the purposes of the TRIPS Agreement, the relevant periods are calculated by reference to the same date, i.e. 10 October 1974, as for the purposes of the Berne Convention. This would mean that renewable periods of ten years would be the same for the purposes of both Agreements, and that, also under the TRIPS Agreement, the period of ten years currently running would expire on 10 October 2004."[48]

[45] Panel Report on *US – Section 110(5) Copyright Act*, paras. 6.57–6.58.
[46] Panel Report on *US – Section 110(5) Copyright Act*, paras. 6.60 and 6.63.
[47] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.82.
[48] IP/C/M/19, para. 8; IP/C/14.

XI. ARTICLE 10

A. TEXT OF ARTICLE 10

Article 10
Computer Programs and Compilations of Data

1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).

2. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

B. INTERPRETATION AND APPLICATION OF ARTICLE 10

No jurisprudence or decision of a competent WTO body.

XII. ARTICLE 11

A. TEXT OF ARTICLE 11

Article 11
Rental Rights

In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

B. INTERPRETATION AND APPLICATION OF ARTICLE 11

No jurisprudence or decision of a competent WTO body.

XIII. ARTICLE 12

A. TEXT OF ARTICLE 12

Article 12
Term of Protection

Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

B. INTERPRETATION AND APPLICATION OF ARTICLE 12

No jurisprudence or decision of a competent WTO body.

XIV. ARTICLE 13

A. TEXT OF ARTICLE 13

Article 13
Limitations and Exceptions

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

B. INTERPRETATION AND APPLICATION OF ARTICLE 13

1. General

(a) Scope

56. In *US – Section 110(5) Copyright Act*, the Panel rejected a suggested limitation of the scope of Article 13:

> "In our view, neither the express wording nor the context of Article 13 or any other provision of the TRIPS Agreement supports the interpretation that the scope of application of Article 13 is limited to the exclusive rights newly introduced under the TRIPS Agreement."[49]

57. With respect to the scope of Article 13, see paragraph 59 below.

58. In interpreting Article 13, the Panel in *US – Section 110(5) Copyright Act* outlined its interpretative approach to this provision, specified the conditions for limitations or exceptions to exclusive rights and found that these conditions apply cumulatively:

> "Article 13 of the TRIPS Agreement requires that limitations and exceptions to exclusive rights (1) be confined to certain special cases, (2) do not conflict with a normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the right holder. The principle of effective treaty interpretation requires us to give a distinct meaning to each of the three conditions and to avoid a reading that could reduce any of the conditions to 'redundancy or inutility'. The three conditions apply on a cumulative basis, each being a separate and independent requirement that must be satisfied. Failure to comply with any one of the three conditions results in the Article 13 exception being disallowed. Both parties

[49] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.80.

agree on the cumulative nature of the three conditions. The Panel shares their view. It may be noted at the outset that Article 13 cannot have more than a narrow or limited operation. Its tenor, consistent as it is with the provisions of Article 9(2) of the Berne Convention (1971), discloses that it was not intended to provide for exceptions or limitations except for those of a limited nature. The narrow sphere of its operation will emerge from our discussion and application of its provisions in the paragraphs which follow."[50]

(b) Relationship with other Articles

59. In *US – Section 110(5) Copyright Act*, the Panel made a finding on the scope of application of Article 13 with respect to individual subparagraphs of Articles 11 and 11*bis* of the Berne Convention (1971):

"We conclude that Article 13 of the TRIPS Agreement applies to Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement, given that neither the express wording nor the context of Article 13 or any other provision of the TRIPS Agreement supports the interpretation that the scope of application of Article 13 is limited to the exclusive rights newly introduced under the TRIPS Agreement."[51]

60. The Panel also clearly distinguished the different situations covered by Article 11*bis*(2) of the Berne Convention (1971) and Article 13 of the *TRIPS Agreement*, respectively:

"We believe that Article 11*bis*(2) of the Berne Convention (1971) and Article 13 cover different situations. On the one hand, Article 11*bis*(2) authorizes Members to determine conditions under which the rights conferred by Article 11*bis*(1)(i–iii) may be exercised. The imposition of such conditions may completely replace the free exercise of the exclusive right of authorizing the use of the rights embodied in subparagraphs (i–iii) provided that equitable remuneration and the author's moral rights are not prejudiced. However, unlike Article 13 of the TRIPS Agreement, Article 11*bis*(2) of the Berne Convention (1971) would not in any case justify use free of charge.

On the other hand, it is sufficient that a limitation or an exception to the exclusive rights provided under Article 11*bis*(1) of the Berne Convention (1971) as incorporated into the TRIPS Agreement meets the three conditions contained in its Article 13 to be permissible. If these three conditions are met, a government may choose between different options for limiting the right in question, including use free of charge and without an authorization by the right holder. This is not in conflict with any of the paragraphs of Article 11*bis* because use free of any charge may be permitted for minor exceptions by virtue of the minor exceptions doctrine which applies, *inter alia*, also to Article 11*bis*.

As regards situations that would not meet the above-mentioned three conditions, a government may not justify an exception, including one involving use free of charge, by Article 13 of the TRIPS Agreement. However, also in these situations Article 11*bis*(2) of the Berne Convention (1971) as incorporated into the TRIPS Agreement would nonetheless allow Members to substitute, for an exclusive right, a compulsory licence, or determine other conditions provided that they were not prejudicial to the right holder's right to obtain an equitable remuneration."[52]

61. In the same context, the Panel considered that a reading of Articles 11*bis*(2) of the Berne Convention (1971) and Article 13 of the *TRIPS Agreement* which did not differentiate the situations covered respectively by these provisions, would render Article 13 "somewhat redundant":

"We believe that our interpretation gives meaning and effect to Article 11*bis*(2), the minor exceptions doctrine as it applies to Article 11*bis*, and Article 13. However, in our view, under the interpretation suggested by the European Communities this would not be the case, e.g., in the following situations. If any *de minimis* exception from rights conferred by Article 11*bis*(1)(i–iii) were subject to the requirement to provide equitable remuneration within the meaning of Article 11*bis*(2), no exemption whatsoever from the rights recognized by Article 11*bis*(1) could permit use free of charge even if the three criteria of Article 13 were met. As a result, narrow exceptions or limitations would be subject to the three conditions of Article 13 in addition to the requirement to provide equitable remuneration. At the same time, broader exceptions or limitations which do not comply with the criteria of Article 13 could arguably still be justified under Article 11*bis*(2) as long as the conditions imposed ensure, *inter alia*, equitable remuneration. Such an interpretation could render Article 13 somewhat redundant because narrow exceptions would be subject to all the requirements of Article 13 and Article 11*bis*(2) on a cumulative basis, while for broader exceptions compliance with Article 11*bis*(2) could suffice. Both situations would lead to the result that any use free of charge would not be permissible. These examples are illustrative of situations where the terms and conditions of Article 13, Article 11*bis*(2) and the minor exceptions doctrine would not be given full meaning and effect."[53]

62. With respect to the relationship of Article 13 to Article 9(2) of the Berne Convention (1971) and Articles 17, 26.2 and 30 of the *TRIPS Agreement*, see footnote 104.

[50] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.97.
[51] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.94.
[52] Panel Report on *US – Section 110(5) Copyright Act*, paras. 6.87–6.89.
[53] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.90.

(c) "certain special cases"

63. In *US – Section 110(5) Copyright Act*, the Panel interpreted the meaning of the phrase "certain special cases", the first condition in Article 13:

> "In our view, the first condition of Article 13 requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach. On the other hand, a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of Article 13's first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute. However, public policy purposes stated by law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition."[54]

64. The Panel also addressed the relevance of whether the measure at issue had as its declared aim a legitimate public policy:

> "As regards the parties' arguments on whether the public policy purpose of an exception is relevant, we believe that the term 'certain special cases' should not lightly be equated with 'special purpose'.[55] It is difficult to reconcile the wording of Article 13 with the proposition that an exception or limitation must be justified in terms of a legitimate public policy purpose in order to fulfill the first condition of the Article. We also recall in this respect that in interpreting other WTO rules, such as the national treatment clauses of the GATT and the GATS, the Appellate Body has rejected interpretative tests which were based on the subjective aim or objective pursued by national legislation.[56]"[57]

65. The Panel subsequently applied the above quoted standard under Article 13 to examine whether the United States' measure at issue in *US – Section 110(5) Copyright Act* met the first condition of "certain special cases":

> "[W]e first examine whether the exceptions have been clearly defined. Second, we ascertain whether the exemptions are narrow in scope, *inter alia*, with respect to their reach. In that respect, we take into account what percentage of eating and drinking establishments and retail establishments may benefit from the business exemption under subparagraph (B), and in turn what percentage of establishments may take advantage of the homestyle exemption under subparagraph (A). On a subsidiary basis, we consider whether it is possible to draw inferences about the reach of the business and homestyle exemptions from the stated policy purposes underlying these exemptions according to the statements made during the US legislative process."[58]

(d) "do not conflict with a normal exploitation of the work"

66. In *US – Section 110(5) Copyright Act*, in examining the second condition under Article 13, i.e. "do not conflict with a normal exploitation of the work", the Panel first sought a definition for the term "exploitation":

> "The ordinary meaning of the term 'exploit' connotes 'making use of' or 'utilising for one's own ends'. We believe that 'exploitation' of musical works thus refers to the activity by which copyright owners employ the exclusive rights conferred on them to extract economic value from their rights to those works."[59]

67. The Panel then proceeded to provide an interpretation of the term "normal":

> "We note that the ordinary meaning of the term 'normal' can be defined as 'constituting or conforming to a type or standard; regular, usual, typical, ordinary, conventional . . .'. In our opinion, these definitions appear to reflect two connotations: the first one appears to be of an empirical nature, i.e., what is regular, usual, typical or ordinary. The other one reflects a somewhat more normative, if not dynamic, approach, i.e., conforming to a type or standard. We do not feel compelled to pass a judgment on which one of these connotations could be more relevant. Based on Article 31 of the Vienna Convention, we will attempt to develop a harmonious interpretation which gives meaning and effect to both connotations of 'normal'.
>
> If 'normal' exploitation were equated with full use of all exclusive rights conferred by copyrights, the exception

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[54] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.112.

[55] (*footnote original*) We note that the term "special purpose" has been referred to in interpreting the largely similarly worded Article 9(2) of the Berne Convention (1971). *See* Ricketson, *The Berne Convention*, op. cit., p. 482. We are ready to take into account "teachings of the most highly qualified publicists of the various nations" as a "subsidiary source for the determination of law". We refer to this phrase in the sense of Article 38(d) of the Statute of the International Court of Justice which refers to such "teachings" (or in French "la doctrine") as "subsidiary means for the determination of law". But we are cautious to use the interpretation of a term developed in the context of an exception for the reproduction right for interpreting the same terms in the context of a largely similarly worded exception for other exclusive rights conferred by copyrights.

[56] (*footnote original*) *See* Appellate Body Report on *Japan – Alcoholic Beverages*, pp. 19–23, for the rejection of the so-called "aims and effects" test in the context of the national treatment clause of Article III of GATT 1994. *See also* the Appellate Body Report on *EC – Bananas III*, paras. 241, 243, 246, for the rejection of the "aims-and-effects" test in the context of the national treatment clause of Article XVII of GATS.

[57] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.111.

[58] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.113.

[59] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.165.

clause of Article 13 would be left devoid of meaning. Therefore, 'normal' exploitation clearly means something less than full use of an exclusive right.[60]"[61]

68. The Panel then endorsed a differentiated examination of whether a limitation or an exception conflicts with the normal exploitation of a work:

"We agree with the European Communities that whether a limitation or an exception conflicts with a normal exploitation of a work should be judged for each exclusive right individually."[62]

69. The Panel also indicated that when assessing the meaning of "normal exploitation", it would consider both empirical and normative criteria:

"In our view, this test [whether there are areas of the market in which the copyright owner would ordinarily expect to exploit the work, but which are not available for exploitation because of this exemption] seems to reflect the empirical or quantitative aspect of the connotation of 'normal', the meaning of 'regular, usual, typical or ordinary'. We can, therefore, accept this US approach, but only for the empirical or quantitative side of the connotation. We have to give meaning and effect also to the second aspect of the connotation, the meaning of 'conforming to a type or standard'. We described this aspect of normalcy as reflecting a more normative approach to defining normal exploitation, that includes, *inter alia*, a dynamic element capable of taking into account technological and market developments. The question then arises how this normative aspect of 'normal' exploitation could be given meaning in relation to the exploitation of musical works.

. . .

Thus it appears that one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance."[63]

70. After exploring the two different connotations of the term "normal exploitation", the Panel then set forth a test for "normal exploitation" based on the consideration of "economic competition" and "market conditions":

"We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e., the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.

In developing a benchmark for defining the normative connotation of normal exploitation, we recall the European Communities' emphasis on the potential impact of an exception rather than on its actual effect on the market at a given point in time, given that, in its view, it is the potential effect that determines the market conditions.

. . .

We base our appraisal of the actual and potential effects on the commercial and technological conditions that prevail in the market currently or in the near future. What is a normal exploitation in the market-place may evolve as a result of technological developments or changing consumer preferences. Thus, while we do not wish to speculate on future developments, we need to consider the actual and potential effects of the exemptions in question in the current market and technological environment.

We do acknowledge that the extent of exercise or non-exercise of exclusive rights by right holders at a given point in time is of great relevance for assessing what is the normal exploitation with respect to a particular exclusive right in a particular market. However, in certain circumstances, current licensing practices may not provide a sufficient guideline for assessing the potential impact of an exception or limitation on normal exploitation. For example, where a particular use of works is not covered

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[60] (*footnote original*) In the context of exceptions to reproduction rights under Article 9(2) of the Berne Convention (1971) – whose second condition is worded largely identically to the second condition of Article 13 of the TRIPS Agreement – the Main Committee I of the Stockholm Diplomatic Conference (1967) stated:

> "If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory licence, or to provide for use without payment. A practical example may be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use."

See the Records of the Intellectual Property Conference of Stockholm, 11 June – 14 July 1967. Report on the Work of the Main Committee I (Substantive Provisions of the Berne Convention: Articles 1–20). As reproduced in the Berne Convention Centenary, p. 197.

[61] Panel Report on *US – Section 110(5) Copyright Act*, paras. 6.166–6.167.

[62] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.173.

[63] Panel Report on *US – Section 110(5) Copyright Act*, paras. 6.178 and 6.180.

by the exclusive rights conferred in the law of a jurisdiction, the fact that the right holders do not license such use in that jurisdiction cannot be considered indicative of what constitutes normal exploitation. The same would be true in a situation where, due to lack of effective or affordable means of enforcement, right holders may not find it worthwhile or practical to exercise their rights."[64]

(e) "do not unreasonably prejudice the legitimate interests of the right holder"

71. In *US – Section 110(5) Copyright Act*, in examining the third condition under Article 13, i.e. the phrase "do not unreasonably prejudice the legitimate interests of the right holder", the Panel distinguished several steps in the analysis of this requirement:

"We note that the analysis of the third condition of Article 13 of the TRIPS Agreement implies several steps. First, one has to define what are the 'interests' of right holders at stake and which attributes make them 'legitimate'. Then, it is necessary to develop an interpretation of the term 'prejudice' and what amount of it reaches a level that should be considered 'unreasonable'."[65]

72. The Panel then proceeded to examine each of these terms in turn and began with their ordinary meaning:

"The ordinary meaning of the term 'interests' may encompass a legal right or title to a property or to use or benefit of a property (including intellectual property). It may also refer to a concern about a potential detriment or advantage, and more generally to something that is of some importance to a natural or legal person. Accordingly, the notion of 'interests' is not necessarily limited to actual or potential economic advantage or detriment.

The term 'legitimate' has the meanings of

'(a) conformable to, sanctioned or authorized by, law or principle; lawful; justifiable; proper;

(b) normal, regular, conformable to a recognized standard type.'

Thus, the term relates to lawfulness from a legal positivist perspective, but it has also the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights.

We note that the ordinary meaning of 'prejudice' connotes damage, harm or injury. 'Not unreasonable' connotes a slightly stricter threshold than 'reasonable'. The latter term means 'proportionate', 'within the limits of reason, not greatly less or more than might be thought likely or appropriate', or 'of a fair, average or considerable amount or size'."[66]

73. After considering the ordinary meaning of the individual terms of the phrase "do not unreasonably prejudice the legitimate interests of the right holder", the Panel considered these terms more specifically:

"Given that the parties do not question the 'legitimacy' of the interest of right holders to exercise their rights for economic gain, the crucial question becomes which degree or level of 'prejudice' may be considered as 'unreasonable'. Before dealing with the question of what amount or which kind of prejudice reaches a level beyond reasonable, we need to find a way to measure or quantify legitimate interests.

In our view, one – albeit incomplete and thus conservative – way of looking at legitimate interests is the economic value of the exclusive rights conferred by copyright on their holders. It is possible to estimate in economic terms the value of exercising, e.g., by licensing, such rights. That is not to say that legitimate interests are necessarily limited to this economic value.

In examining the second condition of Article 13, we have addressed the US argument that the prejudice to right holders caused by the exemptions at hand are minimal because they already receive royalties from broadcasting stations. We concluded that each exclusive right conferred by copyright, *inter alia*, under each subparagraph of Articles 11*bis* and 11 of the Berne Convention (1971), has to be considered separately for the purpose of examining whether a possible conflict with a 'normal exploitation' exists.

The crucial question is which degree or level of 'prejudice' may be considered as 'unreasonable', given that, under the third condition, a certain amount of 'prejudice' has to be presumed justified as 'not unreasonable'. In our view, prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner."[67]

74. The Panel indicated that the "reasonableness" of the prejudice to the right holder should not be assessed only with respect to the parties of the dispute at hand:

"However, given our considerations above, our assessment of whether the prejudice, caused by the exemptions contained in Section 110(5), to the legitimate interests of the right holder is of an unreasonable level is not limited to the right holders of the European Communities."[68]

75. With respect to its methodology for examination of the existence of a prejudice, the Panel stated that it would consider information on market conditions and consider both actual and potential effects:

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[64] Panel Report on *US – Section 110(5) Copyright Act*, paras. 6.183–6.184 and 6.187–6.188.
[65] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.222.
[66] Panel Report on *US – Section 110(5) Copyright Act*, paras. 6.223–6.225.
[67] Panel Report on *US – Section 110(5) Copyright Act*, paras. 6.226–6.229.
[68] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.235.

"We will consider the information on market conditions provided by the parties taking into account, to the extent feasible, the actual as well as the potential prejudice caused by the exemptions, as a prerequisite for determining whether the extent or degree of prejudice is of an unreasonable level. In these respects, we recall our consideration above that taking account of actual as well as potential effects is consistent with past GATT/WTO dispute settlement practice.

. . .

[I]n considering the prejudice to the legitimate interests of right holders caused by the business exemption, we have to take into account not only the actual loss of income from those restaurants that were licensed by the CMOs at the time that the exemption become effective, but also the loss of potential revenue from other restaurants of similar size likely to play music that were not licensed at that point."[69]

XV. ARTICLE 14

A. TEXT OF ARTICLE 14

Article 14
Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations

1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

4. The provisions of Article 11 in respect of computer programs shall apply *mutatis mutandis* to producers of phonograms and any other right holders in phonograms as determined in a Member's law. If on 15 April 1994 a Member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. The term of protection granted pursuant to paragraph 3 shall last for at least 20 years from the end of the calendar year in which the broadcast took place.

6. Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms.

B. INTERPRETATION AND APPLICATION OF ARTICLE 14

No jurisprudence or decision of a competent WTO body.

Section 2: Trademarks

XVI. ARTICLE 15

A. TEXT OF ARTICLE 15

Article 15
Protectable Subject Matter

1. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

2. Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967).

3. Members may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. An application shall not be refused solely on the ground that

[69] Panel Report on *US – Section 110(5) Copyright Act*, paras. 6.236 and 6.249.

intended use has not taken place before the expiry of a period of three years from the date of application.

4. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

5. Members shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, Members may afford an opportunity for the registration of a trademark to be opposed.

B. INTERPRETATION AND APPLICATION OF ARTICLE 15

1. Article 15.1

76. In *US – Section 211 Appropriations Act*, the Appellate Body rejected an argument that Members must register trademarks that meet the requirements of Article 15.1:

> "It follows that the wording of Article 15.1 allows WTO Members to set forth in their domestic legislation conditions for the registration of trademarks that do *not* address the definition of either 'protectable subject-matter' or of what constitutes a trademark.
>
> . . .
>
> In our view, Article 15.1 of the *TRIPS Agreement* limits the right of Members to determine the 'conditions' for filing and registration of trademarks under their domestic legislation pursuant to Article 6(1) [of the Paris Convention (1967) as incorporated in the TRIPS Agreement] *only* as it relates to the distinctiveness requirements enunciated in Article 15.1."[70]

2. Article 15.2

77. In *US – Section 211 Appropriations Act*, the Appellate Body found that paragraph 2 of Article 15 permits Members to deny trademark registration on grounds other than those expressly provided for in the *TRIPS Agreement* and the Paris Convention (1967):

> "The specific reference to Article 15.1 in Article 15.2 makes it clear that the 'other grounds' for denial of registration to which Article 15.2 refers are different from those mentioned in Article 15.1. . . .
>
> . . .
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> . . . a condition need not be expressly mentioned in the Paris Convention (1967) in order not to 'derogate' from it. Denial of registration on 'other grounds' would derogate from the Paris Convention (1967) only if the denial were on grounds that are inconsistent with the provisions of that Convention.
>
> [We] conclude also that 'other grounds' for the denial of registration within the meaning of Article 15.2 of the *TRIPS Agreement* are not limited to grounds expressly provided for in the exceptions contained in the Paris Convention (1967) or the *TRIPS Agreement*. . . ."[71]

XVII. ARTICLE 16

A. TEXT OF ARTICLE 16

Article 16
Rights Conferred

1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

2. Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.

3. Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

B. INTERPRETATION AND APPLICATION OF ARTICLE 16

1. General

78. In its review under Article 24.2 concerning the application of the provisions from the Section of the *TRIPS Agreement* on geographical indications, the Council for TRIPS invited Members to respond to a Checklist of Questions, some of which relate to Article 16. See paragraph 87 below.

[70] Appellate Body Report on *US – Section 211 Appropriations Act*, paras. 156 and 165.
[71] Appellate Body Report on *US – Section 211 Appropriations Act*, paras. 171, 177 and 178.

2. Article 16.1

(a) "The owner"

79. In *US – Section 211 Appropriations Act*, the Appellate Body found that the *TRIPS Agreement* does not contain a provision that determines who owns or who does not own a trademark:

> "As we read it, Article 16 confers on the *owner* of a registered trademark an internationally agreed minimum level of 'exclusive rights' that all WTO Members must guarantee in their domestic legislation. These exclusive rights protect the owner against infringement of the registered trademark by unauthorized third parties.
>
> We underscore that Article 16.1 confers these exclusive rights on the 'owner' of a registered trademark. As used in this treaty provision, the ordinary meaning of 'owner' can be defined as the proprietor or the person who holds the title or dominion of the property constituted by the trademark. We agree with the Panel that this ordinary meaning does not clarify how the ownership of a trademark is to be determined. Also, we agree with the Panel that Article 16.1 does not, in express terms, define how ownership of a registered trademark is to be determined. Article 16.1 confers exclusive rights on the 'owner', but Article 16.1 does not tell us who the 'owner' *is*.
>
> . . .
>
> [W]e conclude that neither Article 16.1 of the *TRIPS Agreement*, nor any other provision of either the *TRIPS Agreement* and the Paris Convention (1967), determines who owns or who does not own a trademark."[72]

(b) "making rights available on the basis of use"

80. In *US – Section 211 Appropriations Act*, the Appellate Body rejected an argument that the holder of a trademark registration must, under Article 16.1, be considered the owner of the trademark until such time as it ceases to hold the registration:

> "We recall that the European Communities contends that the Panel created an artificial distinction between the owner of a registered trademark and the trademark itself. We disagree with the apparent equation by the European Communities of trademark registration with trademark ownership. Here, again, the European Communities appears to us to overlook the necessary legal distinction between a trademark system in which ownership is based on registration and a trademark system in which ownership is based on use. As we have noted more than once, United States law confers exclusive trademark rights, not on the basis of registration, but on the basis of use. There is nothing in Article 16.1 that compels the United States to base the protection of exclusive rights on registration. Indeed, as we have also observed more than once, the last sentence of Article 16.1 confirms that WTO Members may make such rights available on the basis of use. The United States has done so. Therefore, it necessarily follows that, under United States law, registration is *not* conclusive of ownership of a trademark. Granted, under United States law, the registration of a trademark does confer a *prima facie* presumption of the registrant's ownership of the registered trademark and of the registrant's exclusive right to use that trademark in commerce. But, while we agree with the Panel that the presumptive owner of the *registered* trademark must be entitled, under United States law, to the exclusive rights flowing from Article 16.1 unless and until the presumption arising from registration is successfully challenged through court or administrative proceedings, we do not agree with the European Communities' evident equation of registration with ownership."[73]

XVIII. ARTICLE 17

A. TEXT OF ARTICLE 17

Article 17
Exceptions

Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

B. INTERPRETATION AND APPLICATION OF ARTICLE 17

81. With respect to the relationship of Article 17 to Article 9(2) of the Berne Convention (1971) and Articles 13, 26.2 and 30 of the *TRIPS Agreement*, see footnote 104.

XIX. ARTICLE 18

A. TEXT OF ARTICLE 18

Article 18
Term of Protection

Initial registration, and each renewal of registration, of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely.

B. INTERPRETATION AND APPLICATION OF ARTICLE 18

No jurisprudence or decision of a competent WTO body.

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[72] Appellate Body Report on *US – Section 211 Appropriations Act*, paras. 186, 187 and 195.

[73] Appellate Body Report on *US – Section 211 Appropriations Act*, para. 199.

XX. ARTICLE 19

A. TEXT OF ARTICLE 19

Article 19
Requirement of Use

1. If use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.

2. When subject to the control of its owner, use of a trademark by another person shall be recognized as use of the trademark for the purpose of maintaining the registration.

B. INTERPRETATION AND APPLICATION OF ARTICLE 19

No jurisprudence or decision of a competent WTO body.

XXI. ARTICLE 20

A. TEXT OF ARTICLE 20

Article 20
Other Requirements

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

B. INTERPRETATION AND APPLICATION OF ARTICLE 20

82. The dispute in *Indonesia – Autos* occurred before the end of the transitional period for developing country Members to implement certain provisions of the *TRIPS Agreement*. However, the complaint raised Article 20 only in conjunction with two other articles to which the transitional period did not apply. With respect to the claim concerning national treatment under Article 3, the Panel did not consider the provisions of the relevant Indonesian law as "requirements" within the meaning of Article 20:

> "In taking up the first of these questions, [i.e. is the use of a trademark to which the Indonesian law and practices at issue relates 'specifically addressed' by Article 20] the issue to be considered initially is whether the Indonesian law and practices in question constitute a special requirement that might encumber the use of the trademarks of nationals of other WTO Members in terms of Article 20 of the TRIPS Agreement. The United States has put forward two basic arguments on this question, which are similar to the arguments it has put forward also in regard to the maintenance of trademarks .... The first argument is that a foreign company that enters into an arrangement with a Pioneer company would be encumbered in using the trademark that it used elsewhere for the model that was adopted by the National Car Programme. We do not accept that this argument establishes an inconsistency with the provisions of Article 20, for the reason ... that, if a foreign company enters into an arrangement with a Pioneer company it does so voluntarily and in the knowledge of any consequent implications for its ability to use any pre-existing trademark. In these circumstances, we do not consider the provisions of the National Car Programme as they relate to trademarks can be construed as 'requirements', in the sense of Article 20.
>
> The second United States argument is that non-Indonesian car companies are encumbered in using their trademarks in Indonesia by being put at a competitive disadvantage because the cars produced under the National Car Programme bearing the Indonesian trademark benefit from tariff, subsidy and other benefits flowing from that programme. In regard to this argument, we also feel that the points developed in our earlier discussion of the United States claims regarding the maintenance of trademarks are relevant, in particular in paragraph 14.273 above. Moreover, the United States has not explained to our satisfaction how the ineligibility for benefits accruing under the National Car Programme could constitute 'requirements' imposed on foreign trademark holders, in the sense of Article 20 of the TRIPS Agreement."[74]

83. The Panel made the same finding with respect to the claim concerning the commitment under Article 65.5:

> "The arguments put forward by the United States in support of its claim are essentially the same as those that have been considered in paragraphs 14.277 and 14.278 above. For the reasons set out in those paragraphs above, we find that the United States has not demonstrated that measures have been taken that reduce the degree of consistency with the provisions of Article 20 and which would therefore be in violation of Indonesia's obligations under Article 65.5 of the TRIPS Agreement."[75]

[74] Panel Report on *Indonesia – Autos*, paras. 14.277–14.278.
[75] Panel Report on *Indonesia – Autos*, para. 14.282.

XXII. ARTICLE 21

A. TEXT OF ARTICLE 21

Article 21
Licensing and Assignment

Members may determine conditions on the licensing and assignment of trademarks, it being understood that the compulsory licensing of trademarks shall not be permitted and that the owner of a registered trademark shall have the right to assign the trademark with or without the transfer of the business to which the trademark belongs.

B. INTERPRETATION AND APPLICATION OF ARTICLE 21

No jurisprudence or decision of a competent WTO body.

Section 3: Geographical Indications

XXIII. ARTICLE 22

A. TEXT OF ARTICLE 22

Article 22
Protection of Geographical Indications

1. Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

(b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).

3. A Member shall, *ex officio* if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.

4. The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.

B. INTERPRETATION AND APPLICATION OF ARTICLE 22

84. With respect to the review under Article 24.2 of the application of the provisions of the Section of the *TRIPS Agreement* on geographical indications, see paragraph 87 below.

XXIV. ARTICLE 23

A. TEXT OF ARTICLE 23

Article 23
Additional Protection for Geographical Indications for Wines and Spirits

1. Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.[4]

(*footnote original*) [4] Notwithstanding the first sentence of Article 42, Members may, with respect to these obligations, instead provide for enforcement by administrative action.

2. The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, *ex officio* if a Member's legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.

3. In the case of homonymous geographical indications for wines, protection shall be accorded to each indication, subject to the provisions of paragraph 4 of Article 22. Each Member shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.

4. In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.

B. INTERPRETATION AND APPLICATION OF ARTICLE 23

1. General

85. With respect to the review under Article 24.2 of the application of the provisions of the Section of the

TRIPS Agreement on geographical indications, see paragraph 87 below.

2. Article 23.4

86. At its meeting of 27 February 1997, the Council for TRIPS agreed to initiate preliminary work on issues relevant to the negotiations specified in Article 23.4 of the *TRIPS Agreement* through an information-gathering activity.[76] In this connection, at its meeting of 19 September 1997, the Council requested the Secretariat to prepare a factual background note on existing international notification and registration systems for geographical indications relating to wines and spirits, according to an agreed outline.[77] At its meeting of 17 February 1999, the Council agreed to request the Secretariat to look to see what additional information it could provide on national and international systems for the protection of geographical indications relating to products other than wines and spirits, taking into account certain matters.[78]

XXV. ARTICLE 24

A. TEXT OF ARTICLE 24

Article 24
International Negotiations; Exceptions

1. Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23. The provisions of paragraphs 4 through 8 below shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. In the context of such negotiations, Members shall be willing to consider the continued applicability of these provisions to individual geographical indications whose use was the subject of such negotiations.

2. The Council for TRIPS shall keep under review the application of the provisions of this Section; the first such review shall take place within two years of the entry into force of the WTO Agreement. Any matter affecting the compliance with the obligations under these provisions may be drawn to the attention of the Council, which, at the request of a Member, shall consult with any Member or Members in respect of such matter in respect of which it has not been possible to find a satisfactory solution through bilateral or plurilateral consultations between the Members concerned. The Council shall take such action as may be agreed to facilitate the operation and further the objectives of this Section.

3. In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement.

4. Nothing in this Section shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (*a*) for at least 10 years preceding 15 April 1994 or (*b*) in good faith preceding that date.

5. Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

(a) before the date of application of these provisions in that Member as defined in Part VI; or

(b) before the geographical indication is protected in its country of origin;

measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.

6. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the WTO Agreement.

7. A Member may provide that any request made under this Section in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Member or after the date of registration of the trademark in that Member provided that the trademark has been published by that date, if such date is earlier than the date on which the adverse use became generally known in that Member, provided that the geographical indication is not used or registered in bad faith.

8. The provisions of this Section shall in no way prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public.

[76] IP/C/M/12, para. 73.
[77] IP/C/M/15, para. 56 and Annex. The Secretariat note was circulated as IP/C/W/85.
[78] IP/C/M/22, para. 102. The additional information was circulated as IP/C/W/85/Add.1.

9. There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.

B. INTERPRETATION AND APPLICATION OF ARTICLE 24

1. Article 24.2

87. At its meeting of 12 May 1998, the Council for TRIPS, in its review under Article 24.2 of the application of the provisions of the section of the *TRIPS Agreement* on geographical indications, took note of a Checklist of Questions[79] and invited those Members already under an obligation to apply the provisions of the section on geographical indications to provide responses, it being understood that other Members could also furnish replies on a voluntary basis. Further, at its meeting of 16 July 1998, the Council for TRIPS took note of some additional questions and agreed that those questions be included in the Checklist.[80] At its meeting of 7–8 July 1999, the Council for TRIPS requested the Secretariat to prepare a paper summarizing the responses to the Checklist of Questions on the basis of an outline, on the understanding that it would be made explicit that the paper would be without prejudice to the rights and obligations of Members and that its purpose was merely to facilitate an understanding of the more detailed information that had been provided in national responses to the Checklist.[81]

Section 4: Industrial Designs

XXVI. ARTICLE 25

A. TEXT OF ARTICLE 25

Article 25
Requirements for Protection

1. Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.

2. Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law.

B. INTERPRETATION AND APPLICATION OF ARTICLE 25

No jurisprudence or decision of a competent WTO body.

XXVII. ARTICLE 26

A. TEXT OF ARTICLE 26

Article 26
Protection

1. The owner of a protected industrial design shall have the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.

2. Members may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.

3. The duration of protection available shall amount to at least 10 years.

B. INTERPRETATION AND APPLICATION OF ARTICLE 26

1. Article 26.2

88. With respect to the relationship of Article 26.2 to Article 9(2) of the Berne Convention (1971) and Articles 13, 17, and 30 of the *TRIPS Agreement*, see footnote 104.

Section 5: Patents

XXVIII. ARTICLE 27

A. TEXT OF ARTICLE 27

Article 27
Patentable Subject Matter

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.[5] Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph

[79] IP/C/M/18, para. 45. The Checklist of Questions was circulated as IP/C/13.
[80] IP/C/M/19, para. 42. The additional questions were circulated as IP/C/13/Add.1.
[81] IP/C/M/24, para. 39. The Secretariat note was circulated as IP/C/W/253 and subsequently updated and circulated as IP/C/W/253/Rev.1.

3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

(*footnote original*) [5] For the purposes of this Article, the terms "inventive step" and "capable of industrial application" may be deemed by a Member to be synonymous with the terms "non-obvious" and "useful" respectively.

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 27

1. Article 27.1

(a) "Without discrimination"

89. In *Canada – Pharmaceutical Patents*, in explaining its understanding of the term "without discrimination" in Article 27, the Panel advised against using the term "discrimination" whenever "more precise standards are available", given the potentially "infinite complexity" of the term:

> "The primary TRIPS provisions that deal with discrimination, such as the national treatment and most-favoured-nation provisions of Articles 3 and 4, do not use the term 'discrimination'. They speak in more precise terms. The ordinary meaning of the word 'discriminate' is potentially broader than these more specific definitions. It certainly extends beyond the concept of differential treatment. It is a normative term, pejorative in connotation, referring to results of the unjustified imposition of differentially disadvantageous treatment. Discrimination may arise from explicitly different treatment, sometimes called '*de jure* discrimination', but it may also arise from ostensibly identical treatment which, due to differences in circumstances, produces differentially disadvantageous effects, sometimes called '*de facto* discrimination'. The standards by which the justification for differential treatment is measured are a subject of infinite complexity. 'Discrimination' is a term to be avoided whenever more precise standards are available, and, when employed, it is a term to be interpreted with caution, and with care to add no more precision than the concept contains.
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> In considering how to address these conflicting claims of discrimination, the Panel recalled that various claims of discrimination, *de jure* and *de facto*, have been the subject of legal rulings under GATT or the WTO. These rulings have addressed the question whether measures were in conflict with various GATT or WTO provisions prohibiting variously defined forms of discrimination. As the Appellate Body has repeatedly made clear, each of these rulings has necessarily been based on the precise legal text in issue, so that it is not possible to treat them as applications of a general concept of discrimination. Given the very broad range of issues that might be involved in defining the word 'discrimination' in Article 27.1 of the TRIPS Agreement, the Panel decided that it would be better to defer attempting to define that term at the outset, but instead to determine which issues were raised by the record before the Panel, and to define the concept of discrimination to the extent necessary to resolve those issues."[82]

90. The Panel also attributed two different meanings to the term "*de facto* discrimination" under Article 27.1 in the following terms:

> "*[D]e facto* discrimination is a general term describing the legal conclusion that an ostensibly neutral measure transgresses a non-discrimination norm because its actual effect is to impose differentially disadvantageous consequences on certain parties, and because those differential effects are found to be wrong or unjustifiable. Two main issues figure in the application of that general concept in most legal systems. One is the question of *de facto* discriminatory effect – whether the actual effect of the measure is to impose differentially disadvantageous consequences on certain parties. The other, related to the justification for the disadvantageous effects, is the issue of purpose – not an inquiry into the subjective purposes of the officials responsible for the measure, but an inquiry into the objective characteristics of the measure from which one can infer the existence or non-existence of discriminatory objectives."[83]

91. With respect to the anti-discrimination rule in Article 27.1 and Articles 30 and 31, see paragraphs 94–95 below.

[82] Panel Report on *Canada – Pharmaceutical Patents*, paras. 7.94 and 7.98.
[83] Panel Report on *Canada – Pharmaceutical Patents*, para. 7.101.

(b) "the field of technology"

92. In *Canada – Patent Term*, addressing a claim of discrimination in terms of the field of technology, the Panel stated that it had ascertained neither *de jure* nor *de facto* discrimination:

> "In sum, the Panel found that the evidence in record before it did not raise a plausible claim of discrimination under Article 27.1 of the TRIPS Agreement. It was not proved that the legal scope of Section 55.2(1) was limited to pharmaceutical products, as would normally be required to raise a claim of *de jure* discrimination. Likewise, it was not proved that the adverse effects of Section 55.2(1) were limited to the pharmaceutical industry, or that the objective indications of purpose demonstrated a purpose to impose disadvantages on pharmaceutical patents in particular, as is often required to raise a claim of *de facto* discrimination. Having found that the record did not raise any of these basic elements of a discrimination claim, the Panel was able to find that Section 55.2(1) is not inconsistent with Canada's obligations under Article 27.1 of the TRIPS Agreement. Because the record did not present issues requiring any more precise interpretation of the term 'discrimination' in Article 27.1, none was made."[84]

2. Article 27.3

93. At its meeting of 1–2 December 1998, the Council for TRIPS agreed to initiate the review due under Article 27.3(b) of the provisions of that subparagraph through an information-gathering exercise. In this connection, the Council invited Members that were already under an obligation to apply Article 27.3(b) to provide information on how the matters addressed in this provision were presently treated in their national law. Other Members were invited to provide such information on a best endeavours basis. While it was left to each Member to provide information as it saw fit, having regard to the specific provisions of Article 27.3(b), the Council requested the Secretariat to provide an illustrative list of questions relevant in this regard, in order to assist Members to prepare their contributions. The Council also requested the Secretariat to establish contact with the FAO, the Secretariat of the Convention on Biological Diversity and UPOV, to request factual information on their activities of relevance. It was understood that this information-gathering was without prejudice to the nature of the review provided for in Article 27.3(b).[85] At its meeting of 2–5 April 2001, the Council agreed that the Secretariat re-issue the illustrative list of questions and invited Members to provide their responses to it, if they had not yet done so.[86] At its meeting of 5–7 March 2002, the Council requested the Secretariat to update the synoptic tables annexed to its note with the list, based on the further information submitted by Members.[87]

3. Relationship with other Articles

94. In *Canada – Pharmaceutical Patents*, rejecting Canada's argument that Article 27.1 did not apply to exceptions granted under Article 30, the Panel addressed the relationship between these provisions:

> "The text of the TRIPS Agreement offers no support for such an interpretation. Article 27.1 prohibits discrimination as to enjoyment of 'patent rights' without qualifying that term. Article 30 exceptions are explicitly described as 'exceptions to the exclusive rights conferred by a patent' and contain no indication that any exemption from non-discrimination rules is intended. A discriminatory exception that takes away enjoyment of a patent right is discrimination as much as is discrimination in the basic rights themselves. The acknowledged fact that the Article 31 exception for compulsory licences and government use is understood to be subject to the non-discrimination rule of Article 27.1, without the need for any textual provision so providing, further strengthens the case for treating the non-discrimination rules as applicable to Article 30. Articles 30 and 31 are linked together by the opening words of Article 31 which define the scope of Article 31 in terms of exceptions not covered by Article 30.[88] Finally, the Panel could not agree with Canada's attempt to distinguish between Articles 30 and 31 on the basis of their mandatory/permissive character; both provisions permit exceptions to patent rights subject to certain mandatory conditions. Nor could the Panel understand how such a 'mandatory/permissive' distinction, even if present, would logically support making the kind of distinction Canada was arguing. In the Panel's view, what was important was that in the rights available under national law, that is to say those resulting from the basic rights and any permissible exceptions to them, the forms of discrimination referred to in Article 27.1 should not be present."[89]

95. Rejecting Canada's related arguments, the Panel also provided guidance as to the policy considerations contained in Article 27:

> "Nor was the Panel able to agree with the policy arguments in support of Canada's interpretation of Article 27. To begin with, it is not true that being able to discriminate against particular patents will make it possible to meet Article 30's requirement that the exception be 'limited'. An Article 30 exception cannot be made

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[84] Panel Report on *Canada – Pharmaceutical Patents*, para. 7.105.

[85] IP/C/M/21, para. 111. The Secretariat note was circulated as IP/C/W/122.

[86] IP/C/M/30, para.186. The illustrative list of questions and an informal note prepared by the Secretariat was reissued as IP/C/W/273.

[87] IP/C/M/37/Add 1, para. 195. The Secretariat note was updated and circulated as IP/C/W/273/Rev.1.

[88] (*footnote original*) Article 31 is titled "Other Use Without Authorization of the Rights Holder", and footnote 7 to Article 31 defines "other use" as "use" (derogations from exclusive patent rights) other than that allowed by Article 30.

[89] Panel Report on *Canada – Pharmaceutical Patents*, para. 7.90.

'limited' by limiting it to one field of technology, because the effects of each exception must be found to be 'limited' when measured against each affected patent. Beyond that, it is not true that Article 27 requires all Article 30 exceptions to be applied to all products. Article 27 prohibits only discrimination as to the place of invention, the field of technology, and whether products are imported or produced locally. Article 27 does not prohibit bona fide exceptions to deal with problems that may exist only in certain product areas. Moreover, to the extent the prohibition of discrimination does limit the ability to target certain products in dealing with certain of the important national policies referred to in Articles 7 and 8.1, that fact may well constitute a deliberate limitation rather than a frustration of purpose. It is quite plausible, as the EC argued, that the TRIPS Agreement would want to require governments to apply exceptions in a non-discriminatory manner, in order to ensure that governments do not succumb to domestic pressures to limit exceptions to areas where right holders tend to be foreign producers."[90]

96. In *India – Patents (US)*, the Appellate Body addressed the relationship between Article 27 and Article 70.8 and held that the latter provision applies in a situation where a Member does not make available patents pursuant to the former provision:

"The introductory clause to Article 70.8 provides that it applies '[w]here a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27 . . .' of the TRIPS Agreement. Article 27 requires that patents be made available 'for any inventions, whether products or processes, in all fields of technology', subject to certain exceptions. However, pursuant to paragraphs 1, 2 and 4 of Article 65, a developing country Member may delay providing product patent protection in areas of technology not protectable in its territory on the general date of application of the TRIPS Agreement for that Member until 1 January 2005. Article 70.8 relates specifically and exclusively to situations where a Member does not provide, as of 1 January 1995, patent protection for pharmaceutical and agricultural chemical products."[91]

97. With respect to the relationship of Section 5 of Part II and Article 70.2, see paragraph 165 below.

XXIX. ARTICLE 28

A. TEXT OF ARTICLE 28

Article 28
Rights Conferred

1. A patent shall confer on its owner the following exclusive rights:

(a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing[6] for these purposes that product;

(*footnote original*) [6] This right, like all other rights conferred under this Agreement in respect of the use, sale, importation or other distribution of goods, is subject to the provisions of Article 6.

(b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

B. INTERPRETATION AND APPLICATION OF ARTICLE 28

98. In *Canada – Pharmaceutical Patents*, the Panel was called on to examine a complaint that a Canadian measure was in violation of Article 28.1:

"There was no dispute as to the meaning of Article 28.1 exclusive rights as they pertain to Section 55.2(2) of Canada's Patent Act. Canada acknowledged that the provisions of Section 55.2(2) permitting third parties to 'make', 'construct' or 'use' the patented product during the term of the patent, without the patent owner's permission, would be a violation of Article 28.1 if not excused under Article 30 of the Agreement. The dispute on the claim of violation of Article 28.1 involved whether Section 55.2(2) of the Patent Act complies with the conditions of Article 30."[92]

XXX. ARTICLE 29

A. TEXT OF ARTICLE 29

Article 29
Conditions on Patent Applicants

1. Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application.

2. Members may require an applicant for a patent to provide information concerning the applicant's corresponding foreign applications and grants.

[90] Panel Report on *Canada – Pharmaceutical Patents*, para. 7.91.
[91] Appellate Body Report on *India – Patents (US)*, para. 52.
[92] Panel Report on *Canada – Pharmaceutical Patents*, para. 7.18.

B. INTERPRETATION AND APPLICATION OF ARTICLE 29

No jurisprudence or decision of a competent WTO body.

XXXI. ARTICLE 30

A. TEXT OF ARTICLE 30

Article 30
Exceptions to Rights Conferred

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

B. INTERPRETATION AND APPLICATION OF ARTICLE 30

1. General

99. In *Canada – Pharmaceutical Patents*, the Panel addressed the basic structure of Article 30, outlined the conditions for its application and then found that these conditions apply cumulatively:

> "Article 30 establishes three criteria that must be met in order to qualify for an exception: (1) the exception must be 'limited'; (2) the exception must not 'unreasonably conflict with normal exploitation of the patent'; (3) the exception must not 'unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties'. The three conditions are cumulative, each being a separate and independent requirement that must be satisfied. Failure to comply with any one of the three conditions results in the Article 30 exception being disallowed.
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> The three conditions must, of course, be interpreted in relation to each other. Each of the three must be presumed to mean something different from the other two, or else there would be redundancy. Normally, the order of listing can be read to suggest that an exception that complies with the first condition can nevertheless violate the second or third, and that one which complies with the first and second can still violate the third. The syntax of Article 30 supports the conclusion that an exception may be 'limited' and yet fail to satisfy one or both of the other two conditions. The ordering further suggests that an exception that does not 'unreasonably conflict with normal exploitation' could nonetheless 'unreasonably prejudice the legitimate interests of the patent owner'."[93]

100. For a similar analysis of Article 13, see paragraph 58 above.

101. The Panel then considered both the systemic importance of Article 30 within the *TRIPS Agreement* and the extent to which other provisions of the Agreement can impart meaning to Article 30:

> "In the Panel's view, Article 30's very existence amounts to a recognition that the definition of patent rights contained in Article 28 would need certain adjustments. On the other hand, the three limiting conditions attached to Article 30 testify strongly that the negotiators of the Agreement did not intend Article 30 to bring about what would be equivalent to a renegotiation of the basic balance of the Agreement. Obviously, the exact scope of Article 30's authority will depend on the specific meaning given to its limiting conditions. The words of those conditions must be examined with particular care on this point. Both the goals and the limitations stated in Articles 7 and 8.1 must obviously be borne in mind when doing so as well as those of other provisions of the TRIPS Agreement which indicate its object and purposes."[94]

2. "limited exceptions"

102. In *Canada – Pharmaceutical Patents*, the Panel addressed the question whether the "stockpiling" exception was exempted under Article 30, in the light of the requirement under Article 30 that exceptions to Article 28 be "limited". The Panel first agreed with the proposition that the "limited" character of an exception is to be assessed with respect to their impact on the rights of the patent owner:

> "The Panel agreed with the EC interpretation that 'limited' is to be measured by the extent to which the exclusive rights of the patent owner have been curtailed. The full text of Article 30 refers to 'limited exceptions to the exclusive rights conferred by a patent'. In the absence of other indications, the Panel concluded that it would be justified in reading the text literally, focusing on the extent to which legal rights have been curtailed, rather than the size or extent of the economic impact. In support of this conclusion, the Panel noted that the following two conditions of Article 30 ask more particularly about the economic impact of the exception, and provide two sets of standards by which such impact may be judged. The term 'limited exceptions' is the only one of the three conditions in Article 30 under which the extent of the curtailment of rights as such is dealt with."[95]

103. The Panel, however, rejected suggested approaches to measure the curtailment of the patent owner's rights by counting the number of rights impaired or by considering whether the exclusive right to sell during the patent term is affected:

> "The Panel does not agree, however, with the EC's position that the curtailment of legal rights can be measured by simply counting the number of legal rights impaired

[93] Panel Report on *Canada – Pharmaceutical Patents*, paras. 7.20–7.21.
[94] Panel Report on *Canada – Pharmaceutical Patents*, para. 7.26.
[95] Panel Report on *Canada – Pharmaceutical Patents*, para. 7.31.

by an exception. A very small act could well violate all five rights provided by Article 28.1 and yet leave each of the patent owner's rights intact for all useful purposes. To determine whether a particular exception constitutes a limited exception, the extent to which the patent owner's rights have been curtailed must be measured.

The Panel could not accept Canada's argument that the curtailment of the patent owner's legal rights is 'limited' just so long as the exception preserves the exclusive right to sell to the ultimate consumer during the patent term. Implicit in the Canadian argument is a notion that the right to exclude sales to consumers during the patent term is the essential right conveyed by a patent, and that the rights to exclude 'making' and 'using' the patented product during the term of the patent are in some way secondary. The Panel does not find any support for creating such a hierarchy of patent rights within the TRIPS Agreement. If the right to exclude sales were all that really mattered, there would be no reason to add other rights to exclude 'making' and 'using'. The fact that such rights were included in the TRIPS Agreement, as they are in most national patent laws, is strong evidence that they are considered a meaningful and independent part of the patent owner's rights."[96]

104. Subsequently, the Panel stated that while economic impact was addressed by two of the conditions under Article 30, the "limited exception" condition was not related to economic concerns:

"After analysing all three conditions stated in Article 30 of the TRIPS Agreement, the Panel was satisfied that Article 30 does in fact address the issue of economic impact, but only in the other two conditions contained in that Article. As will be seen in the analysis of these other conditions below, the other two conditions deal with the issue of economic impact, according to criteria that relate specifically to that issue. Viewing all three conditions as a whole, it is apparent that the first condition ('limited exception') is neither designed nor intended to address the issue of economic impact directly."[97]

3. "do not unreasonably conflict with a normal exploitation of the patent"

105. In *Canada – Pharmaceutical Patents*, the Panel addressed the meaning of the term "normal exploitation" contained in the second condition under Article 30, i.e. the phrase "do not unreasonably conflict with a normal exploitation of the patent".

"The Panel considered that 'exploitation' refers to the commercial activity by which patent owners employ their exclusive patent rights to extract economic value from their patent. The term 'normal' defines the kind of commercial activity Article 30 seeks to protect. The ordinary meaning of the word 'normal' is found in the dictionary definition: 'regular, usual, typical, ordinary, conventional'. As so defined, the term can be understood to refer either to an empirical conclusion about what is common within a relevant community, or to a normative standard of entitlement. The Panel concluded that the word 'normal' was being used in Article 30 in a sense that combined the two meanings.

The normal practice of exploitation by patent owners, as with owners of any other intellectual property right, is to exclude all forms of competition that could detract significantly from the economic returns anticipated from a patent's grant of market exclusivity. The specific forms of patent exploitation are not static, of course, for to be effective exploitation must adapt to changing forms of competition due to technological development and the evolution of marketing practices. Protection of all normal exploitation practices is a key element of the policy reflected in all patent laws. Patent laws establish a carefully defined period of market exclusivity as an inducement to innovation, and the policy of those laws cannot be achieved unless patent owners are permitted to take effective advantage of that inducement once it has been defined."[98]

106. After holding that the term "normal" referred to both what is common and to a "normative standard of entitlement", the Panel deliberated regarding what could be considered "normal" in the specific circumstances of the case at issue:

"Canada has raised the argument that market exclusivity occurring after the 20-year patent term expires should not be regarded as 'normal'. The Panel was unable to accept that as a categorical proposition. Some of the basic rights granted to all patent owners, and routinely exercised by all patent owners, will typically produce a certain period of market exclusivity after the expiration of a patent. For example, the separate right to prevent 'making' the patented product during the term of the patent often prevents competitors from building an inventory needed to enter the market immediately upon expiration of a patent. There is nothing abnormal about that more or less brief period of market exclusivity after the patent has expired.

The Panel considered that Canada was on firmer ground, however, in arguing that the additional period of de facto market exclusivity created by using patent rights to preclude submissions for regulatory authorization should not be considered 'normal'. The additional period of market exclusivity in this situation is not a natural or normal consequence of enforcing patent rights. It is an unintended consequence of the conjunction of the patent laws with product regulatory laws, where the combination of patent rights with the time demands of

[96] Panel Report on *Canada – Pharmaceutical Patents*, paras. 7.32–7.33.
[97] Panel Report on *Canada – Pharmaceutical Patents*, para. 7.49.
[98] Panel Report on *Canada – Pharmaceutical Patents*, paras. 7.54–7.55.

> the regulatory process gives a greater than normal period of market exclusivity to the enforcement of certain patent rights. It is likewise a form of exploitation that most patent owners do not in fact employ. For the vast majority of patented products, there is no marketing regulation of the kind covered by Section 55.2(1), and thus there is no possibility to extend patent exclusivity by delaying the marketing approval process for competitors."[99]

107. In this context, the Panel found that "normal exploitation" could not simply refer back to the general concern to protect Article 28 exclusionary rights as such:

> "The Panel could not agree with the EC's assertion that the mere existence of the patent owner's rights to exclude was a sufficient reason, by itself, for treating all gains derived from such rights as flowing from 'normal exploitation'. In the Panel's view, the EC's argument contained no evidence or analysis addressed to the various meanings of 'normal' – neither a demonstration that most patent owners extract the value of their patents in the manner barred by Section 55.2(1), nor an argument that the prohibited manner of exploitation was "normal" in the sense of being essential to the achievement of the goals of patent policy. To the contrary, the EC's focus on the exclusionary rights themselves merely restated the concern to protect Article 28 exclusionary rights as such. This is a concern already dealt with by the first condition of Article 30 ('limited exception') and the Panel found the ultimate EC arguments here impossible to distinguish from the arguments it had made under that first condition."[100]

4. "do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties"

108. In *Canada – Pharmaceutical Patents*, with respect to the term "legitimate interests" in the third condition "do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties" under Article 30, the Panel first acknowledged the difficulty for Canada in proving a negative proposition:

> "The third condition of Article 30 is the requirement that the proposed exception must not 'unreasonably prejudice the legitimate interests of the patent owner, taking into account the legitimate interests of third parties'. Although Canada, as the party asserting the exception provided for in Article 30, bears the burden of proving compliance with the conditions of that exception, the order of proof is complicated by the fact that the condition involves proving a negative. One cannot demonstrate that no legitimate interest of the patent owner has been prejudiced until one knows what claims of legitimate interest can be made. Likewise, the weight of legitimate third party interests cannot be fully appraised until the legitimacy and weight of the patent owner's legitimate interests, if any, are defined. Accordingly, without disturbing the ultimate burden of proof, the Panel chose to analyse the issues presented by the third condition of Article 30 according to the logical sequence in which those issues became defined."[101]

109. The Panel then proceeded to examine whether the Canadian regulatory review's exception was compatible with the third condition under Article 30 – i.e. whether it did not "unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties". The exception at issue was an exception applicable specifically to producers of generic pharmaceuticals, enabling such producers to complete the burdensome and time-consuming marketing authorization procedure (up to two and a half years) prior to the expiration of the patent term of the relevant original product:

> "The ultimate issue with regard to the regulatory review exception's compliance with the third condition of Article 30 involved similar considerations to those arising under the second condition ('normal exploitation') – the fact that the exception would remove the additional period of de facto market exclusivity that patent owners could achieve if they were permitted to employ their rights to exclude 'making' and 'using' (and 'selling') the patented product during the term of the patent to prevent potential competitors from preparing and/or applying for regulatory approval during the term of the patent. The issue was whether patent owners could claim a 'legitimate interest' in the economic benefits that could be derived from such an additional period of de facto market exclusivity and, if so, whether the regulatory review exception 'unreasonably prejudiced' that interest."[102]

110. The Panel addressed the claim that "legitimate interests" should be identified with legal interests:

> "The word 'legitimate' is commonly defined as follows:
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> (a) Conformable to, sanctioned or authorized by, law or principle: lawful; justifiable; proper;
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> (b) Normal, regular, conformable to a recognized standard type.
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> Although the European Communities' definition equating 'legitimate interests' with a full respect of legal interests pursuant to Article 28.1 is within at least some of these definitions, the EC definition makes it difficult to

[99] Panel Report on *Canada – Pharmaceutical Patents*, paras. 7.56–7.57.
[100] Panel Report on *Canada – Pharmaceutical Patents*, para. 7.58.
[101] Panel Report on *Canada – Pharmaceutical Patents*, para. 7.60.
[102] Panel Report on *Canada – Pharmaceutical Patents*, para. 7.61.

make sense of the rest of the third condition of Article 30, in at least three respects. First, since by that definition every exception under Article 30 will be causing 'prejudice' to some legal rights provided by Article 28 of the Agreement, that definition would reduce the first part of the third condition to a simple requirement that the proposed exception must not be 'unreasonable'. Such a requirement could certainly have been expressed more directly if that was what was meant. Second, a definition equating 'legitimate interests' with legal interests makes no sense at all when applied to the final phrase of Article 30 referring to the 'legitimate interests' of third parties. Third parties are by definition parties who have no legal right at all in being able to perform the tasks excluded by Article 28 patent rights. An exceptions clause permitting governments to take account of such third party legal interests would be permitting them to take account of nothing. And third, reading the third condition as a further protection of legal rights would render it essentially redundant in light of the very similar protection of legal rights in the first condition of Article 30 ('limited exception')."[103]

111. After expressing its disagreement with the suggested definition of "legitimate interests" as "legal interests", as proposed by the European Communities, the Panel put forward its own definition of "legitimate interests":

"To make sense of the term 'legitimate interests' in this context, that term must be defined in the way that it is often used in legal discourse – as a normative claim calling for protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms. This is the sense of the word that often appears in statements such as 'X has no legitimate interest in being able to do Y'. We may take as an illustration one of the most widely adopted Article 30-type exceptions in national patent laws – the exception under which use of the patented product for scientific experimentation, during the term of the patent and without consent, is not an infringement. It is often argued that this exception is based on the notion that a key public policy purpose underlying patent laws is to facilitate the dissemination and advancement of technical knowledge and that allowing the patent owner to prevent experimental use during the term of the patent would frustrate part of the purpose of the requirement that the nature of the invention be disclosed to the public. To the contrary, the argument concludes, under the policy of the patent laws, both society and the scientist have a 'legitimate interest' in using the patent disclosure to support the advance of science and technology. While the Panel draws no conclusion about the correctness of any such national exceptions in terms of Article 30 of the TRIPS Agreement, it does adopt the general meaning of the term 'legitimate interests' contained in legal analysis of this type.

. . .

The text of the present, more general version of Article 30 of the TRIPS Agreement was obviously based on the text of Article 9(2) of the Berne Convention. Berne Article 9(2) deals with exceptions to the copyright holder's right to exclude reproduction of its copyrighted work without permission. The text of Article 9(2) is as follows:

> 'It shall be a matter for legislation in the countries of the Union to permit the reproduction of [literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'[104]

The text of Berne Article 9(2) was not adopted into Article 30 of the TRIPS Agreement without change. Whereas the final condition in Berne Article 9(2) ('legitimate interests') simply refers to the legitimate interests of the author, the TRIPS negotiators added in Article 30 the instruction that account must be taken of 'the legitimate interests of third parties'. Absent further explanation in the records of the TRIPS negotiations, however, the Panel was not able to attach a substantive meaning to this change other than what is already obvious in the text itself, namely that the reference to the 'legitimate interests of third parties' makes sense only if the term 'legitimate interests' is construed as a concept broader than legal interests."[105]

112. Another claim put forward in *Canada – Pharmaceutical Patents* called attention to the fact that patent owners whose innovative products are subject to marketing approval requirements suffer a loss of economic benefits to the extent that delays in obtaining government approval prevent them from marketing their product during a substantial part of the patent term (the same government approval which producers of generic pharmaceuticals, under the above-mentioned regulatory review exception, were able to obtain prior to the date of the expiry of the patent term). The Panel considered the relevant practice by some Members to ascertain whether the European Communities' policy concern was "a widely recognized policy norm":

"The Panel therefore examined whether the claimed interest should be considered a 'legitimate interest' within the meaning of Article 30. The primary issue was whether the normative basis of that claim rested on a widely recognized policy norm.

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[103] Panel Report on *Canada – Pharmaceutical Patents*, para. 7.68.

[104] (*footnote original*) The text of Berne Article 9(2) also served as the model for three other exceptions clauses in the TRIPS Agreement – Articles 13, 17 and 26.2, providing respectively for similar exceptions from obligations on copyright, trademarks and industrial designs. Article 13 is a nearly identical copy of Berne Article 9(2). Like Article 30, both Articles 17 and 26.2 made small changes to the text of Berne Article 9(2).

[105] Panel Report on *Canada – Pharmaceutical Patents*, paras. 7.69 and 7.71.

> The type of normative claim put forward by the EC has been affirmed by a number of governments that have enacted *de jure* extensions of the patent term, primarily in the case of pharmaceutical products, to compensate for the *de facto* diminution of the normal period of market exclusivity due to delays in obtaining marketing approval. According to the information submitted to the Panel, such extensions have been enacted by the European Communities, Switzerland, the United States, Japan, Australia and Israel. The EC and Switzerland have done so while at the same time allowing patent owners to continue to use their exclusionary rights to gain an additional, *de facto* extension of market exclusivity by preventing competitors from applying for regulatory approval during the term of the patent. The other countries that have enacted *de jure* patent term extensions have also, either by legislation or by judicial decision, created a regulatory review exception similar to Section 55.2(1), thereby eliminating the possibility of an additional *de facto* extension of market exclusivity."[106]

113. While finding some support for the European Communities' claim in the practice of a certain number of Member governments who had granted compensatory adjustment for the effective diminution of patent holder rights, the Panel held that such practice has not been universal:

> "This positive response to the claim for compensatory adjustment has not been universal, however. In addition to Canada, several countries have adopted, or are in the process of adopting, regulatory review exceptions similar to Section 55.2(1) of the Canadian Patent Act, thereby removing the *de facto* extension of market exclusivity, but these countries have not enacted, and are not planning to enact, any *de jure* extensions of the patent term for producers adversely affected by delayed marketing approval. When regulatory review exceptions are enacted in this manner, they represent a decision not to restore any of the period of market exclusivity due to lost delays in obtaining marketing approval. Taken as a whole, these government decisions may represent either disagreement with the normative claim made by the EC in this proceeding, or they may simply represent a conclusion that such claims are outweighed by other equally legitimate interests.
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> . . .
>
> On balance, the Panel concluded that the interest claimed on behalf of patent owners whose effective period of market exclusivity had been reduced by delays in marketing approval was neither so compelling nor so widely recognized that it could be regarded as a 'legitimate interest' within the meaning of Article 30 of the TRIPS Agreement. Notwithstanding the number of governments that had responded positively to that claimed interest by granting compensatory patent term extensions, the issue itself was of relatively recent standing, and the community of governments was obviously still divided over the merits of such claims. Moreover, the Panel believed that it was significant that concerns about regulatory review exceptions in general, although well known at the time of the TRIPS negotiations, were apparently not clear enough, or compelling enough, to make their way explicitly into the recorded agenda of the TRIPS negotiations. The Panel believed that Article 30's 'legitimate interests' concept should not be used to decide, through adjudication, a normative policy issue that is still obviously a matter of unresolved political debate."[107]

5. Relationship with other Articles

114. With respect to the relationship of Article 30 to Article 9(2) of the Berne Convention (1971) and Articles 13, 17 and 26.2 of the *TRIPS Agreement*, see footnote 104 above.

XXXII. ARTICLE 31

A. TEXT OF ARTICLE 31

Article 31
Other Use Without Authorization of the Right Holder

Where the law of a Member allows for other use[7] of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

(*footnote original*) [7] "Other use" refers to use other than that allowed under Article 30.

(a) authorization of such use shall be considered on its individual merits;

(b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for

[106] Panel Report on *Canada – Pharmaceutical Patents*, paras. 7.77–7.78.
[107] Panel Report on *Canada – Pharmaceutical Patents*, paras. 7.79 and 7.82.

the government, the right holder shall be informed promptly;

(c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;

(d) such use shall be non-exclusive;

(e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;

(f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;

(g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;

(h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

(i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;

(l) where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent"), the following additional conditions shall apply:

(i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;

(ii) the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and

(iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.

B. INTERPRETATION AND APPLICATION OF ARTICLE 31

115. With respect to the grant of compulsory licences and what constitutes a national emergency or other circumstances of extreme urgency, see the Declaration on the TRIPS Agreement and Public Health, reproduced in Section LXXVIII below.

116. On 30 August 2003 the General Council adopted a Decision granting waivers from the obligations set out in paragraphs (f) and (h) of Article 31 of the *TRIPS Agreement* with respect to pharmaceutical products.[108]

XXXIII. ARTICLE 32

A. TEXT OF ARTICLE 32

Article 32
Revocation/Forfeiture

An opportunity for judicial review of any decision to revoke or forfeit a patent shall be available.

B. INTERPRETATION AND APPLICATION OF ARTICLE 32

No jurisprudence or decision of a competent WTO body.

XXXIV. ARTICLE 33

A. TEXT OF ARTICLE 33

Article 33
Term of Protection

The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.[8]

[108] See the minutes of the General Council meeting in WT/GC/M/82. The text of the waiver can be found in WT/L/540. This Decision was adopted by the General Council in the light of a statement read out by the Chairman, as reflected in paragraphs 29–31 of the minutes of the General Council meeting.

(*footnote original*) [8] It is understood that those Members which do not have a system of original grant may provide that the term of protection shall be computed from the filing date in the system of original grant.

B. INTERPRETATION AND APPLICATION OF ARTICLE 33

1. General

(a) Basic structure

117. In *Canada – Patent Term*, Canada argued that although it was making available a patent protection period of only 17 years from the date of the *grant* of the patent, contrary to the requirement under Article 33 of a 20-year protection period counting from the date of the *filing* of the patent application, the relevant Canadian law was not inconsistent with Article 33, because – due to the length of the application procedures – the *effective* patent protection period was in fact equal to 20 years, as required by Article 33. The Panel rejected this argument and found a violation of Article 33. On appeal, the Appeal Body first considered the ordinary meaning of Article 33:

> "In our view, the words used in Article 33 present very little interpretative difficulty. The 'filing date' is the date of filing of the patent application. The term of protection 'shall not end' before twenty years counted from the date of filing of the patent application. The calculation of the period of 'twenty years' is clear and specific. In simple terms, Article 33 defines the earliest date on which the term of protection of a patent may end. This earliest date is determined by a straightforward calculation: it results from taking the date of filing of the patent application and adding twenty years. As the filing date of the patent application and the twenty-year figure are both unambiguous, so too is the resultant earliest end date of the term of patent protection." [109]

118. As Article 33 requires that a Member "make available" a patent protection period of 20 years, the Appellate Body then considered the meaning of the term "available":

> "We agree with the Panel that, in Article 33 of the *TRIPS Agreement*, the word 'available' means 'available, as a matter of right', that is to say, available as a matter of legal right and certainty.
>
> . . .
>
> To demonstrate that the patent term in Article 33 is 'available', it is not sufficient to point, as Canada does, to a combination of procedures that, when used in a particular sequence or in a particular way, *may* add up to twenty years. The opportunity to obtain a twenty-year patent term must not be 'available' only to those who are somehow able to meander successfully through a maze of administrative procedures. The opportunity to obtain a twenty-year term must be a readily discernible and specific right, and it must be clearly seen as such by the patent applicant when a patent application is filed. The grant of the patent must be sufficient *in itself* to obtain the minimum term mandated by Article 33. The use of the word 'available' in Article 33 does not undermine but, rather, underscores this obligation." [110]

119. The Appellate Body agreed with the Panel that Article 33 does not embody a notion of "effective" protection:

> "The text of Article 33 gives no support to the notion of an 'effective' term of protection as distinguished from a 'nominal' term of protection. On the contrary, the obligation in Article 33 is straightforward and mandatory: to provide, as a specific right, a term of protection that does not end before the expiry of a period of twenty years counted from the filing date." [111]

(b) Relationship with other Articles

120. With respect to the relationship of Article 33 with Articles 1.1 and 62.2, see paragraph 3 above.

121. In *Canada – Pharmaceutical Patents*, the Panel did not examine an Article 33 complaint after having found a violation of Article 28.1. On the issue of judicial economy more generally, see Section XXXVI.F of the Chapter on the *DSU*.

XXXV. ARTICLE 34

A. TEXT OF ARTICLE 34

Article 34
Process Patents: Burden of Proof

1. For the purposes of civil proceedings in respect of the infringement of the rights of the owner referred to in paragraph 1(b) of Article 28, if the subject matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process. Therefore, Members shall provide, in at least one of the following circumstances, that any identical product when produced without the consent of the patent owner shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process:

   (a) if the product obtained by the patented process is new;

   (b) if there is a substantial likelihood that the identical product was made by the process and the owner of the patent has been unable through

[109] Appellate Body Report on *Canada – Patent Term*, para. 85.
[110] Appellate Body Report on *Canada – Patent Term*, paras. 90 and 92.
[111] Appellate Body Report on *Canada – Patent Term*, para. 95.

reasonable efforts to determine the process actually used.

2. Any Member shall be free to provide that the burden of proof indicated in paragraph 1 shall be on the alleged infringer only if the condition referred to in subparagraph (a) is fulfilled or only if the condition referred to in subparagraph (b) is fulfilled.

3. In the adduction of proof to the contrary, the legitimate interests of defendants in protecting their manufacturing and business secrets shall be taken into account.

B. INTERPRETATION AND APPLICATION OF ARTICLE 34

No jurisprudence or decision of a competent WTO body.

Section 6: Layout-Designs (Topographies) of Integrated Circuits

XXXVI. ARTICLE 35 AND INCORPORATED PROVISIONS OF THE IPIC TREATY

A. TEXT OF ARTICLE 35

Article 35
Relation to the IPIC Treaty

Members agree to provide protection to the layout-designs (topographies) of integrated circuits (referred to in this Agreement as "layout-designs") in accordance with Articles 2 through 7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty on Intellectual Property in Respect of Integrated Circuits and, in addition, to comply with the following provisions.

The text of Articles 2 through 7 (other than Article 6.3) and Articles 12 and 16.3 of the IPIC Treaty appears in Section LXXVII below.

B. INTERPRETATION AND APPLICATION OF ARTICLE 35 AND INCORPORATED PROVISIONS OF THE IPIC TREATY

No jurisprudence or decision of a competent WTO body.

XXXVII. ARTICLE 36

A. TEXT OF ARTICLE 36

Article 36
Scope of the Protection

Subject to the provisions of paragraph 1 of Article 37, Members shall consider unlawful the following acts if performed without the authorization of the right holder:[9] importing, selling, or otherwise distributing for commercial purposes a protected layout-design, an integrated circuit in which a protected layout-design is incorporated, or an article incorporating such an integrated circuit only in so far as it continues to contain an unlawfully reproduced layout-design.

(*footnote original*) [9] The term "right holder" in this Section shall be understood as having the same meaning as the term "holder of the right" in the IPIC Treaty.

B. INTERPRETATION AND APPLICATION OF ARTICLE 36

No jurisprudence or decision of a competent WTO body.

XXXVIII. ARTICLE 37

A. TEXT OF ARTICLE 37

Article 37
Acts Not Requiring the Authorization of the Right Holder

1. Notwithstanding Article 36, no Member shall consider unlawful the performance of any of the acts referred to in that Article in respect of an integrated circuit incorporating an unlawfully reproduced layout-design or any article incorporating such an integrated circuit where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the integrated circuit or article incorporating such an integrated circuit, that it incorporated an unlawfully reproduced layout-design. Members shall provide that, after the time that such person has received sufficient notice that the layout-design was unlawfully reproduced, that person may perform any of the acts with respect to the stock on hand or ordered before such time, but shall be liable to pay to the right holder a sum equivalent to a reasonable royalty such as would be payable under a freely negotiated licence in respect of such a layout-design.

2. The conditions set out in subparagraphs (a) through (k) of Article 31 shall apply *mutatis mutandis* in the event of any non-voluntary licensing of a layout-design or of its use by or for the government without the authorization of the right holder.

B. INTERPRETATION AND APPLICATION OF ARTICLE 37

No jurisprudence or decision of a competent WTO body.

XXXIX. ARTICLE 38

A. TEXT OF ARTICLE 38

Article 38
Term of Protection

1. In Members requiring registration as a condition of protection, the term of protection of layout-designs shall not end before the expiration of a period of 10 years counted from the date of filing an application for registration or from the first commercial exploitation wherever in the world it occurs.

2. In Members not requiring registration as a condition for protection, layout-designs shall be protected for a term of no less than 10 years from the date of the first commercial exploitation wherever in the world it occurs.

3. Notwithstanding paragraphs 1 and 2, a Member may provide that protection shall lapse 15 years after the creation of the layout-design.

B. INTERPRETATION AND APPLICATION OF ARTICLE 38

No jurisprudence or decision of a competent WTO body.

Section 7: Protection of Undisclosed Information

XL. ARTICLE 39

A. TEXT OF ARTICLE 39

Article 39

1. In the course of ensuring effective protection against unfair competition as provided in Article 10*bis* of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.

2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices[10] so long as such information:

(*footnote original*) [10] For the purpose of this provision, "a manner contrary to honest commercial practices" shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.

(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) has commercial value because it is secret; and

(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

B. INTERPRETATION AND APPLICATION OF ARTICLE 39

No jurisprudence or decision of a competent WTO body.

Section 8: Control of Anti-Competitive Practices in Contractual Licences

XLI. ARTICLE 40

A. TEXT OF ARTICLE 40

Article 40

1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

3. Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.

4. A Member whose nationals or domiciliaries are subject to proceedings in another Member concerning alleged violation of that other Member's laws and regulations on the subject matter of this Section shall, upon

request, be granted an opportunity for consultations by the other Member under the same conditions as those foreseen in paragraph 3.

B. INTERPRETATION AND APPLICATION OF ARTICLE 40

No jurisprudence or decision of a competent WTO body.

PART III
ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Section 1: General Obligations

XLII. ARTICLE 41

A. TEXT OF ARTICLE 41

Article 41

1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

B. INTERPRETATION AND APPLICATION OF ARTICLE 41

122. In *Canada – Patent Term*, the Panel rejected Canada's argument that, in light of a certain amount of delay in granting patent rights, the term of protection at issue met with the requirements under Article 33.[112] In its finding, which was subsequently not addressed by the Appellate Body, the Panel referred to Article 41.2 as it is applied to acquisition procedures by Article 62.4:

> "In our view, requiring applicants to resort to delays such as abandonment, reinstatement, non-payment of fees and non-response to a patent examiner's report would be inconsistent with the general principle that procedures not be unnecessarily complicated as expressed in Article 41.2 and applied to acquisition procedures by Article 62.4. By their very nature, the delays, which are not tied to any valid reason related to the examination and grant process, would be inconsistent with the general principle that procedures not entail 'unwarranted delays' as expressed in Article 41.2 and applied to acquisition procedures by Article 62.4.
>
> We noted in paragraphs 6.107 and 6.108 above that the Commissioner's powers to reinstate and restore applications under Section 30(2) and Section 73 were discretionary at all material times and not available as a matter of right to patent applicants. Canada argued, however, that despite the use of the word 'may' in Section 73, the payment of the necessary fee enabled the applicant to obtain reinstatement of his patent application as a matter of right. In other words, had the Commissioner exercised his discretion to refuse an application for reinstatement, an applicant would have been required to pay an additional fee and pursue legal proceedings against the Commissioner in a court of law in order for a term of protection expiring 20 years from the date of filing the application to be available. We find potential requirements that an applicant commence proceedings for a writ of mandamus and pay additional fees to be in breach of the general principle that procedures not be 'unnecessarily complicated or costly' as expressed in Article 41.2 and applied to acquisition procedures by Article 62.4."[113]

[112] With respect to the claim that an equivalent "effective" period of protection can fulfill the requirement of Article 33, see paragraphs 117–120 above.

[113] Panel Report on *Canada – Patent Term*, paras. 6.117–6.118.

Section 2: Civil and Administrative Procedures and Remedies

XLIII. ARTICLE 42

A. TEXT OF ARTICLE 42

Article 42
Fair and Equitable Procedures

Members shall make available to right holders[11] civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

(*footnote original*) [11] For the purpose of this Part, the term "right holder" includes federations and associations having legal standing to assert such rights.

B. INTERPRETATION AND APPLICATION OF ARTICLE 42

1. "right holders"

123. In *US – Section 211 Appropriations Act*, the Appellate Body considered that the term "right holders" included not only persons who had been established as owners of rights but also persons who claimed to have legal standing to assert rights:

> "We agree with the Panel that the term 'right holders' as used in Article 42 is not limited to persons who have been established as owners of trademarks. Where the *TRIPS Agreement* confers rights exclusively on 'owners' of a right, it does so in express terms, such as in Article 16.1, which refers to the 'owner of a registered trademark'. By contrast, the term 'right holders' within the meaning of Article 42 also includes persons who claim to have legal standing to assert rights. This interpretation is also borne out by the fourth sentence of Article 42, which refers to 'parties'. Civil judicial procedures would not be fair and equitable if access to courts were not given to both complainants and defendants who purport to be owners of an intellectual property right."[114]

2. Rights covered by Article 42

124. In *US – Section 211 Appropriations Act*, the Appellate Body considered the nature of the rights covered by Article 42:

> "From all this, we understand that the rights which Article 42 obliges Members to make available to right holders are *procedural* in nature. These *procedural* rights guarantee an international minimum standard for nationals of other Members within the meaning of Article 1.3 of the *TRIPS Agreement*."

125. In *US – Section 211 Appropriations Act*, the Appellate Body considered the situation in which a requirement of substantive law made it impossible for a court to rule in favour of a claim to a trademark right and found:

> "There is nothing in the *procedural* obligations of Article 42 that prevents a Member, in such a situation, from legislating whether or not its courts must examine *each and every* requirement of substantive law at issue before making a ruling."[115]

126. In *US – Section 211 Appropriations Act*, the Appellate Body applied its findings in respect of Article 42 of the *TRIPS Agreement* with regard to holders of rights in trademarks and holders of rights in trade names as well.[116]

XLIV. ARTICLE 43

A. TEXT OF ARTICLE 43

Article 43
Evidence

1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.

2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Member may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.

[114] Appellate Body Report on *US – Section 211 Appropriations Act*, para. 217.
[115] Appellate Body Report on *US – Section 211 Appropriations Act*, paras. 221 and 226.
[116] Appellate Body Report on *US – Section 211 Appropriations Act*, paras. 222–231 and 358.

B. INTERPRETATION AND APPLICATION OF ARTICLE 43

127. In *India – Patents (EC)*, the European Communities claimed – similarly to the United States' claim in the earlier case *India – Patents (US)* – that India had failed to provide an exclusive marketing system pursuant to its obligation under Article 70.9 of the *TRIPS Agreement*. India argued that a generally available system was not required under Article 70.9; as support for its claim, India pointed to the provisions of Articles 42 [sic] to 48 of the *TRIPS Agreement*, where the judicial authorities of Members "shall have authority" to order certain actions and contrasted this wording with that of Article 70.9, which provides that marketing rights "shall be granted" when certain conditions are met. The Panel rejected this argument by India:

> "We do not share India's view that it can be deduced from the use of these words in those Articles that a system of general availability is not called for under Article 70.9. To infer this, one would have to hold that the omission of the words 'shall have the authority' in Articles 42–48 [sic] (so that a court was required to act in a certain way when prescribed conditions were met, rather than merely having the authority to do so) would mean that a Member would not be expected to give its judicial authorities in advance the authority to act in this way, for example to award an injunction, but could legislate to this effect when a specific occasion arose. Such an inference would obviously be absurd. Rather the function of the words 'shall have the authority' is to address the issue of judicial discretion, not that of general availability."[117]

XLV. ARTICLE 44

A. TEXT OF ARTICLE 44

Article 44
Injunctions

1. The judicial authorities shall have the authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods. Members are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right.

2. Notwithstanding the other provisions of this Part and provided that the provisions of Part II specifically addressing use by governments, or by third parties authorized by a government, without the authorization of the right holder are complied with, Members may limit the remedies available against such use to payment of remuneration in accordance with subparagraph (h) of Article 31. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member's law, declaratory judgments and adequate compensation shall be available.

B. INTERPRETATION AND APPLICATION OF ARTICLE 44

128. With respect to the meaning of the words "shall have the authority" as used in Articles 43–48, see paragraph 127 above.

XLVI. ARTICLE 45

A. TEXT OF ARTICLE 45

Article 45
Damages

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

B. INTERPRETATION AND APPLICATION OF ARTICLE 45

129. With respect to the meaning of the words "shall have the authority" as used in Articles 43–48, see paragraph 127 above.

XLVII. ARTICLE 46

A. TEXT OF ARTICLE 46

Article 46
Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional require-

[117] Panel Report on *India – Patents (EC)*, para. 7.66.

ments, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.

B. INTERPRETATION AND APPLICATION OF ARTICLE 46

130. With respect to the meaning of the words "shall have the authority" as used in Articles 43–48, see paragraph 127 above.

XLVIII. ARTICLE 47

A. TEXT OF ARTICLE 47

Article 47
Right of Information

Members may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

B. INTERPRETATION AND APPLICATION OF ARTICLE 47

131. With respect to the meaning of the words "shall have the authority" as used in Articles 43–48, see paragraph 127 above.

XLIX. ARTICLE 48

A. TEXT OF ARTICLE 48

Article 48
Indemnification of the Defendant

1. The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.

2. In respect of the administration of any law pertaining to the protection or enforcement of intellectual property rights, Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law.

B. INTERPRETATION AND APPLICATION OF ARTICLE 48

132. With respect to the meaning of the words "shall have the authority" as used in Articles 43–48, see paragraph 127 above.

L. ARTICLE 49

A. TEXT OF ARTICLE 49

Article 49
Administrative Procedures

To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

B. INTERPRETATION AND APPLICATION OF ARTICLE 49

No jurisprudence or decision of a competent WTO body.

Section 3: Provisional Measures

LI. ARTICLE 50

A. TEXT OF ARTICLE 50

Article 50

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

(a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;

(b) to preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder

and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

B. INTERPRETATION AND APPLICATION OF ARTICLE 50

No jurisprudence or decision of a competent WTO body.

Section 4: Special Requirements Related to Border Measures[12]

(*footnote original*) [12] Where a Member has dismantled substantially all controls over movement of goods across its border with another Member with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.

LII. ARTICLE 51

A. TEXT OF ARTICLE 51

Article 51
Suspension of Release by Customs Authorities

Members shall, in conformity with the provisions set out below, adopt procedures[13] to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods[14] may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Members may enable such an application to be made in respect of goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are met. Members may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories.

(*footnote original*) [13] It is understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit.
(*footnote original*) [14] For the purposes of this Agreement:

(a) "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;

(b) "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

B. INTERPRETATION AND APPLICATION OF ARTICLE 51

No jurisprudence or decision of a competent WTO body.

LIII. ARTICLE 52

A. TEXT OF ARTICLE 52

Article 52
Application

Any right holder initiating the procedures under Article 51 shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's intellectual property right and to supply a sufficiently detailed description of

the goods to make them readily recognizable by the customs authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action.

B. INTERPRETATION AND APPLICATION OF ARTICLE 52

No jurisprudence or decision of a competent WTO body.

LIV. ARTICLE 53

A. TEXT OF ARTICLE 53

Article 53
Security or Equivalent Assurance

1. The competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.

2. Where pursuant to an application under this Section the release of goods involving industrial designs, patents, layout-designs or undisclosed information into free circulation has been suspended by customs authorities on the basis of a decision other than by a judicial or other independent authority, and the period provided for in Article 55 has expired without the granting of provisional relief by the duly empowered authority, and provided that all other conditions for importation have been complied with, the owner, importer, or consignee of such goods shall be entitled to their release on the posting of a security in an amount sufficient to protect the right holder for any infringement. Payment of such security shall not prejudice any other remedy available to the right holder, it being understood that the security shall be released if the right holder fails to pursue the right of action within a reasonable period of time.

B. INTERPRETATION AND APPLICATION OF ARTICLE 53

No jurisprudence or decision of a competent WTO body.

LV. ARTICLE 54

A. TEXT OF ARTICLE 54

Article 54
Notice of Suspension

The importer and the applicant shall be promptly notified of the suspension of the release of goods according to Article 51.

B. INTERPRETATION AND APPLICATION OF ARTICLE 54

No jurisprudence or decision of a competent WTO body.

LVI. ARTICLE 55

A. TEXT OF ARTICLE 55

Article 55
Duration of Suspension

If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of paragraph 6 of Article 50 shall apply.

B. INTERPRETATION AND APPLICATION OF ARTICLE 55

No jurisprudence or decision of a competent WTO body.

LVII. ARTICLE 56

A. TEXT OF ARTICLE 56

Article 56
Indemnification of the Importer and of the Owner of the Goods

Relevant authorities shall have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 55.

B. INTERPRETATION AND APPLICATION OF ARTICLE 56

No jurisprudence or decision of a competent WTO body.

LVIII. ARTICLE 57

A. TEXT OF ARTICLE 57

Article 57
Right of Inspection and Information

Without prejudice to the protection of confidential information, Members shall provide the competent authorities the authority to give the right holder sufficient opportunity to have any goods detained by the customs authorities inspected in order to substantiate the right holder's claims. The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such goods inspected. Where a positive determination has been made on the merits of a case, Members may provide the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee and of the quantity of the goods in question.

B. INTERPRETATION AND APPLICATION OF ARTICLE 57

No jurisprudence or decision of a competent WTO body.

LIX. ARTICLE 58

A. TEXT OF ARTICLE 58

Article 58
Ex Officio Action

Where Members require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired *prima facie* evidence that an intellectual property right is being infringed:

(a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;

(b) the importer and the right holder shall be promptly notified of the suspension. Where the importer has lodged an appeal against the suspension with the competent authorities, the suspension shall be subject to the conditions, *mutatis mutandis*, set out at Article 55;

(c) Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

B. INTERPRETATION AND APPLICATION OF ARTICLE 58

No jurisprudence or decision of a competent WTO body.

LX. ARTICLE 59

A. TEXT OF ARTICLE 59

Article 59
Remedies

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46. In regard to counterfeit trademark goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances.

B. INTERPRETATION AND APPLICATION OF ARTICLE 59

No jurisprudence or decision of a competent WTO body.

LXI. ARTICLE 60

A. TEXT OF ARTICLE 60

Article 60
De Minimis Imports

Members may exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

B. INTERPRETATION AND APPLICATION OF ARTICLE 60

No jurisprudence or decision of a competent WTO body.

Section 5: Criminal Procedures

LXII. ARTICLE 61

A. TEXT OF ARTICLE 61

Article 61

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

B. INTERPRETATION AND APPLICATION OF ARTICLE 61

No jurisprudence or decision of a competent WTO body.

PART IV
ACQUISITION AND MAINTENANCE OF INTELLECTUAL PROPERTY RIGHTS AND RELATED *INTER-PARTES* PROCEDURES

LXIII. ARTICLE 62

A. TEXT OF ARTICLE 62

Article 62

1. Members may require, as a condition of the acquisition or maintenance of the intellectual property rights provided for under Sections 2 through 6 of Part II, compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the provisions of this Agreement.

2. Where the acquisition of an intellectual property right is subject to the right being granted or registered, Members shall ensure that the procedures for grant or registration, subject to compliance with the substantive conditions for acquisition of the right, permit the granting or registration of the right within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection.

3. Article 4 of the Paris Convention (1967) shall apply *mutatis mutandis* to service marks.

4. Procedures concerning the acquisition or maintenance of intellectual property rights and, where a Member's law provides for such procedures, administrative revocation and *inter partes* procedures such as opposition, revocation and cancellation, shall be governed by the general principles set out in paragraphs 2 and 3 of Article 41.

5. Final administrative decisions in any of the procedures referred to under paragraph 4 shall be subject to review by a judicial or quasi-judicial authority. However, there shall be no obligation to provide an opportunity for such review of decisions in cases of unsuccessful opposition or administrative revocation, provided that the grounds for such procedures can be the subject of invalidation procedures.

B. INTERPRETATION AND APPLICATION OF ARTICLE 62

133. In *Canada – Patent Term*, Canada argued that Article 33, a provision calling for a minimum patent protection period, must be read in conjunction with Article 62.2, which recognizes the fact that the length of the patent-granting process invariably involves some curtailment of the period of protection. From the interplay of these two provisions, Canada argued that Article 33 embodies a notion of "effective" protection and that Article 33 can be complied with by making available a nominally shorter period of protection, while taking into consideration "effective" protection during the period of the patent approval proceedings.[118] The Appellate Body upheld the Panel's rejection of this argument:

> ". . . Article 62.2 deals with procedures relating to the acquisition of intellectual property rights. Article 62.2 does not deal with the duration of those rights once they are acquired. Article 62.2 is of no relevance to this case. This purely procedural Article cannot be used to modify the clear and substantive standard set out in Article 33 so as to conjecture a new standard of 'effective' protection. Each Member of the WTO may well have its own subjective judgement about what constitutes a 'reasonable period of time' not only for granting patents in general, but also for granting patents in specific sectors or fields of complexity. If Canada's arguments were accepted, each and every Member of the WTO would be free to adopt a term of 'effective' protection for patents that, in its judgement, meets the criteria of 'reasonable period of time' and 'unwarranted curtailment of the period of protection', and to claim that its term of protection is substantively 'equivalent' to the term of protection envisaged by Article 33. Obviously, this cannot be what the Members of the WTO envisaged in concluding the TRIPS Agreement. Our task is to interpret the covered agreements harmoniously. A harmonious interpretation of Article 33 and Article 62.2 must regard these two treaty provisions as distinct and separate Articles containing obligations that must be fulfilled distinctly and separately."[119]

134. With respect to the relationship of Article 62.2 with Articles 1.1 and 33, see paragraph 3 above.

PART V
DISPUTE PREVENTION AND SETTLEMENT

LXIV. ARTICLE 63

A. TEXT OF ARTICLE 63

Article 63
Transparency

1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition,

[118] With respect to the claim that an equivalent "effective" period of protection can fulfill the requirement of Article 33, see paras. 117–120 of this Chapter.

[119] Appellate Body Report on *Canada – Patent Term*, para. 97.

enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

2. Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with WIPO on the establishment of a common register containing these laws and regulations are successful. The Council shall also consider in this connection any action required regarding notifications pursuant to the obligations under this Agreement stemming from the provisions of Article 6*ter* of the Paris Convention (1967).

3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

4. Nothing in paragraphs 1, 2 and 3 shall require Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

B. INTERPRETATION AND APPLICATION OF ARTICLE 63

1. Article 63.2

(a) Notification requirements

135. At its meeting of 21 November 1995, the Council for TRIPS adopted Decisions on the rules of procedure for notification under Article 63.2,[120] including a possible format for listing of "Other Laws and Regulations"[121] and a Checklist of Issues on Enforcement.[122]

136. Article 2 of the Agreement between the World Intellectual Property Organization and the World Trade Organization contains provisions relevant to notifications and translation of laws and regulations under Article 63.2.[123]

LXV. ARTICLE 64

A. TEXT OF ARTICLE 64

Article 64
Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.

2. Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.

3. During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.

B. INTERPRETATION AND APPLICATION OF ARTICLE 64

1. General

137. With respect to the interpretation and application of the provisions of Articles XXII and XXIII of the *GATT 1994* as elaborated and applied by the *DSU* to provisions of the *TRIPS Agreement*, see the Chapter on the *DSU*.

138. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the *TRIPS Agreement* were invoked:

	Case Name	Case Number	Invoked Articles
1	*India – Patents (US)*	WT/DS50	Articles 27, 63, 70.8 and 70.9
2	*Indonesia – Autos*	WT/DS54, WT/DS55, WT/DS59, WT/DS64	Articles 3, 20 and 65

[120] IP/C/M/4, Section A.2.(i). The procedures can be found in Council Decision IP/C/2.
[121] IP/C/M/4, Section A.2.(i). The format can be found in Decision of the Council for TRIPS, IP/C/4.
[122] IP/C/M/4, Section A.2.(i). The Checklist can be found in Decision of the Council for TRIPS, IP/C/5.
[123] The text of the Agreement can be found in IP/C/6.

	Case Name	Case Number	Invoked Articles
3	*India – Patents (EC)*	WT/DS79	Article 70.8(a) and 70.9
4	*Canada – Pharmaceutical Patents*	WT/DS114	Articles 27, 30, 33 and 70
5	*US – Section 110(5) Copyright Act*	WT/DS160	Articles 9.1 and 13
6	*Canada – Patent Term*	WT/DS170	Articles 33, 62.1, 62.4, 65, 70.1 and 70.2
7	*US – Section 211 Appropriations Act*	WT/DS176	Articles 2.1, 3.1, 4, 15.1, 16.1 and 42.

2. Article 64.3

139. On 14 November 2001, the Ministerial Conference adopted a Decision on Implementation-Related Issues and Concerns, which includes a moratorium for so-called "non-violation" and "situation" complaints under the TRIPS Agreement. Paragraph 11.1 of the Decision reads as follows:

> "The TRIPS Council is directed to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to the Fifth Session of the Ministerial Conference. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement."[124]

PART VI
TRANSITIONAL ARRANGEMENTS

LXVI. ARTICLE 65

A. TEXT OF ARTICLE 65

Article 65
Transitional Arrangements

1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.

2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.

3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations, may also benefit from a period of delay as foreseen in paragraph 2.

4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.

5. A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 65

1. General

140. In *Canada – Patent Term*, after upholding the Panel's finding that a term of protection available under the Canadian patent law was shorter than required under Article 33, the Appellate Body distinguished the content of TRIPS obligations from their temporal effect:

> "In conclusion, we wish to point out that our findings in this appeal have no effect whatsoever on the transitional arrangements found in Part VI of the TRIPS Agreement. The provisions in Part VI establish when obligations of the TRIPS Agreement are to be applied by a WTO Member and not what those obligations are. The issues raised in this appeal relate to what the obligations are, not to when they apply."[125]

2. Article 65.4

(a) "an additional period of five years"

141. In *India – Patents (US)*, the Panel linked Articles 27 and 65:

> "Article 27 requires that patents be made available in all fields of technology, subject to certain narrow exceptions. Article 65 provides for transitional periods for developing countries: in general five years from the entry into force of the WTO Agreement, i.e. 1 January 2000, and an additional five years to provide for product patents in areas of technology not so patentable as of 1 January 2000. Thus, in such areas of technology, developing countries are not required to provide product patent protection until 1 January 2005."[126]

142. In *India – Patents (EC)*, the Panel emphasized that its findings on the substance of the TRIPS obligations do not relate in any way to the transition period:

[124] The text of the Decision can be found in WT/MIN(01)/17.
[125] Appellate Body Report on *Canada – Patent Term*, para. 100.
[126] Panel Report on *India – Patents (US)*, para. 7.27.

"Since the matter has been addressed by India in its arguments and caused some confusion in the previous case, we would like to underline that the Panel's findings do not in any way foreshorten the transition period of until, at the latest, 1 January 2005 that India has for meeting its obligations under Articles 65.4 and 70.8(b) and (c)."[127]

3. Article 65.5

(a) "changes . . . do not result in a lesser degree of consistency"

143. In *Indonesia – Autos*, the Panel examined the claim of the United States that "Indonesia is in violation of its obligations under Article 65.5 of the TRIPS Agreement because provisions of the National Car Programme which were introduced by Indonesia during its transition period under the TRIPS Agreement put special requirements on nationals of other WTO Members in respect of the use of their trademarks which are inconsistent with the provisions of Article 20 of the TRIPS Agreement":

"The arguments put forward by the United States in support of its claim [under Article 65.5] are essentially the same as those that have been considered in paragraphs 14.277 and 14.278 above [in relation to Article 3, in conjunction with Article 20 on use of trademarks]. For the reasons set out in those paragraphs above, [that these are not 'requirements' in the sense of Article 20] we find that the United States has not demonstrated that measures have been taken that reduce the degree of consistency with the provisions of Article 20 and which would therefore be in violation of Indonesia's obligations under Article 65.5 of the TRIPS Agreement."[128]

4. Relationship with other Articles

144. In *Indonesia – Autos*, the Panel noted that the transition period under Article 65.2 does not apply to Article 3:

"[W]e note that Indonesia has been under an obligation to apply the provisions of Article 3 since 1 January 1996, Article 3 not benefiting from the additional four years of transition generally provided by Article 65.2 to developing country Members."[129]

145. The Panel in *India – Patents (US)* made clear that Article 70.8 is also one of the provisions of the *TRIPS Agreement* to which the transition period of Article 65 does not apply:

"However, these transitional provisions [in Article 65] are not applicable to Article 70.8, which ensures that, if product patent protection is not already available for pharmaceutical and agricultural chemical product inventions, a means must be in place as of 1 January 1995 which allows for the entitlement to file patent applications for such inventions and the allocation of filing and priority dates to them so that the novelty of the inventions in question and the priority of the applications claiming their protection can be preserved for the purposes of determining their eligibility for protection by a patent at the time that product patent protection will be available for these inventions, i.e. at the latest after the expiry of the transitional period."[130]

146. Certain provisions of the *TRIPS Agreement* contain obligations contingent upon the applicability of Article 65 (and 66). The Panel in *India – Patents (US)* held with respect to Article 70.9:

"As is the case with Article 70.8(a), the granting of exclusive marketing rights is a special obligation linked with the enjoyment by Members of the transitional arrangements under Articles 65 and 66 of the Agreement."[131]

LXVII. ARTICLE 66

A. TEXT OF ARTICLE 66

Article 66
Least-Developed Country Members

1. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

2. Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

B. INTERPRETATION AND APPLICATION OF ARTICLE 66

1. Article 66.1

(a) Extension of transition period

147. On 27 June 2002, the Council for TRIPS adopted a decision extending the transition period under Article 66.1 for least-developed country Members for certain obligations with respect to pharmaceutical products, in the following terms:

[127] Panel Report on *India – Patents (EC)*, para. 8.1.
[128] Panel Report on *Indonesia – Autos*, para. 14.282.
[129] Panel Report on *Indonesia – Autos*, para. 14.266.
[130] Panel Report on *India – Patents (US)*, para. 7.27.
[131] Panel Report on *India – Patents (US)*, para. 7.59.

"1. Least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016.

2. This decision is made without prejudice to the right of least-developed country Members to seek other extensions of the period provided for in paragraph 1 of Article 66 of the TRIPS Agreement."[132]

(b) Relationship with other Articles

148. With respect to the relationship of Article 66.1 with Article 70.8(a) and 70.9, see paragraphs 145–146 above.

2. Article 66.2

149. On 19 February 2003, the Council for TRIPS adopted a decision establishing arrangements for the submission by developed country Members of annual reports on their implementation of Article 66.2 and their annual review by the Council for TRIPS.[133]

LXVIII. ARTICLE 67

A. TEXT OF ARTICLE 67

Article 67
Technical Cooperation

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

B. INTERPRETATION AND APPLICATION OF ARTICLE 67

150. Article 4 of the Agreement between the World Intellectual Property Organization and the World Trade Organization contains provisions on legal-technical assistance and technical cooperation.[134]

PART VII
INSTITUTIONAL ARRANGEMENTS; FINAL PROVISIONS

LXIX. ARTICLE 68

A. TEXT OF ARTICLE 68

Article 68
Council for Trade-Related Aspects of Intellectual Property Rights

The Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures. In carrying out its functions, the Council for TRIPS may consult with and seek information from any source it deems appropriate. In consultation with WIPO, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization.

B. INTERPRETATION AND APPLICATION OF ARTICLE 68

1. Rules of procedure of the Council for TRIPS

151. At its meetings of 24 May 1995 and 21 September 1995, the Council for TRIPS adopted its rules of procedure. At its meeting on 15 November 1995, the General Council approved those rules of procedure.[135]

2. Observer status

152. With respect to the entities that have been granted observer status in the Council for TRIPS, see below.

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[132] The Council for TRIPS adopted this decision pursuant to the instruction of the Ministerial Conference in the Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2, reproduced in Section LXXVIII below). See the minutes of the Council for TRIPS' meeting in IP/C/M/36. The text of the adopted decision can be found in IP/C/25. At the same meeting, the Council for TRIPS approved a draft waiver for least-developed country Members of obligations under Article 70.9 with respect to pharmaceutical products. See paragraph 164 below.

[133] The Council for TRIPS adopted this decision pursuant to the instruction of the Ministerial Conference in the Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2, reproduced in Section LXXVIII below). See the minutes of the Council for TRIPS' meeting in IP/C/M/39. The text of the adopted decision can be found in IP/C/28.

[134] The text of the Agreement can be found in IP/C/6.

[135] IP/C/M/2, para 5; IP/C/M/3, para.2; WT/GC/M/8, para. 4. The rules of procedure can be found in IP/C/1.

(a) Organizations granted observer status

- Food and Agriculture Organization (FAO)
- International Monetary Fund (IMF)
- International Union for the Protection of New Varieties of Plants (UPOV)
- Organization for Economic Cooperation and Development (OECD)
- United Nations (UN)
- United Nations Conference on Trade and Development (UNCTAD)
- World Bank
- World Customs Organization (WCO)
- World Intellectual Property Organization (WIPO)

(b) Organizations having ad hoc observer status

- World Health Organization (WHO)

3. Cooperation with WIPO

153. At its meeting of 11 December 1995, the Council for TRIPS approved the text of a proposed agreement between the World Intellectual Property Organization and the World Trade Organization, and agreed to submit it to the General Council for its approval. At its meeting on 13 December 1995, the General Council approved the proposed agreement.[136] The Agreement was signed on behalf of the organizations on 22 December 1995 and entered into force on 1 January 1996.

LXX. ARTICLE 69

A. TEXT OF ARTICLE 69

Article 69
International Cooperation

Members agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights. For this purpose, they shall establish and notify contact points in their administrations and be ready to exchange information on trade in infringing goods. They shall, in particular, promote the exchange of information and cooperation between customs authorities with regard to trade in counterfeit trademark goods and pirated copyright goods.

B. INTERPRETATION AND APPLICATION OF ARTICLE 69

1. Notification requirements

154. At its meeting of 21 September 1995 the Council for TRIPS adopted a common procedure for the notification of contact points that Members had established for the purposes of Article 69.[137]

LXXI. ARTICLE 70

A. TEXT OF ARTICLE 70

Article 70
Protection of Existing Subject Matter

1. This Agreement does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question.

2. Except as otherwise provided for in this Agreement, this Agreement gives rise to obligations in respect of all subject matter existing at the date of application of this Agreement for the Member in question, and which is protected in that Member on the said date, or which meets or comes subsequently to meet the criteria for protection under the terms of this Agreement. In respect of this paragraph and paragraphs 3 and 4, copyright obligations with respect to existing works shall be solely determined under Article 18 of the Berne Convention (1971), and obligations with respect to the rights of producers of phonograms and performers in existing phonograms shall be determined solely under Article 18 of the Berne Convention (1971) as made applicable under paragraph 6 of Article 14 of this Agreement.

3. There shall be no obligation to restore protection to subject matter which on the date of application of this Agreement for the Member in question has fallen into the public domain.

4. In respect of any acts in respect of specific objects embodying protected subject matter which become infringing under the terms of legislation in conformity with this Agreement, and which were commenced, or in respect of which a significant investment was made, before the date of acceptance of the WTO Agreement by that Member, any Member may provide for a limitation of the remedies available to the right holder as to the continued performance of such acts after the date of application of this Agreement for that Member. In such cases the Member shall, however, at least provide for the payment of equitable remuneration.

5. A Member is not obliged to apply the provisions of Article 11 and of paragraph 4 of Article 14 with respect

[136] IP/C/M/5, para.9; WT/GC/M/9, Section 1(e). The text of the agreement can be found in IP/C/6.
[137] IP/C/M/3, para. 27.

to originals or copies purchased prior to the date of application of this Agreement for that Member.

6. Members shall not be required to apply Article 31, or the requirement in paragraph 1 of Article 27 that patent rights shall be enjoyable without discrimination as to the field of technology, to use without the authorization of the right holder where authorization for such use was granted by the government before the date this Agreement became known.

7. In the case of intellectual property rights for which protection is conditional upon registration, applications for protection which are pending on the date of application of this Agreement for the Member in question shall be permitted to be amended to claim any enhanced protection provided under the provisions of this Agreement. Such amendments shall not include new matter.

8. Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

(a) notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed;

(b) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application; and

(c) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement, for those of these applications that meet the criteria for protection referred to in subparagraph (b).

9. Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for a period of five years after obtaining marketing approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.

B. INTERPRETATION AND APPLICATION OF ARTICLE 70

1. General

(a) Relationship between Article 70.1 and 70.2

155. In *Canada – Patent Term*, Canada argued that the grant of a patent term is an integral part of the act granting the patent in question. As such, Canada considered that the length of the patent terms falls within the scope of the term "act" contained in Article 70.1. From this, Canada concluded that the grant of the patent term is part of an act which occurred before the entry into force of the *TRIPS Agreement*, with the result that Article 33 did not apply. With respect to the relationship between Article 70.1 and 70.2, Canada argued that the phrase "except as otherwise provided for in this Agreement" demonstrates that Article 70.2 does not apply in this instance and that Article 70.1 takes precedence over Article 70.2. The Appellate Body rejected this argument:

> "Like the Panel, we see Articles 70.1 and 70.2 as dealing with two distinct and separate matters. The former deals with past 'acts', while the latter deals with 'subject-matter' existing on the applicable date of the TRIPS Agreement. Article 70.1 of the TRIPS Agreement operates only to exclude obligations in respect of 'acts which occurred' before the date of application of the TRIPS Agreement, but does not exclude rights and obligations in respect of continuing situations. On the contrary, 'subject matter existing . . . which is protected' is clearly a continuing situation, whether viewed as protected inventions, or as the patent rights attached to them. 'Subject matter existing . . . which is protected' is not within the scope of Article 70.1, and, therefore, the '[e]xcept as otherwise provided for' clause in Article 70.2 can have no application to it. Thus, for the sake of argument, even if there is a relationship between Article 70.1 and the opening proviso in Article 70.2, Canada's argument with respect to Old Act patents fails nonetheless, as we have concluded that the continuing rights relating to Old Act patents do not fall within the scope of Article 70.1.
>
> We wish to point out that our interpretation of Article 70 does not lead to a 'retroactive' application of the TRIPS Agreement. Article 70.1 alone addresses 'retroactive' circumstances, and it excludes them generally from the scope of the Agreement. The application of Article 33 to inventions protected under Old Act patents is justified under Article 70.2, not Article 70.1. A treaty applies to existing rights, even when those rights result from 'acts which occurred' before the treaty entered into force."[138]

[138] Appellate Body Report on *Canada – Patent Term*, paras. 69–70.

2. Article 70.1

(a) "acts which occurred before the date of application of the Agreement"

156. In *Canada – Patent Term*, in the context of juxtaposing the term "acts" under Article 70.1 and the term "subject-matter" under Article 70.2, the Appellate Body held with respect to the former:

> "Our main task is to give meaning to the phrase 'acts which occurred before the date of application' and to interpret Article 70.1 harmoniously with the rest of the provisions of Article 70. We are of the view that the term 'acts' has been used in Article 70.1 in its normal or ordinary sense of 'things done', 'deeds', 'actions' or 'operations'. In the context of 'acts' falling within the domain of intellectual property rights, the term 'acts' in Article 70.1 may, therefore, encompass the 'acts' of public authorities (that is, governments as well as their regulatory and administrative authorities) as well as the 'acts' of private or third parties. Examples of the 'acts' of public authorities may include, in the field of patents, the examination of patent applications, the grant or rejection of a patent, the revocation or forfeiture of a patent, the grant of a compulsory licence, the impounding by customs authorities of goods alleged to infringe the intellectual property rights of a holder, and the like. Examples of 'acts' of private or third parties may include 'acts' such as the filing of a patent application, infringement or other unauthorized use of a patent, unfair competition, or abuse of patent rights."[139]

157. The Appellate Body then reached a conclusion on the scope of application of Article 70.1:

> "We conclude, therefore, that Article 70.1 of the TRIPS Agreement cannot be interpreted to exclude existing rights, such as patent rights, even if such rights arose through acts which occurred before the date of application of the TRIPS Agreement for a Member. We, therefore, confirm the finding of the Panel that Article 70.1 does not exclude from the scope of the TRIPS Agreement Old Act patents [i.e. Canadian patents granted on the basis of patent applications filed before 1 October 1989] that existed on the date of application of the TRIPS Agreement for Canada."[140]

158. In reaching the previous conclusion, the Appellate Body relied both on the wording of Article 70.1 and on the object and purpose of the *TRIPS Agreement*:

> "The ordinary meaning of the term 'acts' suggests that the answer to this question must be no. An 'act' is something that is 'done', and the use of the phrase 'acts which occurred' suggests that what was done is now complete or ended. This excludes situations, including existing rights and obligations, that have *not* ended. Indeed, the title of Article 70, 'Protection of Existing Subject Matter', confirms contextually that the focus of Article 70 is on bringing within the scope of the *TRIPS Agreement* 'subject matter' which, on the date of the application of the Agreement for a Member, is existing and which meets the relevant criteria for protection under the Agreement.
>
> A contrary interpretation would seriously erode the scope of the other provisions of Article 70, especially the explicit provisions of Article 70.2. Almost any existing situation or right can be said to have arisen from one or more past 'acts'. For example, virtually all contractual and property rights could be said to arise from 'acts which occurred' in the past. If the phrase 'acts which occurred' were interpreted to cover all *continuing* situations involving patents which were granted before the date of application of the *TRIPS Agreement* for a Member, including such rights as those under Old Act patents, then Article 70.1 would preclude the application of virtually the whole of the *TRIPS Agreement* to rights conferred by the patents arising from such 'acts'. This is not consistent with the object and purpose of the *TRIPS Agreement*, as reflected in the Preamble of the Agreement."[141]

3. Article 70.2

(a) "subject matter existing at the date of application of this Agreement"

159. In *Canada – Patent Term*, the Appellate Body distinguished clearly between the term "acts" within Article 70.1 and the term "subject-matter" under Article 70.2. With respect to the latter term, the Appellate Body relied, *inter alia*, on the use of the term in other provisions of the *TRIPS Agreement*:

> "We agree with the Panel's reasoning that 'subject matter' in Article 70.2 refers, in the case of patents, to inventions. The ordinary meaning of the term 'subject-matter' is a 'topic dealt with or the subject represented in a debate, exposition, or work of art'. Useful context is provided by the qualification of the term 'subject matter', in the same sentence of Article 70.2, by the word 'protected', as well as by the phrase 'meet the criteria for protection under the terms of this Agreement' appearing later in the same sentence. As noted earlier, the title to Article 70 also uses the words 'Protection of Existing Subject Matter'. We can deduce, therefore, that the 'subject matter', for purposes of Article 70.2, is that which is 'protected', or 'meets the criteria for protection', under the terms of the TRIPS Agreement. As, in the present case, patents are the means of protection, then whatever patents protect must be the 'subject matter' to which Article 70.2 refers.
>
> Articles 27, 28, 31 and 34 of the *TRIPS Agreement* also use the words 'subject-matter' with respect to patents

[139] Appellate Body Report on *Canada – Patent Term*, para. 54.
[140] Appellate Body Report on *Canada – Patent Term*, para. 60.
[141] Appellate Body Report on *Canada – Patent Term*, paras. 58–59.

and provide an equally useful context for interpretation. Article 27, entitled 'Patentable Subject-matter', states: 'patents shall be available for any *inventions*' . . . . This Article identifies the criteria that an invention must fulfill in order to be eligible to receive a patent, and it also identifies the types of inventions that may be excluded from patentability even if they meet those criteria. On the other hand, in Articles 28, 31 and 34, the words 'subject-matter' relate to patents that are granted pursuant to the criteria in Article 27; that is to say, these Articles relate to inventions that are protected by patents granted, as distinguished from the 'patentable' inventions to which Article 27 refers. These Articles confirm the conclusion that *inventions* are the relevant 'subject-matter' in the case of patents, and that the 'subject-matter' in Article 70.2 means, in the case of patents, patentable or patented inventions. Article 70.2 thus gives rise to obligations in respect of all such inventions existing on the date of application of the *TRIPS Agreement* for a Member. In the appeal before us, where the measure in dispute is Section 45 of Canada's *Patent Act*, which applies to Old Act patents, the word 'subject-matter' means the inventions that were protected by those patents. We, therefore, confirm the conclusion of the Panel in this regard."[142]

4. Article 70.8

(a) "a means by which applications for patents for such inventions can be filed"

160. In *India – Patents (US)*, in reviewing the Panel's finding that the patent law of India was inconsistent with Article 70.8, the Appellate Body considered the meaning of the term "means" within the phrase "a means by which applications for patents for such inventions can be filed":

> "Article 70.8(a) imposes an obligation on Members to provide 'a means' by which mailbox applications can be filed 'from the date of entry into force of the WTO Agreement'. Thus, this obligation has been in force since 1 January 1995. The issue before us in this appeal is not whether this obligation exists or whether this obligation is now in force. Clearly, it exists, and, equally clearly, it is in force now. The issue before us in this appeal is: what precisely is the 'means' for filing mailbox applications that is contemplated and required by Article 70.8(a)?
>
> . . .
>
> We believe the Panel was correct in finding that the 'means' that the Member concerned is obliged to provide under Article 70.8(a) must allow for 'the entitlement to file mailbox applications and the allocation of filing and priority dates to them'. Furthermore, the Panel was correct in finding that the 'means' established under Article 70.8(a) must also provide 'a sound legal basis to preserve novelty and priority as of those dates'. These findings flow inescapably from the necessary operation of paragraphs (b) and (c) of Article 70.8."[143]

161. While the term "means" was held to include the notion of a "sound legal basis", the Appellate Body also found that such a "sound legal basis" did not have to provide for complete legal certainty with respect to the future grant of the relevant patent:

> "However, we do not agree with the Panel that Article 70.8(a) requires a Member to establish a means 'so as to eliminate any reasonable doubts regarding whether mailbox applications and eventual patents based on them could be rejected or invalidated because, at the filing or priority date, the matter for which protection was sought was unpatentable in the country in question'. India is entitled, by the 'transitional arrangements' in paragraphs 1, 2 and 4 of Article 65, to delay application of Article 27 for patents for pharmaceutical and agricultural chemical products until 1 January 2005. In our view, India is obliged, by Article 70.8(a), to provide a legal mechanism for the filing of mailbox applications that provides a sound legal basis to preserve both the novelty of the inventions and the priority of the applications as of the relevant filing and priority dates. No more."[144]

5. Article 70.9

(a) "exclusive marketing rights"

162. In *India – Patents (US)*, reviewing the Panel's finding that the patent law of India was inconsistent with Article 70.9, the Appellate Body addressed the relationship between Article 70.8(a) and 70.9:

> "By its terms, Article 70.9 applies only in situations where a product patent application is filed under Article 70.8(a). Like Article 70.8(a), Article 70.9 applies 'notwithstanding the provisions of Part VI'. Article 70.9 specifically refers to Article 70.8(a), and they operate in tandem to provide a package of rights and obligations that apply during the transitional periods contemplated in Article 65. It is obvious, therefore, that both Article 70.8(a) and Article 70.9 are intended to apply as from the date of entry into force of the WTO Agreement."[145]

163. In *India – Patents (EC)*, examining the EC claim under Article 70.9, the Panel addressed the argument by India that Article 70.9, referring only to the grant of "exclusive marketing rights", should be distinguished from e.g. the phrase "patents shall be available" under Article 27:

> "India essentially repeats its arguments in the previous case that the obligations under Article 70.9 should be

[142] Appellate Body Report on *Canada – Patent Term*, paras. 65–66.
[143] Appellate Body Report on *India – Patents (US)*, paras. 54 and 57.
[144] Appellate Body Report on *India – Patents (US)*, para. 58.
[145] Appellate Body Report on *India – Patents (US)*, para. 82.

distinguished from those under other provisions of the TRIPS Agreement because it uses the term 'exclusive marketing rights shall be granted . . .'. According to India, there is a material difference between this expression and such other expressions as 'patents shall be available . . .' in Article 27. We disagree. The Panel report in dispute WT/DS50 [*India – Patents (US)*] points out that the term 'right' connotes an entitlement to which a person has a just claim and that, as such, it implies general, non-discretionary availability in the case of those eligible to exercise it. It was held that an exclusive marketing right could not be 'granted' in a specific case unless it was 'available' in the first place. The Panel's view was upheld by the Appellate Body, and we do not see any reason to adopt a different position in the present case. In this connection, we would also note that India considers that exclusive marketing rights are to be granted in response to requests from those who are eligible. In our view, a request-based system of rights cannot operate effectively unless there is a mechanism in place that establishes general availability and enables such requests to be made."[146]

(b) Least-developed country Members

164. On 8 July 2002 the General Council adopted a waiver of the obligations of least-developed country Members under paragraph 9 of Article 70 with respect to pharmaceutical products until 1 January 2016.[147]

6. Relationship with other Articles

(a) Relationship between Section 5 of Part II and Article 70.2

165. In *Canada – Patent Term*, the Appellate Body addressed the relationship between Section 5 and Article 70.2:

"Article 70.2 applies the obligations of the TRIPS Agreement to 'all subject matter existing . . . and which is protected' on the date of application of the TRIPS Agreement for a Member. A Member is required, as from that date, to implement all obligations under the TRIPS Agreement in respect of such existing subject matter. This includes the obligation in Article 33. We see no basis in the text for isolating or insulating the obligation in Article 33 relating to the duration of a patent term from the other obligations relating to patents that are also found in Section 5 of the TRIPS Agreement. There is nothing whatsoever in Section 5 to indicate that the obligation relating to patent term in Article 33 differs in application in any respect from the other obligations in Section 5. An obligation that relates to duration must necessarily have a beginning and an end date. On that ground alone, it cannot be argued that the obligation is attached to, and arises uniquely from, certain 'acts'. Although Canada has not done so, it could just as easily be argued that the exclusive rights under Article 28 are also an 'integral part' of the 'act' of granting a patent, as those rights also can arise only from the grant and consequent existence of a patent."[148]

(b) Relationships between Articles 65 and 66 and Article 70.8 and 70.9

166. With respect to the relationship between Article 65 and Article 70.8, see paragraph 145 above. With respect to the relationship between Articles 65 and 66 and Article 70.9, see paragraph 146 above.

LXXII. ARTICLE 71

A. TEXT OF ARTICLE 71

Article 71
Review and Amendment

1. The Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65. The Council shall, having regard to the experience gained in its implementation, review it two years after that date, and at identical intervals thereafter. The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.

2. Amendments merely serving the purpose of adjusting to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted under those agreements by all Members of the WTO may be referred to the Ministerial Conference for action in accordance with paragraph 6 of Article X of the WTO Agreement on the basis of a consensus proposal from the Council for TRIPS.

B. INTERPRETATION AND APPLICATION OF ARTICLE 71

No jurisprudence or decision of a competent WTO body.

LXXIII. ARTICLE 72

A. TEXT OF ARTICLE 72

Article 72
Reservations

Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

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[146] Panel Report on *India – Patents (EC)*, para. 7.65.

[147] See the minutes of the General Council meeting in WT/GC/M/75. The text of the waiver can be found in WT/L/478. The Council for TRIPS approved the draft waiver at its meeting on 27 June 2002. See the minutes of its meeting in IP/C/M/36. At the same meeting, the Council for TRIPS adopted a decision extending the transition period under Article 66.1 for least-developed country Members for certain obligations with respect to pharmaceutical products. See paragraph 147 above.

[148] Appellate Body Report on *Canada – Patent Term*, para. 77.

B. INTERPRETATION AND APPLICATION OF ARTICLE 72

No jurisprudence or decision of a competent WTO body.

LXXIV. ARTICLE 73

A. TEXT OF ARTICLE 73

Article 73
Security Exceptions

Nothing in this Agreement shall be construed:

(a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

B. INTERPRETATION AND APPLICATION OF ARTICLE 73

No jurisprudence or decision of a competent WTO body.

LXXV. TEXT OF THE PROVISIONS OF THE PARIS CONVENTION (1967) INCORPORATED BY ARTICLE 2.1 OF THE TRIPS AGREEMENT

Article 1
[Establishment of the Union; Scope of Industrial Property][1]

(*footnote original*) [1] Articles have been given titles to facilitate their identification. There are no titles in the signed (French) text.

(1) The countries to which this Convention applies constitute a Union for the protection of industrial property.

(2) The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.

(3) Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.

(4) Patents shall include the various kinds of industrial patents recognized by the laws of the countries of the Union, such as patents of importation, patents of improvement, patents and certificates of addition, etc.

Article 2
[National Treatment for Nationals of Countries of the Union]

(1) Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.

(2) However, no requirement as to domicile or establishment in the country where protection is claimed may be imposed upon nationals of countries of the Union for the enjoyment of any industrial property rights.

(3) The provisions of the laws of each of the countries of the Union relating to judicial and administrative procedure and to jurisdiction, and to the designation of an address for service or the appointment of an agent, which may be required by the laws on industrial property are expressly reserved.

Article 3
[Same Treatment for Certain Categories of Persons as for Nationals of Countries of the Union]

Nationals of countries outside the Union who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the countries of the Union shall be treated in the same manner as nationals of the countries of the Union.

Article 4
[A to I. *Patents, Utility Models, Industrial Designs, Marks, Inventors' Certificates:* Right of Priority. – G. *Patents:* Division of the Application]

A.—

(1) Any person who has duly filed an application for a patent, or for the registration of a utility model, or

of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed.

(2) Any filing that is equivalent to a regular national filing under the domestic legislation of any country of the Union or under bilateral or multilateral treaties concluded between countries of the Union shall be recognized as giving rise to the right of priority.

(3) By a regular national filing is meant any filing that is adequate to establish the date on which the application was filed in the country concerned, whatever may be the subsequent fate of the application.

B.—

Consequently, any subsequent filing in any of the other countries of the Union before the expiration of the periods referred to above shall not be invalidated by reason of any acts accomplished in the interval, in particular, another filing, the publication or exploitation of the invention, the putting on sale of copies of the design, or the use of the mark, and such acts cannot give rise to any third-party right or any right of personal possession. Rights acquired by third parties before the date of the first application that serves as the basis for the right of priority are reserved in accordance with the domestic legislation of each country of the Union

C.—

(1) The periods of priority referred to above shall be twelve months for patents and utility models, and six months for industrial designs and trademarks.

(2) These periods shall start from the date of filing of the first application; the day of filing shall not be included in the period.

(3) If the last day of the period is an official holiday, or a day when the Office is not open for the filing of applications in the country where protection is claimed, the period shall be extended until the first following working day.

(4) A subsequent application concerning the same subject as a previous first application within the meaning of paragraph (2), above, filed in the same country of the Union shall be considered as the first application, of which the filing date shall be the starting point of the period of priority, if, at the time of filing the subsequent application, the said previous application has been withdrawn, abandoned, or refused, without having been laid open to public inspection and without leaving any rights outstanding, and if it has not yet served as a basis for claiming a right of priority. The previous application may not thereafter serve as a basis for claiming a right of priority.

D.—

(1) Any person desiring to take advantage of the priority of a previous filing shall be required to make a declaration indicating the date of such filing and the country in which it was made. Each country shall determine the latest date on which such declaration must be made.

(2) These particulars shall be mentioned in the publications issued by the competent authority, and in particular in the patents and the specifications relating thereto.

(3) The countries of the Union may require any person making a declaration of priority to produce a copy of the application (description, drawings, etc.) previously filed. The copy, certified as correct by the authority which received such application, shall not require any authentication, and may in any case be filed, without fee, at any time within three months of the filing of the subsequent application. They may require it to be accompanied by a certificate from the same authority showing the date of filing, and by a translation.

(4) No other formalities may be required for the declaration of priority at the time of filing the application. Each country of the Union shall determine the consequences of failure to comply with the formalities prescribed by this Article, but such consequences shall in no case go beyond the loss of the right of priority.

(5) Subsequently, further proof may be required.

Any person who avails himself of the priority of a previous application shall be required to specify the number of that application; this number shall be published as provided for by paragraph (2), above.

E.—

(1) Where an industrial design is filed in a country by virtue of a right of priority based on the filing of a utility model, the period of priority shall be the same as that fixed for industrial designs

(2) Furthermore, it is permissible to file a utility model in a country by virtue of a right of priority based on the filing of a patent application, and vice versa.

F.—

No country of the Union may refuse a priority or a patent application on the ground that the applicant claims multiple priorities, even if they originate in different countries, or on the ground that an application claiming one or more priorities contains one or more elements that were not included in the application or applications whose priority is claimed, provided that, in both cases, there is unity of invention within the meaning of the law of the country.

With respect to the elements not included in the application or applications whose priority is claimed, the filing of the subsequent application shall give rise to a right of priority under ordinary conditions.

G.—

(1) If the examination reveals that an application for a patent contains more than one invention, the applicant may divide the application into a certain number of divisional applications and preserve as the date of each the date of the initial application and the benefit of the right of priority, if any.

(2) The applicant may also, on his own initiative, divide a patent application and preserve as the date of each divisional application the date of the initial application and the benefit of the right of priority, if any. Each country of the Union shall have the right to determine the conditions under which such division shall be authorized.

H.—

Priority may not be refused on the ground that certain elements of the invention for which priority is claimed do not appear among the claims formulated in the application in the country of origin, provided that the application documents as a whole specifically disclose such elements.

I.—

(1) Applications for inventors' certificates filed in a country in which applicants have the right to apply at their own option either for a patent or for an inventor's certificate shall give rise to the right of priority provided for by this Article, under the same conditions and with the same effects as applications for patents.

(2) In a country in which applicants have the right to apply at their own option either for a patent or for an inventor's certificate, an applicant for an inventor's certificate shall, in accordance with the provisions of this Article relating to patent applications, enjoy a right of priority based on an application for a patent, a utility model, or an inventor's certificate.

Article 4*bis*
[*Patents:* Independence of Patents Obtained for the Same Invention in Different Countries]

(1) Patents applied for in the various countries of the Union by nationals of countries of the Union shall be independent of patents obtained for the same invention in other countries, whether members of the Union or not.

(2) The foregoing provision is to be understood in an unrestricted sense, in particular, in the sense that patents applied for during the period of priority are independent, both as regards the grounds for nullity and forfeiture, and as regards their normal duration.

(3) The provision shall apply to all patents existing at the time when it comes into effect.

(4) Similarly, it shall apply, in the case of the accession of new countries, to patents in existence on either side at the time of accession.

(5) Patents obtained with the benefit of priority shall, in the various countries of the Union, have a duration equal to that which they would have, had they been applied for or granted without the benefit of priority.

Article 4*ter*
[*Patents:* Mention of the Inventor in the Patent]

The inventor shall have the right to be mentioned as such in the patent.

Article 4*quater*
[*Patents:* Patentability in Case of Restrictions of Sale by Law]

The grant of a patent shall not be refused and a patent shall not be invalidated on the ground that the sale of the patented product or of a product obtained by means of a patented process is subject to restrictions or limitations resulting from the domestic law.

Article 5
[A. *Patents:* Importation of Articles; Failure to Work or Insufficient Working; Compulsory Licences. – B. *Industrial Designs:* Failure to Work; Importation of Articles. – C. *Marks:* Failure to Use; Different Forms; Use by Co-proprietors. – D. *Patents, Utility Models, Marks, Industrial Designs:* Marking]

A.—

(1) Importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail forfeiture of the patent.

(2) Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.

(3) Forfeiture of the patent shall not be provided for except in cases where the grant of compulsory licenses would not have been sufficient to prevent the said abuses. No proceedings for the forfeiture or revocation of a patent may be instituted before the expiration of two years from the grant of the first compulsory license.

(4) A compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent,

whichever period expires last; it shall be refused if the patentee justifies his inaction by legitimate reasons. Such a compulsory license shall be non-exclusive and shall not be transferable, even in the form of the grant of a sub–license, except with that part of the enterprise or good/will which exploits such license.

(5) The foregoing provisions shall be applicable, mutatis mutandis, to utility models.

B.—

The protection of industrial designs shall not, under any circumstance, be subject to any forfeiture, either by reason of failure to work or by reason of the importation of articles corresponding to those which are protected.

C.—

(1) If, in any country, use of the registered mark is compulsory, the registration may be cancelled only after a reasonable period, and then only if the person concerned does not justify his inaction.

(2) Use of a trademark by the proprietor in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered in one of the countries of the Union shall not entail invalidation of the registration and shall not diminish the protection granted to the mark.

(3) Concurrent use of the same mark on identical or similar goods by industrial or commercial establishments considered as co-proprietors of the mark according to the provisions of the domestic law of the country where protection is claimed shall not prevent registration or diminish in any way the protection granted to the said mark in any country of the Union, provided that such use does not result in misleading the public and is not contrary to the public interest.

D.—

No indication or mention of the patent, of the utility model, of the registration of the trademark, or of the deposit of the industrial design, shall be required upon the goods as a condition of recognition of the right to protection.

Article 5*bis*
[*All Industrial Property Rights:* Period of Grace for the Payment of Fees for the Maintenance of Rights; *Patents:* Restoration]

(1) A period of grace of not less than six months shall be allowed for the payment of the fees prescribed for the maintenance of industrial property rights, subject, if the domestic legislation so provides, to the payment of a surcharge.

(2) The countries of the Union shall have the right to provide for the restoration of patents which have lapsed by reason of non-payment of fees.

Article 5*ter*
[*Patents:* Patented Devices Forming Part of Vessels, Aircraft, or Land Vehicles]

In any country of the Union the following shall not be considered as infringements of the rights of a patentee:

1. the use on board vessels of other countries of the Union of devices forming the subject of his patent in the body of the vessel, in the machinery, tackle, gear and other accessories, when such vessels temporarily or accidentally enter the waters of the said country, provided that such devices are used there exclusively for the needs of the vessel;

2. the use of devices forming the subject of the patent in the construction or operation of aircraft or land vehicles of other countries of the Union, or of accessories of such aircraft or land vehicles, when those aircraft or land vehicles temporarily or accidentally enter the said country.

Article 5*quater*
[*Patents:* Importation of Products Manufactured by a Process Patented in the Importing Country]

When a product is imported into a country of the Union where there exists a patent protecting a process of manufacture of the said product, the patentee shall have all the rights, with regard to the imported product, that are accorded to him by the legislation of the country of importation, on the basis of the process patent, with respect to products manufactured in that country.

Article 5*quinquies*
[*Industrial Designs*]

Industrial designs shall be protected in all the countries of the Union.

Article 6
[*Marks:* Conditions of Registration; Independence of Protection of Same Mark in Different Countries]

(1) The conditions for the filing and registration of trademarks shall be determined in each country of the Union by its domestic legislation.

(2) However, an application for the registration of a mark filed by a national of a country of the Union in any country of the Union may not be refused, nor may a registration be invalidated, on the ground that filing, registration, or renewal, has not been effected in the country of origin.

(3) A mark duly registered in a country of the Union shall be regarded as independent of marks registered in the other countries of the Union, including the country of origin.

Article 6*bis*
[*Marks:* Well–Known Marks]

(1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well–known mark or an imitation liable to create confusion therewith.

(2) A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested.

(3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.

Article 6*ter*
[*Marks:* Prohibitions concerning State Emblems, Official Hallmarks, and Emblems of Intergovernmental Organizations]

(1)

(a) The countries of the Union agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.

(b) The provisions of subparagraph *(a)*, above, shall apply equally to armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations of which one or more countries of the Union are members, with the exception of armorial bearings, flags, other emblems, abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection.

(c) No country of the Union shall be required to apply the provisions of subparagraph *(b)*, above, to the prejudice of the owners of rights acquired in good faith before the entry into force, in that country, of this Convention. The countries of the Union shall not be required to apply the said provisions when the use or registration referred to in subparagraph *(a)*, above, is not of such a nature as to suggest to the public that a connection exists between the organization concerned and the armorial bearings, flags, emblems, abbreviations, and names, or if such use or registration is probably not of such a nature as to mislead the public as to the existence of a connection between the user and the organization.

(2) Prohibition of the use of official signs and hallmarks indicating control and warranty shall apply solely in cases where the marks in which they are incorporated are intended to be used on goods of the same or a similar kind.

(3)

(a) For the application of these provisions, the countries of the Union agree to communicate reciprocally, through the intermediary of the International Bureau, the list of State emblems, and official signs and hallmarks indicating control and warranty, which they desire, or may hereafter desire, to place wholly or within certain limits under the protection of this Article, and all subsequent modifications of such list. Each country of the Union shall in due course make available to the public the lists so communicated. Nevertheless such communication is not obligatory in respect of flags of States.

(b) The provisions of subparagraph *(b)* of paragraph (1) of this Article shall apply only to such armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations as the latter have communicated to the countries of the Union through the intermediary of the International Bureau.

(4) Any country of the Union may, within a period of twelve months from the receipt of the notification, transmit its objections, if any, through the intermediary of the International Bureau, to the country or international intergovernmental organization concerned.

(5) In the case of State flags, the measures prescribed by paragraph (1), above, shall apply solely to marks registered after November 6, 1925.

(6) In the case of State emblems other than flags, and of official signs and hallmarks of the countries of the Union, and in the case of armorial bearings, flags, other emblems. abbreviations, and names, of international intergovernmental organizations, these provisions shall apply only to marks registered more than two months after receipt of the communication provided for in paragraph (3), above.

(7) In cases of bad faith, the countries shall have the right to cancel even those marks incorporating State emblems, signs, and hallmarks, which were registered before November 6, 1925.

(8) Nationals of any country who are authorized to make use of the State emblems, signs, and hallmarks, of

their country may use them even if they are similar to those of another country.

(9) The countries of the Union undertake to prohibit the unauthorized use in trade of the State armorial bearings of the other countries of the Union, when the use is of such a nature as to be misleading as to the origin of the goods.

(10) The above provisions shall not prevent the countries from exercising the right given in paragraph (3) of Article 6*quinquies*, Section B, to refuse or to invalidate the registration of marks incorporating, without authorization, armorial bearings, flags, other State emblems, or official signs and hallmarks adopted by a country of the Union, as well as the distinctive signs of international intergovernmental organizations referred to in paragraph (1), above.

Article 6*quater*
[*Marks:* Assignment of Marks]

(1) When, in accordance with the law of a country of the Union, the assignment of a mark is valid only if it takes place at the same time as the transfer of the business or goodwill to which the mark belongs, it shall suffice for the recognition of such validity that the portion of the business or goodwill located in that country be transferred to the assignee, together with the exclusive right to manufacture in the said country, or to sell therein, the goods bearing the mark assigned.

(2) The foregoing provision does not impose upon the countries of the Union any obligation to regard as valid the assignment of any mark the use of which by the assignee would, in fact, be of such a nature as to mislead the public, particularly as regards the origin, nature, or essential qualities, of the goods to which the mark is applied.

Article 6*quinquies*
[*Marks:* Protection of Marks Registered in One Country of the Union in the Other Countries of the Union]

A.—

(1) Every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, subject to the reservations indicated in this Article. Such countries may, before proceeding to final registration, require the production of a certificate of registration in the country of origin, issued by the competent authority. No authentication shall be required for this certificate.

(2) Shall be considered the country of origin the country of the Union where the applicant has a real and effective industrial or commercial establishment, or, if he has no such establishment within the Union, the country of the Union where he has his domicile, or, if he has no domicile within the Union but is a national of a country of the Union, the country of which he is a national.

B.—

Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases:

1. when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed;

2. when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed;

3. when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.

This provision is subject, however, to the application of Article 10*bis*.

C.—

(1) In determining whether a mark is eligible for protection, all the factual circumstances must be taken into consideration, particularly the length of time the mark has been in use.

(2) No trademark shall be refused in the other countries of the Union for the sole reason that it differs from the mark protected in the country of origin only in respect of elements that do not alter its distinctive character and do not affect its identity in the form in which it has been registered in the said country of origin.

D.—

No person may benefit from the provisions of this Article if the mark for which he claims protection is not registered in the country of origin.

E.—

However, in no case shall the renewal of the registration of the mark in the country of origin involve an obligation to renew the registration in the other countries of the Union in which the mark has been registered.

F.—

The benefit of priority shall remain unaffected for applications for the registration of marks filed within the period fixed by Article 4, even if registration in the country of origin is effected after the expiration of such period.

Article 6*sexies*
[*Marks:* Service Marks]

The countries of the Union undertake to protect service marks. They shall not be required to provide for the registration of such marks.

Article 6*septies*
[*Marks:* Registration in the Name of the Agent or Representative of the Proprietor Without the Latter's Authorization]

(1) If the agent or representative of the person who is the proprietor of a mark in one of the countries of the Union applies, without such proprietor's authorization, for the registration of the mark in his own name, in one or more countries of the Union, the proprietor shall be entitled to oppose the registration applied for or demand its cancellation or, if the law of the country so allows, the assignment in his favor of the said registration, unless such agent or representative justifies his action.

(2) The proprietor of the mark shall, subject to the provisions of paragraph (1), above, be entitled to oppose the use of his mark by his agent or representative if he has not authorized such use.

(3) Domestic legislation may provide an equitable time limit within which the proprietor of a mark must exercise the rights provided for in this Article.

Article 7
[*Marks:* Nature of the Goods to which the Mark is Applied]

The nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark.

Article 7*bis*
[*Marks:* Collective Marks]

(1) The countries of the Union undertake to accept for filing and to protect collective marks belonging to associations the existence of which is not contrary to the law of the country of origin, even if such associations do not possess an industrial or commercial establishment.

(2) Each country shall be the judge of the particular conditions under which a collective mark shall be protected and may refuse protection if the mark is contrary to the public interest.

(3) Nevertheless, the protection of these marks shall not be refused to any association the existence of which is not contrary to the law of the country of origin, on the ground that such association is not established in the country where protection is sought or is not constituted according to the law of the latter country.

Article 8
[*Trade Names*]

A trade name shall be protected in all the countries of the Union without the obligation of filing or registration, whether or not it forms part of a trademark.

Article 9
[*Marks, Trade Names:* Seizure, on Importation, etc., of Goods Unlawfully Bearing a Mark or Trade Name]

(1) All goods unlawfully bearing a trademark or trade name shall be seized on importation into those countries of the Union where such mark or trade name is entitled to legal protection.

(2) Seizure shall likewise be effected in the country where the unlawful affixation occurred or in the country into which the goods were imported.

(3) Seizure shall take place at the request of the public prosecutor, or any other competent authority, or any interested party, whether a natural person or a legal entity, in conformity with the domestic legislation of each country.

(4) The authorities shall not be bound to effect seizure of goods in transit.

(5) If the legislation of a country does not permit seizure on importation, seizure shall be replaced by prohibition of importation or by seizure inside the country.

(6) If the legislation of a country permits neither seizure on importation nor prohibition of importation nor seizure inside the country, then, until such time as the legislation is modified accordingly, these measures shall be replaced by the actions and remedies available in such cases to nationals under the law of such country.

Article 10
[*False Indications:* Seizure, on Importation, etc., of Goods Bearing False Indications as to their Source or the Identity of the Producer]

(1) The provisions of the preceding Article shall apply in cases of direct or indirect use of a false indication of the source of the good or the identity of the producer, manufacturer, or merchant.

(2) Any producer, manufacturer, or merchant, whether a natural person or a legal entity, engaged in the production or manufacture of or trade in such goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of source is used, shall in any case be deemed an interested party.

Article 10*bis*
[*Unfair Competition*]

(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;

2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;

3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

Article 10*ter*
[*Marks, Trade Names, False Indications, Unfair Competition:* Remedies, Right to Sue]

(1) The countries of the Union undertake to assure to nationals of the other countries of the Union appropriate legal remedies effectively to repress all the acts referred to in Articles 9, 10, and 10*bis*.

(2) They undertake, further, to provide measures to permit federations and associations representing interested industrialists, producers, or merchants, provided that the existence of such federations and associations is not contrary to the laws of their countries, to take action in the courts or before the administrative authorities, with a view to the repression of the acts referred to in Articles 9, 10 and 10*bis*, in so far as the law of the country in which protection is claimed allows such action by federations and associations of that country.

Article 11
[*Inventions, Utility Models, Industrial Designs, Marks:* Temporary Protection at Certain International Exhibitions]

(1) The countries of the Union shall, in conformity with their domestic legislation, grant temporary protection to patentable inventions, utility models, industrial designs, and trademarks, in respect of goods exhibited at official or officially recognized international exhibitions held in the territory of any of them.

(2) Such temporary protection shall not extend the periods provided by Article 4. If, later, the right of priority is invoked, the authorities of any country may provide that the period shall start from the date of introduction of the goods into the exhibition.

(3) Each country may require. as proof of the identity of the article exhibited and of the date of its introduction, such documentary evidence as it considers necessary.

Article 12
[Special National Industrial Property Services]

(1) Each country of the Union undertakes to establish a special industrial property service and a central office for the communication to the public of patents, utility models, industrial designs, and trademarks.

(2) This service shall publish an official periodical journal. It shall publish regularly:

(a) the names of the proprietors of patents granted, with a brief designation of the inventions patented;

(b) the reproductions of registered trademarks.

. . .

Article 19
[Special Agreements]

It is understood that the countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention.

. . .

LXXVI. TEXT OF THE PROVISIONS OF THE BERNE CONVENTION (1971) INCORPORATED BY ARTICLE 9.1 OF THE TRIPS AGREEMENT

Article 1
[*Establishment of a Union*][1]

(*footnote original*) Each Article and the Appendix have been given titles to facilitate their identification. There are no titles in the signed (English) text.

The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.

Article 2

[*Protected Works:* 1. "Literary and artistic works"; 2. Possible requirement of fixation; 3. Derivative works; 4. Official texts; 5. Collections; 6. Obligation to protect; beneficiaries of protection; 7. Works of applied art and industrial designs; 8. News]

(1) The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

(2) It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.

(3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

(4) It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.

(5) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

(6) The works mentioned in this Article shall enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title.

(7) Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.

(8) The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.

Article 2*bis*

[*Possible Limitation of Protection of Certain Works:* 1. Certain speeches; 2. Certain uses of lectures and addresses; 3. Right to make collections of such works]

(1) It shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings.

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11*bis*(1) of this Convention, when such use is justified by the informatory purpose.

(3) Nevertheless, the author shall enjoy the exclusive right of making a collection of his works mentioned in the preceding paragraphs.

Article 3

[*Criteria of Eligibility for Protection:* 1. Nationality of author; place of publication of work; 2. Residence of author; 3. "Published" works; 4. "Simultaneously published" works]

(1) The protection of this Convention shall apply to:

(a) authors who are nationals of one of the countries of the Union, for their works, whether published or not;

(b) authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union.

(2) Authors who are not nationals of one of the countries of the Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country.

(3) The expression "published works" means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that

the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.

(4) A work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication.

Article 4

[*Criteria of Eligibility for Protection of Cinematographic Works, Works of Architecture and Certain Artistic Works*]

The protection of this Convention shall apply, even if the conditions of Article 3 are not fulfilled, to:

(a) authors of cinematographic works the maker of which has his headquarters or habitual residence in one of the countries of the Union;

(b) authors of works of architecture erected in a country of the Union or of other artistic works incorporated in a building or other structure located in a country of the Union.

Article 5

[*Rights Guaranteed:* 1. and 2. Outside the country of origin; 3. In the country of origin; 4. "Country of origin"]

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.

(4) The country of origin shall be considered to be:

(a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;

(b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;

(c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:

(i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and

(ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

Article 6

[*Possible Restriction of Protection in Respect of Certain Works of Nationals of Certain Countries Outside the Union:* 1. In the country of the first publication and in other countries; 2. No retroactivity; 3. Notice]

(1) Where any country outside the Union fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union, the latter country may restrict the protection given to the works of authors who are, at the date of the first publication thereof, nationals of the other country and are not habitually resident in one of the countries of the Union. If the country of first publication avails itself of this right, the other countries of the Union shall not be required to grant to works thus subjected to special treatment a wider protection than that granted to them in the country of first publication.

(2) No restrictions introduced by virtue of the preceding paragraph shall affect the rights which an author may have acquired in respect of a work published in a country of the Union before such restrictions were put into force.

(3) The countries of the Union which restrict the grant of copyright in accordance with this Article shall give notice thereof to the Director General of the World Intellectual Property Organization (hereinafter designated as "the Director General") by a written declaration specifying the countries in regard to which protection is restricted, and the restrictions to which rights of authors

who are nationals of those countries are subjected. The Director General shall immediately communicate this declaration to all the countries of the Union.

Article 7

[*Term of Protection:* 1. Generally; 2. For cinematographic works; 3. For anonymous and pseudonymous works; 4. For photographic works and works of applied art; 5. Starting date of computation; 6. Longer terms; 7. Shorter terms; 8. Applicable law; "comparison" of terms]

(1) The term of protection granted by this Convention shall be the life of the author and fifty years after his death.

(2) However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making.

(3) In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses his identity during the above-mentioned period, the term of protection applicable shall be that provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.

(4) It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.

(5) The term of protection subsequent to the death of the author and the terms provided by paragraphs (2), (3) and (4) shall run from the date of death or of the event referred to in those paragraphs, but such terms shall always be deemed to begin on the first of January of the year following the death or such event.

(6) The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.

(7) Those countries of the Union bound by the Rome Act of this Convention which grant, in their national legislation in force at the time of signature of the present Act, shorter terms of protection than those provided for in the preceding paragraphs shall have the right to maintain such terms when ratifying or acceding to the present Act.

(8) In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.

Article 7*bis*

[*Term of Protection for Works of Joint Authorship*]

The provisions of the preceding Article shall also apply in the case of a work of joint authorship, provided that the terms measured from the death of the author shall be calculated from the death of the last surviving author.

Article 8

[*Right of Translation*]

Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works.

Article 9

[*Right of Reproduction:* 1. Generally; 2. Possible exceptions; 3. Sound and visual recordings]

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Article 10

[*Certain Free Uses of Works:* 1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author]

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or

to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

Article 10*bis*

[*Further Possible Free Uses of Works:* 1. Of certain articles and broadcast works; 2. Of works seen or heard in connection with current events]

(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

Article 11

[*Certain Rights in Dramatic and Musical Works:* 1. Right of public performance and of communication to the public of a performance; 2. In respect of translations]

(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

(i) the public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works.

(2) Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

Article 11*bis*

[*Broadcasting and Related Rights:* 1. Broadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast, public communication of broadcast by loudspeaker or analogous instruments; 2. Compulsory licences; 3. Recording; ephemeral recordings]

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation.

Article 11*ter*

[*Certain Rights in Literary Works:* 1. Right of public recitation and of communication to the public of a recitation; 2. In respect of translations]

(1) Authors of literary works shall enjoy the exclusive right of authorizing:

(i) the public recitation of their works, including such public recitation by any means or process;

(ii) any communication to the public of the recitation of their works.

(2) Authors of literary works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

Article 12
[*Right of Adaptation, Arrangement and Other Alteration*]

Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.

Article 13
[*Possible Limitation of the Right of Recording of Musical Works and Any Words Pertaining Thereto:* 1. Compulsory licences; 2. Transitory measures; 3. Seizure on importation of copies made without the author's permission]

(1) Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(2) Recordings of musical works made in a country of the Union in accordance with Article 13(3) of the Conventions signed at Rome on June 2, 1928, and at Brussels on June 26, 1948, may be reproduced in that country without the permission of the author of the musical work until a date two years after that country becomes bound by this Act.

(3) Recordings made in accordance with paragraphs (1) and (2) of this Article and imported without permission from the parties concerned into a country where they are treated as infringing recordings shall be liable to seizure.

Article 14
[*Cinematographic and Related Rights:* 1. Cinematographic adaptation and reproduction; distribution; public performance and public communication by wire of works thus adapted or reproduced; 2. Adaptation of cinematographic productions; 3. No compulsory licences]

(1) Authors of literary or artistic works shall have the exclusive right of authorizing:

(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;

(ii) the public performance and communication to the public by wire of the works thus adapted or reproduced.

(2) The adaptation into any other artistic form of a cinematographic production derived from literary or artistic works shall, without prejudice to the authorization of the author of the cinematographic production, remain subject to the authorization of the authors of the original works.

(3) The provisions of Article 13(1) shall not apply.

Article 14*bis*
[*Special Provisions Concerning Cinematographic Works:* 1. Assimilation to "original" works; 2. Ownership; limitation of certain rights of certain contributors; 3. Certain other contributors]

(1) Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article.

(2)

(a) Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed.

(b) However, in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.

(c) The question whether or not the form of the undertaking referred to above should, for the application of the preceding subparagraph *(b)*, be in a written agreement or a written act of the same effect shall be a matter for the legislation of the country where the maker of the cinematographic work has his headquarters or habitual residence. However, it shall be a matter for the legislation of the country of the Union where protection is claimed to provide that the said undertaking shall be in a written agreement or a written act of the same effect. The countries whose legislation so provides shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

(d) By "contrary or special stipulation" is meant any restrictive condition which is relevant to the aforesaid undertaking.

(3) Unless the national legislation provides to the contrary, the provisions of paragraph (2)*(b)* above shall not be applicable to authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof. However, those countries of the Union whose legislation does not contain rules providing for the application of the said paragraph (2)*(b)* to such director shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

Article 14*ter*

[*"Droit de suite" in Works of Art and Manuscripts:* 1. Right to an interest in resales; 2. Applicable law; 3. Procedure]

(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

Article 15

[*Right to Enforce Protected Rights:* 1. Where author's name is indicated or where pseudonym leaves no doubt as to author's identity; 2. In the case of cinematographic works; 3. In the case of anonymous and pseudonymous works; 4. In the case of certain unpublished works of unknown authorship]

(1) In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner. This paragraph shall be applicable even if this name is a pseudonym, where the pseudonym adopted by the author leaves no doubt as to his identity.

(2) The person or body corporate whose name appears on a cinematographic work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the maker of the said work.

(3) In the case of anonymous and pseudonymous works, other than those referred to in paragraph (1) above, the publisher whose name appears on the work shall, in the absence of proof to the contrary, be deemed to represent the author, and in this capacity he shall be entitled to protect and enforce the author's rights. The provisions of this paragraph shall cease to apply when the author reveals his identity and establishes his claim to authorship of the work.

(4)

(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

Article 16

[*Infringing Copies:* 1. Seizure; 2. Seizure on importation; 3. Applicable law]

(1) Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection.

(2) The provisions of the preceding paragraph shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected.

(3) The seizure shall take place in accordance with the legislation of each country.

Article 17

[*Possibility of Control of Circulation, Presentation and Exhibition of Works*]

The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.

Article 18

[*Works Existing on Convention's Entry Into Force:* 1. Protectable where protection not yet expired in country of origin; 2. Non-protectable where protection already expired in country where it is claimed; 3. Application of these principles; 4. Special cases]

(1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.

(2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.

(3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

(4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.

Article 19

[*Protection Greater than Resulting from Convention*]

The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.

Article 20

[*Special Agreements Among Countries of the Union*]

The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.

Article 21

[*Special Provisions Regarding Developing Countries:* 1. Reference to Appendix; 2. Appendix part of Act]

(1) Special provisions regarding developing countries are included in the Appendix.

(2) Subject to the provisions of Article 28(1)*(b)*, the Appendix forms an integral part of this Act.

. . .

APPENDIX

[SPECIAL PROVISIONS REGARDING DEVELOPING COUNTRIES]

Article I

[*Faculties Open to Developing Countries:* 1. Availability of certain faculties; declaration; 2. Duration of effect of declaration; 3. Cessation of developing country status; 4. Existing stocks of copies; 5. Declarations concerning certain territories; 6. Limits of reciprocity]

(1) Any country regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations which ratifies or accedes to this Act, of which this Appendix forms an integral part, and which, having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a position to make provision for the protection of all the rights as provided for in this Act, may, by a notification deposited with the Director General at the time of depositing its instrument of ratification or accession or, subject to Article V(1)*(c)*, at any time thereafter, declare that it will avail itself of the faculty provided for in Article II, or of the faculty provided for in Article III, or of both of those faculties. It may, instead of availing itself of the faculty provided for in Article II, make a declaration according to Article V(1)*(a)*.

(2)

(a) Any declaration under paragraph (1) notified before the expiration of the period of ten years from the entry into force of Articles 1 to 21 and this Appendix according to Article 28(2) shall be effective until the expiration of the said period. Any such declaration may be renewed in whole or in part for periods of ten years each by a notification deposited with the Director General not more than fifteen months and not less than three months before the expiration of the ten-year period then running.

(b) Any declaration under paragraph (1) notified after the expiration of the period of ten years from the entry into force of Articles 1 to 21 and this Appendix according to Article 28(2) shall be effective until the expiration of the ten-year period then running. Any such declaration may be renewed as provided for in the second sentence of subparagraph (a).

(3) Any country of the Union which has ceased to be regarded as a developing country as referred to in paragraph (1) shall no longer be entitled to renew its declaration as provided in paragraph (2), and, whether or not it formally withdraws its declaration, such country shall be precluded from availing itself of the faculties referred to in paragraph (1) from the expiration of the ten-year period then running or from the expiration of a

period of three years after it has ceased to be regarded as a developing country, whichever period expires later.

(4) Where, at the time when the declaration made under paragraph (1) or (2) ceases to be effective, there are copies in stock which were made under a license granted by virtue of this Appendix, such copies may continue to be distributed until their stock is exhausted.

(5) Any country which is bound by the provisions of this Act and which has deposited a declaration or a notification in accordance with Article 31(1) with respect to the application of this Act to a particular territory, the situation of which can be regarded as analogous to that of the countries referred to in paragraph (1), may, in respect of such territory, make the declaration referred to in paragraph (1) and the notification of renewal referred to in paragraph (2). As long as such declaration or notification remains in effect, the provisions of this Appendix shall be applicable to the territory in respect of which it was made.

(6)

(a) The fact that a country avails itself of any of the faculties referred to in paragraph (1) does not permit another country to give less protection to works of which the country of origin is the former country than it is obliged to grant under Articles 1 to 20.

(b) The right to apply reciprocal treatment provided for in Article 30(2)*(b)*, second sentence, shall not, until the date on which the period applicable under Article I(3) expires, be exercised in respect of works the country of origin of which is a country which has made a declaration according to Article V(1)*(a)*.

Article II

[*Limitations on the Right of Translation:* 1. Licences grantable by competent authority; 2. to 4. Conditions allowing the grant of such licences; 5. Purposes for which licences may be granted; 6. Termination of licences; 7. Works composed mainly of illustrations; 8. Works withdrawn from circulation; 9. Licences for broadcasting organizations]

(1) Any country which has declared that it will avail itself of the faculty provided for in this Article shall be entitled, so far as works published in printed or analogous forms of reproduction are concerned, to substitute for the exclusive right of translation provided for in Article 8 a system of non-exclusive and non-transferable licenses, granted by the competent authority under the following conditions and subject to Article IV.

(2)

(a) Subject to paragraph (3), if, after the expiration of a period of three years, or of any longer period determined by the national legislation of the said country, commencing on the date of the first publication of the work, a translation of such work has not been published in a language in general use in that country by the owner of the right of translation, or with his authorization, any national of such country may obtain a license to make a translation of the work in the said language and publish the translation in printed or analogous forms of reproduction.

(b) A license under the conditions provided for in this Article may also be granted if all the editions of the translation published in the language concerned are out of print.

(3)

(a) In the case of translations into a language which is not in general use in one or more developed countries which are members of the Union, a period of one year shall be substituted for the period of three years referred to in paragraph (2)*(a)*.

(b) Any country referred to in paragraph (1) may, with the unanimous agreement of the developed countries which are members of the Union and in which the same language is in general use, substitute, in the case of translations into that language, for the period of three years referred to in paragraph (2)*(a)* a shorter period as determined by such agreement but not less than one year. However, the provisions of the foregoing sentence shall not apply where the language in question is English, French or Spanish. The Director General shall be notified of any such agreement by the Governments which have concluded it.

(4)

(a) No license obtainable after three years shall be granted under this Article until a further period of six months has elapsed, and no license obtainable after one year shall be granted under this Article until a further period of nine months has elapsed

(i) from the date on which the applicant complies with the requirements mentioned in Article IV(1), or

(ii) where the identity or the address of the owner of the right of translation is unknown, from the date on which the applicant sends, as provided for in Article IV(2), copies of his application submitted to the authority competent to grant the license.

(b) If, during the said period of six or nine months, a translation in the language in respect of which the application was made is published by the owner of the right of translation or with his authorization, no license under this Article shall be granted.

(5) Any license under this Article shall be granted only for the purpose of teaching, scholarship or research.

(6) If a translation of a work is published by the owner of the right of translation or with his authorization at a price reasonably related to that normally charged in the country for comparable works, any license granted under this Article shall terminate if such translation is in the same language and with substantially the same content as the translation published under the license. Any copies already made before the license terminates may continue to be distributed until their stock is exhausted.

(7) For works which are composed mainly of illustrations, a license to make and publish a translation of the text and to reproduce and publish the illustrations may be granted only if the conditions of Article III are also fulfilled.

(8) No license shall be granted under this Article when the author has withdrawn from circulation all copies of his work.

(9)

(a) A license to make a translation of a work which has been published in printed or analogous forms of reproduction may also be granted to any broadcasting organization having its headquarters in a country referred to in paragraph (1), upon an application made to the competent authority of that country by the said organization, provided that all of the following conditions are met:

(i) the translation is made from a copy made and acquired in accordance with the laws of the said country;

(ii) the translation is only for use in broadcasts intended exclusively for teaching or for the dissemination of the results of specialized technical or scientific research to experts in a particular profession;

(iii) the translation is used exclusively for the purposes referred to in condition (ii) through broadcasts made lawfully and intended for recipients on the territory of the said country, including broadcasts made through the medium of sound or visual recordings lawfully and exclusively made for the purpose of such broadcasts;

(iv) all uses made of the translation are without any commercial purpose.

(b) Sound or visual recordings of a translation which was made by a broadcasting organization under a license granted by virtue of this paragraph may, for the purposes and subject to the conditions referred to in subparagraph *(a)* and with the agreement of that organization, also be used by any other broadcasting organization having its headquarters in the country whose competent authority granted the license in question.

(c) Provided that all of the criteria and conditions set out in subparagraph *(a)* are met, a license may also be granted to a broadcasting organization to translate any text incorporated in an audio-visual fixation where such fixation was itself prepared and published for the sole purpose of being used in connection with systematic instructional activities.

(d) Subject to subparagraphs *(a)* to *(c)*, the provisions of the preceding paragraphs shall apply to the grant and exercise of any license granted under this paragraph.

Article III

[*Limitation on the Right of Reproduction:*
1. Licences grantable by competent authority;
2. to 5. Conditions allowing the grant of such licences; 6. Termination of licences;
7. Works to which this Article applies]

(1) Any country which has declared that it will avail itself of the faculty provided for in this Article shall be entitled to substitute for the exclusive right of reproduction provided for in Article 9 a system of non-exclusive and non-transferable licenses, granted by the competent authority under the following conditions and subject to Article IV.

(2)

(a) If, in relation to a work to which this Article applies by virtue of paragraph (7), after the expiration of

(i) the relevant period specified in paragraph (3), commencing on the date of first publication of a particular edition of the work, or

(ii) any longer period determined by national legislation of the country referred to in paragraph (1), commencing on the same date,

copies of such edition have not been distributed in that country to the general public or in connection with systematic instructional activities, by the owner of the right of reproduction or with his authorization, at a price reasonably related to that normally charged in the country for comparable works, any national of such country may obtain a license to reproduce and publish such edition at that or a lower price for use in connection with systematic instructional activities.

(b) A license to reproduce and publish an edition which has been distributed as described in subparagraph *(a)* may also be granted under the conditions provided for in this Article if, after the expiration of the applicable period, no authorized copies of that edition have been on sale for a period

of six months in the country concerned to the general public or in connection with systematic instructional activities at a price reasonably related to that normally charged in the country for comparable works.

(3) The period referred to in paragraph (2)*(a)(i)* shall be five years, except that

(i) for works of the natural and physical sciences, including mathematics, and of technology, the period shall be three years;

(ii) for works of fiction, poetry, drama and music, and for art books, the period shall be seven years.

(4)

(a) No license obtainable after three years shall be granted under this Article until a period of six months has elapsed

(i) from the date on which the applicant complies with the requirements mentioned in Article IV(1), or

(ii) where the identity or the address of the owner of the right of reproduction is unknown, from the date on which the applicant sends, as provided for in Article IV(2), copies of his application submitted to the authority competent to grant the license.

(b) Where licenses are obtainable after other periods and Article IV(2) is applicable, no license shall be granted until a period of three months has elapsed from the date of the dispatch of the copies of the application.

(c) If, during the period of six or three months referred to in subparagraphs *(a)* and *(b)*, a distribution as described in paragraph (2)*(a)* has taken place, no license shall be granted under this Article.

(d) No license shall be granted if the author has withdrawn from circulation all copies of the edition for the reproduction and publication of which the license has been applied for.

(5) A license to reproduce and publish a translation of a work shall not be granted under this Article in the following cases:

(i) where the translation was not published by the owner of the right of translation or with his authorization, or

(ii) where the translation is not in a language in general use in the country in which the license is applied for.

(6) If copies of an edition of a work are distributed in the country referred to in paragraph (1) to the general public or in connection with systematic instructional activities, by the owner of the right of reproduction or with his authorization, at a price reasonably related to that normally charged in the country for comparable works, any license granted under this Article shall terminate if such edition is in the same language and with substantially the same content as the edition which was published under the said license. Any copies already made before the license terminates may continue to be distributed until their stock is exhausted.

(7)

(a) Subject to subparagraph *(b)*, the works to which this Article applies shall be limited to works published in printed or analogous forms of reproduction.

(b) This Article shall also apply to the reproduction in audio-visual form of lawfully made audio-visual fixations including any protected works incorporated therein and to the translation of any incorporated text into a language in general use in the country in which the license is applied for, always provided that the audio-visual fixations in question were prepared and published for the sole purpose of being used in connection with systematic instructional activities.

Article IV

[*Provisions Common to Licences Under Articles II and III:* 1 and 2. Procedure; 3. Indication of author and title of work; 4. Exportation of copies; 5. Notice; 6. Compensation]

(1) A license under Article II or Article III may be granted only if the applicant, in accordance with the procedure of the country concerned, establishes either that he has requested, and has been denied, authorization by the owner of the right to make and publish the translation or to reproduce and publish the edition, as the case may be, or that, after due diligence on his part, he was unable to find the owner of the right. At the same time as making the request, the applicant shall inform any national or international information center referred to in paragraph (2).

(2) If the owner of the right cannot be found, the applicant for a license shall send, by registered airmail, copies of his application, submitted to the authority competent to grant the license, to the publisher whose name appears on the work and to any national or international information center which may have been designated, in a notification to that effect deposited with the Director General, by the Government of the country in which the publisher is believed to have his principal place of business.

(3) The name of the author shall be indicated on all copies of the translation or reproduction published under a license granted under Article II or Article III. The title of the work shall appear on all such copies. In the

case of a translation, the original title of the work shall appear in any case on all the said copies.

(4)

(a) No license granted under Article II or Article III shall extend to the export of copies, and any such license shall be valid only for publication of the translation or of the reproduction, as the case may be, in the territory of the country in which it has been applied for.

(b) For the purposes of subparagraph *(a)*, the notion of export shall include the sending of copies from any territory to the country which, in respect of that territory, has made a declaration under Article I(5).

(c) Where a governmental or other public entity of a country which has granted a license to make a translation under Article II into a language other than English, French or Spanish sends copies of a translation published under such license to another country, such sending of copies shall not, for the purposes of subparagraph *(a)*, be considered to constitute export if all of the following conditions are met:

(i) the recipients are individuals who are nationals of the country whose competent authority has granted the license, or organizations grouping such individuals;

(ii) the copies are to be used only for the purpose of teaching, scholarship or research;

(iii) the sending of the copies and their subsequent distribution to recipients is without any commercial purpose; and

(iv) the country to which the copies have been sent has agreed with the country whose competent authority has granted the license to allow the receipt, or distribution, or both, and the Director General has been notified of the agreement by the Government of the country in which the license has been granted.

(5) All copies published under a license granted by virtue of Article II or Article III shall bear a notice in the appropriate language stating that the copies are available for distribution only in the country or territory to which the said license applies.

(6)

(a) Due provision shall be made at the national level to ensure

(i) that the license provides, in favor of the owner of the right of translation or of reproduction, as the case may be, for just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned, and

(ii) payment and transmittal of the compensation: should national currency regulations intervene, the competent authority shall make all efforts, by the use of international machinery, to ensure transmittal in internationally convertible currency or its equivalent.

(b) Due provision shall be made by national legislation to ensure a correct translation of the work, or an accurate reproduction of the particular edition, as the case may be.

Article V

[*Alternative Possibility for Limitation of the Right of Translation:* 1. Regime provided for under the 1886 and 1896 Acts; 2. No possibility of change to regime under Article II; 3. Time limit for choosing the alternative possibility]

(1)

(a) Any country entitled to make a declaration that it will avail itself of the faculty provided for in Article II may, instead, at the time of ratifying or acceding to this Act:

(i) if it is a country to which Article 30(2)*(a)* applies, make a declaration under that provision as far as the right of translation is concerned;

(ii) if it is a country to which Article 30(2)*(a)* does not apply, and even if it is not a country outside the Union, make a declaration as provided for in Article 30(2)*(b)*, first sentence.

(b) In the case of a country which ceases to be regarded as a developing country as referred to in Article I(1), a declaration made according to this paragraph shall be effective until the date on which the period applicable under Article I(3) expires.

(c) Any country which has made a declaration according to this paragraph may not subsequently avail itself of the faculty provided for in Article II even if it withdraws the said declaration.

(2) Subject to paragraph (3), any country which has availed itself of the faculty provided for in Article II may not subsequently make a declaration according to paragraph (1).

(3) Any country which has ceased to be regarded as a developing country as referred to in Article I(1) may, not later than two years prior to the expiration of the period applicable under Article I(3), make a declaration to the effect provided for in Article 30(2)*(b)*, first sentence, notwithstanding the fact that it is not a country outside the Union. Such declaration shall take effect at the date on which the period applicable under Article I(3) expires.

Article VI

[*Possibilities of applying, or admitting the application of, certain provisions of the Appendix before becoming bound by it:* 1. Declaration; 2. Depository and effective date of declaration]

(1) Any country of the Union may declare, as from the date of this Act, and at any time before becoming bound by Articles 1 to 21 and this Appendix:

(i) if it is a country which, were it bound by Articles 1 to 21 and this Appendix, would be entitled to avail itself of the faculties referred to in Article I(1), that it will apply the provisions of Article II or of Article III or of both to works whose country of origin is a country which, pursuant to (ii) below, admits the application of those Articles to such works, or which is bound by Articles 1 to 21 and this Appendix; such declaration may, instead of referring to Article II, refer to Article V;

(ii) that it admits the application of this Appendix to works of which it is the country of origin by countries which have made a declaration under (i) above or a notification under Article I.

(2) Any declaration made under paragraph (1) shall be in writing and shall be deposited with the Director General. The declaration shall become effective from the date of its deposit.

LXXVII. TEXT OF THE PROVISIONS OF THE IPIC TREATY INCORPORATED BY ARTICLE 35 OF THE TRIPS AGREEMENT

. . .

Article 2
Definitions

For the purposes of this Treaty:

(i) "integrated circuit" means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function,

(ii) "layout-design (topography)" means the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture,

(iii) "holder of the right" means the natural person who, or the legal entity which, according to the applicable law, is to be regarded as the beneficiary of the protection referred to in Article 6,

(iv) "protected layout-design (topography)" means a layout-design (topography) in respect of which the conditions of protection referred to in this Treaty are fulfilled,

(v) "Contracting Party" means a State, or an Intergovernmental Organization meeting the requirements of item *(x)*, party to this Treaty,

(vi) "territory of a Contracting Party" means, where the Contracting Party is a State, the territory of that State and, where the Contracting Party is an Intergovernmental Organization, the territory in which the constituting treaty of that Intergovernmental Organization applies,

(vii) "Union" means the Union referred to in Article 1,

(viii) "Assembly" means the Assembly referred to in Article 9,

(ix) "Director General" means the Director General of the World Intellectual Property Organization,

(x) "Intergovernmental Organization" means an organization constituted by, and composed of, States of any region of the world, which has competence in respect of matters governed by this Treaty, has its own legislation providing for intellectual property protection in respect of layout-designs (topographies) and binding on all its member States, and has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to this Treaty.

Article 3
The Subject Matter of the Treaty

(1) *[Obligation to Protect Layout-Designs (Topographies)]*

(a) Each Contracting Party shall have the obligation to secure, throughout its territory, intellectual property protection in respect of layout-designs (topographies) in accordance with this Treaty. It shall, in particular, secure adequate measures to ensure the prevention of acts considered unlawful under Article 6 and appropriate legal remedies where such acts have been committed.

(b) The right of the holder of the right in respect of an integrated circuit applies whether or not the integrated circuit is incorporated in an article.

(c) Notwithstanding Article 2*(i)*, any Contracting Party whose law limits the protection of layout-designs (topographies) to layout-designs (topographies) of semiconductor integrated circuits shall be

free to apply that limitation as long as its law contains such limitation.

(2) *[Requirement of Originality]*

(a) The obligation referred to in paragraph (1)*(a)* shall apply to layout-designs (topographies) that are original in the sense that they are the result of their creators' own intellectual effort and are not commonplace among creators of layout-designs (topographies) and manufacturers of integrated circuits at the time of their creation.

(b) A layout-design (topography) that consists of a combination of elements and interconnections that are commonplace shall be protected only if the combination, taken as a whole, fulfills the conditions referred to in subparagraph *(a)*.

Article 4
The Legal Form of the Protection

Each Contracting Party shall be free to implement its obligations under this Treaty through a special law on layout-designs (topographies) or its law on copyright, patents, utility models, industrial designs, unfair competition or any other law or a combination of any of those laws.

Article 5
National Treatment

(1) *[National Treatment]*

Subject to compliance with its obligation referred to in Article 3(1)*(a)*, each Contracting Party shall, in respect of the intellectual property protection of layout-designs (topographies), accord, within its territory,

(i) to natural persons who are nationals of, or are domiciled in the territory of, any of the other Contracting Parties, and

(ii) to legal entities which or natural persons who, in the territory of any of the other Contracting Parties, have a real and effective establishment for the creation of layout-designs (topographies) or the production of integrated circuits,

the same treatment that it accords to its own nationals.

(2) *[Agents, Addresses for Service, Court Proceedings]*

Notwithstanding paragraph (1), any Contracting Party is free not to apply national treatment as far as any obligations to appoint an agent or to designate an address for service are concerned or as far as the special rules applicable to foreigners in court proceedings are concerned.

(3) *[Application of Paragraphs (1) and (2) to Intergovernmental Organizations]*

Where the Contracting Party is an Intergovernmental Organization, "nationals" in paragraph (1) means nationals of any of the States members of that Organization.

Article 6
The Scope of the Protection

(1) *[Acts Requiring the Authorization of the Holder of the Right]*

(a) Any Contracting Party shall consider unlawful the following acts if performed without the authorization of the holder of the right:

(i) the act of reproducing, whether by incorporation in an integrated circuit or otherwise, a protected layout-design (topography) in its entirety or any part thereof, except the act of reproducing any part that does not comply with the requirement of originality referred to in Article 3(2),

(ii) the act of importing, selling or otherwise distributing for commercial purposes a protected layout-design (topography) or an integrated circuit in which a protected layout-design (topography) is incorporated.

(b) Any Contracting Party shall be free to consider unlawful also acts other than those specified in subparagraph (a) if performed without the authorization of the holder of the right.

(2) *[Acts Not Requiring the Authorization of the Holder of the Right]*

(a) Notwithstanding paragraph (1), no Contracting Party shall consider unlawful the performance, without the authorization of the holder of the right, of the act of reproduction referred to in paragraph (1)*(a)(i)* where that act is performed by a third party for private purposes or for the sole purpose of evaluation, analysis, research or teaching.

(b) Where the third party referred to in subparagraph *(a)*, on the basis of evaluation or analysis of the protected layout-design (topography) ("the first layout-design (topography)"), creates a layout-design (topography) complying with the requirement of originality referred to in Article 3(2) ("the second layout-design (topography)"), that third party may incorporate the second layout-design (topography) in an integrated circuit or perform any of the acts referred to in paragraph (1) in respect of the second layout-design (topography) without being regarded as infringing the rights of the holder of the right in the first layout-design (topography).

(c) The holder of the right may not exercise his right in respect of an identical original layout-design (topography) that was independently created by a third party.

. . .

(4) *[Sale and Distribution of Infringing Integrated Circuits Acquired Innocently]*

Notwithstanding paragraph (1)*(a)*(ii), no Contracting Party shall be obliged to consider unlawful the performance of any of the acts referred to in that paragraph in respect of an integrated circuit incorporating an unlawfully reproduced layout-design (topography) where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the said integrated circuit, that it incorporates an unlawfully reproduced layout-design (topography).

(5) *[Exhaustion of Rights]*

Notwithstanding paragraph (1)*(a)*(ii), any Contracting Party may consider lawful the performance, without the authorization of the holder of the right, of any of the acts referred to in that paragraph where the act is performed in respect of a protected layout-design (topography), or in respect of an integrated circuit in which such a layout-design (topography) is incorporated, that has been put on the market by, or with the consent of, the holder of the right.

Article 7
Exploitation; Registration, Disclosure

(1) *[Faculty to Require Exploitation]*

Any Contracting Party shall be free not to protect a layout-design (topography) until it has been ordinarily commercially exploited, separately or as incorporated in an integrated circuit, somewhere in the world.

(2) *[Faculty to Require Registration; Disclosure]*

(a) Any Contracting Party shall be free not to protect a layout-design (topography) until the layout-design (topography) has been the subject of an application for registration, filed in due form with the competent public authority, or of a registration with that authority; it may be required that the application be accompanied by the filing of a copy or drawing of the layout-design (topography) and, where the integrated circuit has been commercially exploited, of a sample of that integrated circuit, along with information defining the electronic function which the integrated circuit is intended to perform; however, the applicant may exclude such parts of the copy or drawing that relate to the manner of manufacture of the integrated circuit, provided that the parts submitted are sufficient to allow the identification of the layout-design (topography).

(b) Where the filing of an application for registration according to subparagraph *(a)* is required, the Contracting Party may require that such filing be effected within a certain period of time from the date on which the holder of the right first exploits ordinarily commercially anywhere in the world the layout-design (topography) of an integrated circuit; such period shall not be less than two years counted from the said date.

(c) Registration under subparagraph *(a)* may be subject to the payment of a fee.

. . .

Article 12
Safeguard of Paris and Berne Conventions

This Treaty shall not affect the obligations that any Contracting Party may have under the Paris Convention for the Protection of Industrial Property or the Berne Convention for the Protection of Literary and Artistic Works.

. . .

Article 16
Entry Into Force of the Treaty

. . .

(3) *[Protection of Layout-Designs (Topographies) Existing at Time of Entry Into Force]*

Any Contracting Party shall have the right not to apply this Treaty to any layout-design (topography) that exists at the time this Treaty enters into force in respect of that Contracting Party, provided that this provision does not affect any protection that such layout-design (topography) may, at that time, enjoy in the territory of that Contracting Party by virtue of international obligations other than those resulting from this Treaty or the legislation of the said Contracting Party.

. . .

LXXVIII. TEXT OF THE DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH[149]

1. We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.

2. We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.

3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.

4. We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our

[149] Adopted by the Fourth Session of the WTO Ministerial Conference at Doha on 14 November 2001.

commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:

(a) In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.

(b) Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.

(c) Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.

(d) The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.

6. We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

7. We reaffirm the commitment of developed-country Members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country Members pursuant to Article 66.2. We also agree that the least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016, without prejudice to the right of least-developed country Members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement. We instruct the Council for TRIPS to take the necessary action to give effect to this pursuant to Article 66.1 of the TRIPS Agreement.

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XXXVII. TIME-FRAMES IN RELATION TO PANEL AND APPELLATE BODY REPORTS 1384

I. ARTICLE 1

A. TEXT OF ARTICLE 1

Members hereby *agree* as follows:

Article 1
Coverage and Application

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of

this Understanding taken in isolation or in combination with any other covered agreement.

2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. Article 1.1: "covered agreements"

1. In *Brazil – Desiccated Coconut*, the Appellate Body defined the term "covered agreements" as follows:

> "The 'covered agreements' include the *WTO Agreement*, the Agreements in Annexes 1 and 2, as well as any Plurilateral Trade Agreement in Annex 4 where its Committee of signatories has taken a decision to apply the *DSU*. In a dispute brought to the DSB, a panel may deal with all the relevant provisions of the covered agreements cited by the parties to the dispute in one proceeding."[1]

2. In *India – Patents (US)*, the Appellate Body examined the Panel's interpretation of various provisions of the TRIPS Agreement and noted that "as one of the covered agreements under the DSU, the *TRIPS Agreement* is subject to the dispute settlement rules and procedures of that Understanding".[2]

3. The Appellate Body on *EC – Poultry* considered the relationship between Schedule LXXX of the European Communities and the so-called "Oilseeds Agreement", which had been negotiated by the European Communities and ten other contracting parties, including Brazil. As a part of its agreement with Brazil, a "global" tariff-rate quota had been introduced by the European Communities and subsequently incorporated into the European Communities' Schedule LXXX. Subsequently, in the context of the interpretation of the European Communities' Schedule, the question of the relationship between Schedule LXXX and the Oilseeds Agreement arose. The European Communities argued that Schedule LXXX superseded and terminated the Oilseeds Agreement because the WTO Agreement was a later treaty relating to the same subject matter in accordance with Article 59.1 of the *Vienna Convention*; alternatively, the European Communities argued that the Oilseeds Agreement only applied to the extent compatible with Schedule LXXX, pursuant to Article 30.3 of the *Vienna Convention*. The Appellate Body stated:

> "In our view, it is not necessary to have recourse to either Article 59.1 or Article 30.3 of the *Vienna Convention*, because the text of the *WTO Agreement* and the legal arrangements governing the transition from the GATT 1947 to the WTO resolve the issue of the relationship between Schedule LXXX and the Oilseeds Agreement in this case. Schedule LXXX is annexed to the *Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994* (the '*Marrakesh Protocol*'), and is an integral part of the GATT 1994. As such, it forms part of the multilateral obligations under the *WTO Agreement*. The Oilseeds Agreement, in contrast, is a bilateral agreement negotiated by the European Communities and Brazil under Article XXVIII of the GATT 1947, as part of the resolution of the dispute in *EEC – Oilseeds*. As such, the Oilseeds Agreement is not a 'covered agreement' within the meaning of Articles 1 and 2 of the DSU. Nor is the Oilseeds Agreement part of the multilateral obligations accepted by Brazil and the European Communities pursuant to the *WTO Agreement*, which came into effect on 1 January 1995. The Oilseeds Agreement is not cited in any Annex to the *WTO Agreement*. Although the provisions of certain legal instruments that entered into force under the GATT 1947 were made part of the GATT 1994 pursuant to the language in Annex 1A incorporating the GATT 1994 into the *WTO Agreement*, the Oilseeds Agreement is not one of those legal instruments."[3]

4. The Appellate Body on *Guatemala – Cement I* examined the Panel's interpretation of the relationship between Article 17 of the *Anti-Dumping Agreement* and the rules and procedures of the *DSU* (see also paragraph 7 below). In this context, the Appellate Body made the following general statement about Article 1.1 of the *DSU*:

> "Article 1.1 of the DSU establishes an integrated dispute settlement system which applies to all of the agreements

[1] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 13. With respect to the freedom of panels to rely, in their findings, on provisions other than those referred to by the parties in the request for establishment of a panel or in the terms of reference, see paras. 331–332 in this Chapter.
[2] Appellate Body Report on *India – Patents (US)*, para. 29.
[3] Appellate Body Report on *EC – Poultry*, para. 79.

listed in Appendix 1 to the DSU (the 'covered agreements'). The DSU is a coherent system of rules and procedures for dispute settlement which applies to 'disputes brought pursuant to the consultation and dispute settlement provisions of' the covered agreements. The *Anti-Dumping Agreement* is a covered agreement listed in Appendix 1 of the DSU; the rules and procedures of the DSU, therefore, apply to disputes brought pursuant to the consultation and dispute settlement provisions contained in Article 17 of that Agreement."[4]

5. In *India – Quantitative Restrictions*, India appealed the Panel's conclusion that the Panel was competent to review the justification of India's balance-of-payments (BOP) restrictions under Article XVIII:B of the *GATT 1994*. India argued that the Panel had erred by failing to give proper consideration to the "institutional balance" embodied in the WTO Agreement; according to India, BOP measures were within the exclusive competence of the BOP Committee and the General Council. India claimed that in view of the competence of the BOP Committee and the General Council with respect to balance-of-payments restrictions under Article XVIII:12 of *GATT 1994* and the *BOP Understanding*, the Panel erred in finding that the competence of panels to review the justification of balance-of-payments restrictions is "unlimited". The Appellate Body ruled:

> "We note that Appendix 1 to the DSU lists 'Multilateral Agreements on Trade in Goods', to which the GATT 1994 belongs, among the agreements covered by the DSU. A dispute concerning Article XVIII:B is, therefore, covered by the DSU.
>
> . . .
>
> Appendix 2 does not identify any special or additional dispute settlement rules or procedures relating to balance-of-payments restrictions. It does not mention Article XVIII:B of the GATT 1994, or any of its paragraphs. The DSU is, therefore, fully applicable to the current dispute."[5]

2. Article 1.2: "special or additional rules and procedures"

(a) General

6. The Appellate Body on *Guatemala – Cement I* stated that special and additional rules within the meaning of Article 1.2 of the *DSU* apply only in the case of "inconsistency" or a "difference" between these rules and the provisions of the *DSU*:

> "Article 1.2 of the DSU provides that the 'rules and procedures of this Understanding shall apply *subject to such special or additional rules and procedures* on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding.' (emphasis added) It states, furthermore, that these special or additional rules and procedures 'shall prevail' over the provisions of the DSU '[t]o the extent that there is a *difference* between' the two sets of provisions. (emphasis added) Accordingly, if there is no 'difference', then the rules and procedures of the DSU apply *together with* the special or additional provisions of the covered agreement. In our view, it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement c*annot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them. An interpreter must, therefore, identify an *inconsistency* or a *difference* between a provision of the DSU and a special or additional provision of a covered agreement *before* concluding that the latter *prevails* and that the provision of the DSU does not apply."[6]

(b) Article 17 of the Anti-Dumping Agreement

7. In examining the relationship between Article 17 of the *Anti-Dumping Agreement* and the rules and procedures of the *DSU*, the Panel on *Guatemala – Cement I* found that Article 17 of the *Anti-Dumping Agreement* "provides for a coherent set of rules for dispute settlement specific to anti-dumping cases . . . that replaces the more general approach of the DSU". However, the Appellate Body disagreed with the Panel and held:

> "Article 17.3 of the *Anti-Dumping Agreement* is not listed in Appendix 2 of the DSU as a special or additional rule and procedure. It is not listed precisely because it provides the legal basis for consultations to be requested by a complaining Member under the *Anti-Dumping Agreement*. Indeed, it is the equivalent provision in the *Anti-Dumping Agreement* to Articles XXII and XXIII of the GATT 1994, which serve as the basis for consultations and dispute settlement under the GATT 1994, under most of the other agreements in Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization* (the '*WTO Agreement*'), and under the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the '*TRIPS Agreement*').
>
> . . .
>
> Clearly, the consultation and dispute settlement provisions of a covered agreement are not meant to *replace*, as a coherent system of dispute settlement for that agreement, the rules and procedures of the DSU. To read Article 17 of the *Anti-Dumping Agreement* as *replacing*

[4] Appellate Body Report on *Guatemala – Cement I*, para. 64.
[5] Appellate Body Report on *India – Quantitative Restrictions*, paras. 85–86. With respect to the competence of panels to review balance-of-payments restrictions, see also Chapter on *GATT*, Section XIX.D(b).
[6] Appellate Body Report on *Guatemala – Cement I*, para. 65. See also Appellate Body Report on *US – FSC*, para. 159.

the DSU system as a whole is to deny the integrated nature of the WTO dispute settlement system established by Article 1.1 of the DSU.

For these reasons, we conclude that the Panel erred in finding that Article 17 of the *Anti-Dumping Agreement* 'provides for a coherent set of rules for dispute settlement specific to anti-dumping cases . . . that replaces the more general approach of the DSU'."[7]

8. In *US – Hot-Rolled Steel*, the Appellate Body pointed out that Article 17.6 of the *Anti-Dumping Agreement* is identified in Article 1.2 and Appendix 2 of the *DSU* as one of the special or additional rules and procedures that prevail over the *DSU* to the extent that there is a difference between those provisions and the provisions of the *DSU*. Quoting its previous Report on *Guatemala – Cement I* (see paragraph 6 above), the Appellate Body considered the extent to which Article 17.6 of the *Anti-Dumping Agreement* can properly be read as "complementing" the rules and procedures of the *DSU* or, conversely, the extent to which Article 17.6 "conflicts" with the *DSU*. The Appellate Body concluded that there was no conflict between Articles 17.6(i) and 17.6 (ii) and the *DSU*.[8]

9. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body summed up the situation of Articles 17.4 to 17.7 of the *Anti-Dumping Agreement* as special or additional rules as follows:

"We recall, in this regard, that Article 1.1 of the DSU applies the rules and procedures contained in the DSU to 'disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1', but that this general rule is, under Article 1.2 of the DSU, subject to the special or additional rules and procedures on dispute settlement identified in Appendix 2 to the DSU. The *Anti-Dumping Agreement* is listed as a covered agreement in Appendix 1 of the DSU. Articles 17.4 through 17.7 of the *Anti-Dumping Agreement* are listed as special or additional rules in Appendix 2 to the DSU."[9]

(c) Article 4.7 of the SCM Agreement

10. In *Australia – Automotive Leather II (Article 21.5 – US)*, both parties argued that Article 4.7 of the *SCM Agreement* should be read consistently with Article 19.1 of the *DSU*. The Panel concluded that Article 19.1 of the *DSU* is not the basis of the recommendation in a case involving prohibited subsidies. The Panel stated:

"Rather, the recommendation to 'withdraw the subsidy' is required by Article 4.7 of the SCM Agreement, which is a special or additional rule or procedure on dispute settlement, identified in Appendix 2 to the DSU. It is Article 4.7 which we must interpret and apply in this dispute. In this respect, we note Article 1.2 of the DSU . . . Thus, to the extent that 'withdraw the subsidy' requires some action that is different from 'bring the measure into conformity', it is that different action which prevails."[10]

II. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2
Administration

1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

2. The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.

3. The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this Understanding.

4. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.[1]

(*footnote original*) [1] The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. General

11. With respect to the functions of the DSB, see Section V.B.3 of the Chapter on the *WTO Agreement*.

[7] Appellate Body Report on *Guatemala – Cement I*, paras. 64 and 67–68. See also Appellate Body Report on *US – Lead and Bismuth II*, para. 45; Appellate Body Report on *US – 1916 Act*, para. 70.
[8] Appellate Body Report on *US – Hot-Rolled Steel*, paras. 51 and 56–57.
[9] Appellate Body Report on *US – Corrosion Resistant Steel Sunset Review*, footnote 82 to para. 83.
[10] Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.41.

2. Rules of procedure for DSB meetings

12. As regards the rules of procedure for the meetings of the DSB, see Section XXXIV below.

3. Date of circulation

13. When there is a reference to the terms "date of circulation" or "issuance to all Members" or "issuance to the Members" in the *DSU* and its additional and special rules, the date to be used is the date printed on the WTO document to be circulated with the assurance of the Secretariat that the date printed on the document is the date on which this document is effectively put in the pigeon holes of delegations in all three working languages. This practice will be used on a trial basis and be subject to revision when necessary.[11]

4. Communications with the DSB

14. At its meeting on 31 May 1995, the DSB agreed that, for reasons of efficiency, communications under the DSU or any other covered agreements should always be sent to the Secretariat with a copy to the Chairman.[12]

5. Time-periods

15. At its meeting of 27 September 1995, the DSB agreed[13] to the following practice concerning the expiration of time-periods:

> "When, under the DSU (and its special or additional rules and procedures), a time-period within which a communication must be made or action taken by a Member to exercise or preserve its rights expires on a non-working day of the WTO Secretariat, any such communication or action will be deemed to have been made or taken on the WTO non-working day if lodged on the first working day of the WTO Secretariat following the day on which such time-period would normally expire."[14]

6. Rules of conduct

16. As regards the rules of conduct, see Section XXXIV below.

7. Negotiations on the amendment of the DSU

17. With respect to the negotiations on the improvement of the DSU at the Special Session of the DSB further to the Doha mandate, see Section XI.B.2 on the *WTO Agreement*.

III. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3
General Provisions

1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

4. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

6. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the mea-

[11] WT/DSB/6.
[12] WT/DSB/M/5, section 7. WT/DSB/6.
[13] WT/DSB/M/7, section 10. With respect to the elections of officials, see WT/DSB/M/4.
[14] WT/DSB/6.

sure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

8. In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

9. The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

10. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

11. This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement. With respect to disputes for which the request for consultations was made under GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry into force of the WTO Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply.[2]

(*footnote original*) [2] This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.

12. Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. Article 3.2

(a) "security and predictability"

18. The Appellate Body on *Japan – Alcoholic Beverages II* examined whether the Japanese tax measure governing the taxation of alcoholic beverages violated Article III:2 of *GATT 1994*. After concurring with the Panel's finding that the Liquor Tax Law was not in compliance with Article III:2, the Appellate Body made the following general statement about WTO rules and the concept of "security and predictability":

> "WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system."[15]

19. In *US – Section 301 Trade Act*, the Panel examined the European Communities' argument that Section 301 is inconsistent with Article 23 of the *DSU* as well as various articles of *GATT 1994*. In its examination, the Panel discussed the importance of the concept of "security and predictability" and stated:

> "Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators. DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it. In this respect we are referring not only to preambular language but also to positive law provisions in the DSU itself."[16]

20. In *Chile – Alcoholic Beverages*, Chile claimed that the Panel's findings on the issues of "not similarly taxed" and "so as to afford protection" – which had found Chile to be in violation of its WTO obligations under Article

[15] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 31.
[16] Panel Report on *US – Section 301 Trade Act*, para. 7.75.

III:2 of *GATT 1994* – compromised the security and predictability of the multilateral trading system, as provided for in Article 3.2 of the *DSU*. Chile also claimed that the Panel had added to the rights and obligations of WTO Members under the *WTO Agreement*, contrary to Article 19.2 of the *DSU*. The Appellate Body rejected this argument. See paragraph 83 below.

(b) "clarify the existing provisions"

21. In *US – Wool Shirts and Blouses*, the Appellate Body examined whether a complaining party is entitled to a finding on each of the legal claims it makes to a panel. The Appellate Body stated:

> "Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[17]

22. In *EC – Poultry*, the Appellate Body held that just as a panel is not required to address every legal claim made by a party, neither does it have an obligation to address every argument made by a party. See paragraph 333 below.

(c) "customary rules of interpretation of public international law"

(i) Rules of "interpretation"

23. In *Argentina – Poultry Anti-Dumping Duties*, Argentina raised as a preliminary issue that prior to bringing WTO dispute settlement proceedings against Argentina's anti-dumping measure, Brazil had challenged that measure before a MERCOSUR Ad Hoc Arbitral Tribunal. Argentina requested that, in light of the prior MERCOSUR proceedings, the Panel refrain from ruling on the claims raised by Brazil in the present WTO dispute settlement proceedings. In the alternative, Argentina asserted that the Panel should be bound by the ruling of the MERCOSUR Tribunal.[18] As regards the subsidiary claim, Argentina claimed that the earlier MERCOSUR ruling was part of the normative framework to be applied by the Panel as a result of Article 31.3(c) of the *Vienna Convention*, whereby "relevant rules of international law applicable in the relations between the parties" shall be taken into account for the purpose of treaty interpretation. The Panel disagreed with Argentina and pointed out that Article 3.2 of the *DSU* is concerned with international rules of treaty *interpretation* rather than of treaty *application:*

> "We note that Article 3.2 of the *DSU* is concerned with international rules of treaty interpretation. Article 31.3(c) of the *Vienna Convention* is similarly concerned with treaty interpretation. However, Argentina has not sought to rely on any law providing that, in respect of relations between Argentina and Brazil, the WTO agreements should be interpreted in a particular way. In particular, Argentina has not relied on any statement or finding in the MERCOSUR Tribunal ruling to suggest that we should interpret specific provisions of the WTO agreements in a particular way. Rather than concerning itself with the interpretation of the WTO agreements, Argentina actually argues that the earlier MERCOSUR Tribunal ruling requires us to rule in a particular way. In other words, Argentina would have us apply the relevant WTO provisions in a particular way, rather than interpret them in a particular way. However, there is no basis in Article 3.2 of the *DSU*, or any other provision, to suggest that we are bound to rule in a particular way, or apply the relevant WTO provisions in a particular way. We note that we are not even bound to follow rulings contained in adopted WTO panel reports,[19] so we see no reason at all why we should be bound by the rulings of non-WTO dispute settlement bodies. Accordingly, we reject Argentina's alternative arguments regarding Article 31.3(c) of the *Vienna Convention*.[20]"[21]

(ii) Article 31 of the Vienna Convention: general rule of interpretation

24. The Appellate Body on *US – Gasoline* stated that the "general rule of interpretation", contained in Article 31[22] of the *Vienna Convention* had attained the status of

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[17] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 19. With respect to the issue of whether a Panel is required to address all legal claims raised by a party, see pp. 17–18 of the Report.

[18] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.17.

[19] (*footnote original*) See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 14, DSR 1996:I, 125.

[20] (*footnote original*) Even if Argentina had relied on the MERCOSUR Tribunal ruling to argue that particular provisions of the WTO Agreement should be interpreted in a particular way, it is not entirely clear that Article 31.3(c) of the *Vienna Convention* would apply. In particular, it is not clear to us that a rule applicable between only several WTO Members would constitute a relevant rule of international law applicable in the relations between the "parties".

[21] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.41.

[22] Article 31 of the *Vienna Convention* reads:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:

customary or general international law. The Appellate Body added that WTO law was not to be "read in clinical isolation from public international law":

> "The 'general rule of interpretation' set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the *DSU*, to apply in seeking to clarify the provisions of the *General Agreement* and the other 'covered agreements' of the *Marrakesh Agreement Establishing the World Trade Organization* (the '*WTO Agreement*'). That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law."[23]

25. In connection with applying the "customary rules of interpretation of public international law", the Appellate Body in *Japan – Alcoholic Beverages II* stated:

> "Article 31 of the *Vienna Convention* provides that the words of the treaty form the foundation for the interpretative process: 'interpretation must be based above all upon the text of the treaty'."[24]

26. The Panel on *US – Section 301 Trade Act* held that "the elements referred to in Article 31 – text, context and object-and-purpose as well as good faith – are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order."[25] In contrast, the Appellate Body in *US – Shrimp* adopted the following approach:

> "A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."[26]

27. In *India – Patents (US)*, the Appellate Body emphasized that the principles of treaty interpretation "neither require nor condone" the importation into a treaty of "words that are not there" nor of "concepts that were not intended":

> "The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended. . . .These rules must be respected and applied in interpreting the *TRIPS Agreement* or any other covered agreements. . . .Both panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the *Vienna Convention*, and must not add to or diminish rights and obligations provided in the *WTO Agreement*."[27]

28. In *EC – Hormones*, the Appellate Body paraphrased its statement from *India – Patents(US)*, referenced in paragraph 27 above, in the following terms:

> "The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, not words the interpreter may feel should have been used."[28]

29. The Panel on *Canada – Pharmaceutical Patents* held that in the case of the *TRIPS Agreement*, the context of certain TRIPS provisions to which the Panel could have recourse for interpretative purposes also encompassed provisions of the international agreements on intellectual property incorporated into the *TRIPS Agreement*, such as the Berne Convention of 1971:

> "The Panel noted that, in the framework of the TRIPS Agreement, which incorporates certain provisions of the major pre-existing international instruments on intellectual property, the context to which the Panel may have recourse for purposes of interpretation of specific TRIPS provisions, in this case Articles 27 and 28, is not restricted to the text, Preamble and Annexes of the TRIPS Agreement itself, but also includes the provisions of the international instruments on intellectual property incorporated into the TRIPS Agreement, as well as any agreement between the parties relating to these agreements

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

[23] Appellate Body Report on *US – Gasoline*, p. 17. See also Appellate Body Report on *India – Patents (US)*, para. 46; Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 10–12; and Panel Report on *US – DRAMS*, para. 6.13.

[24] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 11.

[25] Panel Report on *US – Section 301 Trade Act*, para. 7.22.

[26] Appellate Body Report on *US – Shrimp*, para. 114. See also Panel Reports on *US – Section 301 Trade Act*, para. 7.22; *India – Patents (US)*, para. 7.18; *US – Underwear*, para. 7.18; Appellate Body Report on *Argentina – Footwear (EC)*, para. 91.

[27] Appellate Body Report on *India – Patents (US)*, paras. 45–46. See also Appellate Body Report on *India – Quantitative Restrictions*, footnote 23, para. 94.

[28] Appellate Body report on *EC – Hormones*, para. 181.

within the meaning of Article 31(2) of the Vienna Convention on the Law of Treaties. Thus, as the Panel will have occasion to elaborate further below, Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (1971) (hereinafter referred to as the Berne Convention) is an important contextual element for the interpretation of Article 30 of the TRIPS Agreement."[29]

(iii) Article 31(3)(b) of the Vienna Convention: subsequent practice[30]

Panel reports

30. In *Japan – Alcoholic Beverages II*, the Panel found that "panel reports adopted by the Contracting Parties constitute subsequent practice in a specific case". The Appellate Body disagreed[31] and, in reversing the Panel's findings on this issue, considered "subsequent practice" to mean a "concordant, common and consistent" sequence of acts:

"Article 31(3)(b) of the *Vienna Convention* states that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' is to be 'taken into account together with the context' in interpreting the terms of the treaty. Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant."[32,33]

Practice amongst Members

31. In *Chile – Price Band System*, Argentina had argued before the Panel that Chile's price band system was a measure "of the kind which has been required to be converted into ordinary customs duties" and which, by the terms of Article 4.2 of the *Agreement on Agriculture* (see Section V.B.3(a) of the Chapter on the *Agreement on Agriculture*) Members are required not to maintain. As regards the interpretation of the phrase "measures which have been required to be converted into ordinary customs duties", Chile contended that it was "highly relevant" that no country that had had a price band system in place before the conclusion of the Uruguay Round had actually converted it into ordinary customs duties. The Appellate Body looked into the possibility that this practice could be considered "subsequent practice" pursuant to Article 31(3)(b) of the *Vienna Convention* and therefore a practice relevant to the interpretation of Article 4.2. The Appellate Body referred to its definition of "subsequent practice" in its Report in *Japan – Alcoholic Beverages II* (see paragraph 30 above) and noted that neither the Panel record nor the submissions of the parties suggested that there was a discernible pattern of acts or pronouncements implying an agreement among WTO Members on the interpretation of Article 4.2. The Appellate Body thus concluded that this practice of some Members alleged by Chile did not amount to a "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*.[34]

(iv) Article 31.4: specialized meaning

32. In *Mexico – Telecoms*, the Panel, in the process of considering the meaning of various telecommunications terms (such as linking and interconnection), decided that they were terms that may be given a "special meaning", according to Article 31.4 of the Vienna Convention, "if it is established that the parties so intended". The Panel concluded that, given that the provision at issue was a technical one that appeared in a specialized service sector, the Panel was "entitled to examine what 'special meaning' it may have in the telecommunications context".[35]

(v) Article 32 of the Vienna Convention: supplementary means of interpretation

General

Status of Article 32

33. In *Japan – Alcoholic Beverages II*, the Appellate Body recalled its statement in *US – Gasoline* that there is a need to achieve clarification by reference to the fundamental rule of treaty interpretation set out in Article 31(1) of the *Vienna Convention* and that this general rule "has attained the status of a rule of customary or general international law".[36] The Appellate Body then went on to state in *Japan – Alcoholic Beverages II* that Article 32 of the *Vienna Convention*,[37] which deals with

[29] Panel Report on *Canada – Pharmaceutical Patents*, para. 7.14.
[30] Article 31(3)(b) of the *Vienna Convention* provides that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" is to be "taken into account together with the context" in interpreting the terms of the treaty.
[31] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 12.
[32] (*footnote original*) Yearbook of the International Law Commission, Vol. II, p. 222; Sinclair, *supra.*, footnote 24, p. 138.
[33] Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 12–13. See also Panel Report on *US – FSC*, para. 7.75.
[34] Appellate Body Report on *Chile – Price Band System*, paras. 213–214.
[35] Panel Report on *Mexico – Telecoms*, paras. 7.108–7.117.
[36] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 10.
[37] Article 32 of the *Vienna Convention* reads: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

the role of supplementary means of interpretation, "has also attained the same status".[38]

When to resort to Article 32

34. In *Canada – Dairy*, the Appellate Body, disagreeing with the Panel, considered that a certain notation in Canada's Schedule was not clear and thus, it was "appropriate to turn to 'supplementary means of interpretation' pursuant to Article 32 of the *Vienna Convention*".[39]

Circumstances of the conclusion of a treaty

Negotiating history

35. The Appellate Body on *EC – Computer Equipment* found that the "circumstances of [the] conclusion" of a treaty, which is a supplementary means of interpretation under Article 32 of the *Vienna Convention*, permits in certain cases the examination of the historical background against which the treaty was negotiated:

> "The application of these rules in Article 31 of the *Vienna Convention* will usually allow a treaty interpreter to establish the meaning of the term. However, if after applying Article 31 the meaning of the term remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, Article 32 allows a treaty interpreter to have recourse to:
>
> > '. . . supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.'
>
> With regard to 'the circumstances of [the] conclusion' of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated."[40]

36. In *US – Export Restraints*, the Panel recalled the decision of the Appellate Body in *Japan – Alcoholic Beverages II* (see paragraph 30 above) and stated that "pursuant to Article 32 of the *Vienna Convention*, negotiating history can thus be invoked as a supplementary means of interpretation, to confirm a conclusion reached on the basis of a textual and contextual analysis of a treaty".[41]

37. In *Egypt – Steel Rebar*, the Panel referred to the negotiating history of Annex II of the *Anti-Dumping Agreement* as confirmation of its views that the provisions of this Annex that address what information can be used as facts available "have to do with ensuring the reliability of the information used by the investigating authority":

> "It is clear that the provisions of Annex II that address what information can be used as facts available (which, along with the other provisions of Annex II, 'shall be observed') have to do with ensuring the reliability of the information used by the investigating authority. This view may further be confirmed, as foreseen in Article 32 of the Vienna Convention on the Law of Treaties,[42] by the negotiating history of Annex II. In particular, this Annex was originally developed by the Tokyo Round Committee on Anti-Dumping Practices, which adopted it on 8 May 1984 as a 'Recommendation Concerning Best Information Available in Terms of Article 6:8'.[43] During the Uruguay Round negotiations, the substantive provisions of the original recommendation were incorporated with almost no changes as Annex II to the AD Agreement. A preambular paragraph to the original recommendation, which was not retained when Annex II was created, in our view, provides some insight into the intentions of the drafters concerning its application. This paragraph reads as follows:
>
> > The authorities of the importing country have a right and an obligation to make decisions on the basis of the best information available during the investigation from whatever source, even where evidence has been supplied by the interested party. The Anti-Dumping Code recognizes the right of the importing country to base findings on the facts available when any interested party refuses access to or does not provide the necessary information within a reasonable period, or significantly impedes the investigation (Article 6:8). However, all reasonable steps should be taken by the authorities of the importing countries to avoid the use of information from unreliable sources.
>
> To us, this preambular language conveys that the *full* package of provisions in the recommendation, applicable in implementing Article 6:8 of the Tokyo Round Anti-Dumping Code, was intended, *inter alia,* to ensure that in using facts available (i.e., in applying Article 6:8), information from unreliable sources would be avoided."[44]

Customs classification practice

38. The Appellate Body on *EC – Computer Equipment* further considered that the classification practice of the European Communities was part of the "circumstances of the conclusion" of the WTO Agreement and that this may be used as a supplementary means of interpretation:

> "In the light of our observations on 'the circumstances of [the] conclusion' of a treaty as a supplementary means of interpretation under Article 32 of the *Vienna Convention*, we consider that the classification practice in the European Communities during the Uruguay Round is part of 'the circumstances of [the] conclusion' of the *WTO Agreement* and may be used as a supplementary

[38] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 10.
[39] Appellate Body Report on *Canada – Dairy*, para. 138.
[40] Appellate Body Report on *EC – Computer Equipment*, para. 86.
[41] Panel Report on *US – Export Restraints*, para. 8.64.
[42] See footnote 37 above.
[43] ADP/21.
[44] Panel Report on *Egypt – Steel Rebar*, para. 7.154.

means of interpretation within the meaning of Article 32 of the *Vienna Convention*."[45]

39. With respect to the question whether the classification practice of one country, existing at the time of tariff negotiation, was relevant for the interpretation of a country's Schedule of concessions, the Appellate Body, in *EC – Computer Equipment*, emphasized that while of limited value, such unilateral practice was not irrelevant; also, the Appellate Body found that where such unilateral practice of one Member was inconsistent, it could not be considered relevant:

"We note that the Panel examined the classification practice of only the European Communities, and found that the classification of LAN equipment by the United States during the Uruguay Round tariff negotiations was not relevant. The purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty. To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance. However, the Panel was mistaken in finding that the classification practice of the United States was *not* relevant.

. . .

Then there is the question of the *consistency* of prior practice. Consistent prior classification practice may often be significant. Inconsistent classification practice, however, c*annot* be relevant in interpreting the meaning of a tariff concession."[46]

Agreements between Members

40. In *EC – Poultry*, the Appellate Body found that a bilateral agreement between two WTO Members could serve as "supplementary means" of interpretation for a provision of a covered agreement:

"[T]he Oilseeds Agreement may serve as a *supplementary means* of interpretation of Schedule LXXX pursuant to Article 32 of the *Vienna Convention*, as it is part of the historical background of the concessions of the European Communities for frozen poultry meat."[47]

Working documents of the GATT Secretariat

41. In *Mexico – Telecoms*, the Panel considered that an Explanatory Note issued by the GATT Secretariat as a working document for the Group of Negotiations on Services was part of the "circumstances" of the conclusion of the GATS, within the meaning of Article 32 of the Vienna Convention:

"In interpreting the scope of cross border supply in Article I:2(a) of the GATS, we need not decide whether the Explanatory Note provides 'context' (as an agreement or instrument made in connection with the conclusion of the GATS) under paragraph 2 of Article 31 of the Vienna Convention, or whether it can be 'taken into account', together with the context, as a subsequent agreement or practice under paragraph 3 of the same provision. In any case, we consider that the source, content and use of the Explanatory Note make it part of the 'circumstances' of the conclusion of the GATS, within the meaning of Article 32 of the Vienna Convention. We may therefore properly have recourse to the Explanatory Note to confirm our understanding of the ordinary meaning of Article I:2(a) of the GATS."[48]

"*In dubio mitius*"

42. In *EC – Hormones*, the Appellate Body referred to "the interpretative principle of *in dubio mitius*" as a supplementary means of interpretation "widely recognized in international law". It there stated that "the principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties."[49]

(vi) Good faith

43. In *US – Shrimp*, the Appellate Body held that the chapeau of Article XX was "but one expression of good faith" and also reflected the notion of "*abus de droit*":

"The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.'[50] An abusive exer-

[45] Appellate Body Report on *EC – Computer Equipment*, para. 92.
[46] Appellate Body Report on *EC – Computer Equipment*, paras. 93–95.
[47] Appellate Body Report on *EC – Poultry*, para. 83.
[48] Panel Report on *Mexico – Telecoms*, para. 7.44. The Panel also found that the Draft Model Schedule and the Note by the Chairman to the Scheduling Guidelines were, with respect to the GATS Protocol on Telecommunications, an important part of the "circumstances of its conclusion" within the meaning of Article 32 of the Vienna Convention. Panel Report on *Mexico – Telecoms*, para. 7.67.
[49] Appellate Body Report on *EC – Hormones*, footnote 154.
[50] (*footnote original*) B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapter 4, in particular p. 125, elaborates:

> . . . A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (*i.e.*, in furtherance of the interests which the right is intended to protect). It should at the same time be *fair and*

> cise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law."[51]

44. In *US – Hot-Rolled Steel*, the Appellate Body noted that the pervasive principle of good faith "informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements".[52]

45. In *US – Export Restraints*,[53] the Panel mentioned the decision of the Appellate Body in *US – Gasoline* which referred to "a fundamental rule of treaty interpretation [which] has received its most authoritative and succinct expression in [Article 31.1 of] the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*')",[54] i.e. good faith.

46. In *EC – Computer Equipment*, the Appellate Body examined whether the Panel had erred in interpreting the meaning of a tariff concession in the European Communities Schedule in light of the "legitimate expectations" of an exporting Member (see Section on legitimate expectations, paragraphs 73–76 below). The Appellate Body disagreed with the Panel's finding that the tariff concession of a Member may be determined on the basis of the "legitimate expectation" of just one (namely the exporting) Member and emphasized that it was rather the *common intention* of the parties that should be ascertained. The Appellate Body stated:

> "[W]e do not agree with the Panel that interpreting the meaning of a concession in a Member's Schedule in the light of the 'legitimate expectations' of exporting Members is consistent with the principle of good faith interpretation under Article 31 of the *Vienna Convention*. Recently, in *India – Patents*, the panel stated that good faith interpretation under Article 31 required 'the protection of legitimate expectations'. We found that the panel had misapplied Article 31 of the *Vienna Convention*. . .
>
> The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty. Tariff concessions provided for in a Member's Schedule – the interpretation of which is at issue here – are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*."[55]

47. In *US – Offset Act (Byrd Amendment)*, the Appellate Body, recalling its previous reports in *US – Shrimp* and *US – Hot-Rolled Steel*, acknowledged that "there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith".[56] However, it further stressed that "[n]othing . . . in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion."[57]

48. Interpreting the above considerations by the Appellate Body, the Panel in *Argentina – Poultry Anti-Dumping Duties* explained that "two conditions must be satisfied before a Member may be found to have failed to act in good faith. First, the Member must have violated a substantive provision of the WTO agreements. Second, there must be something 'more than mere violation'."[58]

49. As regards the application of the principle of good faith in the context of the obligation to engage in dispute settlement procedures in good faith in an effort

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> *equitable as between the parties* and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty. . . .(emphasis added)

Also see, for example, Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed, Vol. I (Longman's, 1992), pp. 407–410, *Border and Transborder Armed Actions Case*, (1988) I.C.J. Rep. 105; *Rights of Nationals of the United States in Morocco Case*, (1952) I.C.J. Rep. 176; *Anglo-Norwegian Fisheries Case*, (1951) I.C.J. Rep. 142.

51 Appellate Body Report on *US – Shrimp*, para. 158.

52 Appellate Body Report on *US – Hot-Rolled Steel*, para. 101. In *US – Cotton Yarn*, the Appellate Body considered that it was not necessary for the purpose of the appeal at issue "to express a view on the question whether an importing Member would be under an *obligation*, flowing from the 'pervasive' general principle of *good faith* that underlies all treaties, to *withdraw* a safeguard measure if post-determination evidence relating to pre-determination facts were to emerge revealing that a determination was based on such a critical factual error that one of the conditions required by Article 6 turns out never to have been met." Appellate Body Report on *US – Cotton Yarn*, para. 81.

53 Panel Report on *US – Export Restraints*, para. 8.18.

54 Appellate Body Report on *US – Gasoline*, p. 16.

55 Appellate Body Report on *EC – Computer Equipment*, paras. 83–84.

56 Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 297.

57 Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 298.

58 Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.36.

to resolve a dispute pursuant to Article 3.10 of the *DSU*, see Section III.B.6(a) below.

(vii) Principle of effective treaty interpretation

50. The Appellate Body on *US – Gasoline* considered the principle of effective treaty interpretation (*ut res magis valeat quam pereat*)[59] as "one of the corollaries of the 'general rule of interpretation' in the *Vienna Convention*". In particular, the Appellate Body stated:

> "One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[60]"[61]

51. In application of the principle of effective treaty interpretation as defined in paragraph 50 above, the Appellate Body in *US – Gasoline* found that the Panel had erroneously applied the same standard of discrimination to Article III:4 of *GATT 1994* and to the chapeau of Article XX of *GATT 1994*. The Appellate Body held that to do so would be to effectively deprive the chapeau of its meaning and found that such an approach would be contrary to the principle of giving "meaning and effect to all the terms of a treaty":

> "The enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4. That would also be true if the finding were one of inconsistency with some other substantive rule of the *General Agreement*. The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning . . . One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[62]

52. In *Japan – Alcoholic Beverages II*, the Appellate Body referred to its ruling in *US – Gasoline* (see paragraph 50 above) and indicated that "a fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness (*ut res magis valeat quam perea)*".[63] The Appellate Body concluded that "Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation."[64]

53. In *US – Underwear*, the Appellate Body invoked the principle of effective interpretation to sustain its conclusion that the common, day-to-day, implication which arises from the language of Article 6.7 of the *Agreement on Textiles and Clothing* is that a restraint is to be applied in the future, after the consultations, should these prove fruitless and the proposed measure not be withdrawn.[65]

54. In *Korea – Dairy*, the Appellate Body recalled the principle of effective treaty interpretation as it had defined it in *US – Gasoline* (see paragraph 24 above) and concluded that:

> "In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.'[66] An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole.[67] Article II:2 of the *WTO Agree-*

[59] Appellate Body Report on *Korea – Dairy*, para. 80.

[60] (*footnote original*) *E.g., Corfu Channel Case* (1949) *ICJ Reports*, p.24 (International Court of Justice); *Territorial Dispute Case* (*Libyan Arab Jamahiriya* v. *Chad*) (1994) *ICJ Reports*, p. 23 (International Court of Justice); 1966 *Yearbook of the International Law Commission*, Vol. II at 219; *Oppenheim's International Law* (9th ed., Jennings and Watts eds., 1992), Volume 1, 1280–1281; P. Dallier and A. Pellet, *Droit International Public*, 5th ed. (1994) para. 17.2; D. Carreau, *Droit International*, (1994) para. 369.

[61] Appellate Body Report on *US – Gasoline*, p. 23.

[62] Appellate Body Report on *US – Gasoline*, p. 23.

[63] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 12. See also Panel Report on *India – Quantitative Restrictions*, footnote 354; Panel Report on *Canada – Patent Term*, paras. 6.48–6.50; Panel Report on *EC – Asbestos*, footnote 22 to para. 8.29.

[64] Appellate Body Report on *Japan – Alcoholic Beverages*, p. 18.

[65] Appellate Body Report on *US – Underwear*, p. 16.

[66] (*footnote original*) We have emphasized this in Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, circulated 14 December 1999, para. 81. See also Appellate Body Report, *United States – Gasoline*, *supra*, footnote 12, p. 23; Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 41, p. 12; and Appellate Body Report, *India – Patents*, *supra*, footnote 21, para. 45.

[67] (*footnote original*) The duty to interpret a treaty as a whole has been clarified by the Permanent Court of International Justice in *Competence of the I.L.O. to Regulate Agricultural Labour* (1922), PCIJ, Series B, Nos. 2 and 3, p. 23. This approach has been followed by the International Court of Justice in *Ambatielos Case* (1953) *ICJ Reports*, p. 10; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) *ICJ Reports*, p. 15; and *Case Concerning Rights of United States Nationals in Morocco* (1952) *ICJ Reports*, pp. 196–199. See also I. Brownlie, *Principles of Public International Law*, 5th ed. (Clarendon Press, 1998), p. 634; G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951–1954: Treaty Interpretation and Other Treaty Points", 33 *British Yearbook of International Law* (1957), p. 211 at p. 220; A. McNair, *The Law of Treaties* (Clarendon Press, 1961), pp. 381–382; I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984), pp. 127–129; M. O. Hudson, *La Cour Permanente de Justice Internationale* (Editions A Pedone, 1936), pp. 654–659; and L. A. Podesta Costa and J. M. Ruda, *Derecho Internacional Público*, Vol. 2 (Tipográfica, 1985), p. 105.

> *ment* expressly manifests the intention of the Uruguay Round negotiators that the provisions of the *WTO Agreement* and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole."[68]

55. In *Korea – Dairy*, the Appellate Body applied the principle of effective treaty interpretation to the relationship between the *Agreement on Safeguards* and Article XIX of *GATT 1994* and concluded that "having said that *all of the provisions* of a treaty must be given meaning and legal effect, we believe that the clause in Article XIX:1(a) – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . .' – must have meaning".[69] The Appellate Body therefore disagreed with the Panel on the latter's conclusion whereby the clause in Article XIX:1(a) of *GATT 1994* – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . . does not add conditions for any measure to be applied pursuant to Article XIX but rather serves as an explanation of why an Article XIX measure may be needed".[70]

56. The same issue as referenced in paragraph 55 above arose in *Argentina – Footwear (EC)*. In this case, the Appellate Body also considered whether the Panel had reached a correct conclusion concerning the relationship between the *Agreement on Safeguards* and Article XIX of *GATT 1994*. The Appellate Body agreed with the Panel that "Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an inseparable package of rights and disciplines which have to be considered in conjunction". However, the Appellate Body reversed the Panel's finding that the "*express omission* of the criterion of unforeseen developments in the [*Agreement on Safeguards*] (which otherwise transposes, reflects and refines in great detail the essential conditions for the imposition of safeguard measures provided for in Article XIX of GATT) must . . . have meaning".[71] The Appellate Body held:

> "[A] treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously. And, an appropriate reading of this 'inseparable package of rights and disciplines' must, accordingly, be one that gives meaning to *all* the relevant provisions of these two equally binding agreements."[72]

57. In *Canada – Dairy*, the Appellate Body made it clear that a treaty interpreter cannot lightly assume that a WTO Member intended no specific purpose when inscribing a term in its schedule.

> "In interpreting the language in Canada's Schedule, the Panel focused on the verb 'represents' and opined that, because of the use of this verb, the notation was no more than a '*description*' of the 'way the size of the quota was determined'. The net consequence of the Panel's interpretation is a failure to give the notation in Canada's Schedule *any* legal effect as a 'term and condition'. If the language is *merely* a 'description' or a 'narration' of how the quantity was arrived at, we do not see what purpose it serves in being inscribed in the Schedule. The Panel, in other words, acted upon the assumption that Canada projected no identifiably necessary or useful qualifying or limiting purpose in inscribing the notation in its Schedule. The Panel thus disregarded the principle of effectiveness in its interpretive effort."[73]

58. In *US – Section 211 Appropriations Act*, the Appellate Body disagreed with the Panel's view that the words "in respect of" in Article 2.1 of the *TRIPS Agreement* have the effect of "conditioning" Members' obligations under the Articles of the Paris Convention (1967) incorporated into the *TRIPS Agreement*, with the result that trade names are not covered. In reference to its previous rulings in *US – Gasoline* (see paragraph 50 above) and *Japan – Alcoholic Beverages II* (see paragraph 52 above) concerning the principle of effective interpretation, the Appellate Body considered that to "adopt the Panel's approach would be to deprive Article 8 of the Paris Convention (1967), as incorporated into the *TRIPS Agreement* by virtue of Article 2.1 of that Agreement, of any and all meaning and effect".[74]

(viii) Article 33 of the Vienna Convention: plurilingual treaties

59. In *India – Quantitative Restrictions*, the Panel, when examining the meaning of certain terms in the Ad Note to Article XVIII:11 of the GATT 1994, noted that its interpretation was consistent with the Spanish and French versions of the Agreement.[75]

60. In *EC – Asbestos*, the Panel considered that "[a]s the WTO Agreement is a treaty with authentic texts in three languages, it is . . . important to bear in mind the spirit underlying the provisions of Article

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[68] Appellate Body Report on *Korea – Dairy*, para. 81.
[69] Appellate Body Report on *Korea – Dairy*, para. 82.
[70] Appellate Body Report on *Korea – Dairy*, para. 82, referring to Panel Report on *Korea – Dairy*, para. 7.42.
[71] Panel Report on *Argentina – Footwear (EC)*, para. 8.58.
[72] Appellate Body Report on *Argentina – Footwear (EC)*, para. 81.
[73] Appellate Body Report on *Canada – Dairy*, para. 135 (footnote omitted).
[74] Appellate Body Report on *US – Section 211 Appropriations Act*, para. 338.
[75] Appellate Body Report on *India – Quantitative Restrictions*, para. 5.196–5.198.

33[76]".[77] The Appellate Body also referred to the different authentic languages and examined the term "similar" as compared to "*produits similaires*" and "*productos similares*" since both French and Spanish versions of the WTO Agreements, "together with the English version, are equally authentic[78]".[79]

61. In *Chile – Price Band System*, the Panel, when attempting to define the term "ordinary customs duty", had found that the dictionary meanings of the English term, on the one hand, and the French and Spanish corresponding terms, on the other hand, differed in the way they defined "ordinary". The Appellate Body, which disagreed with the Panel's interpretation of this term, noted that the Panel had interpreted the French and Spanish versions of the term "ordinary customs duty" to mean something different from the ordinary meaning of the English version of that term. In this regard, the Appellate Body stated that "It is difficult to see how, in doing so, the Panel took into account the rule of interpretation codified in Article 33(4)[80] of the *Vienna Convention* whereby 'when a comparison of the authentic texts discloses a difference of meaning . . ., the meaning which best *reconciles* the texts . . . shall be adopted' (emphasis added).[81]

(ix) Presumption against conflict

GATT 1994 and the Annex 1A Agreements

62. In *EC – Bananas III*, given the existence of claims raised under *GATT 1994*, the *Licensing Agreement* and the *TRIMs Agreement*, the Panel was required to consider the interpretative interrelationship of these three agreements. In so doing, it first referred to the *General Interpretative Note to Annex 1A* of the *WTO Agreement*, which provides that in the event of conflict between a provision of the *GATT 1994* and another Agreement of Annex 1A, the provision of the other Agreement prevails. Noting that both the *Licensing Agreement* and the *TRIMs Agreement* are agreements in Annex 1A to *WTO Agreement*, the Panel, in a finding not reviewed by the Appellate Body, concluded that, in the case before it, "no conflicting, i.e. mutually exclusive, obligations arise from the provisions of the three Agreements . . . ".[82] See paragraphs 902–911 below.

Issue of *lex specialis* / conflict

63. In *Indonesia – Autos*, Indonesia argued that the measures under examination were subsidies and therefore the *SCM Agreement*, being *lex specialis*, was the only "applicable law" (to the exclusion of other WTO provisions). The Panel recalled that a presumption against conflict existed in public international law:

> "We recall the Panel's finding in *Indonesia – Autos*, a dispute where
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> > 'In considering Indonesia's defence that there is a general conflict between the provisions of the SCM Agreement and those of Article III of GATT, and consequently that the SCM Agreement is the only applicable law, we recall first that in public international law there is a presumption against conflict. This presumption is especially relevant in the WTO context[83] since all WTO agreements, including GATT 1994 which was modified by Understandings when judged necessary, were negotiated at the same time, by the same Members and in the same forum. In this context we recall the principle of effective interpretation pursuant to which all provisions of a treaty (and in the WTO system all agreements) must be given meaning, using the ordinary meaning of words.' "[84]

[76] (*footnote original*) The Panel also notes the importance attached by the Appellate Body to the principle of effectiveness (*ut res magis valeat quam pereat)* concerning the interpretation of the provisions of the WTO Agreement in several cases (see, for example, *United States – Standards for Reformulated and Conventional Gasoline,* adopted on 20 May 1996, WT/DS60/AB/R (hereinafter "*United States – Gasoline*"), op. cit., pp.18 and 23; *Guatemala – Cement*, op. cit., para. 75; *Argentina – Safeguards*, op. cit., para. 88. The Panel also notes in the *Reports of the Commission to the General Assembly, Yearbook of the International Law Commission,* 1966, Volume II, A/CN.4/SER.A/1966/Add.1, p. 219, that the International Law Commission indicates that:

> "[. . .] in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in Article [31], paragraph 1, which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose.* When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the object and purposes of the treaty demand that the former interpretation should be adopted." [Italics in the original.]

[77] Panel Report on *EC – Asbestos*, para. 8.29.

[78] (*footnote original*) *WTO Agreement*, final, authenticating clause. See also Article 33(1) of the *Vienna Convention on the Law of the Treaties*, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 *International Legal Materials* 679.

[79] Appellate Body Report on *EC – Asbestos*, para. 91.

[80] Article 33(4) of the *Vienna Convention* provides:

> "Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

[81] Appellate Body Report on *Chile – Price Band System*, para. 271.

[82] Panel Report on *EC – Bananas III*, paras. 7.157–7.163.

[83] (*footnote original*) In this context we note that the WTO Agreement contains a specific rule on conflicts which is however limited to conflicts between a specific provision of GATT 1994 and a provision of another agreement of Annex 1A. We do not consider this interpretative note in this section of the report because we are dealing with Indonesia's argument that there is a general conflict between Article III and the SCM Agreement, while the note is concerned with specific conflicts between a provision of GATT 1994 and a specific provision of another agreement of Annex 1A.

[84] Panel Report on *Indonesia – Autos*, para. 14.28. See also Panel Report on *Turkey – Textiles*, paras. 9.92–9.95.

64. As regards the presumption against conflict when in relation to special or additional rules and procedure, see paragraphs 6–8 above.

(x) Non-retroactivity of treaties

65. In *Brazil – Desiccated Coconut*, the Appellate Body discussed Article 28 of the *Vienna Convention*,[85] i.e. the provision containing the general principle of non-retroactivity of treaties:

> "The fundamental question in this case is one of the temporal application of one set of international legal norms, or the successor set of norms, to a particular measure taken during the period of co-existence of the GATT 1947 and the *Tokyo Round SCM Code* with the *WTO Agreement*. Article 28 of the *Vienna Convention* contains a general principle of international law concerning the non-retroactivity of treaties.
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> . . .
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> Article 28 states the general principle that a treaty shall not be applied retroactively 'unless a different intention appears from the treaty or is otherwise established'. Absent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force."[86]

66. In *EC – Hormones*, the Appellate Body examined the Panel's finding that the *SPS Agreement* should apply to the European Communities measures that were enacted before the entry into force of the *WTO Agreement* on 1 January 1995 because the measures continued to exist after that date and the *SPS Agreement* does not indicate any intention to limits its application to measures enacted after the entry into force of the *WTO Agreement*. The Appellate Body stated:

> "We agree with the Panel that the *SPS Agreement* would apply to situations or measures that did not cease to exist, such as the 1981 and 1988 Directives, unless the *SPS Agreement* reveals a contrary intention. We also agree with the Panel that the *SPS Agreement* does not reveal such an intention. The *SPS Agreement* does not contain any provision limiting the temporal application of the *SPS Agreement*, or of any provision thereof, to SPS measures adopted after 1 January 1995. In the absence of such a provision, it cannot be assumed that central provisions of the *SPS Agreement*, such as Articles 5.1 and 5.5, do not apply to measures which were enacted before 1995 but which continue to be in force thereafter. If the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 from the disciplines of provisions as important as Articles 5.1 and 5.5, it appears reasonable to us to expect that they would have said so explicitly. Articles 5.1 and 5.5 do not distinguish between SPS measures adopted before 1 January 1995 and measures adopted since; the relevant implication is that they are intended to be applicable to both."[87]

67. In *Canada – Patent Term*, the Appellate Body stated that Article 70.1 of the *TRIPS Agreement* excludes obligations in respect of "acts which occurred" before the date of the application of the *TRIPS Agreement* but does not exclude rights and obligations in respect of continuing situations. The Appellate Body, in noting that its interpretation did not lead to a retroactive application of the *TRIPS Agreement*, stated:

> "Article 28 of the *Vienna Convention* covers not only any 'act', but also any 'fact' or 'situation which ceased to exist'. Article 28 establishes that, in the absence of a contrary intention, treaty provisions do *not* apply to 'any situation which ceased to exist' before the treaty's entry into force for a party to the treaty. Logically, it seems to us that Article 28 also necessarily implies that, absent a contrary intention, treaty obligations *do* apply to any 'situation' which has *not* ceased to exist – that is, to any situation that arose in the past, but continues to exist under the new treaty. Indeed, the very use of the word 'situation' suggests something that subsists and continues over time; it would, therefore, include 'subject matter existing . . . and which is protected', such as Old Act patents at issue in this dispute, even though those patents, and the rights conferred by those patents, arose from 'acts which occurred' before the date of application of the *TRIPS Agreement* for Canada.
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> This interpretation is confirmed by the Commentary on Article 28, which forms part of the preparatory work of the *Vienna Convention*:
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> . . .
>
> We note that Article 28 of the *Vienna Convention* is not applicable if 'a different intention appears from the treaty or is otherwise established'. We see no such 'different intention' in Article 70. Despite some differences in wording and structure from Article 28, we do not see Article 70.1 as in any way establishing 'a different intention' within the meaning of Article 28 of the *Vienna Convention*."[88]

(xi) State responsibility

General

68. In *Turkey – Textiles*, the Panel noted that in public international law, Turkey could be held responsible for the measures taken by the customs union between Turkey and the European Communities. The Panel

[85] Article 28 of the *Vienna Convention* provides:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

[86] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 14.
[87] Appellate Body Report on *EC – Hormones*, para. 128.
[88] Appellate Body Report on *Canada – Patent Term*, paras. 72–74.

noted and quoted the separate opinion of Judge Shahabuddeen in the *Nauru* case before the ICJ:

> "'[T]he [International Law Commission] considered, that *where States act through a common organ, each State is separately answerable for the wrongful act of the common organ*. That view, it seems to me, runs in the direction of supporting Nauru's contention that each of the three States in this case is jointly and severally responsible for the way Nauru was administered on their behalf by Australia, whether or not Australia may be regarded as technically as a common organ. . . ."[89] (Emphasis added.)[90]

69. The Panel on *Turkey – Textiles* also noted the International Law Commission's commentaries to the adopted report:

> "A similar conclusion is called for in cases of parallel attribution of a single course of conduct to several States, as when the conduct in question has been adopted by an organ common to a number of States. According to the principles on which the articles of chapter II of the draft are based, *the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then the two or more States will concurrently have committed separate, although identical, internationally wrongful acts*. It is self-evident that the parallel commission of identical offences by two or more States is altogether different from participation by one of those States in an internationally wrongful act committed by the other."[91] (Emphasis added.)[92]

70. In *US – Section 301 Trade Act*, although it eventually held that a statute "which . . . reserves the right for the Member concerned to do something which it has promised *not* to do under Article 23.2(a)" was a violation of Article 23.2(a) read together with Article 23.1 (see paragraph 3 below), the Panel made the following general statement on State responsibility:

> "[U]nder traditional public international law, legislation under which an eventual violation could, or even would, subsequently take place, does not normally in and of itself engage State responsibility. If, say, a State undertakes not to expropriate property of foreign nationals without appropriate compensation, its State responsibility would normally be engaged only at the moment foreign property had actually been expropriated in a given instance."[93]

Proportionality of countermeasures

71. In *US – Cotton Yarn*, the Appellate Body referred to the rules of general international law on state responsibility as supporting its conclusions on the reasons why a comparative analysis is needed as part of the attribution of serious damage analysis under Article 6.4, second sentence of the *Agreement on Textiles and Clothing*. The Appellate Body pointed out the need for proportionality as between the serious damage and the countermeasure imposed. It indicated that "[its] view is supported further by the rules of general international law on state responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered":

> "[T]he part of the total serious damage attributed to an exporting Member must be proportionate to the damage caused by the imports from that Member. Contrary to the view of the United States, we believe that Article 6.4, second sentence, does not permit the attribution of the totality of serious damage to one Member, unless the imports from that Member alone have caused all the serious damage.
>
> Our view is supported further by the rules of general international law on state responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered. In the same vein, we note that Article 22.4 of the DSU stipulates that the suspension of concessions shall be equivalent to the level of nullification or impairment. This provision of the DSU has been interpreted consistently as not justifying punitive damages. These two examples illustrate the consequences of breaches by states of their international obligations, whereas a safeguard action is merely a remedy to WTO-consistent 'fair trade' activity. It would be absurd if the breach of an international obligation were sanctioned by proportionate countermeasures, while, in the absence of such breach, a WTO Member would be subject to a disproportionate and, hence, 'punitive', attribution of serious damage not wholly caused by its exports. In our view, such an exorbitant derogation from the principle of proportionality in respect of the attribution of serious damage could be justified only if the drafters of the *ATC* had expressly provided for it, which is not the case."[94]

72. In *US – Line Pipe*, also in the context of the application of a safeguard, the Appellate Body emphasized the importance of the state responsibility rules which

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[89] (*footnote original*) *Nauru* case, Separate Opinion of Judge Shahabuddeen, at 284. Clark, R., Book review of *Nauru: Environmental Damage Under International Trusteeship* (C. Weeramantry), *The International Lawyer* Vol. 28, No. 1, at 186.

[90] Panel Report on *Turkey – Textiles*, para. 9.42.

[91] (*footnote original*) See the *Yearbook of the International Law Commission*, 1978, Vol.II, Part Two, at 99. These commentaries were adopted by the Commission in its session of 8 May to 28 July 1978. Article 27 on state responsibility to which these commentaries refer was adopted at the ILC session of 6 May to 26 July 1996. These commentaries and the report were submitted in the same years to the United Nations General Assembly for its consideration.

[92] Panel Report on *Turkey – Textiles*, para. 9.43.

[93] Panel Report on *US – Section 301 Trade Act*, para. 7.80.

[94] Appellate Body Report on *US – Cotton Yarn*, paras. 119–120.

command the need for proportionality when imposing countermeasures:

> "If the pain inflicted on exporters by a safeguard measure were permitted to have effects beyond the share of injury caused by increased imports, this would imply that an exceptional remedy, which is not meant to protect the industry of the importing country from unfair or illegal trade practices, could be applied in a more trade-restrictive manner than countervailing and anti-dumping duties. On what basis should the *WTO Agreement* be interpreted to limit a countermeasure to the extent of the injury caused by unfair practices or a violation of the treaty but not so limit a countermeasure when there has not even been an allegation of a violation or an unfair practice?
>
> . . .
>
> We note as well the customary international law rules on state responsibility, to which we also referred in *US – Cotton Yarn*. We recalled there that the rules of general international law on state responsibility require that countermeasures in response to breaches by States of their international obligations be proportionate to such breaches. Article 51 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that 'countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'. Although Article 51 is part of the International Law Commission's Draft Articles, which do not constitute a binding legal instrument as such, this provision sets out a recognized principle of customary international law. We observe also that the United States has acknowledged this principle elsewhere. In its comments on the International Law Commission's Draft Articles, the United States stated that 'under customary international law a rule of proportionality applies to the exercise of countermeasures'."[95]

(xii) Legitimate expectations

73. In *Japan – Alcoholic Beverages II*, the Appellate Body held that adopted panel reports create legitimate expectations among WTO Members. See paragraph 80 below.

74. The Appellate Body on *India – Patents (US)* held that the principles of treaty interpretation "neither require nor condone" the importation into a treaty of "words that are not there" or "concepts that were not intended". See paragraph 27 above. The Appellate Body made this statement while reversing the Panel's finding that "[t]he protection of legitimate expectations of Members regarding the conditions of competition is a well-established GATT principle, which derives in part from Article XXIII"[96] and that, when interpreting the text of the *TRIPS Agreement*, "the legitimate expectations of WTO Members concerning the TRIPS Agreement must be taken into account".[97] The Appellate Body disagreed with the Panel that the legitimate expectations of Members and private rights holders concerning conditions of competition must always be taken into account in interpreting the *TRIPS Agreement* and stated that the concept of "reasonable expectations" belonged to the domain of non-violation complaints. The Appellate Body also criticized "the Panel's invocation of the 'legitimate expectations' of Members relating to conditions of competition [which] melds the legally distinct bases for 'violation' and 'non-violation' complaints under Article XXIII of the GATT 1994 into one uniform cause of action":

> "The doctrine of protecting the 'reasonable expectations' of contracting parties developed in the context of 'non-violation' complaints brought under Article XXIII:1(b) of the GATT 1947. Some of the rules and procedures concerning 'non-violation' cases have been codified in Article 26.1 of the DSU. 'Non-violation' complaints are rooted in the GATT's origins as an agreement intended to protect the reciprocal tariff concessions negotiated among the contracting parties under Article II.[98] In the absence of substantive legal rules in many areas relating to international trade, the 'non-violation' provision of Article XXIII:1(b) was aimed at preventing contracting parties from using non-tariff barriers or other policy measures to negate the benefits of negotiated tariff concessions. Under Article XXIII:1(b) of the GATT 1994, a Member can bring a 'non-violation' complaint when the negotiated balance of concessions between Members is upset by the application of a measure, whether or not this measure is inconsistent with the provisions of the covered agreement. The ultimate goal is not the withdrawal of the measure concerned, but rather achieving a mutually satisfactory adjustment, usually by means of compensation.
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> . . . the *only* cause of action permitted under the *TRIPS Agreement* during the first five years after the entry into force of the *WTO Agreement* is a 'violation' complaint under Article XXIII:1(a) of the GATT 1994. This case involves allegations of violation of obligations under the *TRIPS Agreement*. However, the Panel's invocation of the 'legitimate expectations' of Members relating to conditions of competition melds the legally-distinct bases for 'violation' and 'non-violation' complaints under Article XXIII of the GATT 1994 into one uniform cause of action. This is not consistent with either Article XXIII of the GATT 1994 or Article 64 of the *TRIPS Agreement*. Whether or not 'non-violation' complaints should be available for

[95] Appellate Body Report on *US – Line Pipe*, paras. 257 and 259.
[96] Panel Report on *India – Patents (US)*, para. 7.20.
[97] Panel Report on *India – Patents (US)*, para. 7.22.
[98] (*footnote original*) See, in general, E.-U. Petersmann, "Violation Complaints and Non-violation Complaints in International Law" (1991) *German Yearbook of International Law* 175.

disputes under the *TRIPS Agreement* is a matter that remains to be determined by the Council for Trade-Related Aspects of Intellectual Property (the 'Council for TRIPS') pursuant to Article 64.3 of the *TRIPS Agreement*. It is *not* a matter to be resolved through interpretation by panels or by the Appellate Body."[99]

75. In *EC – Computer Equipment*, the Appellate Body examined whether the Panel had erred in interpreting the meaning of a tariff concession in the European Communities Schedule in light of the "legitimate expectations" of an exporting Member. The Appellate Body disagreed with the Panel's finding that the tariff concession of a Member may be determined on the basis of the "legitimate expectation" of just one (namely the exporting) Member and emphasized that it was rather the *common intention* of the parties which should be ascertained. See paragraph 46 above.

76. With respect to the issue of "legitimate expectations" under non-violation complaints, see Chapter on *GATT 1994*, Section XXIV.B.2(h).

(xiii) Proportionality

77. The Appellate Body has referred to the need for proportionality of countermeasures by reference to the international rules on state responsibility. See in this regard paragraphs 71–72 above.

(xiv) Precautionary principle

78. In *EC – Hormones*, the Appellate Body agreed with the Panel finding that the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the SPS Agreement and made the following observations about this principle:

"The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear.[100] We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.[101]

It appears to us important, nevertheless, to note some aspects of the relationship of the precautionary principle to the *SPS Agreement*. First, the principle has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement. Secondly, the precautionary principle indeed finds reflection in Article 5.7 of the *SPS Agreement*. We agree, at the same time, with the European Communities, that there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle. It is reflected also in the sixth paragraph of the preamble and in Article 3.3. These explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations. Thirdly, a panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned. Lastly, however, the precautionary principle does

[99] Appellate Body Report on *India – Patents (US)*, paras. 41–42.

[100] (*footnote original*) Authors like P. Sands, J. Cameron and J. Abouchar, while recognizing that the principle is still evolving, submit nevertheless that there is currently sufficient state practice to support the view that the precautionary principle is a principle of customary international law. See, for example, P. Sands, *Principles of International Environmental Law*, Vol. I (Manchester University Press, 1995) p. 212; J. Cameron, "The Status of the Precautionary Principle in International Law", in J. Cameron and T. O'Riordan (eds.), *Interpreting the Precautionary Principle* (Cameron May, 1994) 262, p. 283; J.Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in D. Freestone and E. Hey (eds.), *The Precautionary Principle in International Law* (Kluwer, 1996) 29, p. 52. Other authors argue that the precautionary principle has not yet reached the status of a principle of international law, or at least, consider such status doubtful, among other reasons, due to the fact that the principle is still subject to a great variety of interpretations. See, for example, P. Birnie and A. Boyle, *International Law and the Environment* (Clarendon Press, 1992), p. 98; L. Gündling, "The Status in International Law of the Precautionary Principle" (1990), 5:1,2,3 *International Journal of Estuarine and Coastal Law* 25, p. 30; A. de Mestral (et al), *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed. (Emond Montgomery, 1993), p. 765; D. Bodansky, in *Proceedings of the 85th Annual Meeting of the American Society of International Law* (ASIL, 1991), p. 415.

[101] (*footnote original*) In *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the International Court of Justice recognized that in the field of environmental protection ". . . new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight . . .". However, we note that the Court did not identify the precautionary principle as one of those recently developed norms. It also declined to declare that such principle could override the obligations of the Treaty between Czechoslovakia and Hungary of 16 September 1977 concerning the construction and operation of the Gabčíkovo/Nagymaros System of Locks. See *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Judgement, 25 September 1997, paras. 140, 111–114. Not yet reported in the I.C.J. Reports but available on internet at http://www.icj-cij.org/idecis.htm.

not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the *SPS Agreement*."[102]

(xv) Estoppel

79. In *Argentina – Poultry Anti-Dumping Duties*, Argentina invoked the principle of estoppel to justify its claim that the Panel had to recuse itself from the dispute. Argentina had raised as a preliminary issue that, prior to bringing WTO dispute settlement proceedings against Argentina's anti-dumping measure, Brazil had challenged that measure before a MERCOSUR Ad Hoc Arbitral Tribunal. Argentina requested that, in light of the prior MERCOSUR proceedings, that the Panel refrain from ruling on the claims raised by Brazil in the present WTO dispute settlement proceedings.[103] The United States, a third party, argued that there is no basis for a WTO panel to apply the principle of estoppel. The Panel did not take up the issue of whether this principle can be applied by a panel or not. In a footnote to the Report, the Panel simply said that since it had found that the conditions identified by Argentina for the application of the principle of estoppel[104] were not present, it did not consider it necessary to determine whether or not it would have had the authority to apply the principle of estoppel if the relevant conditions had been satisfied. Neither did the Panel consider it necessary to determine whether the three conditions proposed by Argentina were sufficient for the application of that proposal.[105]

(xvi) Status of adopted GATT/WTO Panel and Appellate Body Reports

80. In *Japan – Alcoholic Beverages II*, the Appellate Body, further to reversing the Panel's findings that adopted panel reports constituted subsequent practice in a specific case under Article 31.3(b) of the Vienna Convention (see paragraph 30 above), held that "[a]dopted panel reports are an important part of the GATT *acquis*":

> "Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement* bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the Contracting Parties to the GATT 1947 – and acknowledges the continuing relevance of that experience to the new trading system served by the WTO. Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*."[106]

81. In *US – Shrimp (Article 21.5 – Malaysia)* the Appellate Body referred to its ruling in *Japan – Alcoholic Beverages II* (see paragraph 80 above) and considered that the same reasoning applied to Appellate Body reports:

> "[W]e note that in our Report in *Japan – Taxes on Alcoholic Beverages*, we stated that:
>
> > Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.
>
> This reasoning applies to adopted Appellate Body Reports as well. Thus, in taking into account the reasoning in an adopted Appellate Body Report – a Report, moreover, that was directly relevant to the Panel's disposition of the issues before it – the Panel did not err. The Panel was correct in using our findings as a tool for its own reasoning. Further, we see no indication that, in doing so, the Panel limited itself merely to examining the new measure from the perspective of the recommendations and rulings of the DSB."[107]

82. In *US – Softwood Lumber V*, the United States requested that the Appellate Body not import wholesale the findings and reasoning from the Appellate Body report on *EC – Bed Linen* on the grounds that it was not a party to that dispute, that the arguments raised in that case were different and that the United States' practice of zeroing was not at issue in that appeal. The complainant, Canada, disagreed. The Appellate Body, after referring to its prior reports on *Japan – Alcoholic Beverages II* and *US – Shrimp (Article 21.5 – Malaysia)* and to Article 3.2 of the *DSU*,

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[102] Appellate Body Report on *EC – Hormones*, paras. 124–125.
[103] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.17.
[104] Argentina claimed that the principle of estoppel applies in circumstances where (i) a statement of fact which is clear and unambiguous, and which (ii) is voluntary, unconditional, and authorized, is (iii) relied on in good faith. Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.37.
[105] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, footnote 58.
[106] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 14.
[107] Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, paras. 108–109.

indicated that they had given full consideration to the particular facts of the case before them and to the arguments raised by the United States on appeal, as well as to those raised by Canada and the third participants. The Appellate Body said that, in doing so, they "have taken into account the reasoning and findings contained in the Appellate Body Report in *EC – Bed Linen*, as appropriate".[108]

(d) "add to or diminish the rights and obligations"

83. In *Chile – Alcoholic Beverages*, Chile argued before the Appellate Body that the Panel's findings under Article III:2 of *GATT 1994* in connection with "not similarly taxed" and "so as to afford protection" added to the rights and obligations of Members in contravention of Articles 3.2 and 19.2 of the *DSU*. The Appellate Body stated:

> "In this dispute, while we have rejected certain of the factors relied upon by the Panel, we have found that the Panel's legal conclusions are not tainted by any reversible error of law. In these circumstances, we do not consider that the Panel has added to the rights or obligations of any Member of the WTO. Moreover, we have difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreements. Chile's appeal under Articles 3.2 and 19.2 of the DSU must, therefore, be denied."[109]

84. In *US – Certain EC Products*, the Appellate Body ruled that the purpose of dispute settlement is only to preserve the rights and obligations of Members:

> "[W]e observe that it is certainly not the task of either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the *WTO Agreement*. Only WTO Members have the authority to amend the DSU or to adopt such interpretations. Pursuant to Article 3.2 of the DSU, the task of panels and the Appellate Body in the dispute settlement system of the WTO is 'to preserve the rights and obligations of Members under the covered agreements, and to *clarify the existing provisions* of those agreements in accordance with customary rules of interpretation of public international law.' (emphasis added) Determining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO."[110]

(e) Relationship with other Agreements

(i) Article 17.6(ii) of the Anti-Dumping Agreement

85. In *US – Hot-Rolled Steel*, the Appellate Body looked into the first sentence of Article 17.6(ii) of the *Anti-Dumping Agreement*, which provides that the Panel "shall" interpret the provisions of the *Anti-Dumping Agreement* "in accordance with customary rules of interpretation", and considered that it echoed closely Article 3.2 of the *DSU* (see paragraph 642 of the Chapter on the *Anti-Dumping Agreement*).[111]

2. Article 3.3

(a) "measures taken by another Member"

86. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body referred to Article 3.3 while defining which type of measures can, as such, be the subject of dispute settlement proceedings.

> "Article 3.3 of the DSU refers to 'situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by *measures taken by another Member*'. (emphasis added) This phrase identifies the relevant nexus, for purposes of dispute settlement proceedings, between the "measure" and a "Member". In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.[112] The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch.[113]"[114]

87. As regards the concept of measures subject to dispute settlement, see Section VI.B.3(c) below.

3. Article 3.6

(a) Notification of mutually agreed solutions

88. The mutually agreed solutions pursuant to Article 3.6 that have been notified to the DSB as of 31 December 2004 are:

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[108] Appellate Body Report on *US – Softwood Lumber V*, para. 112.
[109] Appellate Body Report on *Chile – Alcoholic Beverages*, para. 79.
[110] Appellate Body Report on *US – Certain EC Products*, para. 92.
[111] Appellate Body Report on *US – Hot Rolled Steel*, para. 57. See also Panel Report on *US – Steel Plate*, para. 7.7.
[112] (*footnote original*) We need not consider, in this appeal, related issues such as the extent to which the acts or omissions of regional or local governments, or even the actions of private entities, could be attributed to a Member in particular circumstances.
[113] (*footnote original*) Both specific determinations made by a Member's executive agencies and regulations issued by its executive branch can constitute acts attributable to that Member. See, for example, the Panel Report in *US – DRAMS*, where the measures referred to the panel included a USDOC determination in an administrative review as well as a regulatory provision issued by USDOC.
[114] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

	WT/DS No.	Dispute	Date of Notification	Reference
1	WT/DS5	*Korea – Measures Concerning the Shelf-Life of Products*	20.7.1995	WT/DS5/5
2	WT/DS7	*European Communities – Trade Description of Scallops (Canada)*	5.7.1996	WT/DS7/12 WT/DSB/M/20
3	WT/DS12	*European Communities – Trade Description of Scallops (Peru)*	5.7.1996	WT/DS12/12 WT/DSB/M/20
4	WT/DS14	*European Communities – Trade Description of Scallops (Chile)*	5.7.1996	WT/DS14/11 WT/DSB/M/20
5	WT/DS19	*Poland – Import Regime for Automobiles*	26.8.1996	WT/DS19/2
6	WT/DS20	*Korea – Measures Concerning Bottled Water*	24.4.1996	WT/DS20/6
7	WT/DS21	*Australia – Measures Affecting the Importation of Salmonids*	27.10.2000	WT/DS21/10
8	WT/DS28	*Japan – Measures Concerning Sound Recordings*	24.1.1997	WT/DS28/4
9	WT/DS36	*Pakistan – Patent Protection for Pharmaceutical and Agricultural Chemical Products*	28.2.1997	WT/DS36/4
10	WT/DS37	*Portugal – Patent Protection under the Industrial Property Act*	3.10.1996	WT/DS37/2
11	WT/DS40	*Korea – Laws, Regulations and Practices in the Telecommunications Sector*	22.10.1997	WT/DS40/2
12	WT/DS42	*Japan – Measures Concerning Sound Recordings*	7.11.1997	WT/DS42/4
13	WT/DS43	*Turkey – Taxation of Foreign Film Revenues*	14.7.1997	WT/DS43/3
14	WT/DS72	*European Communities – Measures Affecting Butter Products*	11.11.1999	WT/DS72/7
15	WT/DS73	*Japan – Procurement of a Navigation Satellite*	19.2.1998	WT/DS73/5
16	WT/DS74	*Philippines – Measures Affecting Pork and Poultry*	13.1.1998	WT/DS74/5
17	WT/DS82	*Ireland – Measures Affecting the Grant of Copyright and Neighbouring Rights*	6.11.2000	WT/DS82/3
18	WT/DS83	*Denmark – Measures Affecting the Enforcement of Intellectual Property Rights*	7.6.2001	WT/DS83/2
19	WT/DS85	*United States – Measures Affecting Textiles and Apparel Products*	11.2.1998	WT/DS85/9
20	WT/DS86	*Sweden – Measures Affecting the Enforcement of Intellectual Property Rights*	2.12.1998	WT/DS86/2
21	WT/DS91	*India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (Australia)*	17.3.1998	WT/DS91/8
22	WT/DS92	*India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (Canada)*	18.3.1998	WT/DS92/8
23	WT/DS93	*India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*	14.9.1998	WT/DS93/8
24	WT/DS94	*India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (Switzerland)*	23.2.1998	WT/DS94/9
25	WT/DS96	*India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (EC)*	7.4.1998	WT/DS96/8
26	WT/DS99	*United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*	20.10.2000	WT/DS99/12
27	WT/DS102	*Philippines – Measures Affecting Pork and Poultry*	13.1.1998	WT/DS102/6
28	WT/DS103	*Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*	9.5.2003	WT/DS103/33
29	WT/DS113	*Canada – Measures Affecting Dairy Exports*	9.5.2003	WT/DS113/33
30	WT/DS115	*European Communities – Measures Affecting the Grant of Copyright and Neighbouring Rights*	6.11.2000	WT/DS115/3
31	WT/DS119	*Australia – Anti-Dumping Measures on Imports of Coated Woodfree Paper Sheets*	13.5.1998	WT/DS119/4
32	WT/DS124	*European Communities – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*	20.3.2001	WT/DS124/2
33	WT/DS125	*Greece – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*	20.3.2001	WT/DS125/2
34	WT/DS126	*Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*	24.7.2000	WT/DS126/11
35	WT/DS151	*United States – Measures Affecting Textiles and Apparel Products*	24.7.2000	WT/DS151/10
36	WT/DS171	*Argentina – Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals*	31.5.2002	WT/DS171/3

Table (*cont.*)

	WT/DS No.	Dispute	Date of Notification	Reference
37	WT/DS190	*Argentina – Transitional Safeguard Measures on Certain Imports of Woven Fabrics of Cotton and Cotton Mixtures Originating in Brazil*	27.6.2000	WT/DS190/2
38	WT/DS196	*Argentina – Certain Measures on the Protection of Patents and Test Data*	31.5.2002	WT/DS196/4
39	WT/DS198	*Romania – Measures on Minimum Import Prices*	26.9.2001	WT/DS198/2
40	WT/DS199	*Brazil – Measures Affecting Patent Protection*	5.7.2001	WT/DS199/4
41	WT/DS210	*Belgium – Administration of Measures Establishing Customs Duties for Rice*	18.12.2001	WT/DS210/6
42	WT/DS231	*European Communities – Trade Description of Sardines*	25.7.2003	WT/DS231/18
43	WT/DS235	*Slovakia – Safeguard Measure on Imports of Sugar*	11.1.2002	WT/DS235/2
44	WT/DS237	*Turkey – Certain Import Procedures for Fresh Fruit*	22.11.2002	WT/DS237/4
45	WT/DS250	*United States – Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products*	28.5.2004	WT/DS250/3
46	WT/DS261	*Uruguay – Tax Treatment on Certain Products*	8.1.2004	WT/DS261/7
47	WT/DS313	*European Communities – Anti-Dumping Duties on Certain Flat Rolled Iron or Non-Alloy Steel Products from India*	22.10.2004	WT/DS313/2

4. Article 3.7

(a) "whether action under these procedures would be fruitful"

90. In the context of a discussion on legal interest, the Appellate Body on *EC – Bananas III* agreed with the Panel that "neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a 'legal interest' as a prerequisite for requesting a panel". In this regard, see paragraph 158 below.

91. In *Mexico – Corn Syrup (Article 21.5 – US)*, Mexico challenged on appeal the Panel's silence regarding the alleged failure of the United States to satisfy its obligation under the first sentence of Article 3.7 of the *DSU* to exercise its judgement as to whether dispute settlement proceedings would be "fruitful". The Appellate Body then examined whether a failure to comply with the first sentence of Article 3.7 of the *DSU* would deprive a panel of its authority to deal with and dispose of a matter. The Appellate Body first indicated that "this sentence reflects a basic principle that Members should have recourse to WTO dispute settlement in good faith, and not frivolously set in motion the procedures contemplated in the DSU".[115] It went on to point out the self-regulating nature of that sentence and concluded that the Panel was not obliged to consider this issue on its own motion:

> "Given the 'largely self-regulating' nature of the requirement in the first sentence of Article 3.7, panels and the Appellate Body must presume, whenever a Member submits a request for establishment of a panel, that such Member does so in good faith, having duly exercised its judgement as to whether recourse to that panel would be 'fruitful'. Article 3.7 neither requires nor authorizes a panel to look behind that Member's decision and to question its exercise of judgement. Therefore, the Panel was not obliged to consider this issue on its own motion."[116]

(b) "aim of the dispute settlement mechanism is to secure a positive solution to a dispute"

92. The Appellate Body on *US – Wool Shirts and Blouses* referred to Article 3.7 of the *DSU* and emphasized that a requirement to address all legal claims raised by a party is not consistent with the aim of the WTO dispute settlement system, which is to settle disputes.[117]

(c) "suspending the application of concessions or other obligations"

93. In *US – Certain EC Products*, the Panel had found that the measure at issue constituted an unauthorized suspension of concessions and thus violated Article 3.7 (and Articles 22.6 and 23.2(c)) of the *DSU*.[118] The Appellate Body first described the workings of Article 3.7 and upheld the Panel's findings, indicating that, in its view, "if a Member has acted in breach of Articles 22.6 and 23.2(c) of the DSU, that Member has also, in view of the nature and content of Article 3.7, last sentence, necessarily acted contrary to the latter provision":

[115] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 73.
[116] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 74.
[117] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 19.
[118] Panel Report on *US – Certain EC Products*, para. 6.73.

"Article 3.7 is part of Article 3 of the DSU, which is entitled 'General Provisions' and sets out the basic principles and characteristics of the WTO dispute settlement system. Article 3.7 itself lists and describes the possible temporary and definitive outcomes of a dispute, one of which is the suspension of concessions or other obligations to which the last sentence of Article 3.7 refers. The last sentence of Article 3.7 provides that the suspension of concessions or other obligations is a 'last resort' that is subject to DSB authorization.

The obligation of WTO Members not to suspend concessions or other obligations without prior DSB authorization is explicitly set out in Articles 22.6 and 23.2(c), not in Article 3.7 of the DSU. It is, therefore, not surprising that the European Communities did not explicitly claim, or advance arguments in support of, a violation of Article 3.7, last sentence. The European Communities argued that the 3 March Measure is inconsistent with Articles 22.6 and 23.2(c) of the DSU. We consider, however, that if a Member has acted in breach of Articles 22.6 and 23.2(c) of the DSU, that Member has also, in view of the nature and content of Article 3.7, last sentence, necessarily acted contrary to the latter provision.

Although we do not believe that it was necessary or incumbent upon the Panel to find that the United States violated Articles 3.7 of the DSU, we find no reason to disturb the Panel's finding that, by adopting the 3 March Measure, the United States acted inconsistently with 'Articles 23.2(c), 3.7 and 22.6 of the DSU'.[119]"[120]

94. With respect to the suspension of concessions, see Section XXII.B below.

5. Article 3.8

(a) Presumption of "nullification or impairment"

95. In *EC – Bananas III*, the European Communities appealed the Panel's finding that "the infringement of obligations by the European Communities under a number of WTO agreements, are a prima facie case of nullification or impairment of benefits in the meaning of Article 3.8 of the DSU". The Appellate Body observed that the European Communities, in its appeal, attempted to "rebut the presumption of nullification or impairment on the basis that the United States has never exported a single banana to the European Community, and therefore, could not possibly suffer any trade damage". The Appellate Body stated:

"[W]e note that the two issues of nullification or impairment and of the standing of the United States are closely related . . . .[T]wo points are made that the Panel may well have had in mind in reaching its conclusions on nullification or impairment. One is that the United States is a producer of bananas and that a potential export interest by the United States cannot be excluded; the other is that the internal market of the United States for bananas could be affected by the EC bananas regime and by its effects on world supplies and world prices of bananas . . . . They are . . . relevant to the question whether the European Communities has rebutted the presumption of nullification or impairment.

So, too, is the panel report in *United States – Superfund*, to which the Panel referred. In that case, the panel examined whether measures with 'only an insignificant effect on the volume of exports do nullify or impair benefits under Article III:2 . . .'. The panel concluded (and in so doing, confirmed the views of previous panels) that:

> 'Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted.'[121]

The panel in *United States – Superfund* subsequently decided 'not to examine the submissions of the parties on the trade effects of the tax differential' on the basis of the legal grounds it had enunciated. The reasoning in *United States – Superfund* applies equally in this case."[122]

96. In *Turkey – Textiles*, Turkey argued that even if its quantitative restrictions on imports of textile and clothing products from India were in violation of WTO law, India had not suffered any nullification or impairment of its WTO benefits within the meaning of Article 3.8 of the *DSU*. Turkey pointed out that imports of textile and clothing from India had actually increased since the Turkish measures at issue had entered into force. The Panel, in a finding not reviewed by the Appellate Body, rejected this argument:

"We are of the view that it is not possible to segregate the impact of the quantitative restrictions from the impact of other factors. While recognizing Turkey's efforts to liberalize its import regime on the occasion of the formation of its customs union with the European Communities, it appears to us that even if Turkey were to demonstrate that India's overall exports of clothing

[119] (*footnote original*) Panel Report, para. 6.87.
[120] Appellate Body Report on *US – Certain EC Products*, paras. 119–121.
[121] (*footnote original*) GATT Panel Report on *US – Superfund*, para. 5.1.9.
[122] Appellate Body Report on *EC – Bananas III*, paras. 251–253.

and textile products to Turkey have increased from their levels of previous years, it would not be sufficient to rebut the presumption of nullification and impairment caused by the existence of WTO incompatible import restrictions. Rather, at minimum, the question is whether exports have been what they would otherwise have been, were there no WTO incompatible quantitative restrictions against imports from India. Consequently, we consider that even if the presumption in Article 3.8 of the DSU were rebuttable, Turkey has not provided us with sufficient information to set aside the presumption that the introduction of these import restrictions on 19 categories of textile and clothing products has nullified and impaired the benefits accruing to India under GATT/WTO."[123]

97. In *Guatemala – Cement II*, Guatemala argued that its alleged failure to issue proper notifications and its failure to provide the Mexican interested party with the full text of the application for anti-dumping investigations had not nullified or impaired Mexico's benefits accruing under the *Anti-Dumping Agreement*. The Panel declined to consider this preliminary objection by Guatemala, stating that "we will address the issue of nullification or impairment after we have considered whether Guatemala has acted consistently with its obligations under the AD Agreement".[124] Subsequently, the Panel held:

"Guatemala argues that in the case of the Article 5.5 notification it did not initiate the investigation until after Mexico had been notified and that it granted Cruz Azul an extension to respond to the questionnaire and thus Mexico was not impaired in the defence of its interests. We have already found that the initiation date was 11 January 1996 and thus notification under Article 5.5 was not provided until after initiation. There is no way to ascertain what Mexico might have done if it had received a timely notification. The extension of time for response to the questionnaire granted to Cruz Azul has no bearing on the fact that Mexico was not informed in time. Thus, we do not consider that Guatemala has rebutted the presumption of nullification or impairment with respect to violations of Article 5.5."

98. In *Argentina – Ceramic Tiles*, Argentina claimed that the European Communities had failed to demonstrate that Italian tile exporters were "prejudiced" by the failure of the Argentine anti-dumping authority to calculate individual anti-dumping margins. In this context, Argentina relied on the Appellate Body's findings in *Korea – Dairy*.[125] The Panel rejected the Argentine arguments:

"We note, however, that the Appellate Body Report in the *Korea – Dairy Safeguards* case, to which Argentina refers in support of its argument, dealt with the question of whether the request for establishment met the requirements of Article 6.2 of the DSU. The issue before the Appellate Body was whether Article 6.2 of the DSU was complied with or not. The Appellate Body, in deciding that question, concluded that one element to be considered was whether the defending Member was prejudiced in its ability to defend itself by a lack of clarity or specificity in the request for establishment. The Appellate Body did not address the question whether, once it had been established that a provision of the Agreement is violated, it needs in addition to be demonstrated that this violation had prejudiced the rights of the complaining party.[126] Thus, we do not agree that this Appellate Body decision supports Argentina's argument that the concept of harmless error has been accepted in WTO law.

. . .

Article 3.8 of the DSU thus provides that there is a presumption that benefits are nullified or impaired – i.e., there is a presumption of 'harm' – where a provision of the Agreement has been violated. Article 3.8 of the DSU also provides for the possibility that the Member found to have violated a provision may rebut the presumption. In light of the presumption of Article 3.8 of the DSU, the EC having established that Argentina has acted in a manner inconsistent with the AD Agreement, it is up to Argentina to show that the failure to determine an individual dumping margin has not nullified or impaired benefits accruing to the EC under the Agreement. Argentina has failed to adduce any evidence in this respect. Accordingly, we find that the presumption of nullification or impairment of benefits caused by the violation of Article 6.10 of the AD Agreement has not been rebutted by Argentina.[127]"[128]

99. In *US – Offset Act (Byrd Amendment)*, and in respect to adverse effects under Article 5(b) of the *SCM Agreement*, Mexico made arguments of both violation and non-violation nullification or impairment. In relation to claims of violation nullification or impairment, the Panel stated that any presumption arising under Article 3.8 of the *DSU* stemming from these violations

[123] Panel Report on *Turkey – Textiles*, para. 9.204.
[124] Panel Report on *Guatemala – Cement II*, para. 8.25.
[125] Appellate Body Report on *Korea – Dairy*, paras. 114–131.
[126] (*footnote original*) Appellate Body Report, *Korea – Dairy Safeguards*, para. 127: "Along the same lines, we consider that whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated."
[127] (*footnote original*) We note that our view is similar to that of the Panel in the case of *Guatemala – Cement (II)* (Panel Report, *Guatemala – Cement (II)*, paras. 8.22 and 8.111–112), and Panel Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("*Guatemala – Cement (I)*"), WT/DS60/R, adopted as reversed on other grounds by WT/DS60/AB/R, 25 November 1998, para. 7.42.
[128] Panel Report on *Argentina – Ceramic Tiles*, paras. 6.103 and 6.105.

would relate to nullification or impairment caused "*by the violation at issue*" (emphasis in original). The Panel rejected the argument by Mexico on the grounds that, for the purpose of Article 5(b) of the *SCM Agreement*, Mexico must demonstrate that "*the use of a subsidy*" caused nullification or impairment (emphasis in original).[129]

100. On the issue of whether Mexico could have reasonably anticipated at the conclusion of the Uruguay Round that the United States would pass the Offset Act, the Panel on *US – Offset Act (Byrd Amendment)* explained that there was a "presumption that Mexico could not reasonably have anticipated the introduction of [the Offset Act]", since it was introduced in the US Congress after the conclusion of the Uruguay Round negotiations.[130]

101. Because Mexico failed to establish that the Offset Act *per se* is a "specific" subsidy that causes "adverse effects", the Panel rejected Mexico's claim that the Offset Act is inconsistent with Article 5(b) of the *SCM Agreement*.[131] For more information regarding the nullification or impairment requirement in Article 5(b) of the *SCM Agreement*, see Section V.B.2(a) of the Chapter on the *SCM Agreement*.

(b) Relationship with other WTO Agreements

(i) Article XXIII:1 of the GATS

102. In *EC – Bananas III*, the Appellate Body considered that the Panel had erred in extending the scope of the presumption of nullification or impairment in Article 3.8 of the *DSU* to violation claims made under the GATS:

> "We observe, first of all, that the European Communities attempts to rebut the presumption of nullification or impairment with respect to the Panel's findings of violations of the GATT 1994 on the basis that the United States has never exported a single banana to the European Community, and therefore, could not possibly suffer any trade damage. The attempted rebuttal by the European Communities applies only to one complainant, the United States, and to only one agreement, the GATT 1994. In our view, the Panel erred in extending the scope of the presumption in Article 3.8 of the DSU to claims made under the GATS as well as to claims made by the Complaining Parties other than the United States."[132]

103. In the same vein, the Panel in *Mexico – Telecoms* indicated that the *GATS* does not require that, in the case of a violation complaint (Article XXIII:1 of the *GATS*), "nullification or impairment" of treaty benefits has to be claimed by the complaining WTO Member and examined by a Panel:

> "Unlike some other covered agreements (e.g. GATT Article XXIII:1 in connection with Article 3.8 of the DSU), the GATS does not require that, in the case of a violation complaint (GATS Article XXIII:1), 'nullification or impairment' of treaty benefits has to be claimed by the complaining WTO Member and examined by a Panel. Whereas Article XXIII:1 of the GATT specifically conditions access to WTO dispute settlement procedures on an allegation that a 'benefit' or the 'attainment of an objective' under that agreement are being 'nullified or impaired', the corresponding provision in the GATS (Article XXIII:1) permits access to dispute settlement procedures if a Member 'fails to carry out its obligations or specific commitments' under the GATS. In this respect, we note that the Appellate Body in *EC – Bananas III* stated that the panel in that case 'erred in extending the scope of the presumption in Article 3.8 of the DSU to claims made under the GATS'.[133] Having found that Mexico has violated certain provisions of the GATS, we are therefore bound by Article 19 of the DSU to proceed directly to the recommendation set out in that provision."[134]

(ii) Article 5(b) of the SCM Agreement

104. In this respect, see paragraph 99 above.

6. Article 3.10

(a) "good faith . . . effort to resolve the dispute"

105. In *US – FSC*, the United States requested that the Appellate Body dismiss the appeal on the basis that the request for consultations had not included a "statement of available evidence as required by Article 4.2 of the SCM Agreement".[135] The Appellate Body noted in this regard that one year passed between submission of the request for consultations by the European Communities and the first mention of this objection by the United States. The Appellate Body stated that in light of the fact that consultations were held on three occasions and that the United States did not raise objections at the two DSB meetings at which the request for the establishment of a panel was on the agenda, the United States could not now assert that the European Communities claims under Article 3 of the *SCM Agreement* should have been dismissed and that the Panel's finding on these issues should be reversed. The Appellate Body went on to state:

> "Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures 'in good faith in an effort to resolve the dispute'.

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[129] Panel Report on *US – Offset Act (Byrd Amendment)*, paras. 7.118–119.
[130] Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.131.
[131] Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.133.
[132] Appellate Body Report on *EC – Bananas III*, para. 250.
[133] (*footnote original*) *See* Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, at paragraph 250.
[134] Panel Report on *Mexico – Telecoms*, para. 8.4.
[135] Appellate Body Report on *US – FSC*, para. 36.

> This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law.[136] This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[137]

106. The Appellate Body on *Thailand – H-Beams* confirmed the importance of the principle of good faith when indicating that panel proceedings were not about the development of litigation techniques:

> "In view of the importance of the request for the establishment of a panel, we encourage complaining parties to be precise in identifying the legal basis of the complaint. We also note that nothing in the DSU prevents a defending party from requesting further clarification on the claims raised in a panel request from the complaining party, even before the filing of the first written submission. In this regard, we point to Article 3.10 of the DSU which enjoins Members of the WTO, if a dispute arises, to engage in dispute settlement procedures 'in good faith in an effort to resolve the dispute'. As we have previously stated, the 'procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes'.[138]"[139]

107. In *EC – Tube or Pipe Fittings*, the European Communities had requested the Panel to refuse to consider certain of Brazil's claims on the grounds that these claims were defective as they were too vaguely defined in Brazil's first written submission. In the view of the European Communities, admission of these claims would constitute an infringement of the European Communities' rights of defence and a departure from the good faith standard in Article 3.10 of the *DSU* and from the due process requirement that underlies the *DSU*. The Panel, in a preliminary ruling, rejected the European Communities' request on the grounds that the opportunity would still exist for Brazil to provide further supporting evidence and argumentation in its subsequent submissions with a view to clarifying those allegations in the course of the Panel proceedings. The Panel found support for its ruling in the statement by the Appellate Body in its report on *US – FSC* that the "procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes".[140,141]

108. In *US – Carbon Steel*, the Appellate Body indicated that the assessment of whether the ability of a respondent to defend itself has been prejudiced can be considered well into the course of panel proceedings.

> "[I]n the interests of due process, parties should bring alleged procedural deficiencies to the attention of a panel at the earliest possible opportunity.[142] In this case, we see no reason to disagree with the Panel's view that the United States' objection was not raised in a timely manner. At the same time, however, as we have observed previously, certain issues going to the *jurisdiction* of a panel are so fundamental that they may be considered at any stage in a proceeding.[143]
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> . . .
>
> As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be 'cured' in the subsequent submissions of the parties during the panel proceedings.[144] Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced.[145] Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.[146]"[147]

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[136] (*footnote original*) *United States – Shrimp*, *supra*, footnote 99, para. 158. In that report, we addressed the issue of good faith in the context of the chapeau of Article XX of the GATT 1994.

[137] Appellate Body Report on *US – FSC*, para. 166.

[138] (*footnote original*) Appellate Body Report, *United States – Tax Treatment of "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.

[139] Appellate Body Report on *Thailand – H-Beams*, para. 97.

[140] (*footnote original*) Appellate Body Report, *United States – Tax Treatment of "Foreign Sales Corporations" ("US – FSC")*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.

[141] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.10.

[142] (*footnote original*) Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50; Appellate Body Report, *US – FSC*, para. 166; and Appellate Body Report, *US – 1916 Act*, WT/DS136/AB/R, para. 54.

[143] (*footnote original*) Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36; and Appellate Body Report, *US – 1916 Act*, para. 54.

[144] (*footnote original*) Ibid., para. 143.

[145] (*footnote original*) See, for example, Appellate Body Report, *Korea – Dairy*, para. 127; Appellate Body Report, *Thailand – H-Beams*, para. 95.

[146] (*footnote original*) Appellate Body Report, *Korea – Dairy*, paras. 124–127.

[147] Appellate Body Report on *US – Carbon Steel*, paras. 123 and 127.

109. As regards the principle of good faith in general, see Section III.B(c)(vi) above.

IV. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4
Consultations

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

2. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.[3]

(*footnote original*) [3] Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.

3. If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

4. All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

5. In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

6. Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.

7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

8. In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel.

9. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

10. During consultations Members should give special attention to the particular problems and interests of developing country Members.

11. Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements,[4] such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

(*footnote original*) [4] The corresponding consultation provisions in the covered agreements are listed hereunder:

Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14; Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement on Implementation of Article VII of GATT 1994, paragraph 2 of Article 19; Agreement on Preshipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

1. General

(a) Importance of consultations

110. The Panel on *Brazil – Desiccated Coconut* considered the importance of consultations in the dispute settlement process and indicated that the Members' duty to consult is absolute and cannot be subject to the prior imposition of any terms and conditions by a Member:

> "The Philippines' request concerns a matter which this Panel views with the utmost seriousness. Compliance with the fundamental obligation of WTO Members to enter into consultations where a request is made under the DSU is vital to the operation of the dispute settlement system. Article 4.2 of the DSU provides that 'Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former'. Moreover, pursuant to Article 4.6 of the DSU, consultations are 'without prejudice to the rights of any Member in any further proceedings'. In our view, these provisions make clear that Members' duty to consult is absolute, and is not susceptible to the prior imposition of any terms and conditions by a Member."[148]

111. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body stressed the importance of consultations:

> "We note that Mexico emphasizes the importance of consultations within the GATT and WTO dispute settlement systems. We agree with Mexico on the importance of consultations. Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties, as well as to third parties and to the dispute settlement system as a whole.
>
> The practice of GATT contracting parties in regularly holding consultations is testimony to the important role of consultations in dispute settlement. Article 4.1 of the DSU recognizes this practice and further provides that:
>
> > 'Members affirm their resolve to *strengthen and improve* the *effectiveness* of the consultation procedures employed by Members.' (emphasis added)
>
> A number of panel and Appellate Body reports have recognized the value of consultations within the dispute settlement process.[149]. . ."[150]

(b) Consultations as a prerequisite for panel proceedings

112. The Appellate Body on *Brazil – Aircraft* observed that "Articles 4 and 6 of the DSU, as well as paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel."[151]

113. In *US – Certain EC Products*, the Appellate Body, further to referring to its Report on *Brazil – Aircraft* (see paragraph 112 above), found that an action which had not been subject to consultations because such action had not taken place at the time, was "not a measure at issue in this dispute and does not fall within the Panel's terms of reference".[152]

114. The Appellate Body on *Mexico – Corn Syrup (Article 21.5 – US)*, however, stressed the existence, further to Article 4.3, of certain limitations on consultations being a prerequisite to panel proceedings:

> "[A]s a general matter, consultations are a prerequisite to panel proceedings. However, this general proposition is subject to certain limitations . . .
>
> Article 4.3 of the DSU relates the responding party's conduct towards consultations to the complaining party's

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[148] Panel Report on *Brazil – Desiccated Coconut*, para. 287.

[149] (*footnote original*) The important role of consultations in both the GATT and the WTO dispute settlement systems has repeatedly been acknowledged, both expressly and implicitly, by panels and by the Appellate Body. See, for example: Panel Report, *Uruguayan Recourse to Article XXIII*, adopted 16 November 1962, BISD 11S/95, para. 10; Panel Report, *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted 27 April 1994, BISD 41S/Vol.I/229, para. 333; Panel Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted 20 March 1997, as upheld by the Appellate Body Report, WT/DS22/AB/R, DSR 1997:1, 189, para. 287; Panel Report, *European Communities – Bananas*, WT/DS27/R/ECU, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:III, 1085, paras. 7.17–7.20; Panel Report, *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R, para. 10.19; Appellate Body Report, *Brazil – Aircraft*, *supra*, footnote 30, para. 132; Panel Report, *Brazil – Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS46/AB/R, para. 7.10; Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*United States – Lamb Safeguard*"), WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by the Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R, para. 5.40. See also the discussion of the role of consultations in disputes under the *Agreement on Textiles and Clothing* in Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11, at 23–24.

[150] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 54–56.

[151] Appellate Body Report on *Brazil – Aircraft*, para. 131.

[152] Appellate Body Report on *US – Certain EC Products*, para. 70.

right to request the establishment of a panel. When the responding party does not respond to a request for consultations, or declines to enter into consultations, the complaining party may dispense with consultations and proceed to request the establishment of a panel. In such a case, the responding party, by its own conduct, relinquishes the potential benefits that could be derived from those consultations."[153]

115. The Appellate Body on *Mexico – Corn Syrup (Article 21.5 – US)* also referred to Article 4.7 when explaining the limitations on consultations being a prerequisite to panel proceedings:

"Article 4.7 also relates the conduct of the responding party concerning consultations to the complaining party's right to request the establishment of a panel. This provision states that the responding party may agree with the complaining party to forgo the potential benefits that continued pursuit of consultations might bring. Thus, Article 4.7 contemplates that a panel may be validly established notwithstanding the shortened period for consultations, as long as the parties agree. Article 4.7 does not, however, specify any particular form that the agreement between the parties must take."[154]

116. Finally, the Appellate Body on Mexico – Corn Syrup (Article 21.5 – US) referred to Article 6.2 in support of its reasoning:

"In addition, . . ., pursuant to Article 6.2 of the DSU, one of the requirements for requests for establishment of a panel is that such requests must 'indicate whether consultations were held'. The phrase '*whether* consultations were held' shows that this requirement in Article 6.2 may be satisfied by an express statement that *no consultations were held*. In other words, Article 6.2 also envisages the possibility that a panel may be validly established without being preceded by consultations."[155]

117. The Appellate Body on *Mexico – Corn Syrup (Article 21.5 – US)* thus concluded that, since the *DSU* recognizes situations where the absence of consultations does not deprive the panel of its authority, such absence is not a defect which, by its very nature, would deprive a panel of its authority. More importantly, the Appellate Body considered that the lack of consultations is not a defect a panel must examine even if both parties to the dispute remain silent thereon:

"Thus, the DSU explicitly recognizes circumstances where the absence of consultations would *not* deprive the panel of its authority to consider the matter referred to it by the DSB. In our view, it follows that where the responding party does not object, explicitly and in a timely manner, to the failure of the complaining party to request or engage in consultations, the responding party may be deemed to have consented to the lack of consultations and, thereby, to have relinquished whatever right to consult it may have had.

As a result, we find that the lack of prior consultations is not a defect that, by its very nature, deprives a panel of its authority to deal with and dispose of a matter, and that, accordingly, such a defect is not one which a panel must examine even if both parties to the dispute remain silent thereon. We recall that, in this case, Mexico neither pursued the potential benefits of consultations nor objected that the United States had deprived it of such benefits."[156]

(c) Disclosure of information during consultations

118. In *India – Patents (US)*, the United States argued that if India had disclosed, during consultations, the existence of certain administrative instructions, the United States would have included in its request for establishment of a Panel a claim under Article 63 of the *TRIPS Agreement*. With respect to disclosure of information during consultations, the Appellate Body noted that:

"All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations. For the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings. If, in the aftermath of consultations, any party believes that all the pertinent facts relating to a claim are, for any reason, not before the panel, then that party should ask the panel in that case to engage in additional fact-finding."[157]

(d) Adequacy of consultations

119. In *EC – Bananas III*, the Panel indicated that the function of the panels as regards consultations is only to ascertain whether consultations, when required, were held:

"Consultations are . . . a matter reserved for the parties. The DSB is not involved; no panel is involved; and the consultations are held in the absence of the Secretariat.

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[153] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 58–59.
[154] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 61.
[155] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 62.
[156] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 63–64.
[157] Appellate Body Report on *India – Patents (US)*, para. 94.

> While a mutually agreed solution is to be preferred, in some cases it is not possible for parties to agree upon one. In those cases, it is our view that the function of a panel is only to ascertain that the consultations, if required, were in fact held."[158]

120. In *Korea – Alcoholic Beverages*, Korea argued before the Panel that the complaining parties violated Articles 3.3, 3.7 and 4.5 of the *DSU* by not engaging in consultations in good faith to reach a mutually agreed solution. Korea maintained that there had been no meaningful exchange of facts because the complainants treated the consultations as one-sided question and answer sessions. Korea asserted that such an approach frustrated any reasonable chance for a settlement and considered the non-observance of specific provisions of the *DSU* as a "violation of the tenets of the WTO dispute settlement system". The Panel, in reference to the Panel on *EC – Bananas III* (see paragraph 119 above), confirmed that the panel does not have a mandate to investigate the adequacy of the consultation process that took place between the parties:

> "In our view, the WTO jurisprudence so far has not recognized any concept of 'adequacy' of consultations. The only requirement under the DSU is that consultations were in fact held, or were at least requested, and that a period of sixty days has elapsed from the time consultations were requested to the time a request for a panel was made. What takes place in those consultations is not the concern of a panel. The point was put clearly by the Panel in *Bananas III*, . . .
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> . . .
>
> We do not wish to imply that we consider consultations unimportant. Quite the contrary, consultations are a critical and integral part of the DSU. But, we have no mandate to investigate the adequacy of the consultation process that took place between the parties and we decline to do so in the present case."[159]

121. The Panel on *Turkey – Textiles* confirmed this approach and expressly referred to the panel reports in *EC – Bananas III* and *Korea – Alcoholic Beverages* referenced in paragraphs 119–120 above:

> "[W]e note that in *EC – Bananas III* the panel concluded that the private nature of the bilateral consultations means that panels are normally not in a position to evaluate how the consultations process functions, but could only determine whether consultations, if required, did in fact take place.[160] In this case, the parties never consulted, as Turkey declined to do so without the presence of the European Communities.
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> . . .
>
> We concur with [the finding of the Panel on *Korea – Alcoholic Beverages*]. We note also that our terms of reference (our mandate) are determined, not with reference to the request for consultations, or the content of the consultations, but only with reference to the request for the establishment of a panel.[161] Consultations are a crucial and integral part of the DSU and are intended to facilitate a mutually satisfactory settlement of the dispute, consistent with Article 3.7 of the DSU. However, the only function we have as a panel in relation to Turkey's procedural concerns is to ascertain whether consultations were properly requested, in terms of the DSU, that the complainant was ready to consult with the defendant and that the 60 day period has lapsed before the establishment of a panel was requested by the complainant. We consider that India complied with these procedural requirements and therefore we find it necessary to reject Turkey's claim."[162]

(e) Result of the consultations

122. In *EC – Bananas III*, the Panel dismissed the European Communities argument that consultations must produce an adequate explanation of a complainant's case:

> "As to the EC argument that consultations must lead to an adequate explanation of the Complainants' case, we cannot agree. Consultations are the first step in the dispute settlement process. While one function of the consultations may be to clarify what the case is about, there is nothing in the DSU that provides that a complainant cannot request a panel unless its case is adequately explained in the consultations. The fulfilment of such a requirement would be difficult, if not impossible, for a complainant to demonstrate if a respondent chose to claim a lack of understanding of the case, a result which would undermine the automatic nature of panel establishment under the DSU. The only prerequisite for requesting a panel is that the consultations have 'fail[ed] to settle a dispute within 60 days of receipt of the request for consultations . . .'.[163] Ultimately, the function of providing notice to a respondent of a complainant's claims and arguments is served by the request for establishment of a panel and by the complainant's submissions to that panel."[164]

(f) Challenging a request for consultations

123. For the requirement of good faith when challenging procedural deficiencies, see paragraph 105 above.

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[158] Panel Report on *EC – Bananas III*, para. 7.19.
[159] Panel Report on *Korea – Alcoholic Beverages*, para. 10.19. See also Panel Report on *Turkey – Textiles*, para. 9.24.
[160] (*footnote original*) Panel Report on *EC – Bananas III*, paras. 7.18–7.19.
[161] (*footnote original*) See for instance the Appellate Body Report on *EC – Bananas III*, paras. 139–144; the Appellate Body Report on *Brazil – Measures Affecting Desiccated Coconut*, adopted on 20 March 1997, WT/DS22/AB/R ("*Brazil – Desiccated Coconut*"), page 22; and the Appellate Body Report on *India – Patent*, paras. 86–96.
[162] Panel Report on *Turkey – Textiles*, paras. 9.22 and 9.24.
[163] (*footnote original*) DSU, Article 4.7.
[164] Panel Report on *EC – Bananas III (Guatemala and Honduras)*, para. 7.20.

124. With respect to challenging measures not listed on the request for consultations, see paragraphs 128–132 below.

2. Article 4.1

125. See paragraph 111 above.

3. Article 4.3

126. See paragraph 114 above.

4. Article 4.4

(a) Notification of requests for consultations

127. At its meeting on 19 July 1995, the DSB, with regard to the notification requirement contained in Article 4:4 of the *DSU*, agreed that delegations would send one single text of their notifications to the Secretariat (Council Division), simply specifying in that text the other relevant Councils or Committees to which they wished the notification to be addressed. The Secretariat would then distribute it to the specified relevant bodies.[165]

(b) Absence or addition of "claims" and/or "measures" in the request for consultations

128. The Panel on *Brazil – Aircraft* considered Brazil's objections to the Panel's consideration of certain measures included in the panel request which were based on the fact that they were enacted or implemented after the last consultations between the parties and, as a result, could not have been the subject of consultations. The Panel indicated that it was not governed by prior consultations:

> "We recall that our terms of reference are based upon Canada's request for establishment of a panel, and not upon Canada's request for consultations. These terms of reference were established by the DSB pursuant to Article 7.1 of the DSU and establish the parameters for our work.[166] Nothing in the text of the DSU or Article 4 of the SCM Agreement provides that the scope of a panel's work is governed by the scope of prior consultations. Nor do we consider that we should seek to somehow imply such a requirement into the WTO Agreement. One purpose of consultations, as set forth in Article 4.3 of the SCM Agreement, is to 'clarify the facts of the situation',[167] and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel. Thus, to limit the scope of the panel proceedings to the identical matter with respect to which consultations were held could undermine the effectiveness of the panel process."[168]

129. This view was confirmed by the Appellate Body in *Brazil – Aircraft* which indicated that it "[did] not believe, . . ., that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel".[169]

130. The Panel on *EC – Bed Linen* considered that the absence in the request for establishment of a panel of a subject discussed during consultations simply indicated that a Member did not wish to pursue the matter further:

> "In the absence of any reference in the request for establishment to the treaty Article alleged to have been violated, the question of possible prejudice as a result of failure to state a claim with sufficient clarity simply does not arise. Moreover, we are of the view that the argument that there was no prejudice to the European Communities because Article 6 of the AD Agreement was mentioned in the request for consultations, and may even have been discussed during the consultations is, in this case, irrelevant. Consultations are part of the process of clarifying the matter in dispute between the parties. It is perfectly understandable, and indeed desirable, that issues discussed during consultations do not subsequently become claims in dispute. Thus, the absence of a subject that was discussed in the consultations from the request for establishment indicates that the complaining Member does not intend to pursue that matter further. Whether inadvertent or not, as a result of the omission of Article 6 from the request for establishment the defending Member, the European Communities, and third countries had no notice that India intended to pursue claims under Article 6 of the AD Agreement in this case, and were entitled to rely on the conclusion that it would not do so. Consequently, India would be estopped in any event from raising such claims."[170]

131. The Panel on *Canada – Aircraft* indicated (when considering Article 4.2 of the *SCM Agreement*) that the

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[165] WT/DSB/M/6.

[166] (*footnote original*) See, e.g., *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted 16 January 1998, WT/DS50/AB/R, para. 92 ("The jurisdiction of a panel is established by that Panel's terms of reference, which are governed by Article 7 of the DSU").

[167] (*footnote original*) As the Appellate Body has noted, "the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings." *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted 16 January 1998, WT/DS50/AB/R, para. 94.

[168] Panel Report on *Brazil – Aircraft*, para.7.9. See also *US – Steel Plate* where the Panel recalled the findings of the Panel and Appellate Body in *Brazil – Aircraft* (see Panel Report on *US – Steel Plate*, para.7.17) and rejected India's claim that a "practice" was not properly before the panel because it had not been identified in the request for consultations nor actually consulted about.

[169] Appellate Body Report on *Brazil – Aircraft*, para. 132.

[170] Panel Report on *EC – Bed Linen*, para. 6.16.

matter consulted on and the matter identified in the panel request will not necessarily be identical:

> "In our view, a panel's terms of reference would only fail to be determinative of a panel's jurisdiction if, in light of Article 4.1 – 4.4 of the SCM Agreement applied together with[171] Article 4.2 – 4.7 of the DSU, the complaining party's request for establishment were found to cover a 'dispute' that had not been the subject of a request for consultations. Article 4.4 of the SCM Agreement permits a Member to refer a 'matter' to the DSB if 'no mutually agreed solution' is reached during consultations. In our view, this provision complements Article 4.7 of the DSU, which allows a Member to refer a 'matter' to the DSB if 'consultations fail to settle a dispute'. Read together, these provisions prevent a Member from requesting the establishment of a panel with regard to a 'dispute' on which no consultations were requested. In our view, this approach seeks to preserve due process while also recognising that the 'matter' on which consultations are requested will not necessarily be identical to the 'matter' identified in the request for establishment of a panel. The two 'matters' may not be identical because, as noted by the Appellate Body in *India – Patents*, 'the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings'.[172]"[173]

132. See excerpt from the Panel report on *Canada – Aircraft* contained in Article 4.4 of the *SCM Agreement* discussion in the Chapter on the *SCM Agreement*, Section IV.B.4(a).

(c) Effect of the extension of the duration of identified measures after consultations

133. The Panel on *Chile – Price Band System* addressed the issue of whether or not the extension of the duration of identified measures after consultations affected compliance with Article 4.4 of the *DSU*. Chile argued that none of the safeguard measures challenged by Argentina in the dispute fell within the Panel's jurisdiction. According to Chile, the provisional and definitive safeguard measures concerned were no longer in effect on the date of Argentina's request for establishment of the panel. The Panel responded (on an issue not subsequently appealed) as follows:

> "Chile raises two different objections regarding the Panel's jurisdiction with respect to the definitive safeguard measures and the extension of their duration: first, the definitive safeguard measures had 'expired before the request for establishment was made'; second, the 'extension measures' were not formally included in the request for consultations. We cannot accept either of those objections, for one and the same reason. Both of Chile's objections are based on the proposition that the extension of the period of application results in a measure distinct from the definitive safeguard measure. We disagree with this proposition. In our view, Article 7 of the Agreement on Safeguards makes it clear that what is at issue is not an extension 'of the safeguard measure', but, rather, an extension 'of the period of application of the safeguard measure' or of 'the duration of the safeguard measure'. Article 7 is entitled '*Duration* and Review *of Safeguard Measures*'. Article 7.1 provides . . .:
>
> > This language is sufficiently clear for us as to conclude that the 'extensions' are not distinct measures, but merely continuations in time of the definitive safeguard measures. As a result, we consider that the definitive safeguard measures were not terminated before the request for establishment, but, rather, that their duration was simply extended at that time. Thus, we need not further consider Chile's argument that we lack the authority to make findings in respect of the definitive measures on the grounds that they have expired.[174] For the same reason, we also consider the fact that the extension was not mentioned in the request for consultations irrelevant for the determination of our jurisdiction: pursuant to Article 4.4 of the DSU, Argentina had to, and did, identify the definitive safeguard measures in its request for consultations. The fact that the duration of the identified measures was extended by Chile after the request for consultations cannot affect Argentina's compliance with Article 4.4 of the DSU.[175]
>
> We note, moreover, that the 'extension' did not in any way amend the content of the safeguard measures and that there were, in fact, exchanges between Argentina and Chile during the period of consultations regarding the 'extension'. Chile must therefore have been fully informed about Argentina's intention to challenge the safeguard measures, *as extended in time*. Thus, even if the 'extension' were to be considered a separate measure, *quod non*, Chile's due process rights would not have been impinged upon.[176]"[177]

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[171] (*footnote original*) According to the Appellate Body in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, wherever possible, special or additional rules and procedures for dispute settlement in Annex 1 of the DSU (such as Article 4.1 – 4.4 of the SCM Agreement) should be read so as to complement the provisions of the DSU (WT/DS60/AB/R, adopted 25 November 1998, paras. 64–66).

[172] (*footnote original*) *India – Patent Protection for Pharmaceuticals and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, para. 94.

[173] Panel Report on *Canada – Aircraft*, para. 9.12.

[174] (*footnote original*) We note, in any event, our view that panels do not lack the legal authority to make findings in respect of expired measures. *See* paras. 7.112–7.113, *supra*.

[175] (*footnote original*) Accordingly, we need not decide whether the failure to identify a measure in a request for consultations would deprive a panel of the legal authority to make findings in respect of a measure otherwise within its terms of reference.

[176] (*footnote original*) We note, however, that we are not examining the consistency of the extension decision with the requirements of Article 7.2 of the Agreement on Safeguards, as that is not within our Terms of Reference.

[177] Panel Report on *Chile – Price Band System*, paras. 7.116–7.120.

(d) Relationship between request for consultations and request for the establishment of a panel

134. See paragraphs 128–131 above and the excerpt from the report of the Appellate Body referenced in paragraph 144 below.

5. Article 4.6

(a) "consultations shall be confidential"

(i) Information acquired during consultations

In the same proceedings

135. In *Korea – Alcoholic Beverages*, Korea argued before the Panel that the complainants breached the confidentiality requirement of Article 4.6 of the *DSU* by making reference, in their submissions, to information supplied by Korea during consultations. The Panel, in a finding not reviewed by the Appellate Body, held that while confidentiality in consultations between parties to a dispute was "essential", it also found that "parties do not thereby breach any confidentiality by disclosing in those proceedings information acquired during the consultations":

> "We note that Article 4.6 of the DSU requires confidentiality in the consultations between parties to a dispute. This is essential if the parties are to be free to engage in meaningful consultations. However, it is our view that this confidentiality extends only as far as requiring the parties to the consultations not to disclose any information obtained in the consultations to any parties that were not involved in those consultations. We are mindful of the fact that the panel proceedings between the parties remain confidential, and parties do not thereby breach any confidentiality by disclosing in those proceedings information acquired during the consultations. Indeed, in our view, the very essence of consultations is to enable the parties to gather correct and relevant information, for purposes of assisting them in arriving at a mutually agreed solution, or failing which, to assist them in presenting accurate information to the panel. It would seriously hamper the dispute settlement process if the information acquired during consultations could not subsequently be used by any party in the ensuing proceedings. We find therefore, that there has been no breach of confidentiality by the complainants in this case in respect of information that they became aware of during the consultations with Korea on this matter."[178]

136. The Panel on *EC – Bed Linen* also referred to the finding of the Panel on *Korea – Alcoholic Beverages* referenced in paragraph 135 above. In that case, India presented transcripts of the consultation sessions held with the European Communities, so as to demonstrate the "bad faith" of the European Communities during consultations. Although the Panel concluded that the material submitted by India was not related to any specific legal claim and, as a result, was not relevant to the case, the Panel decided that it would not *a priori* exclude this evidence. *Inter alia*, the Panel recalled the findings of the Panel on *Korea – Alcoholic Beverages* that information obtained in consultations may be presented during subsequent panel proceedings.[179]

Information obtained in different proceedings

137. In *Australia – Automotive Leather II*, Australia, the defending party, demanded that information which the United States, the complaining party, had obtained during consultations preceding a previous panel requested by the United States (a panel which had been established, but never composed and, as a result, never became active) be declared inadmissible in the second proceeding. The Panel, further to referring to the findings of the Panel on *Korea – Alcoholic Beverages* (see paragraph 135 above), considered as follows:

> "Given that, in this case, the parties and the dispute are the same, no panel was actually composed or considered the dispute in the first-requested proceeding, and there are no third parties involved in either proceeding who might have learned information in the course of consultations, we cannot see any reason to exclude the United States Exhibit 2 from our consideration, merely because it was developed in the course of the consultations held pursuant to the first request.[180] Australia has failed to specify what other, if any, facts might have been derived by the United States from the earlier consultations, and so there is no basis for us to exclude any such facts."[181]

Offers of settlement made during consultations

138. In *US – Underwear*, Costa Rica had submitted to the Panel certain information relating to settlement offers made by the United States during the consultations. The Panel decided not to base its findings on such information. See paragraph 137 above.

(ii) Relevance of third party participation in confidentiality of information from consultations

139. The Panel on *Mexico – Corn Syrup* considered, *inter alia*, the effect of third party participation when

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[178] Panel Report on *Korea – Alcoholic Beverages*, para. 10.23.

[179] Panel Report on *EC – Bed Linen*, paras. 6.32–6.35.

[180] (*footnote original*) There is nothing to indicate that there would have been any different answers had the same questions been asked by the United States during consultations held pursuant to the second request. We note Australia's view that there were no consultations held pursuant to the second request, although there was a meeting between the parties. Presumably, this view is based on Australia's position that the second request for consultations, and the second request for establishment, like this Panel which flowed from those requests, were inconsistent with the DSU.

[181] Panel Report on *Australia – Automotive Leather II*, para. 9.34.

referring to consultations and concluded that "the requirement to maintain the confidentiality of consultations is not violated by the inclusion of information obtained during consultations in the written submission of a party provided to a third party in the subsequent panel proceeding even if that third party did not participate in the consultations":

> "[I]t would seriously hamper the dispute settlement process if a party could not use information obtained in the consultations in subsequent panel proceedings merely because a third party which did not participate in the consultations chooses to participate in the panel proceedings.[182] As Mexico points out, third party participation in the panel proceedings cannot be vetoed by the parties to the proceeding. In our view, it would be anomalous if the decision of a Member to participate in a panel proceeding as a third party when it did not, or could not, participate as a third party in the underlying consultations had the effect of limiting the evidence that could be relied upon in the panel proceeding by precluding the introduction of information obtained during the consultations. Third parties are subject to the same requirement to maintain the confidentiality of panel proceedings as are parties. We therefore conclude that the requirement to maintain the confidentiality of consultations is not violated by the inclusion of information obtained during consultations in the written submission of a party provided to a third party in the subsequent panel proceeding even if that third party did not participate in the consultations."[183]

(b) "consultations shall be . . . without prejudice to the rights of any Member"

140. In *US – Underwear*, Costa Rica had submitted to the Panel certain information relating to settlement offers made by the United States during the consultations. The Panel considered that "the wording of Article 4.6 of the *DSU* makes it clear that offers made in the context of consultations are, in case a mutually agreed solution is not reached, of no legal consequence to the later stages of dispute settlement, as far as the rights of the parties to the dispute are concerned". Accordingly, the Panel decided to disregard such information.[184]

6. Article 4.7

141. See paragraph 115 above.

7. Article 4.9

142. In *Canada – Patent Term*, the United States submitted a request for expedited consideration of the dispute under Article 4.9 of the *DSU* on the grounds that the premature expiration of patents during the dispute settlement procedure caused irreparable harm to the patent owners. It referred to the alleged simplicity of the issues in dispute, the absence of third parties and other circumstances. The Panel indicated that due to other demands on its members' time, it could not accelerate the timetable prior to the first substantive meeting; however the Panel stated that it undertook to make every effort to issue its report as soon as possible after the second substantive meeting.[185]

8. Article 4.11

143. The Appellate Body on *EC – Bananas III* touched on Article 4.11 in its finding that no "legal interest" is required for a Member to bring a case under the *DSU*. See paragraph 158 below.

C. RELATIONSHIP WITH OTHER ARTICLES

1. Article 6

144. In response to Brazil's argument that a panel request must include only measures that were either identified in the request for consultations or raised subsequently during the consultations, the Appellate Body in *Brazil – Aircraft* stated:

> "We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel. As stated by the Panel, '[o]ne purpose of consultations, as set forth in Article 4.3 of the SCM Agreement, is to "clarify the facts of the situation", and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel.'"[186]

145. See also paragraph 116 above.

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[182] (*footnote original*) *See Korea – Alcohol Panel Report*, para. 10.23 (issue not raised on appeal). In *Korea – Alcohol*, the Panel faced the question that is raised by Mexico in this dispute – whether a party in a panel proceeding may refer to or rely on information it obtained during the consultations preceding the request for establishment of a panel. That Panel concluded that "[i]t would seriously hamper the dispute settlement process if the information acquired during consultations could not subsequently be used by any party in the ensuing proceedings". *Id.* We note the Panel's statement that the confidentiality requirement of Article 12.7 extends only so far as to require "parties to the consultations not to disclose any information obtained in the consultations to any parties that were not involved in those consultations". *Id.* However, *Korea–Alcohol* involved the same factual circumstances as this dispute with respect to the involvement of a third party to the Panel proceeding which had not participated in the consultations. The same "due process" considerations that underlie the Panel's decision in *Korea–Alcohol* are, in our view, relevant here.

[183] Panel Report on *Mexico – Corn Syrup*, para. 7.41.

[184] Panel Report on *US – Underwear*, para. 7.27.

[185] Panel Report on *Canada – Patent Term*, para. 1.5.

[186] Appellate Body Report on *Brazil – Aircraft*, para. 132. In this connection, the Panel on *Brazil – Aircraft* stated ". . .to limit the scope of the panel proceedings to the identical matter with respect to which consultations were held could undermine the effectiveness of the panel process".

D. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Article 8.10 of the ATC

146. The Panel on *US – Wool Shirts and Blouses* discussed the role of panels under the *DSU* and the role of the TMB under the *ATC*. With respect to consultations, the Panel stated:

> "We note also that, according to Article 8.10 of the ATC, when the TMB process has been completed, a Member which remains unsatisfied with the TMB recommendations can request the establishment of a panel without having to request consultations under Article 4 of the DSU. This is to say that the TMB process can replace the consultation phase in the dispute settlement process under the DSU and is distinct from the formal adjudication process by panels."[187]

2. Article 17 of the Anti-Dumping Agreement

147. See the excerpts from the reports of the panels and Appellate Body referenced in the Chapter on the *Anti-Dumping Agreement*, Section XVII.B.

3. Article 4.2 of the SCM Agreement

148. See paragraph 112 above.

149. As regards the difference between Article 4.4 of the *DSU* and Article 4.2 of the *SCM Agreement*, see the excerpt from the Report of the Appellate Body in *US – FSC* referenced at Section IV.B.1(a) of the Chapter on the *SCM Agreement*.

V. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5
Good Offices, Conciliation and Mediation

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.

2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.

3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.

4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with a view to assisting Members to settle a dispute.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. WTO Director-General's offer of assistance

150. On 13 July 2001, the WTO Director-General[188] addressed a communication to the Members expressing his views that "Members should be afforded every opportunity to settle their disputes through negotiations whenever possible". In this communication,[189] the WTO Director-General noted that Article 5 of the *DSU*, which provides for the use of good offices, conciliation and mediation, had not been used and reminded Members that he was ready and willing to assist them as is envisaged under the terms of Article 5.6. The communication included a set of procedures for Members to use to request assistance under Article 5. The communication notes that these procedures are intended "purely to help Members resolve their differences and do not limit their treaty rights in any manner". It also assures Members that these procedures would not in any way limit the Director-General's availability to assist delegations more generally whenever they request his help.

151. With respect to a mediation outside the *DSU* but following procedures similar to those described in this communication, see paragraphs 152–153 below.

2. Mediation outside the DSU

152. On 10 October 2002, the WTO Director-General[190] issued a communication informing the Members that on 4 September 2002, the Philippines, Thailand and the European Communities had jointly requested mediation by himself or by a mediator appointed by

[187] Panel Report on *US – Wool Shirts and Blouses*, para. 7.19.
[188] The WTO Director-General issuing this communication was Mr Mike Moore.
[189] WT/DSB/25.
[190] The WTO Director-General issuing this communication was Dr Supachai Panitchpakdi.

him with their agreement. The purpose of the mediation was "to examine the extent to which the legitimate interests of the Philippines and Thailand are being unduly impaired as a result of the implementation by the European Communities of the preferential tariff treatment for canned tuna originating in ACP states. In the event that the mediator concludes that undue impairment has in fact occurred, the mediator could consider means by which this situation may be addressed."[191]

153. Although the requesting Members considered that the matter at issue was not a "dispute" within the terms of the *DSU*, they agreed that the mediator could be guided by procedures similar to those envisaged for mediation under Article 5 of the *DSU*, as described in a communication by the Director-General on Article 5 of the *DSU* (see paragraph 150 above). The mediation resulted in an amicable outcome reached by the parties based on an advisory opinion of the mediator.[192]

VI. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6
Establishment of Panels

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.[5]

(*footnote original*) [5] If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

1. General

(a) Multiple panels involving the same parties and same claims

154. In *Australia – Automotive Leather I*, pursuant to a request made by the United States, a panel was established on 22 January 1998[193] and 22 June 1998[194] regarding the same matter. In the latter request for the establishment of a panel, the United States asked that its earlier request be withdrawn. At the DSB meeting held on 22 June 1998, the United States representative said that it had terminated the panel that had been established on 22 January 1998. Australia argued that the United States did not have the right to have a second panel established at the DSB meeting on 22 June 1998 and the DSB did not have the right under the *DSU* to establish such a panel against the wishes of Australia. Australia argued that the Panel was not properly established, and that therefore the Panel should terminate its work immediately. The Panel examined Australia's arguments and stated:

> "The establishment of a panel is the task of the DSB. It is by no means clear that, once the DSB has established a panel, as it did in this case at its meeting of 22 June 1998, the panel so established has the authority to rule on the propriety of its own establishment. Nothing in our terms of reference expressly authorizes us to consider whether the DSB acted correctly in establishing this Panel.
>
> . . .
>
> In our view, Australia is asking this Panel to read into the DSU an implicit prohibition on multiple panels between the same parties regarding the same matter that does not exist in the text of the DSU. Australia's arguments in support of its position arise out of policy considerations and address the object and purpose of the DSU. In light of the fundamental importance in the WTO dispute settlement system of the right to have a panel established to examine a matter, in the absence of a consensus not to do so, we do not consider it appropriate in this dispute to read such an implicit prohibition into the DSU. This is particularly true given that the policy concerns expressed by Australia are purely theoretical and do not arise in this case. Specifically, this is not a case where a complainant is actively pursuing two proceedings with respect to the same matter – the United States has made it very clear that it is not pursuing the first dispute. To the contrary, the United States has sought to terminate the first dispute, and it is Australia which has sought to prevent that result. Nor is this a case where a complainant has sought a second panel before a first panel has completed its work with respect to the same matter because it was dissatisfied with developments in the first panel. Although the first panel in this case was established, it was never composed and thus never began its work.
>
> For the foregoing reasons, we deny Australia's request to terminate this Panel, and will continue our work in accordance with our terms of reference."[195]

[191] WT/GC/66 and WT/GC/66/Add.1.
[192] WT/GC/71.
[193] WT/DS106/2.
[194] WT/DS126/2.
[195] Panel Report on *Australia – Automotive Leather II*, paras. 9.12 and 9.14–9.15.

2. Article 6.2

(a) General

(i) Task of panels to examine requests for establishment

155. In *EC – Bananas III*, the Appellate Body "recognize[d] that a panel request will usually be approved automatically at the DSB meeting following the meeting at which the request first appears on the DSB's agenda".[196] Thus, the Appellate Body concluded that "[a]s a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU . . .".[197]

(ii) Request must be sufficiently precise

156. In *EC – Bananas III*, the Appellate Body held that there were two reasons why a panel request must be "sufficiently precise":

> "As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint."[198]

157. In *US – Carbon Steel*, the Appellate Body reiterated that the underlying requirements of Article 6.2 are first, to define the scope of a dispute, and second, to "serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case".[199]

> "As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be 'cured' in the subsequent submissions of the parties during the panel proceedings.[200] Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced.[201] Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.[202]"[203]

(b) Right to bring claims

(i) Legal interest

158. In *EC – Bananas III*, the European Communities argued that a complaining party must normally have a legal right or interest in the claim it is pursuing. The Appellate Body stated that no provision of the *DSU* contains any such explicit requirement. The Appellate Body also held that "a Member has broad discretion in deciding whether to bring a case against another Member under the DSU". While the Appellate Body stressed that Members are "self-regulating" in their decisions whether to bring a case, it also added that "[t]he United States is a producer of bananas, and a potential export interest by the United States cannot be excluded. The internal market of the United States for bananas could be affected by the European Communities banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas":

> "We agree with the Panel that 'neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a "legal interest" as a prerequisite for requesting a panel'. We do not accept that the need for a 'legal interest' is implied in the DSU or in any other provision of the *WTO Agreement*. It is true that under Article 4.11 of the DSU, a Member wishing to join in multiple consultations must have 'a substantial trade interest', and that under Article 10.2 of the DSU, a third party must have 'a substantial interest' in the matter before a panel. But neither of these provisions in the DSU, nor anything else in the *WTO Agreement*, provides a basis for asserting that parties to the dispute have to meet any similar standard. Yet, we do not believe that this is dispositive of whether, in this case, the United States has 'standing' to bring claims under the GATT 1994."[204]

159. The Appellate Body went on to state:

> "[W]e believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful'.

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196 (*footnote original*) DSU, Article 6.1.
197 Appellate Body Report on *EC – Bananas III*, para. 142.
198 Appellate Body Report on *EC – Bananas III*, para. 142.
199 Appellate Body Report on *US – Carbon Steel*, para. 126.
200 (*footnote original*) Ibid., para. 143. [Appellate Body Report, *EC – Bananas III*]
201 (*footnote original*) See, for example, Appellate Body Report, *Korea – Dairy*, para. 127; Appellate Body Report, *Thailand – H-Beams*, para. 95.
202 (*footnote original*) Appellate Body Report, *Korea – Dairy*, paras. 124–127.
203 Appellate Body Report on *US – Carbon Steel*, para. 127.
204 Appellate Body Report on *EC – Bananas III*, para. 132.

> We are satisfied that the United States was justified in bringing its claims under the GATT 1994 in this case. The United States is a producer of bananas, and a potential export interest by the United States cannot be excluded. The internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas. We also agree with the Panel's statement that:
>
> > '. . . with the increased interdependence of the global economy, . . . Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.'
>
> We note, too, that there is no challenge here to the standing of the United States under the GATS, and that the claims under the GATS and the GATT 1994 relating to the EC import licensing regime are inextricably interwoven in this case.
>
> Taken together, these reasons are sufficient justification for the United States to have brought its claims against the EC banana import regime under the GATT 1994. This does not mean, though, that one or more of the factors we have noted in this case would necessarily be dispositive in another case. We therefore uphold the Panel's conclusion that the United States had standing to bring claims under the GATT 1994."[205]

160. In *Korea – Dairy*, the Panel considered Korea's argument that there is a requirement for an economic interest to bring a matter to the Panel and that the European Communities had failed to meet that requirement:

> "In *EC – Bananas*, the Appellate Body stated that the need for a 'legal interest' could not be implied in the DSU or in any other provisions of the WTO Agreement and that Members were expected to be largely self-regulating in deciding whether any DSU procedure would be 'fruitful'. We cannot read in the DSU any requirement for an 'economic interest'. We also note the provisions of Article 3.8 of the DSU, pursuant to which nullification and impairment is presumed once violation is established."[206]

(ii) Right to bring claims under Article 17.4 of the Anti-Dumping Agreement

161. See the excerpts from the reports of the panels and Appellate Body referenced in Section XVII.B.5 of the Chapter on the *Anti-Dumping Agreement*.

3. Basic requirements under Article 6.2

(a) General

162. In *Korea – Dairy*, the Appellate Body analysed the requirements imposed by Article 6.2:

> "The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In its fourth requirement, Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is 'sufficient to present the problem clearly'. It is not enough, in other words, that 'the legal basis of the complaint' is summarily identified; the identification must 'present the problem clearly'."[207]

163. In *US – Carbon Steel*, the Appellate Body summarized its previous jurisprudence on the requirements of Article 6.2. The Appellate Body noted the importance of the two distinct requirements, namely, identification of the specific measures at issue, and the provision of a brief summary of the claims. Referring to *Guatemala – Cement I*, it concluded that both requirements "together, they comprise the 'matter referred to the DSB', which forms the basis for a panel's terms of reference under Article 7.1 of the DSU":

> "There are, therefore, two distinct requirements, namely identification of *the specific measures at issue*, and the provision of a *brief summary of the legal basis of the complaint* (or the *claims*). Together, they comprise the 'matter referred to the DSB', which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[208]
>
> The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case.[209] When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for establishment of a panel 'to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.'[210]
>
> As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be 'cured' in the subsequent submissions of the parties

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[205] Appellate Body Report on *EC – Bananas III*, paras. 135–138.
[206] Panel Report on *Korea – Dairy*, para. 7.13.
[207] Appellate Body Report on *Korea – Dairy*, para. 120.
[208] (*footnote original*) Appellate Body Report, *Guatemala – Cement I*, paras. 69–76.
[209] (*footnote original*) Appellate Body Report, *Brazil – Desiccated Coconut*, at 186. See also Appellate Body Report, *EC – Bananas III*, para. 142.
[210] (*footnote original*) Appellate Body Report, *EC – Bananas III*, para. 142.

during the panel proceedings.[211] Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced.[212] Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.[213]"[214]

164. As regards the requirement that the request be sufficiently precise, see paragraphs 156–157 above.

(b) "indicate whether consultations were held" and "matter referred to the DSB"

165. In *Brazil – Desiccated Coconut*, the Panel examined the request of the Philippines to make a finding that Brazil's refusal to hold consultations was inconsistent with Articles 4.1, 4.2 and 4.3 of the *DSU*. The Panel recalled that Article 6.2 of the *DSU* requires that a request for the establishment of a panel "shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The Panel stated:

> "The Philippines' request for establishment of a panel clearly fulfils the first requirement of Article 6.2, by indicating the Philippines' view that consultations were not held because Brazil refused to consult. . . .However, there is nothing in the request for establishment of a panel that would lead to the conclusion that the requested panel would be asked to make any finding regarding Brazil's failure to consult. . . .We therefore conclude that the Philippines' claim regarding Brazil's failure to consult is not within our terms of reference."[215]

166. In *Brazil – Aircraft*, the Panel considered that a preliminary objection could properly be sustained if a party established that the required consultations had not been held with respect to a dispute:

> "A party is not entitled to request establishment of a panel unless consultations have been held. Specifically, Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if 'consultations fail to settle a dispute'. Similarly, Article 4.4 of the SCM Agreement allows a 'matter' to be referred to the DSB for establishment of a panel only if consultations have failed to lead to a mutually agreed solution. Given that Article 6.1 of the DSU and Article 4.4 of the SCM Agreement essentially require the DSB to establish a panel automatically upon request of a party, a panel cannot rely upon the DSB to ascertain that requisite consultations have been held and to establish a panel only in those cases.[216] Accordingly, we consider that a panel may consider whether consultations have been held with respect to a 'dispute', and that a preliminary objection may properly be sustained if a party can establish that the required consultations had not been held with respect to a dispute. We do not believe, however, that either Article 4.7 of the DSU or Article 4.4 of the SCM Agreement requires a precise identity between the matter with respect to which consultations were held and that with respect to which establishment of a panel was requested."[217]

167. Regarding the term "matter referred to the DSB", see Section VII.B.2(a) below

(c) "identify the specific measures at issue"

(i) "specific measures at issue"

Nexus between "measure" and "Member"

168. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body referred to Article 3.3 of the *DSU* when defining what type of measures can be the subject of dispute settlement proceedings. The Appellate Body emphasized the nexus existing between the "measure" and a "Member" taking such measure:

> "Article 3.3 of the DSU refers to 'situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by *measures taken by another Member*'. (emphasis added) This phrase identifies the relevant nexus, for purposes of dispute settlement proceedings, between the 'measure' and a 'Member'."[218]

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[211] (*footnote original*) *Ibid.*, para. 143.

[212] (*footnote original*) See, for example, Appellate Body Report, *Korea – Dairy*, para. 127; Appellate Body Report, *Thailand – H-Beams*, para. 95.

[213] (*footnote original*) Appellate Body Report, *Korea – Dairy*, paras. 124–127.

[214] Appellate Body Report on *US – Carbon Steel*, paras. 125–127.

[215] Panel Report on *Brazil – Desiccated Coconut*, para. 290. See also Article 22.6 Arbitration Report on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 28.

[216] (*footnote original*) As stated by the Appellate Body in a somewhat different context in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted 25 September 1997, WT/DS27/AB/R, para. 142:

> "We recognize that a panel request will usually be approved automatically at the DSB meeting following the meeting at which the request first appears on the DSB's agenda. As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU."

[217] Panel Report on *Brazil – Aircraft*, para. 7.10.

[218] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

Scope: any act or omission attributable to a Member

General

169. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body further clarified that "In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[219]

170. The Appellate Body on *US – Corrosion-Resistant Steel Sunset Review* also indicated that those "acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch".[220,221]

Challenging legislation allegedly taken by a customs union

171. The Panel on *Turkey – Textiles* considered, *inter alia*, whether measures involving quantitative restrictions on imports from India should be properly regarded as measures imposed by Turkey or rather as measures taken collectively by the customs union between the European Communities and Turkey. In its analysis, the Panel made the following statement:

> "We also note that the measures are applied by Turkey and that they are mandatory, i.e. they leave no discretion to Turkish authorities but to enforce the measure. It is customary practice of GATT/WTO dispute settlement procedures to address applied measures. In addition, previous adopted GATT panels have always considered that mandatory legislation of a Member, even if not yet in force or not applied,[222] can be challenged by another WTO Member."[223]

Independent operational status test

172. In *US – Export Restraints*, Canada had argued that each of the elements that it cited in its request for establishment of a panel (a US Statute, a Statement of Administrative Action, a Preamble, and a US practice) individually constituted a measure that was susceptible to dispute settlement, and that, "taken together" as well, they constituted a measure.[224] The Panel enunciated the independent operational status test:

> "In considering whether any or all of the measures individually can give rise to a violation of WTO obligations, the central question that must be answered is whether each measure operates in some concrete way in its own right. By this we mean that each measure would have to constitute an instrument with a functional life of its own, i. e., that it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations. To determine whether each measure is operational on its own, we consider the status of each under US law."[225]

(ii) Legal instruments as measures

General

173. In *Japan – Agricultural Products II*, the Appellate Body interpreted the term "measure" as within the meaning of Annex B of the *SPS Agreement*. According to its terms, Annex B applies to all "measures" and lists "laws, decrees and ordinances" as three examples of such measures. The Appellate Body held that this term also included "other instruments which are applicable generally and are similar in character to the instruments explicitly referred to". In the case before it, the Appellate Body found that the Japanese "varietal testing requirement" was a "measure" within the meaning of Annex B of the *SPS Agreement*. See Chapter on *SPS Agreement*, paragraph 176.

174. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body clarified in a footnote that the scope of "laws, regulations and administrative procedures" cannot be determined by reference to how they are labelled in the Member's domestic law:

> "We observe that the scope of each element in the phrase "laws, regulations and administrative procedures" must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 [of the Anti-Dumping Agreement] would vary from Member to Member depending on each Member's domestic law and practice."[226]

Legislation *as such* as a "measure"

General

175. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body warned about the serious-

[219] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

[220] (*footnote original*) Both specific determinations made by a Member's executive agencies and regulations issued by its executive branch can constitute acts attributable to that Member. See, for example, the Panel Report in *US – DRAMS*, where the measures referred to the panel included a USDOC determination in an administrative review as well as a regulatory provision issued by USDOC.

[221] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

[222] (*footnote original*) See for instance the Panel Report on *United States – Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136 ("*US – Superfund*"), paras. 5.2.1–5.2.2; Panel Report on *EEC – Regulation on Imports of Parts and Components*, adopted on 16 May 1990, BISD 37S/132, paras. 5.25–5.26; Panel Report on *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted 19 June 1992, BISD 39S/206, para. 5.39.

[223] Panel Report on *Turkey – Textiles*, para. 9.37.

[224] Panel Report on *US – Export Restraints*, para. 8.82.

[225] Panel Report on *US – Export Restraints*, para. 8.85.

[226] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, footnote 87.

ness of "as such" challenges and urged complainants to "be *especially diligent* in setting out 'as such' claims in their panel requests as clearly as possible":

> "In our view, 'as such' challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. By definition, an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing 'as such' challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than 'as applied' claims.
>
> We also expect that measures subject to 'as such' challenges would normally have undergone, under municipal law, thorough scrutiny through various deliberative processes to ensure consistency with the Member's international obligations, including those found in the covered agreements, and that the enactment of such a measure would implicitly reflect the conclusion of that Member that the measure is not inconsistent with those obligations. The presumption that WTO Members act in good faith in the implementation of their WTO commitments is particularly apt in the context of measures challenged 'as such'. We would therefore urge complaining parties to be *especially diligent* in setting out 'as such' claims in their panel requests as clearly as possible. In particular, we would expect that 'as such' claims state unambiguously the specific measures of municipal law challenged by the complaining party and the legal basis for the allegation that those measures are not consistent with particular provisions of the covered agreements. Through such straightforward presentations of 'as such' claims, panel requests should leave respondent parties in little doubt that, notwithstanding their own considered views on the WTO-consistency of their measures, another Member intends to challenge those measures, as such, in WTO dispute settlement proceedings."[227]

Distinction to be drawn between laws "as such" and the specific application of laws when assessing measures

176. The Appellate Body observed in *US – 1916 Act* the existence of a long line of GATT cases that "firmly established" the principle that complaining parties were permitted to challenge measures "as such": and noted how, since the entry into force of the WTO, numerous panels had dealt with claims "as such":

> "Prior to the entry into force of the *WTO Agreement*, it was firmly established that Article XXIII:1(a) of the GATT 1947 allowed a Contracting Party to challenge legislation as such, independently from the application of that legislation in specific instances. While the text of Article XXIII does not expressly address the matter, panels consistently considered that, under Article XXIII, they had the *jurisdiction* to deal with claims against legislation as such.[228] In *examining* such claims, panels developed the concept that mandatory and discretionary legislation should be distinguished from each other, reasoning that only legislation that mandates a violation of GATT obligations can be found as such to be inconsistent with those obligations. We consider the application of this distinction to the present cases in section IV(B) below.
>
> Thus, that a Contracting Party could challenge legislation as such before a panel was well-settled under the GATT 1947. We consider that the case law articulating and applying this practice forms part of the GATT *acquis* which, under Article XVI:1 of the *WTO Agreement,* provides guidance to the WTO and, therefore, to panels and the Appellate Body. Furthermore, in Article 3.1 of the DSU, Members affirm 'their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947'. We note that, since the entry into force of the *WTO Agreement*, a number of panels have dealt with dispute settlement claims brought against a Member on the basis of its legislation as such, independently from the application of that legislation in specific instances.[229]"[230]

177. The Appellate Body on *US – Carbon Steel* indicated Members may challenge the consistency with the

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[227] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172–173.

[228] (*footnote original*) See, for example, Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances* ("*United States – Superfund*"), adopted 17 June 1987, BISD 34S/136; Panel Report, *United States – Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, BISD 36S/345; Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* ("*Thailand – Cigarettes*"), adopted 7 November 1990, BISD 37S/200; Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages* ("*United States – Malt Beverages*"), adopted 19 June 1992, BISD 39S/206; and Panel Report, *United States – Tobacco*, *supra*, footnote 16. See also Panel Report, *United States – Wine and Grape Products*, *supra*, footnote 18, examining this issue in the context of a claim brought under the Tokyo Round *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade.*

[229] (*footnote original*) See, for example, Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by the Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R; Panel Report, *Canada – Certain Measures Concerning Periodicals,* WT/DS31/R, adopted 30 July 1997, as modified by the Appellate Body Report, WT/DS31/AB/R; Panel Report, *European Communities – Hormones*, WT/DS26/R, WT/DS48/R, adopted 13 February 1998, as modified by the Appellate Body Report, *supra*, footnote 24; Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R; Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS87/AB/R, WT/DS110/AB/R; Panel Report, *United States – FSC,* WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, *supra*, footnote 22; and Panel Report, *United States – Section 110(5) of the US Copyright Act,* WT/DS160/R, adopted 27 July 2000.

[230] Appellate Body Report on *US – 1916 Act*, paras. 60–61.

covered agreements of another Member's laws, as such, as distinguished from any specific application of those laws:

> "We note, first, that, in dispute settlement proceedings, Members may challenge the consistency with the covered agreements of another Member's laws, as such, as distinguished from any specific application of those laws. . .
>
> Thus, a responding Member's law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion.[231] Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case."[232]

178. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body explained how the analysis should be done when a measure is challenged "as such":

> "When a measure is challenged 'as such', the starting point for an analysis must be the measure on its face. If the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone. If, however, the meaning or content of the measure is not evident on its face, further examination is required."[233]

Instruments with normative value

179. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body considered that instruments containing rules or norms could constitute a "measure", irrespective of how or whether those rules or norms are applied in a particular instance:

> "[I]n GATT and WTO dispute settlement practice, panels have frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application.[234] In other words, instruments of a Member containing rules or norms could constitute a "measure", irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms.[235] It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application. Thus, allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated."[236]

180. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body stressed the importance of an examination of the normative nature of the legal instrument at issue, the Sunset Bulletin Policy, when determining whether it is a measure subject to dispute settlement. The Appellate Body in this case did not apply the mandatory/discretionary rule (see paragraphs 190–193 below):

> "The Panel adopted a similar narrow approach in finding that the Sunset Policy Bulletin is not an 'administrative procedure' within the meaning of Article 18.4 of the *Anti-Dumping Agreement*. Having adopted the view that an administrative procedure is 'a pre-established rule for the conduct of an anti-dumping investigation',[237] the Panel assumed that a 'rule' means a 'mandatory rule' and used its previous finding that the Sunset Policy Bulletin is not a mandatory legal instrument to come to the conclusion that it therefore cannot be an administrative procedure. Again, the Panel did not consider the normative nature of the provisions of the Sunset Policy Bulletin, nor compare the type of norms that USDOC is required to publish in formal regulations with the type of norms it may set out in policy statements.[238] These inquiries would have assisted the Panel

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[231] (*footnote original*) See, for example, Appellate Body Report, *US – Wool Shirts and Blouses*, at 335.

[232] Appellate Body Report on *US – Carbon Steel*, paras. 156–157.

[233] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 168.

[234] (*footnote original*) See, for example Panel Report, *US – Superfund*; Panel Report, *US – Malt Beverages*; Panel Report, *EEC – Parts and Components*; Panel Report, *Thailand – Cigarettes*; Panel Report, *US – Tobacco*; Panel Report, *Argentina – Textiles and Apparel*; Panel Report, *Canada – Aircraft*; Panel Report, *Turkey – Textiles*; Panel Report, *US – FSC*; Panel Report, *US – Section 301 Trade Act*; Panel Report, *US – 1916 Act (EC)*; Panel Report, *US – 1916 Act (Japan)*; Panel Report, *US – Hot-Rolled Steel*; Panel Report, *US – Export Restraints*; Panel Report, *US – FSC (21.5 – EC)*; and Panel Report, *Chile – Price Band System*. See also Appellate Body Report, *US – Carbon Steel*, paras. 156 and 157. See also Appellate Body Report, *US – 1916 Act*, footnotes 34 and 35 to paras. 60 and 61, respectively.

[235] (*footnote original*) Panel Report, *US – Superfund*, para. 5.2.2.

[236] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

[237] (*footnote original*) *Ibid.*, para. 7.134, referring to Panel Report, *US – Steel Plate*, para. 7.22.

[238] (*footnote original*) This examination would have assisted the Panel because, as we have explained, *supra*, para. 190, the phrase "laws, regulations and administrative procedures" in Article 18.4 denotes, collectively, the body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.

in determining whether the Sunset Policy Bulletin is, in fact, an 'administrative procedure' within the meaning of Article 18.4 of the *Anti-Dumping Agreement*."[239]

181. In *US – Oil Country Tubular Goods Sunset Reviews*, another anti-dumping case dealing with the United States Sunset Policy Bulletin (see *US – Corrosion-Resistant Steel Sunset Review*, paragraphs 174 and 178–180 above), the Appellate Body stressed that whether an instrument has legal value under domestic law is immaterial when establishing whether it can be a measure subject to dispute settlement. The Appellate Body, referring to its findings in *US – Corrosion-Resistant Steel Sunset Review*, explained that what matters is that the instrument has normative value, meaning: providing administrative guidance, creating expectations among the public and among private actors, and intended to have general and prospective application:

"We note the argument of the United States that the SPB is not a legal instrument under United States law. This argument, however, is not relevant to the question before us. The issue is not whether the SPB is a legal instrument within the domestic legal system of the United States, but rather, whether the SPB is a measure that may be challenged within the WTO system. The United States has explained that, within the domestic legal system of the United States, the SPB does not bind the USDOC and that the USDOC 'is entirely free to depart from [the] SPB at any time'.[240] However, it is not for us to opine on matters of United States domestic law. Our mandate is confined to clarifying the provisions of the *WTO Agreement* and to determining whether the challenged measures are consistent with those provisions. As noted by the United States, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body indicated that 'acts setting forth rules or norms that are intended to have general and prospective application' are measures subject to WTO dispute settlement.[241] We disagree with the United States' application of these criteria to the SPB. In our view, the SPB has normative value, as it provides administrative guidance and creates expectations among the public and among private actors.[242] It is intended to have general application, as it is to apply to all the sunset reviews conducted in the United States. It is also intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance. Thus, we confirm – once again – that the SPB, as such, is subject to WTO dispute settlement."[243]

Discretionary versus mandatory legislation rule

Reference to previous GATT practice

182. In *US – 1916 Act (EC)*, the United States argued, *inter alia*, that, according to established GATT practice, the measure at issue, the so-called 1916 Act, could not be challenged "as such", i.e. independently of its application in a specific case, because it was "discretionary legislation". Specifically, the United States argued that the 1916 Act was non-mandatory because "(i) with respect to both civil and criminal proceedings, United States' courts had in the past interpreted and/or could in the future interpret the 1916 Act in a manner consistent with the WTO obligations of the United States and (ii) the United States Department of Justice had discretion whether to initiate criminal proceedings under the 1916 Act".[244] The Appellate Body recalled GATT practice in respect of this subject-matter:

"Prior to the entry into force of the *WTO Agreement*, it was firmly established that Article XXIII:1(a) of the GATT 1947 allowed a Contracting Party to challenge legislation as such, independently from the application of that legislation in specific instances. While the text of Article XXIII does not expressly address the matter, panels consistently considered that, under Article XXIII, they had the *jurisdiction* to deal with claims against legislation as such.[245] In *examining* such claims, panels developed the concept that mandatory and discretionary legislation should be distinguished from each other, reasoning that only legislation that mandates a violation of GATT obligations can be found as such to be inconsistent with those obligations.

Thus, that a Contracting Party could challenge legislation as such before a panel was well-settled under the

[239] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 98.

[240] (*footnote original*) United States' appellant's submission, para. 13.

[241] (*footnote original*) Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82 (footnote omitted).

[242] (*footnote original*) We note, in this regard, the introductory statement of the SPB:

> This policy bulletin proposes guidance regarding the conduct of sunset reviews. As described below, the proposed policies are intended to complement the applicable statutory and regulatory provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations.

(SPB, p. 18871) This statement was also referenced by the Appellate Body in *US – Corrosion-Resistant Sunset Review*, at paragraph 74.

[243] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

[244] Panel Report on *US – 1916 Act (EC)*, para. 6.82. See also Panel Report on *US – 1916 Act (Japan)*, para. 6.95.

[245] (*footnote original*) See, for example, Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances* ("*United States – Superfund*"), adopted 17 June 1987, BISD 34S/136; Panel Report, United States – Section 337 of the Tariff Act of 1930, adopted 7 November 1989, BISD 36S/345; Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* ("*Thailand – Cigarettes*"), adopted 7 November 1990, BISD 37S/200; Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages* ("*United States – Malt Beverages*"), adopted 19 June 1992, BISD 39S/206; and Panel Report, *United States – Tobacco*, supra, footnote 16. See also Panel Report, *United States – Wine and Grape Products*, supra, footnote 18, examining this issue in the context of a claim brought under the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade.

GATT 1947. We consider that the case law articulating and applying this practice forms part of the GATT *acquis* which, under Article XVI:1 of the *WTO Agreement,* provides guidance to the WTO and, therefore, to panels and the Appellate Body. Furthermore, in Article 3.1 of the DSU, Members affirm 'their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947'. We note that, since the entry into force of the *WTO Agreement*, a number of panels have dealt with dispute settlement claims brought against a Member on the basis of its legislation as such, independently from the application of that legislation in specific instances.[246]"[247]

Relevant type of discretion for distinguishing between discretionary and mandatory legislation

183. Referring to the GATT Panel Report on *US – Tobacco*, the Appellate Body in *US – 1916 Act* emphasized that the type of discretion relevant for the distinction between discretionary and mandatory legislation was discretion vested with the executive branch. Also, the Appellate Body agreed with the Panel on *US – 1916 Act* in rejecting the argument that the United States Department of Justice enjoyed discretion within the meaning of established GATT practice:

"The practice of GATT panels was summed up in *United States – Tobacco*[248] as follows:

> '. . . panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the *executive authority* of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge.'[249] (emphasis added)

Thus, the relevant discretion, for purposes of distinguishing between mandatory and discretionary legislation, is a discretion vested in the *executive branch* of government.

The 1916 Act provides for two types of actions to be brought in a United States federal court: a civil action initiated by private parties, and a criminal action initiated by the United States Department of Justice. Turning first to the civil action, we note that there is no relevant discretion accorded to the executive branch of the United States' government with respect to such action. These civil actions are brought by private parties. A judge faced with such proceedings must simply *apply* the 1916 Act. In consequence, so far as the civil actions that may be brought under the 1916 Act are concerned, the 1916 Act is clearly mandatory legislation as that term has been understood for purposes of the distinction between mandatory and discretionary legislation.

The Panel, however, examined that part of the 1916 Act that provides for criminal prosecutions, and found that the discretion enjoyed by the United States Department of Justice to initiate or not to initiate criminal proceedings does not mean that the 1916 Act is a discretionary law. In light of the case law developing and applying the distinction between mandatory and discretionary legislation,[250] we believe that the discretion enjoyed by the United States Department of Justice is not discretion of such a nature or of such breadth as to transform the 1916 Act into discretionary legislation, as this term has been understood for purposes of distinguishing between mandatory and discretionary legislation. We, therefore, agree with the Panel's finding on this point."[251]

Assessment of whether or not legislation "mandates" action

184. In *US – DRAMS*, Korea challenged certain certification requirements under the United States' anti-dumping law. The provision challenged by Korea required exporters to certify, upon removal of anti-dumping duties, that they agreed to the reinstatement of the anti-dumping duties on the products of their company if, after revocation of the original anti-

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[246] (*footnote original*) See, for example, Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by the Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R; Panel Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R, adopted 30 July 1997, as modified by the Appellate Body Report, WT/DS31/AB/R; Panel Report, *European Communities – Hormones*, WT/DS26/R, WT/DS48/R, adopted 13 February 1998, as modified by the Appellate Body Report, *supra*, footnote 24; Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R; Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS87/AB/R, WT/DS110/AB/R; Panel Report, *United States – FSC*, WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, *supra*, footnote 22; and Panel Report, *United States – Section 110(5) of the US Copyright Act,* WT/DS160/R, adopted 27 July 2000.

[247] Appellate Body Report on *US – 1916 Act*, paras. 60–61.

[248] (*footnote original*) GATT Panel Report on *US – Tobacco*, fn. 16.

[249] (*footnote original*) [GATT Panel Report on *US – Tobacco*], para. 118, referring in footnote to: Panel Report, *United States – Superfund*, *supra*, footnote 34, p. 160; Panel Report, *EEC – Parts and Components*, *supra*, footnote 20, pp. 198–199; Panel Report, *Thailand – Cigarettes*, *supra*, footnote 34, pp. 227–228; Panel Report, *United States – Malt Beverages*, *supra*, footnote 34, pp. 281–282 and 289–290; Panel Report, *United States – Denial of Most-Favoured Nation Treatment as to Non-Rubber Footwear from Brazil*, adopted 19 June 1992, BISD 39S/128, p. 152.

[250] (*footnote original*) See, in particular, the reasoning in the Panel Report, *United States – Malt Beverages*, *supra*, footnote 34, para. 5.60.

[251] Appellate Body Report on *US – 1916 Act*, paras. 88–91. See also Panel Report on *US – Steel Plate,* paras. 7.88–7.89 and 8.3. In this case, the Panel concluded that the "practice" of the US authorities concerning the application of "total facts available" (Article 6.8 *Anti-Dumping Agreement*) is not a measure that can give rise to an independent claim of violation of the *Anti-Dumping Agreement*. See also Panel Report on *US – Section 129(c)(1) URAA*, para. 6.22.

dumping duties, the United States' authorities found dumping. The Panel rejected the Korean arguments, noting that the certification requirement was not a mandatory requirement for revocation under United States' anti-dumping law in general. The Panel held that other provisions of United States anti-dumping law and regulations of the United States authorities made revocation of an anti-dumping order possible contingent upon a different set of requirements, not including the certification requirement:

> "We note section 751(b) of the 1930 Tariff Act (as amended) and section 353.25(d) of the DOC's regulations, whereby an anti-dumping order may be revoked on the basis of 'changed circumstances'. We note that neither of these provisions imposes a certification requirement. In other words, an anti-dumping order may be revoked under these provisions absent fulfilment of the section 353.25(a)(2)(iii) certification requirement. We also note that Korea has not challenged the consistency of these provisions with the WTO Agreement. Thus, because of the existence of legislative avenues for Article 11.2-type reviews that do not impose a certification requirement, and which have not been found inconsistent with the WTO Agreement, we are precluded from finding that the section 353.25(a)(2)(iii) certification requirement in and of itself amounts to a mandatory requirement inconsistent with Article 11.2 of the AD Agreement."[252]

185. In *Canada – Aircraft*, Brazil argued that a programme of the so-called Export Development Corporation (EDC) mandated the grant of subsidies and challenged the programme as such, rather than merely specific applications of this programme. However, the Panel noted that Brazil had conceded that the EDC programme had been *interpreted* as requiring the programme to give Canadian exporters an "edge" and rejected Brazil's claim:

> "[W]e find nothing in Brazil's various submissions in support of this argument. The only factual evidence proffered by Brazil in support of its argument is the quote from EDC's mandate that EDC was established 'for the purposes of supporting and developing, directly or indirectly, Canada's export trade and Canadian capacity to engage in that trade and to respond to international business opportunities.' This statement by itself clearly cannot be viewed as a *requirement* to provide prohibited export subsidies. Nor has Brazil demonstrated otherwise that such support and development necessarily involves subsidization. Although such support and development might conceivably take the form of subsidization, there is nothing to suggest that this will necessarily be the case. In our view, a mandate to support and develop Canada's export trade does not amount to a mandate to grant subsidies, since such support and development could be provided in a broad variety of ways.
>
> We consider that Brazil effectively concedes that the EDC mandate does not require the grant of export subsidies when it states that the EDC mandate has been *interpreted* to require the EDC to fund projects that give 'Canadian exporters an edge when they bid on overseas projects.' For Brazil, this 'edge' necessarily refers to subsidization. Even if the grant of an 'edge' did imply the grant of subsidies, and even if in practice the EDC programme were applied so as to grant subsidies, this would not mean that, *in law*, the EDC mandate requires the grant of subsidies. Rather, in such circumstances the grant of subsidies would be the result of the exercise of the administering authority's discretion in *interpreting* its mandate. We again recall that the panel in *US – Tobacco* recollected 'that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority . . . to act inconsistently with the General Agreement could not be challenged as such. . .'"[253]

Should the mandatory or discretionary question be determined before a substantive finding?

186. In *US – Export Restraints*, the question arose whether the Panel should first determine whether the measure at issue was mandatory or discretionary, and make a substantive finding only if it found the measure to be mandatory. The Panel declined to consider the mandatory/discretionary distinction as a threshold question. In the Panel's view, identifying and addressing the relevant WTO obligations first would facilitate its assessment of the manner in which the legislation at issue addressed those obligations, and whether any violation arose therefrom. In its analysis the Panel referred to the test developed by the GATT Panel on *US – Tobacco*:

> "We are not aware of any GATT/WTO precedent that would require a panel to consider whether legislation is mandatory or discretionary *before* examining the substance of the provisions at issue. To the contrary, we note that a number of panels, in disputes concerning the

[252] Panel Report on *US – DRAMS*, para. 6.53.

[253] Panel Report on *Canada – Aircraft*, paras. 9.127–9.128. See also the Panel in *Canada – Aircraft Credits and Guarantee* which considered that, to prove that a given programme "as such" provides export subsidies, the complainant must establish, on the basis of the pertinent legal instruments, that the programmes at issue "mandate subsidization, in particular, the conferral of a benefit". Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.76–7.77. The Panel further clarified that "to satisfy the 'benefit' element of Article 1 of the *SCM Agreement* for the purposes of a challenge to [the programme at issue] as such, [the complainant] would have to show that the program requires conferral of a benefit, not that it could be used to do so, or even that it is used to do so . . ." Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.107. See also paras. 7.123–7.125 and Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.43 and 5.50.

consistency of legislation, have *not* considered the mandatory/discretionary question in the abstract and as a necessarily threshold issue. Rather, the panels in those cases first resolved any controversy as to the requirements of the GATT/WTO obligations at issue, and only then considered *in light of those findings* whether the defending party had demonstrated adequately that it had sufficient discretion to conform with those rules. That is, the mandatory/discretionary distinction was applied *in a given substantive context.*[254]

We consider such an approach to be appropriate in this case. In particular, identifying and addressing the relevant WTO obligations first will facilitate our assessment of the manner in which the legislation addresses those obligations, and whether any violation is involved. That is, it is after we have considered both the substance of the claims in respect of WTO provisions and the relevant provisions of the legislation at issue that we will be in the best position to determine whether the legislation requires a treatment of export restraints that violates those provisions.

Finally, we note that, whether or not a panel sees the mandatory/discretionary question as a necessarily threshold issue or, as suggested by Canada, as an issue that may arise as part of a panel's examination of the legal claims, it remains true – at least under the classical test which we shall be employing – that legislation as such cannot be found to be inconsistent with a Member's WTO obligations unless it is mandatory in nature. Thus, in any event, the order in which the two issues – the question of the type of legislation and the substance of the case – are addressed would not alter any eventual finding of consistency or lack thereof."[255]

187. In *US – Section 129(c)(1) URAA*, the Panel did not follow the approach of the Panel on *US – Export Restraints*[256] and preferred to analyse first whether the United States' legislation at issue was mandatory, before analysing whether the behaviour mandated would be inconsistent with the relevant WTO provisions.[257]

The relevance of the distinction between mandatory and discretionary legislation in the context of an affirmative defence

188. In *Brazil – Aircraft (Article 21.5 – Canada II)*, the Panel was confronted with the preliminary issue of whether the distinction between mandatory and discretionary legislation was applicable in the context of an affirmative defence. In this particular case, the question presented was whether Brazil was *required* to apply the financing programme in question, PROEX III, which conferred benefits to buyers of Brazilian regional aircraft, in a manner that gave rise to a prohibited export subsidy.[258] Brazil presented an affirmative defence. The Panel actually considered that the distinction between mandatory and discretionary legislation was applicable in this context, even though, in this instance, the Panel was not faced with the issue of conformity with a WTO *obligation*, but rather of conformity with the conditions attached to a WTO *exception*. In its view, this fact alone did not render the GATT/WTO distinction between mandatory and discretionary legislation inapplicable or inappropriate. The Panel recalled:

"The rationale underpinning the traditional GATT/WTO distinction between mandatory and discretionary legislation is that, when the executive branch of a Member is not required to act inconsistently with requirements of WTO law, it should be entitled to a presumption of good faith compliance with those requirements. We consider that that rationale is no less valid in the context of WTO exceptions than it is in the context of WTO obligations. Indeed, were we to take the opposite view, we would,

[254] (*footnote original*) See, e. g., *United States – Superfund:* The scheme in question involved, *inter alia*, a discriminatory penalty tax that would be imposed if required information was not submitted by the importer. The Panel first found that such a penalty tax, if imposed, would violate Article III:2, then went on to find that the Superfund Act did not in fact require imposition of the tax, as the law foresaw the possibility for the United States to adopt regulations that would eliminate the need to impose it (*United States – Taxes on Petroleum and Certain Imported Substances* ("*Superfund*"), Report of the Panel, adopted 17 June 1987, BISD 34S/136, para. 5.2.9); *Thailand – Cigarettes*: After finding that the discriminatory tax rates provided for under the law would violate GATT rules, the Panel went on to find that the Thai authorities both had sufficient regulatory discretion to implement the law consistent with the GATT, and had actually exercised that discretion in that way (*Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the Panel, adopted 7 November 1990, BISD 37S/200, para. 84); *United States – Tobacco*: The US statute mandated that the US Department of Agriculture assess "comparable" inspection fees for imported and domestic tobacco, and the Panel first considered the meaning of the word "comparable" in light of the relevant GATT requirement that such fees be "commensurate" with the cost of services rendered to imported tobacco. The Panel then concluded that the United States had the discretion to interpret "comparable" as "commensurate" (and in practice had done so), i. e., that the legislation did not require a violation (*United States – Measures Affecting the Importation, Internal Sale, and Use of Tobacco*, Report of the Panel, adopted 4 October 1994, BISD 41S/131, para. 123).

[255] Panel Report on *US – Export Restraints*, paras. 8.11–8.13.

[256] The Panel justified the different approach as follows: "We note that the Panel in *United States – Measures Treating Exports Restraints as Subsidies* first considered whether certain action was in conformity with WTO requirements and only then addressed whether the measure at issue mandated such action. . . . In the circumstances of the case at hand, where there is a major *factual* dispute regarding whether section 129(c)(1) requires and/or precludes certain action, we think that a panel is of most assistance to the DSB if it examines the factual issues first. Moreover, we do not see how addressing first whether certain actions identified by Canada would contravene particular WTO provisions would facilitate our assessment of whether section 129(c)(1) mandates the United States to take certain action or not to take certain action. Finally, we have taken into account the fact that, in the present case, our ultimate conclusions with respect to Canada's claims would not differ depending on the order of analysis we decided to follow," Panel Report on *US – Section 129(c)(1) URAA*, footnote 72.

[257] Panel Report on *US – Section 129(c)(1) URAA*, paras. 6.22–6.25.

[258] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 5.43.

in effect, create a situation where Members would be entitled to a presumption of good faith compliance with their WTO *obligations*, but not with the conditions attached to WTO *exceptions*. Such a situation would, in our view, be unwarranted and contrary to logic.

(. . .) the Member invoking an exception as an affirmative defence has the burden of establishing it. In our view, the allocation of the burden of proof is a procedural issue[259] which is distinct from the substantive standard to be applied in assessing the conformity of legislation with a particular provision of the *WTO Agreement*. Simply put, the allocation of the burden of proof determines *who* must show something. On the other hand, the GATT/WTO distinction between mandatory and discretionary legislation determines *what* somebody must show. We believe the standard to be applied in judging the conformity of a piece of legislation with WTO requirements should be the same irrespective of who has the burden of adducing argument and evidence sufficient to establish a *prima facie* case of conformity."[260]

Rejection of the mandatory versus discretionary distinction

189. The Panel on *US – Section 301 Trade Act* did not accept the distinction between discretionary and mandatory legislation in the context of a claim made pursuant to Article 23 of the *DSU*. In this case, the United States was defending the measure at issue with reference to the traditional doctrine that only mandatory laws can violate GATT law "as such". In contrast, the European Communities argued that certain discretionary legislation could also violate GATT law "as such". The Panel did not accept the United States' argument:

"[W]e believe that resolving the dispute as to which type of legislation, *in abstract*, is capable of violating WTO obligations is not germane to the resolution of the type of claims before us. In our view the appropriate method in cases such as this is to examine with care the nature of the WTO obligation at issue and to evaluate the Measure in question in the light of such examination. The question is then whether, on the correct interpretation of the specific WTO obligation at issue, only mandatory or also discretionary national laws are prohibited. We do not accept the legal logic that there has to be one fast and hard rule covering all domestic legislation. After all, is it so implausible that the framers of the WTO Agreement, in their wisdom, would have crafted some obligations which would render illegal even discretionary legislation and crafted other obligations prohibiting only mandatory legislation?[261] Whether or not Section 304 violates Article 23 depends, thus, first and foremost on the precise obligations contained in Article 23.

We can express this view in a different way:

(a) Even if we were to operate on the legal assumption that, as argued by the US, only legislation *mandating* a WTO inconsistency or *precluding* WTO consistency, can violate WTO provisions; and

(b) confirm our earlier factual finding in paragraph 7.31(c) that the USTR enjoys full discretion to decide on the content of the determination,

we would still disagree with the US that the combination of (a) and (b) *necessarily* renders Section 304 compatible with Article 23, since Article 23 may prohibit legislation with certain discretionary elements and therefore the very fact of having in the legislation such discretion could, in effect, preclude WTO consistency. In other words, rejecting, as we have, the presumption implicit in the US argument that no WTO provision ever prohibits discretionary legislation does not imply a reversal of the classical test in the pre-existing jurisprudence that only legislation mandating a WTO inconsistency or precluding WTO consistency, could, as such, violate WTO provisions.[262] Indeed that is the very test we shall apply in our analysis. It simply does not follow from this test, as sometimes has been argued, that legislation with discretion could never violate the WTO. If, for example, it is found that the specific obligations in Article 23 prohibit a certain type of legislative discretion, the existence of such discretion in the statutory language of Section 304 would presumptively preclude WTO consistency."[263]

190. In *US – 1916 Act* the Appellate Body, further to referring to GATT practice (see paragraphs 182–183 above), declined to answer the question of whether the mandatory/discretionary distinction continued to be relevant under WTO law:

"We note that answering the question of the continuing relevance of the distinction between mandatory and discretionary legislation for claims brought under the *Anti-Dumping Agreement* would have no impact upon the outcome of these appeals, because the 1916 Act is clearly not discretionary legislation, as that term has been understood for purposes of distinguishing

[259] (*footnote original*) We note the Appellate Body's view that ". . . the burden of proof is a procedural concept which speaks to the fair and orderly management and disposition of a dispute." (Original Appellate Body Report on *Canada – Aircraft*, *supra*, para. 198.)

[260] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.124–5.125.

[261] (*footnote original*) Imagine, for example, legislation providing that all imports, including those from WTO Members, would be subjected to a customs inspection and that the administration would enjoy the right, at its discretion, to impose on all such goods tariffs in excess of those allowed under the schedule of tariff concessions of the Member concerned. Would the fact that under such legislation the national administration would not be mandated to impose tariffs in excess of the WTO obligation, in and of itself exonerate the legislation in question? Would such a conclusion not depend on a careful examination of the obligations contained in specific WTO provisions, say, Article II of GATT and specific schedule of concessions?

[262] (*footnote original*) See paras. 4.173 ff. and 7.51 of this Report.

[263] Panel Report on *US – Section 301 Trade Act*, paras. 7.53–7.54. See also Panel Report on *US – Section 129(c)(1) URAA*, para. 6.22.

between mandatory and discretionary legislation. Therefore, we do not find it necessary to consider, in these cases, whether Article 18.4, or any other provision of the *Anti-Dumping Agreement*, has supplanted or modified the distinction between mandatory and discretionary legislation.[264] For the same reasons, the Panel did not, in the Japan Panel Report, need to opine on this issue.[265]"[266]

191. The Appellate Body on *US – Countervailing Measures on Certain EC Products*, when examining the question whether Section 1677(5)(F) was inconsistent *per se* with the WTO obligations of the United States because it mandated a particular WTO-inconsistent method of determining the existence of a "benefit", clarified in a footnote that: "We are not, by implication, precluding the possibility that a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation. We make no finding in this respect."[267]

192. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body, in the context of an anti-dumping dispute, for the first time, did not follow the traditional mandatory v. discretionary rule and found that it saw no reason for concluding that, in principle, non-mandatory measures cannot be challenged "as such". In this case, the measure at issue was the United States Sunset Policy Bulletin which the Panel had found not to be challengeable as such because it was not mandatory for the competent authorities. The Appellate Body obviously disagreed:

"We also believe that the provisions of Article 18.4 of the Anti-Dumping Agreement are relevant to the question of the type of measures that may, as such, be submitted to dispute settlement under that Agreement. Article 18.4 contains an explicit obligation for Members to 'take all necessary steps, of a general or particular character' to ensure that their 'laws, regulations and administrative procedures' are in conformity with the obligations set forth in the Anti-Dumping Agreement. Taken as a whole, the phrase 'laws, regulations and administrative procedures' seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.[268] If some of these types of measure could not, as such, be subject to dispute settlement under the Anti-Dumping Agreement, it would frustrate the obligation of 'conformity' set forth in Article 18.4.

This analysis leads us to conclude that there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the *Anti-Dumping Agreement*, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the *Anti-Dumping Agreement*. Hence we see no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such'. To the extent that the Panel's findings in paragraphs 7.145, 7.195, and 7.246 of the Panel Report suggest otherwise, we consider them to be in error.

We observe, too, that allowing measures to be the subject of dispute settlement proceedings, whether or not they are of a mandatory character, is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to 'preserve [their] rights and obligations . . . under the covered agreements, and to clarify the existing provisions of those agreements'.[269] As long as a Member respects the principles set forth in Articles 3.7 and 3.10 of the DSU, namely, to exercise their 'judgement as to whether action under these procedures would be fruitful' and to engage in dispute settlement in good faith, then that Member is entitled to request a panel to examine measures that the Member considers nullify or impair its benefits. We do not think that panels are obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory. This issue is relevant, if at all, only as part of the panel's assessment of whether the measure is, as such, inconsistent with particular obligations. It is to this issue that we now turn."[270]

193. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body, referring to its previous report in *US – 1916 Act* where it did follow the mandatory/discretionary rule, indicated that it had yet to pronounce itself generally upon the continuing relevance of such a distinction and warned against its "mechanistic application":

"We explained in *US – 1916 Act* that this analytical tool existed prior to the establishment of the WTO, and that a number of GATT panels had used it as a technique for evaluating claims brought against legislation as such.[271]

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[264] (*footnote original*) We note that in a recent case, a panel found that even discretionary legislation may violate certain WTO obligations. See Panel Report, *United States – Section 301*, *supra*, footnote 23, paras. 7.53–7.54.

[265] (*footnote original*) We note that, in the EC Panel Report, the Panel reached the same results as in the Japan Panel Report without making any finding that the notion of mandatory/discretionary legislation "is no longer relevant".

[266] Appellate Body Report on *US – 1916 Act*, para. 99.

[267] Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, footnote 334.

[268] (*footnote original*) We observe that the scope of each element in the phrase "laws, regulations and administrative procedures" must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from Member to Member depending on each Member's domestic law and practice.

[269] Article 3.2 of the DSU.

[270] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 87–89.

[271] (*footnote original*) Appellate Body Report, *US – 1916 Act*, paras. 61 and 88.

> As the Panel seemed to acknowledge,[272] we have not, as yet, been required to pronounce generally upon the continuing relevance or significance of the mandatory/discretionary distinction.[273] Nor do we consider that this appeal calls for us to undertake a comprehensive examination of this distinction. We do, nevertheless, wish to observe that, as with any such analytical tool, the import of the 'mandatory/discretionary distinction' may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion."[274]

Application of tariffs as a measure

194. The Appellate Body on *EC – Computer Equipment* opined that not only measures of general application, but also the application of tariffs by customs authorities were "measures" within the meaning of Article 6.2. The Appellate Body agreed that the request for establishment of the Panel did identify the measures properly:

> "We consider that 'measures' within the meaning of Article 6.2 of the DSU are not only measures of general application, i.e., normative rules, but also can be the application of tariffs by customs authorities. Since the request for the establishment of a panel explicitly refers to the application of tariffs on LAN equipment and PCs with multimedia capability by customs authorities in the European Communities, we agree with the Panel that the measures in dispute were properly identified in accordance with the requirements of Article 6.2 of the DSU."[275]

Anti-dumping measures

195. As regards the scope of a "measure" under the *Anti-Dumping Agreement*, see paragraph 1 and Section XVII.B.5(i) of the Chapter on the *Anti-Dumping Agreement*.

(iii) General practice as a measure

196. In *US – Export Restraints*, Canada claimed that the United States "practice" of treating export restraints as meeting the "financial contribution" requirement of Article 1.1(a)(1)(iv) of the *SCM Agreement* was a measure and could be challenged as such. Canada defined the United States' "practice" as "an institutional commitment to follow declared interpretations or methodologies that is reflected in cumulative determinations" and claimed that this "practice" has an "operational existence in and of itself".[276] The Panel considered whether the alleged United States practice required the United States' authorities to treat export restraints in a certain way and therefore had "independent operational status". The Panel, which concluded that there was no measure in the form of a United States practice, indicated:

> "[W]hile Canada may be right that under US law, 'practice must normally be followed, and those affected by US [CVD] law . . . therefore have reason to expect that it will be',[277] past practice can be departed from as long as a reasoned explanation, which prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action [is given]. The argument that expectations are created on the part of foreign governments, exporters, consumers, and petitioners as a result of any particular practice that the DOC 'normally' follows would not be sufficient to accord such a practice an independent operational existence. Nor do we see how the DOC's references in its determinations to its practice gives 'legal effect to that "practice" as determinative of the interpretations and methodologies it applies'.[278] US 'practice' therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada."[279]

197. In *US – Steel Plate*, the United States, in reference to the Panel Report on *US – Export Restraints* (see paragraph 196 above), argued that the United States' "practice" (in this case its practice as regards total facts available)[280] could not be the subject of a claim because

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[272] (*footnote original*) In footnote 95 to para. 7.114, the Panel quoted the following statement from para. 7.88 of the Panel Report in *US – Steel Plate*: "[t]he Appellate Body has recognized the distinction, but has not specifically ruled that it is determinative in consideration of whether a statute is inconsistent with relevant WTO obligations."

[273] (*footnote original*) In our Report in *US – 1916 Act*, we examined the challenged legislation and found that the alleged "discretionary" elements of that legislation were not of a type that, *even under the mandatory/discretionary distinction*, would have led to the measure being classified as "discretionary" and therefore consistent with the *Anti-Dumping Agreement*. In other words, we *assumed* that the distinction could be applied because it did not, in any event, affect the outcome of our analysis. We specifically indicated that it was not necessary, in that appeal, for us to answer "the question of the continuing relevance of the distinction between mandatory and discretionary legislation for claims brought under the *Anti-Dumping Agreement*". (Appellate Body Report, *US – 1916 Act*, para. 99.) We also expressly declined to answer this question in footnote 334 to paragraph 159 of our Report in *US – Countervailing Measures on Certain EC Products*. Furthermore, the appeal in *US – Section 211 Appropriations Act* presented a unique set of circumstances. In that case, in defending the measure challenged by the European Communities, the United States unsuccessfully argued that discretionary regulations, issued under a separate law, cured the discriminatory aspects of the measure at issue.

[274] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

[275] Appellate Body Report on *EC – Computer Equipment*, para. 65.

[276] Panel Report on *US – Export Restraints*, para. 7.120.

[277] (*footnote original*) Response of Canada to question 14 from the Panel following the second meeting.

[278] (*footnote original*) Second Written Submission of Canada, para. 40.

[279] Panel Report on *US – Export Restraints*, para. 8.126.

[280] In *US – Hot-Rolled Steel*, Japan had also challenged the "general" practice of the United States' investigating authorities regarding total facts available. The Panel did not rule on whether a general practice could be challenged separately from the statutory measure on which it is based because it concluded that Japan's claim in this regard was outside its terms of reference. Indeed, the Panel found that there was no mention of such a claim in Japan's request for the establishment of a panel. Panel Report on *US – Hot-Rolled Steel*, para. 7.22.

it did not have "independent operational status" and therefore it was not a "measure".[281] India, on the contrary, claimed that a "practice" becomes a "measure" through repeated similar responses to the same situation.[282] The Panel concluded:

> "That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its past practice. . .[283]
>
> [T]he challenged practice in this case is, in our view, no different from that considered in the *US – Export Restraints* case. It can be departed from so long as a reasoned explanation is given. It therefore lacks independent operational status, as it cannot require USDOC to do something, or refrain from doing something."[284]

(iv) Private action as a "measure"

198. The Panel on *Japan – Film* characterized the problem of classifying private action as a governmental "measure" in the following terms:

> "As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term *measure* in Article XXIII:1(b) and Article 26.1 of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of governments, not those of private parties. But while this 'truth' may not be open to question, there have been a number of trade disputes in relation to which panels have been faced with making sometimes difficult judgments as to the extent to which what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions."[285]

199. Within the context referred to in paragraph 198 above, the Panel on *Japan – Film* had to determine whether so-called "administrative guidance" in Japan amounted to a governmental "measure". The Panel began by considering the ordinary meaning of the term "measure":

> "The ordinary meaning of *measure* as it is used in Article XXIII:1(b) certainly encompasses a law or regulation enacted by a government. But in our view, it is broader than that and includes other governmental actions short of legally enforceable enactments.[286] At the same time, it is also true that not every utterance by a government official or study prepared by a non-governmental body at the request of the government or with some degree of government support can be viewed as a measure of a Member government.
>
> In Japan, it is accepted that the government sometimes acts through what is referred to as administrative guidance. In such a case, the company receiving guidance from the Government of Japan may not be legally bound to act in accordance with it, but compliance may be expected in light of the power of the government and a system of government incentives and disincentives arising from the wide array of government activities and involvement in the Japanese economy. As noted by the parties, administrative guidance in Japan takes various forms. Japan, for example, refers to what it calls 'regulatory administrative guidance', which it concedes effectively substitutes for formal government action.[287] It also refers to promotional administrative guidance, where companies are urged to do things that are in their interest to do in any event. In Japan's view, this sort of guidance should not be assimilated to a measure in the sense of Article XXIII:1(b). For our purposes, these categories inform, but do not determine the issue before us. Thus, it is not useful for us to try to place specific instances of administrative guidance into one general category or another. It will be necessary for us, as it has been for GATT panels in the past, to examine each alleged 'measure' to see whether it has the particular attributes required of a measure for Article XXIII:1(b) purposes."[288]

200. The Panel on *Japan – Film* subsequently reviewed GATT practice with respect to this subject-matter and defined "sufficient government involvement" as the decisive criterion for whether a private action may be deemed to be a governmental "measure":

> "[P]ast GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis."[289]

201. In *Canada – Autos*, the Panel examined the GATT-consistency of commitments undertaken by Canadian motor vehicle manufacturers in their letters addressed to the Canadian Government to increase Canadian value added in the production of motor vehi-

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[281] Panel Report on *US – Steel Plate*, para. 7.14.
[282] Panel Report on *US – Steel Plate*, para. 7.15.
[283] Panel Report on *US – Steel Plate*, para. 7.22.
[284] Panel Report on *US – Steel Plate*, para. 7.23.
[285] Panel Report on *Japan – Film*, para. 10.52.
[286] (*footnote original*) The two definitions of *measure* relevant to our consideration in the *Concise Oxford Dictionary (Ninth Edition 1995)* are "legislative enactment" and "suitable action to achieve some end".
[287] (*footnote original*) See para. 6.94. [Panel Report on *Japan – Film.*]
[288] Panel Report on *Japan – Film*, paras. 10.43–10.44.
[289] Panel Report on *Japan – Film*, paras. 10.55–10.56.

cles. Referring to the GATT Panel Reports on *Canada – FIRA* and *EEC – Parts and Components*,[290] the Panel analysed whether the action of private parties is subject to Article III:4 as follows:

> "It is evident from the reasoning of the Panel Reports in *Canada – FIRA* and in *EEC – Parts and Components* that these Reports do not attempt to state general criteria for determining whether a commitment by a private party to a particular course of action constitutes a 'requirement' for purposes of Article III:4. While these cases are instructive in that they confirm that both legally enforceable undertakings and undertakings accepted by a firm to obtain an advantage granted by a government can constitute 'requirements' within the meaning of Article III:4, we do not believe that they provide support for the proposition that either legal enforceability or the existence of a link between a private action and an advantage conferred by a government is a necessary condition in order for an action by a private party to constitute a 'requirement.' To qualify a private action as a 'requirement' within the meaning of Article III:4 means that in relation to that action a Member is bound by an international obligation, namely to provide no less favourable treatment to imported products than to domestic products.
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> A determination of whether private action amounts to a 'requirement' under Article III:4 must therefore necessarily rest on a finding that there is a nexus between that action and the action of a government such that the government must be held responsible for that action. We do not believe that such a nexus can exist only if a government makes undertakings of private parties legally enforceable, as in the situation considered by the Panel on *Canada – FIRA*, or if a government conditions the grant of an advantage on undertakings made by private parties, as in the situation considered by the Panel on *EEC – Parts and Components*. We note in this respect that the word 'requirement' has been defined to mean '1. The action of requiring something; a request. 2. A thing required or needed, a want, a need. Also the action or an instance of needing or wanting something. 3. Something called for or demanded; a condition which must be complied with.' The word 'requirements' in its ordinary meaning and in light of its context in Article III:4 clearly implies government action involving a demand, request or the imposition of a condition but in our view this term does not carry a particular connotation with respect to the legal form in which such government action is taken. In this respect, we consider that, in applying the concept of 'requirements' in Article III:4 to situations involving actions by private parties, it is necessary to take into account that there is a broad variety of forms of government action that can be effective in influencing the conduct of private parties."[291]

202. In *Argentina – Hides and Leather*, the European Communities claimed that an Argentine resolution, which authorized the presence of representatives of the Argentine domestic leather tanning industry during customs clearance of exports of hides and leather, operated as a de facto export restriction in violation of Article XI:1 of *GATT 1994*. The European Communities admitted that the Argentine measure did not expressly limit exports; however, the European Communities claimed that the presence of the industry associations during the export clearance process allowed access to exporters' confidential business information, which was subsequently used – by virtue of the existence of a tanners' cartel in the Argentine market – to exercise pressure on hides and leather producers not to export their products. The Panel ultimately rejected the European Communities' arguments on the basis of a lack of evidence:

> "We agree with the view expressed by the panel in *Japan – Film.* However, we do not think that it follows either from that panel's statement or from the text or context of Article XI:1 that Members are under an obligation to exclude any possibility that governmental measures may enable private parties, directly or indirectly, to restrict trade, where those measures themselves are not trade-restrictive.[292]
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> . . .
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> The European Communities acknowledges that the representatives of the tanning industry do not have the *de jure* ability to halt bovine hide exports. However, according to the European Communities, having such representatives present during the export clearance process in itself restricts exports in the context of the facts of the case. The European Communities has advanced several reasons why this might be so. The European Communities refers to the GATT dispute of *Japan – Semiconductors* for the proposition that there can be export restrictions without overt actions by the government to physically stop exports. According to the European Communities, in that case it was sufficient for the government to set up a system where peer pressure was used to discourage exports. . . .
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> [I]t is possible that a government could implement a measure which operated to restrict exports because of its interaction with a private cartel. Other points would need to be argued and proved (such as whether there was or needed to be knowledge of the cartel practices on the part of the government) or, to put it as mentioned

[290] GATT Panel Reports on *Canada – FIRA*, para. 5.4 and *EEC – Parts and Components*, para. 5.21.

[291] Panel Report on *Canada – Autos*, paras. 10.106–10.107.

[292] (*footnote original*) As we understand it, Article XI:1 does not incorporate an obligation to exercise "due diligence" in the introduction and maintenance of governmental measures beyond the need to ensure the conformity with Article XI:1 of those measures taken alone.

above, it would need to be established that the actions are properly attributed to the Argentinean government under the rules of state responsibility."[293]

(v) Standard for sufficient "identification"

Identification of measure

203. In *EC – Bananas III*, the "basic EC regulation at issue" was identified in the request for establishment of the Panel. In addition, the request referred in general terms to "subsequent EC legislation, regulations and administrative measures . . . which implement, supplement and amend [the EC banana] regime". The Panel found that for purposes of Article 6.2 this reference was sufficient to cover all European Communities legislation dealing with the importation, sale and distribution of bananas because the measures that the complainants were contesting were "adequately identified", even though they were not explicitly listed.[294] The Appellate Body agreed that the panel request "contains sufficient identification of the measures at issue to fulfil the requirements of Article 6.2".[295]

204. In *Japan – Film*, Japan requested the Panel to exclude eight measures from consideration because they were not set forth in either the request for consultations or the request for the establishment of a panel. Although the measures in question had not been "explicitly described" in the panel request, the Panel considered those measures to be within its terms of reference because they were "implementing measures" based on a basic framework law, specifically identified in the Panel request, which specified the form and circumscribed the possible content and scope of such implementing measures. The Panel established a "clear relationship" standard:

> "The question thus becomes whether the ordinary meaning of the terms of Article 6.2, i.e., that 'the specific measures at issue' be identified in the panel request, can be met if a 'measure' is not explicitly described in the request. To fall within the terms of Article 6.2, it seems clear that a 'measure' not explicitly described in a panel request must have a clear relationship to a 'measure' that is specifically described therein, so that it can be said to be 'included' in the specified 'measure'. In our view, the requirements of Article 6.2 would be met in the case of a 'measure' that is subsidiary or so closely related to a 'measure' specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party. The two key elements – close relationship and notice – are inter-related: only if a 'measure' is subsidiary or closely related to a specifically identified 'measure' will notice be adequate. For example, we consider that where a basic framework law dealing with a narrow subject matter that provides for implementing 'measures' is specified in a panel request, implementing 'measures' might be considered in appropriate circumstances as effectively included in the panel request as well for purposes of Article 6.2. Such circumstances include the case of a basic framework law that specifies the form and circumscribes the possible content and scope of implementing 'measures'."[296]

205. The Panel on *Argentina – Footwear (EC)* found that "it is the identification of [the] measures (rather than merely the numbers of the resolutions and the places of their promulgation in the Official Journal) which is primarily relevant for the purposes of Article 6.2 of the DSU":

> "[W]e consider that the EC's request primarily and unambiguously identifies the provisional and definitive measures (rather than only the cited resolutions and promulgations as such). In our view, it is the identification of these measures (rather than merely the numbers of the resolutions and the places of their promulgation in the Official Journal) which is primarily relevant for purposes of Article 6.2 of the DSU. Therefore, we consider that it is the provisional and definitive measures in their substance rather than the legal acts in their original or modified legal forms that are most relevant for our terms of reference. In our view, this is consistent with the Appellate Body's findings in the *Guatemala – Cement* case."[297]

206. The Panel on *US – Carbon Steel* noted the above findings of the Panel on *Japan – Film* and indicated that the expedited review procedure concerned was not a "measure" that was "subsidiary" or "closely related" to "any of the measures specifically identified":

> "The United States explains that, upon automatic initiation by the DOC of a sunset review within five years of the date of publication of a CVD order, a review can follow one of three basic paths: (i) revocation of the order; (ii) an expedited sunset review; and (iii) a full sunset review. We do not consider that the European Communities' general discussion of the automatic initiation of sunset reviews by the DOC is sufficient to put the United States – as well as other Members – on notice that the expedited review procedure was also under challenge. We note that the European Communities' request refers to 'certain aspects of the sunset review procedure which led to [the DOC decision not to revoke the CVDs on carbon steel]'. The challenge is thus apparently to those aspects of the sunset review procedure that have some relevance to the carbon steel case, which is not true of the expedited review procedure, because the carbon steel case involved a full, not expedited,

[293] Panel Report on *Argentina – Hides and Leather*, paras. 11.17, 11.22 and 11.51.
[294] Panel Report on *EC – Bananas III*, para. 7.27.
[295] (*footnote original*) Appellate Body Report on *European Communities – Bananas III*, para. 140.
[296] Panel Report on *Japan – Film*, para. 10.8.
[297] Panel Report on *Argentina – Footwear (EC)*, para. 8.40.

review. We do not consider the expedited review procedure to be 'a "measure" that is subsidiary, or so closely related to' any of the measures specifically identified, 'that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party'. We, therefore, find that the expedited review procedure is not sufficiently related to a measure or measures that are specifically identified in the request for establishment as to properly bring it within our terms of reference.[298]"[299]

207. As regards the identification of anti-dumping measures, see paragraphs 1 and XVII.B.5(i) of the Chapter on the *Anti-Dumping Agreement.*

Identification of products

208. The Appellate Body on *EC – Computer Equipment* considered whether the measures in dispute and the products affected by such measures were identified with sufficient specificity by the United States in its request for the establishment of a panel. The United States' request for the establishment of panel referred to "all types of LAN equipment" and "PCs with multimedia capability". The Appellate Body considered whether these terms sufficiently defined the products at issue:

"Article 6.2 of the DSU does *not* explicitly require that the products to which the 'specific measures at issue' apply be identified. However, with respect to certain WTO obligations, in order to identify 'the specific measures at issue', it may also be necessary to identify the products subject to the measures in dispute.

LAN equipment and PCs with multimedia capacity are both generic terms. Whether these terms are sufficiently precise to 'identify the specific measure at issue' under Article 6.2 of the DSU depends, in our view, upon whether they satisfy the purposes of the requirements of that provision.

. . .

The European Communities argues that the lack of precision of the term, LAN equipment, resulted in a violation of its right to due process which is implicit in the DSU. We note, however, that the European Communities does not contest that the term, LAN equipment, is a commercial term which is readily understandable in the trade. The disagreement between the European Communities and the United States concerns its exact definition and its precise product coverage. We also note that the term, LAN equipment, was used in the consultations between the European Communities and the United States prior to the submission of the request for the establishment of a panel and, in particular, in an 'Information Fiche' provided by the European Communities to the United States during informal consultations in Geneva in March 1997. We do not see how the alleged lack of precision of the terms, LAN equipment and PCs with multimedia capability, in the request for the establishment of a panel affected the rights of defence of the European Communities *in the course* of the panel proceedings. As the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the Panel."[300, 301]

209. In *Korea – Alcoholic Beverages*, Korea requested the Panel to issue a preliminary ruling with respect to the specificity of the panel requests of the complainants, in this case, the European Communities and the United States. Korea considered that the phrases used by the European Communities ("certain alcoholic beverages falling within HS heading 2208") and the United States ("other distilled spirits such as whisky, brandy, vodka, gin and ad-mixtures") were not specific enough to satisfy Article 6.2. Korea sought this preliminary ruling in order to limit the products at issue in the dispute. The Panel disagreed with Korea:

"The question of whether a panel request satisfies the requirements of Article 6.2 is to be determined on a case by case basis with due regard to the wording of Article 6.2 . . ., the question is whether Korea is put on sufficient notice as to the parameters of the case it is defending . . .

. . .

Korea argues that each imported product must be specifically identified in order to be within the scope of the panel proceeding. The complainants argue that the appropriate imported product is all distilled beverages. They claim, in fact, that for purposes of Article III, there is only one category in issue. They claim to have identified specific examples of such distilled alcoholic beverages for purposes of illustration, not as limits to the category.

The issue of the appropriate categories of products to compare is important to this case. In our view, however, it is one that requires a weighing of evidence. As such it is not an issue appropriate for a preliminary ruling in this case. This is particularly so in light of the Appellate Body's opinion in *Japan – Taxes on Alcoholic Beverages II*,[302]

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[298] (*footnote original*) Having concluded that the European Communities has not identified the expedited review procedure as a specific measure at issue in its request for establishment, we need not, and do not, consider whether the European Communities has provided "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in that request for establishment (paras. 8.5–8.6, *supra*).

[299] Panel Report on *US – Carbon Steel*, para. 8.11.

[300] Appellate Body Report on *EC – Computer Equipment*, paras. 67–68 and 70.

[301] See also Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.40, where the Panel found that the term "export credits" was "readily understandable" in the context of a dispute under Article 3.1(a) of the *SCM Agreement.*

[302] (*footnote original*) Appellate Body Report on *Japan – Taxes on Alcoholic Beverages* (*Japan – Taxes on Alcoholic Beverages II*), adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at pp. 26, 32.

that all imported distilled alcoholic beverages were discriminated against. That element of the decision is not controlling on the ultimate resolution of other cases involving other facts; however, it cannot be considered inappropriate for complainants to follow it in framing their request for a panel in a dispute involving distilled alcoholic beverages. While it is possible that in some cases, the complaint could be considered so vague and broad that a respondent would not have adequate notice of the actual nature of the alleged discrimination, it is difficult to argue that such notice was not provided here in light of the identified tariff heading and the Appellate Body decision in the *Japan – Taxes on Alcoholic Beverages II*. Furthermore, we note that the Appellate Body recently found that a panel request based on a broader grouping of products was sufficiently specific for purposes of Article 6.2.[303] We find therefore, that the complainants' requests for a panel satisfied the requirements of Article 6.2 of the DSU."[304]

210. In *US – FSC*, the United States argued that the European Communities request for the establishment of a panel failed to identify specific measures at issue because the European Communities did not identify the specific products in question as "the nature of export subsidy obligations imposed by the Agreement on Agriculture differ depending on the products at issue and commitments made by the United States thereunder".[305] The Panel found that the request for the establishment satisfied the requirements of Article 6.2 of the *DSU* and stated:

"In its request for establishment of a panel, the European Communities states that in its view the FSC is an export subsidy and that 'the United States has declared that the [FSC] Scheme is not taken into account for the purpose of compliance with their commitments under the AA . . . .' Accordingly, given the inherently all-encompassing nature of this claim, it constitutes a claim that the FSC could give rise to violations of the Agreement on Agriculture with respect to any agricultural product. Consequently, and in the absence of any specification as to the products at issue, this request puts the United States and third parties on notice that the European Communities asserts the existence of violations of the Agreement on Agriculture with respect to all agricultural products."[306]

Identification of industry

211. In *Canada – Aircraft*, Canada asserted before the Panel that the term "civil aircraft industry" was too broad for the purposes of Article 6.2 of the *DSU* because "[i]t includes firms ranging from machine shops and metal treatment facilities to those involved in advanced instrumentation and communications equipment".[307] The Panel ruled:

"We do not consider that the mere fact that the scope of a measure is identified in the request for establishment by reference to a broad product or industry grouping necessarily renders that request for establishment inconsistent with Article 6.2 of the DSU. We believe that the Appellate Body was of a similar opinion in *LAN Equipment,* where it shared the US concern that:

'if the EC arguments on specificity of product definition are accepted, there will inevitably be long drawn-out procedural battles at the early stage of the panel process in every proceeding. The parties will contest every product definition, and the defending party in each case will seek to exclude all products that the complaining parties may have identified by grouping, but not spelled out in "sufficient" detail.'[308]

Although the Appellate Body's remarks were made in the context of a reference to a broad product grouping in the complaining party's request for establishment, we can see no basis for not adopting a similar approach when the request for establishment refers to a broad industry sector, such as the 'civil aircraft industry'. If a complaining party believes that a measure affects a broad industry sector, in our view that complaining party should be entitled to challenge that measure insofar as it affects the totality of the industry concerned, without having to spell out the individual components of that industry, and without running afoul of Article 6.2 of the DSU."[309]

(vi) Measures falling within/outside the panel's terms of reference

212. As regards the scope of measures from the point of view of the scope of the panel's terms of reference and, in particular, the issues surrounding terminated, amended or vague measures, see Section VII.B.2(a)(ii) below.

(d) "a brief summary of the legal basis of the complaint . . . sufficient to present the problem clearly"

(i) Concept of "claim"

213. In *Korea – Dairy*, when distinguishing between claims and arguments, the Appellate Body emphasized that "By '*claim*' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement."[310]

[303] (*footnote original*) Appellate Body Report on *European Communities – Customs Classification of Certain Computer Equipment*, adopted on 22 June 1998 (WT/DS62/AB/R, WT/DS67/AB/R), at paras. 58–73.
[304] Panel Report on *Korea – Alcoholic Beverages*, paras. 10.14–10.16
[305] Panel Report on *US – FSC*, para. 7.23.
[306] Panel Report on *US – FSC*, para. 7.29.
[307] Panel Report on *Canada – Aircraft*, para. 9.23.
[308] (*footnote original*) The Panel referred to para. 71.
[309] Panel Report on *Canada – Aircraft*, paras. 9.36–9.37.
[310] Appellate Body Report on *Korea – Dairy*, para. 139.

(ii) Two-stage test

214. In *EC – Bed Linen*, the Panel analysed the above conclusions of the Appellate Body in *Korea – Dairy* (see paragraphs 219–220 below) and considered that they set "a two-stage test to determine the sufficiency of a panel request under Article 6.2 of the DSU: first, examination of the text of the request for establishment itself, in light of the nature of the legal provisions in question; secondly, an assessment of whether the respondent has been prejudiced by the formulation of claims in the request for establishment, given the actual course of the panel proceedings".[311]

(iii) Identification of the claims

General

215. In *EC – Bananas III*, the Panel indicated that references to a WTO agreement without mentioning any provisions or to unidentified "other" provisions would be insufficient to meet the requirements of Article 6.2:

> "The panel request alleges an inconsistency with the requirements of the Agreement on Agriculture, without specifying any provision thereof. It also states that 'the EC's measures are inconsistent with the following Agreements and provisions *among others*', suggesting that there may be inconsistencies with unspecified agreements and inconsistencies with unspecified provisions of the specified agreements. In these two situations, it is not possible at the panel request stage, even in the broadest generic terms, to describe what legal 'problem' is asserted. While a reference to a specific provision of a specific agreement may not be essential if the problem or legal claim is otherwise clearly described, in the absence of some description of the problem, a mere reference to an entire agreement or simply to 'other' unspecified agreements or provisions is inadequate under the terms of Article 6.2. Accordingly, we find that references to a WTO agreement without mentioning any provisions or to unidentified 'other' provisions are too vague to meet the standards of Article 6.2 of the DSU."[312]

216. The Panel on *EC – Bananas III* also held that "[a] request [for the establishment of a panel] is sufficiently specific to comply with the minimum standards established by the terms of Article 6.2 of the DSU", if it lists the provisions of the specific agreements which the complaining party alleges to have been violated. The Appellate Body agreed:

> "We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements. In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties."[313]

217. In *India – Patents (US)*, India argued that the Panel exceeded its authority under the *DSU* by ruling on the United States' subsidiary claim under Article 63 of the *TRIPS Agreement* after having first accepted the principal claim by the United States of a violation of Article 70.8 of the *TRIPS Agreement*. The request for the establishment of the panel by the United States reads in pertinent part: "India's legal regime appears to be inconsistent with the obligations of the *TRIPS Agreement*, including but not necessarily limited to Articles 27, 65 and 70." The Appellate Body accepted India's claim that the phrase "including but not necessarily limited to" could not "identify the specific measures at issue", as required by Article 6.2 of the *DSU*:

> "[A] claim *must* be included in the request for establishment of a panel in order to come within a panel's terms of reference in a given case.
>
> With respect to Article 63, the convenient phrase, 'including but not necessarily limited to', is simply not adequate to 'identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly' as required by Article 6.2 of the DSU. If this phrase incorporates Article 63, what Article of the *TRIPS Agreement* does it not incorporate? Therefore, this phrase is not sufficient to bring a claim relating to Article 63 within the terms of reference of the Panel."[314]

218. In *India – Patents (US)*, the Appellate Body stressed the importance of the parties' duty to be "fully forthcoming" and to clearly state their claims:

> "All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly."[315]

219. In *Korea – Dairy*, Korea argued before the Appellate Body in its appeal that the mere listing of four articles of the *Agreement on Safeguards* alleged to have been breached does not provide a brief summary of the legal basis of the complaint sufficient to present the problem

[311] Panel Report on *EC – Bed Linen*, para. 6.26. See also Panel Report on *Egypt – Steel Rebar*, para. 7.25.
[312] Panel Report on *EC – Bananas III (Guatemala and Honduras)*, para. 7.30.
[313] Appellate Body Report on *EC – Bananas III*, para. 141.
[314] Appellate Body Report on *India – Patents (US)*, paras. 89–90.
[315] Appellate Body Report on *India – Patents (US)*, para. 94.

clearly. The Appellate Body confirmed its finding in *EC – Bananas III*, but augmented it by establishing the standard of whether "the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated". In its analysis, the Appellate Body identified the necessary requirements for providing a "summary" under Article 6.2:

> "Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is 'sufficient to present the problem clearly'. It is not enough, in other words, that 'the legal basis of the complaint' is summarily identified; the identification must 'present the problem clearly'."[316]

220. The Appellate Body on *Korea – Dairy* confirmed its finding in *EC – Bananas III*, but cautioned that this finding represented only the minimum requirements under Article 6.2 and that the "mere listing of the articles of an agreement alleged to have been breached" may not necessarily be sufficient for the purposes of Article 6.2. The Appellate Body opined that the latter case may arise "where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2." Ultimately, the Appellate Body set forth the standard of "ability of the respondent to defend itself":

> "[W]e did not purport in *European Communities – Bananas* to establish the mere listing of the articles of an agreement alleged to have been breached as a standard of precision, observance of which would *always* constitute sufficient compliance with the requirements of Article 6.2, *in each and every case*, without regard to the particular circumstances of such cases. If we were in fact attempting to construct such a rule in that case, there would have been little point to our enjoining panels to examine a request for a panel '*very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU*'. Close scrutiny of what we in fact said in *European Communities – Bananas* shows that we, firstly, restated the reasons why precision is necessary in a request for a panel; secondly, we stressed that claims, not detailed arguments, are what need to be set out with sufficient clarity; and thirdly, we agreed with the conclusion of the panel that, in that case, the listing of the articles of the agreements claimed to have been violated satisfied the *minimum* requirements of Article 6.2 of the DSU. In view of all the circumstances surrounding that case, we concurred with the panel that the European Communities had not been misled as to what claims were in fact being asserted against it as respondent.
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> Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all.[317] But it may not always be enough. There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of Articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.
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> . . .
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> . . . we consider that whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated."[318]

221. In *EC – Tube or Pipe Fittings*, the European Communities requested the Panel to make a preliminary ruling that certain of Brazil's claims were not within its

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[316] Appellate Body Report on *Korea – Dairy*, para. 120.

[317] (*footnote original*) See Appellate Body Reports on *Brazil – Desiccated Coconut*, p. 22; *EC – Bananas III*, paras. 145 and 147; and *India – Patents*, paras. 89, 92 and 93.

[318] Appellate Body Report on *Korea – Dairy*, paras. 123–124 and 127. In *Argentina – Ceramic Tiles*, Argentina raised as a defence the concept of harmless error and argued that the complainant, the European Communities, had failed to demonstrate that the exporters concerned were prejudiced by the failure to determine an individual dumping margin. Argentina defined the concept of harmless error as "an error that does not cause injury or affect the rights of one of the parties" and contended that this concept has been accepted in WTO law through the Report of the Appellate Body in *Korea – Dairy* (see para. 98 of this Chapter). The Panel noted "however, that the Appellate Body Report in the *Korea – Dairy Safeguards* case, to which Argentina refers in support of its argument, dealt with the question of whether the request for establishment met the requirements of Article 6.2 of the DSU. The issue before the Appellate Body was whether Article 6.2 of the DSU was complied with or not. The Appellate Body, in deciding that question, concluded that one element to be considered was whether the defending Member was prejudiced in its ability to defend itself by a lack of clarity or specificity in the request for establishment. The Appellate Body did not address the question whether, once it had been established that a provision of the Agreement is violated, it needs in addition to be demonstrated that this violation had prejudiced the rights of the complaining party. Thus, we do not agree that this Appellate Body decision supports Argentina's argument that the concept of harmless error has been accepted in WTO law." Panel Report on *Argentina – Ceramic Tiles*, paras. 6.102–6.103.

terms of reference. The Panel noted that among the said claims were several provisions cited by Brazil in its first written submission that were not mentioned in its request for establishment. The Panel, in a finding not reviewed by the Appellate Body, considered that Brazil's claims under those provisions were not within its terms of reference. The Panel cautioned against the use of the expression "especially, but not exclusively" when identifying the claims in a request for establishment of a panel:

> "We note that the Panel request refers generally to the Articles of the *Anti-Dumping Agreement* in question (i.e. Articles 6, 9 and 12) and contains the phrase 'especially (but not exclusively)' when enumerating selective provisions (not including the provisions concerned here) under these Articles. However, we do not view such a general reference as sufficiently clear to identify the specific provisions at issue. This is particularly so in view of the fact that Articles 6, 9 and 12 of the *Anti-Dumping Agreement* contain multiple and diverse obligations, which relate to different subject-matters than the obligations contained in the specific provisions that are cited in the Panel request.[7] The phrase 'especially, but not exclusively' may be convenient, but is inadequate to 'identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly' as required by Article 6.2 of the *DSU*. Furthermore, even assuming *arguendo* that the obligations in these provisions may be 'inter-linked' with or 'dependent' upon a provision that is identified in the Panel request, we do not consider that this consideration is relevant here. The mere fact that a claim may be legally dependent upon another claim does not mean that it is subsumed within, or encompassed by, that claim. If a claim is not identified in the Panel request, the fact that it may be 'inter-linked' with an identified claim is not determinative."[319]

222. As regards the other claims, the European Communities had requested the Panel to find that they were not within its terms of reference. The Panel on *EC – Tube or Pipe Fittings* considered, in a finding not reviewed by the Appellate Body, that the European Communities had failed to demonstrate any prejudice to its interests by the way these "claims" appeared in the Panel request:

> "We consider that it is not necessary for us to rule on whether these allegations constitute 'claims' or 'arguments'. If they are arguments, there would be no need for them to be set out in the Panel request. Even assuming that all of the allegations identified above are 'claims' in respect of which the text of the Panel request may be somewhat deficient in describing the nature of the complaint, the European Communities has failed in any event to demonstrate to us any prejudice to its interests throughout the course of these Panel proceedings by the way these 'claims' appeared in the Panel request. . .
>
> . . . it was evident to us from the participation of the European Communities in asserting its views in various phases of these Panel proceedings, including in its first written submission and in the first Panel meeting and in the exchanges between the parties preceding the first Panel meeting on preliminary issues, that the EC's ability to defend itself had not been prejudiced over the course of these Panel proceedings."[320]

Distinction between claims and arguments

223. After agreeing with the Panel that the request for the establishment of the panel contained sufficient identification of the specific measures at issue to fulfil the requirements of Article 6.2 of the *DSU*, the Appellate Body in *EC – Bananas III* set out the difference between claims and arguments, and furthermore rejected the notion of "curing" a faulty panel request where claims had not been included in the panel request:

> "In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.
>
> Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding."[321]

224. In *EC – Hormones*, the European Communities argued on appeal that since the Panel was not entitled to make findings beyond what had been requested by the parties, it had erred by basing the main part of its reasoning on Article 5.5 of the *SPS Agreement* on a claim that the complainants had not made. The Appellate Body rejected the European Communities' argument and emphasized the distinction between claims and arguments:

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[319] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.14.

[320] Panel Report on *EC – Tube or Pipe Fittings*, paras. 7.22–7.23. See also paras. 7.26–7.27.

[321] Appellate Body Report on *EC – Bananas III*, paras. 141–143. See also Appellate Body Report on *US – Lead and Bismuth II*, paras. 72 and 73.

"Considering that in its request for the establishment of a panel in the proceeding initiated by the United States, as well as in the proceeding started by Canada, both complainants have included a claim that the European Communities ban is inconsistent with Article 5 of the *SPS Agreement*, we believe that the objection of the European Communities overlooks the distinction between legal claims made by the complainant and arguments used by the complainant to sustain its legal claims. . . . Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the *DSU* limits the faculty of a panel freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration. A panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the *DSU*, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute. Given that in this particular case both complainants claimed that the European Communities measures were inconsistent with Article 5.5 of the *SPS Agreement*, we conclude that the Panel did not make any legal finding beyond those requested by the parties."[322]

225. In *India – Patents (US)*, on the issue of claims and arguments, the Appellate Body stated:

"[T]here is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions, and the first and second panel meetings with the parties as a case proceeds."[323]

226. In *Korea – Dairy*, Korea argued in its appeal that the Panel had erred by failing to consider Korea's argument that parties to a dispute settlement procedure cannot introduce new claims at, or subsequent to, the rebuttal stage. The Appellate Body emphasized the difference between claims and arguments as follows:

"[W]e agree with Korea that a party to a dispute settlement proceeding may not introduce a new claim during or after the rebuttal stage. Indeed, any claim that is not asserted in the request for the establishment of a panel may not be submitted at any time after submission and acceptance of that request.[324] By '*claim*' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. Such a *claim of violation* must, as we have already noted, be distinguished from the *arguments* adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision.[325] Arguments supporting a claim are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.[326] In *European Communities – Hormones*, we emphasized the substantial latitude enjoyed by panels in treating the *arguments* presented by either of the parties and said:

> '. . . Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration.'[327]

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[322] Appellate Body Report on *EC – Hormones*, para. 156. In *US – Certain EC Products*, the Appellate Body ruled that "the Panel was not obliged to limit its legal reasoning in reaching a finding to arguments presented by the [complainant]". See Appellate Body Report on *US – Certain EC Products*, para. 123. In *Chile – Price Band System*, Chile had asked the Appellate Body to reverse the Panel's finding on the inconsistency of Chile's price band system with Article II:1(b) second sentence on the ground that Argentina had not actually made a claim under that second sentence. Argentina referred to paragraph 156 of the Appellate Body Report on *EC – Hormones* in support of its argument that "Even if none of the parties had advanced arguments regarding the second sentence of Article II:1(b) of the GATT 1994, the Panel would have had the *right*, indeed the *duty*, to develop its own legal reasoning to support the proper resolution of Argentina's claim." The Appellate Body considered that, in this case, the Panel "had neither a 'right' nor a 'duty' to develop its own legal reasoning to support a claim under the second sentence" and stressed that "the Panel was not entitled to make a claim for Argentina, or to develop its own legal reasoning on a provision that was not at issue":

> "In *EC – Hormones*, and in *US – Certain EC Products*, we affirmed the capacity of panels to develop their own legal reasoning in a context in which it was clear that the complaining party had made a claim on the matter before the panel. It was also clear, in both those cases, that the complainant had advanced arguments in support of the finding made by the panel – even though the arguments in support of the claim were not the same as the interpretation eventually adopted by the Panel. The situation in this appeal is altogether different. No claim was properly made by Argentina under the *second* sentence of Article II:1(b). No legal arguments were advanced by Argentina under the *second* sentence of Article II:1(b). Therefore, those rulings have no relevance to the situation here.
>
> Contrary to what Argentina argues, given our finding that Argentina has not made a *claim* under the *second* sentence of Article II:1(b), the Panel in this case had neither a 'right' nor a 'duty' to develop its own legal reasoning to support a claim under the second sentence. The Panel was not entitled to make a claim for Argentina, or to develop its own legal reasoning on a provision that was not at issue."

Appellate Body Report on *Chile – Price Band System*, paras. 166–168. See also paras. 286–287 of this Chapter regarding the need for a claim to be specific.

[323] Appellate Body Report on *India – Patents (US)*, para. 88.

[324] (*footnote original*) Appellate Body Report on *EC – Bananas III*, para. 143.

[325] (*footnote original*) See also Appellate Body Report on *India – Patents I*, para. 88; and *EC – Hormones*, para. 156.

[326] (*footnote original*) Appellate Body Report on *India – Patents I*, para. 88.

[327] (*footnote original*) Appellate Body Report on *EC – Hormones*, para. 156.

> Both 'claims' and 'arguments' are distinct from the 'evidence' which the complainant or respondent presents to support its assertions of fact and arguments."[328]

227. In *Canada – Autos*, the Panel considered whether Japan's claim that it could "[reserve] its right to elaborate during the course of the panel deliberations" had prejudiced Canada's ability to defend itself. The Panel indicated that Canada had suffered no prejudice:

> "First, the Panel does not consider that this is a situation where, as argued by Canada, the complaining party is permitted 'to eke out its claims incrementally during the various stages of the case'. In making this argument, Canada refers to the Appellate Body decision in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (*EC – Bananas III)*. However, the situation here is unlike that in *EC – Bananas III*, where the Appellate Body stated that 'Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint' (WT/DS27/AB/R, para. 143). In the case before us there is no Article 6.2 issue of specificity of the measures identified in the panel request. Japan in this dispute has not attempted to reserve a right to present a new claim at a later stage of the proceedings; rather, it appears that Japan has simply indicated that it may wish to further elaborate its arguments as to claims already set out in the panel request and in its initial arguments. As such, the Panel does not consider, at this stage, that Canada is likely to be prejudiced in its ability to defend itself in this action.[329]
>
> Second, to the extent any issue of procedural fairness should arise, for example, as to the right of rebuttal by Canada should Japan wait until a later stage of these proceedings to develop its arguments as to its GATT Article III:4 and TRIMS Article 2.1 claims with respect to the "manufacturing requirement" (production-to-sales ratio requirement), the Panel will ensure such procedural fairness by providing Canada with adequate opportunity to respond to any such further elaboration by Japan of its arguments under these claims.
>
> Third, in addition to ensuring procedural fairness, it is of course necessary to set a cut-off date beyond which no new argumentation as to the claims in issue may be accepted, except upon a showing of good cause. In the instant case, the Panel considers that no new argumentation should be introduced beyond the second panel meeting with the parties, except in response to any questions posed by the Panel or otherwise upon a showing of good cause."[330]

228. The Panel on *EC – Bed Linen (Article 21.5 – India)* noted the distinction drawn by the Appellate Body between claims and arguments and indicated that there existed "no obligation on a party to limit its arguments to only those treaty provisions about which claims have been identified in the request for establishment".[331]

(iv) Claims falling within/outside the panel's terms of reference

229. As regards the inclusion or exclusion of claims in the panel's terms of reference, see Section VII.B.2(a)(iii) below.

(v) "presenting the problem clearly"

General

230. In *US – Oil Country Tubular Goods Sunset Review*, the Appellate Body, further to referring to its previous reports on *Thailand – H-Beams* and *Korea – Dairy*, considered that a request for establishment "must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed" in order to present the problem clearly:

> "[I]n order for a panel request to 'present the problem clearly', it must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits. Only by such connection between the measure(s) and the relevant provision(s) can a respondent 'know what case it has to answer, and . . . begin preparing its defence'.[332]"[333]

Relevance of presenting the problem clearly

231. In *Thailand – H-Beams*, the Appellate Body explained the due process objectives behind the requirement for sufficient clarity in a panel request:

> "Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint, that is, with respect to the 'claims' that are being asserted by the complaining party. A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence. Likewise, those Members of the WTO who intend to participate as third parties in panel proceedings must be

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[328] Appellate Body Report on *Korea – Dairy*, para. 139. See also Panel Report on *Egypt – Steel Rebar*, para. 7.58.

[329] (*footnote original*) See the Appellate Body Report on *EC – Bananas III*, *supra* note 49, para. 141, where the Appellate Body states that, in its view, "there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties".

[330] Panel Report on *Canada – Autos*, paras. 4.11–4.13.

[331] Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.63.

[332] (*footnote original*) Appellate Body Report, *Thailand – H-Beams*, para. 88.

[333] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Review*, para. 162.

informed of the legal basis of the complaint. This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."[334]

232. Also, in *Thailand – H-Beams*, the Appellate Body explained further how claims of prejudice should be assessed (commenting particularly on the timing of challenging the sufficiency of a Panel request):

"Thailand argues that it was prejudiced by the lack of clarity of Poland's panel request. The fundamental issue in assessing claims of prejudice is whether a defending party was made aware of the claims presented by the complaining party, sufficient to allow it to defend itself. In assessing Thailand's claims of prejudice, we consider it relevant that, although Thailand asked the Panel for a preliminary ruling on the sufficiency of Poland's panel request with respect to Articles 5 and 6 of the *Anti-Dumping Agreement* at the time of filing of its first written submission, it did not do so at that time with respect to Poland's claims under Articles 2 and 3 of that Agreement. We must, therefore, conclude that Thailand did not feel at that time that it required additional clarity with respect to these claims, particularly as we note that Poland had further clarified its claims in its first written submission. This is a strong indication to us that Thailand did not suffer any prejudice on account of any lack of clarity in the panel request."[335]

233. In *Chile – Price Band System*, the Appellate Body ruled that "[t]he requirements of due process and orderly procedure dictate that claims must be made explicitly in WTO dispute settlement":

"Argentina appears to suggest that a claim may be made implicitly, and need not be made explicitly. We do not agree. The requirements of due process and orderly procedure dictate that claims must be made explicitly in WTO dispute settlement. Only in this way will the panel, other parties, and third parties understand that a specific claim has been made, be aware of its dimensions, and have an adequate opportunity to address and respond to it. WTO Members must not be left to wonder what specific claims have been made against them in dispute settlement. . ."[336]

234. In *US – Oil Country Tubular Goods Sunset Reviews*, the United States had made a request for a number of preliminary rulings regarding both the clarity of the request for establishment and the scope of the terms of reference of the Panel. The Panel, after declining all preliminary rulings, clarified that it had undertaken a textual analysis of the Panel request and that, therefore, it did not need to enter into the issue of whether the United States had been prejudiced in its right to defend itself due to the alleged inconsistencies in Argentina's panel request:

"[W]e note that as our analysis with respect to the totality of the United States' request for preliminary rulings was based on a textual analysis of Argentina's panel request, we did not need to inquire into the issue of whether the United States had been prejudiced in its right to defend itself in the present proceedings due to the alleged inconsistencies in the panel request. We nevertheless note that the United States has not shown to the Panel that it had been prejudiced in its right to defend itself in these proceedings due to these alleged inconsistencies in Argentina's panel request. In several instances, the United States argued that it did not know what case it had to answer because of the lack of precision with respect to certain parts of Argentina's panel request.[337] However, we consider that without supporting arguments, this simple allegation can not be taken to establish prejudice.[338]"[339]

(vi) Clarity of claims in written submissions

235. In *EC – Tube or Pipe Fittings*, the European Communities had requested the Panel to refuse to consider certain of Brazil's claims on the grounds that these claims were defective as they were too vaguely defined in Brazil's first written submission. In the view of the European Communities, admission of these claims would constitute an infringement of the European Communities' rights of defence and a departure from the good faith standard in Article 3.10 *DSU* and from the due process requirement that underlies the *DSU*. The Panel, in a preliminary ruling, rejected the European Communities' request on the grounds that the opportunity would still exist for Brazil to provide further supporting evidence and argumentation in its subsequent submissions with a view to clarifying those allegations in the course of the Panel proceedings:

"To the extent the European Communities is arguing that the first submission is determinative for the clarity of the claims for the purpose of the entire proceeding – in the sense that if a claim is not clearly stated there, no further opportunity exists for clarification over any of the remain-

[334] Appellate Body Report on *Thailand – H-Beams*, para. 88.
[335] Appellate Body Report on *Thailand – H-Beams*, para. 95. See also the Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.43, where the Panel also considered whether a lack of specificity in a panel request had prejudiced the respondent.
[336] Appellate Body Report on *Chile – Price Band System*, para. 164.
[337] (*footnote original*) See, for instance, First Written Submission of the United States, para. 110; Second Oral Submission of the United States, para. 41.
[338] (*footnote original*) We find support for this approach in the Appellate Body decision in *Korea – Dairy* and the panel decision in *HFCS*. See Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy*"), WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, para. 131; Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* ("*Mexico – Corn Syrup*"), WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345, para. 7.17.
[339] Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.71.

ing portion of the proceedings – we cannot accept this argument. In our view, it is in the nature of the Panel process that the claims made by a party may be progressively clarified and refined throughout the proceeding.[340] This may occur through the submission of supporting evidence and argumentation by the parties, commencing with their first written submission, and followed by a round of rebuttal submissions, supplemented by oral statements and answers to questions. It is, of course, clear that this process of progressive clarification would not allow a party to add additional claims (which were not included in the request for establishment of the Panel) during the course of the proceedings. The fundamental due process rights of the parties are thereby preserved.

In the case before us, we consider that even if we were to agree with the European Communities that, at this stage, some of the allegations it identified in Brazil's first submission may be vague, the opportunity would still exist for Brazil to provide further supporting evidence and argumentation in its subsequent submissions with a view to clarifying those allegations in the course of the Panel proceedings (recalling, of course, that the working procedures we have adopted for these panel proceedings provide that the parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions or answers to questions). In this regard we note, for example, that Brazil has already submitted, in response to the EC request, clarifications with regard to each of the claims identified by the European Communities as being 'overly vague'. Through the Panel process, the claims that the European Communities now considers to be vague may therefore become clear at a subsequent stage in these proceedings, including through submissions and through responses by Brazil to questions that the Panel and the European Communities may pose. However, if, subsequently in the course of these proceedings, the European Communities considers that Brazil's claims remain insufficiently clear or that these claims have finally become clear at such a late stage that the European Communities considers that it has not had an opportunity properly to respond, it may bring this situation to the attention of the Panel. The Panel will then consider the situation, keeping in mind the due process rights of the European Communities.

We find support for our ruling in the statement by the Appellate Body in its report on *US – FSC* that the 'procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes'.[341]"[342]

(e) Demonstration of compliance with Article 6.2 requirements

236. The Appellate Body stated in *US – Carbon Steel* that "compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel".[343]

(f) Importance of timing of a specificity objection

237. In *EC – Bananas III*, the Appellate Body considered that the panel request specificity issue was a matter which could be dealt with early on in a case:

> "[T]his kind of issue could be decided early in panel proceedings, without causing prejudice or unfairness to any party or third party, if panels had detailed, standard working procedures that allowed, *inter alia*, for preliminary rulings."[344]

(i) Distinction between sufficiency of a panel request and establishing a prima facie case of violation

238. The Panel on *Thailand – H-Beams* stressed the importance of this distinction when dealing with Thailand's arguments concerning the alleged insufficiency of a panel request:

> "Thailand argues that 'a panel may only accept the mere listing of a particular article as sufficient if absolutely no prejudice was possible during the course of the proceedings.' According to Thailand, 'this would be the case only where (1) a panel found that the complainant had failed to present a prima facie case and thus the adequacy of the defence was irrelevant or (2) a panel did not reach the claims under the listed articles because it decided the case solely on claims properly described in the request.'[345] We are concerned here that Thailand is blurring the distinction between, on the one hand, the sufficiency of the panel request and, on the other, the issue of whether or not the complaining party establishes a *prima facie* case of violation of an obligation imposed by the covered agreements. We recall that 'there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting

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[340] (*footnote original*) We recall the statement by the Appellate Body that "there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the *DSU*, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties". Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 141.

[341] (*footnote original*) Appellate Body Report, *United States – Tax Treatment of "Foreign Sales Corporations" ("US – FSC")*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.

[342] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.10.

[343] Appellate Body Report on *US – Carbon Steel*, para. 127.

[344] Appellate Body Report on *EC – Bananas III*, para. 144.

[345] (*footnote original*) Thailand's response to Panel Questions 2(a) and 7(a), Annex 2–6.

> those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.'[346] Article 6.2 DSU does not relate directly to the sufficiency of the subsequent written and oral submissions of the parties in the course of the proceedings, which may develop the arguments in support of the claims set out in the panel request. Nor does it determine whether or not the complaining party will manage to establish a *prima facie* case of violation of an obligation under a covered agreement in the actual course of the panel proceedings . . ."[347]

(g) Relevance of the principle of good faith

239. As regards the principle of good faith, see paragraphs 43–46 above and 105–107 above.

C. RELATIONSHIP WITH OTHER ARTICLES

1. Article 4

240. With respect to the relationship with Article 4, see paragraph 144 above.

2. Articles 6.2 and 21.5

241. For the relationship of Article 6.2 with Article 21.5, see paragraph 644 below.

D. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Relationship with Article 17 of the Anti-Dumping Agreement

(a) The term "matter" under paragraphs 4 and 5 of Article 17

242. The Appellate Body on *Guatemala – Cement I* held that "[Article 1.2 of the *DSU*] states . . . that . . . special or additional rules and procedures 'shall prevail' over the provisions of the DSU '[t]o the extent that there is a *difference* between' the two sets of provisions". As a result, the Appellate Body considered whether there is inconsistency between Article 6.2 of the *DSU* and Article 17.5 of the *Anti-Dumping Agreement*. The Appellate Body stated:

> "In our view, there is no *inconsistency* between Article 17.5 of the *Anti-Dumping Agreement* and the provisions of Article 6.2 of the DSU. On the contrary, they are complementary and should be applied together. A panel request made concerning a dispute brought under the *Anti-Dumping Agreement* must therefore comply with the relevant dispute settlement provisions of both that Agreement and the DSU. Thus, when a 'matter' is referred to the DSB by a complaining party under Article 17.4 of the *Anti-Dumping Agreement*, the panel request must meet the requirements of Articles 17.4 and 17.5 of the *Anti-Dumping Agreement* as well as Article 6.2 of the DSU."[348]

(b) Anti-dumping measures

243. As regards the concept of anti-dumping measures, see paragraph 1 and XVII.B.5(i) of the Chapter on the *Anti-Dumping Agreement*.

(c) Legal basis for claims under Article 17

244. Article 17 of the *Anti-Dumping Agreement* provides for the dispute settlement procedures for matters under the *Anti-Dumping Agreement*. With respect to the legal basis for claims under the *Anti-Dumping Agreement*, see the Chapter on the *Anti-Dumping Agreement*, XVII.B.1(b).

VII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7
Terms of Reference of Panels

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. General

(a) Importance of the terms of reference

245. The Appellate Body on *Brazil – Desiccated Coconut* explained the importance of the terms of reference in the following terms:

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[346] (*footnote original*) Appellate Body Report, *European Communities – Bananas*, supra, note 37, para. 141.
[347] Panel Report on *Thailand – H-Beams*, para. 7.43.
[348] Appellate Body Report on *Guatemala – Cement I*, para. 75. See also the discussion on the special and additional rules, paras. 6–8.

"A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective – they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute."[349]

246. In *US – Carbon Steel*, the Appellate Body further stated that the terms of reference "define the scope of the dispute".[350]

(b) Instances where a panel must address jurisdictional issues

247. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body defined the two instances where a panel is obliged to address issues that affect its own jurisdiction:

"We believe that a panel comes under a duty to address issues in at least two instances. First, as a matter of due process, and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute. Second, panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regard, we have previously observed that '[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings.'[351] For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.

. . .

[O]ur task is simply to determine whether the 'objections' that Mexico now raises before us are of such a nature that they could have deprived the Panel of its authority to deal with and dispose of the matter. If so, then the Panel was bound to address them on its own motion."[352]

(c) Objections to the panel's jurisdiction

(i) General

248. In *Argentina – Poultry Anti-Dumping Duties*, Argentina raised as a preliminary issue that prior to bringing WTO dispute settlement proceedings against Argentina's anti-dumping measure, Brazil had challenged that measure before a MERCOSUR Ad Hoc Arbitral Tribunal. Argentina requested that, in light of the prior MERCOSUR proceedings, the Panel refrain from ruling on the claims raised by Brazil in the present WTO dispute settlement proceedings.[353] In order to defend its position, Argentina invoked the principle of estoppel. In this regard, see paragraph 79 above. In the alternative, Argentina asserted that the Panel should be bound by the ruling of the MERCOSUR Tribunal.[354] In this regard, see paragraph 23 above. As regards preliminary issues, see Section XXXVI.C below.

(ii) Timing of the objections to the panel's jurisdiction

249. In *US – 1916 Act*, the Appellate Body agreed with the Panel that objections to the Panel's jurisdiction should not be raised at the interim review stage for the first time although it also agreed with the Panel that certain jurisdictional issues may need to be addressed by the Panel at any time:

"We agree with the Panel that the interim review was not an appropriate stage in the Panel's proceedings to raise objections to the Panel's jurisdiction for the first time. An objection to jurisdiction should be raised as early as possible and panels must ensure that the requirements of due process are met. However, we also agree with the Panel's consideration that 'some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time.'[355] We do not share the European Communities' view that objections to the jurisdiction of a panel are appropriately regarded as simply 'procedural objections'. The vesting of jurisdiction

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[349] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 21.

[350] Appellate Body Report on *US – Carbon Steel*, para. 126.

[351] (*footnote original*) Appellate Body Report, *United States – 1916 Act*, *supra*, footnote 32, para. 54.

[352] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 36 and 53.

[353] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.17.

[354] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.17.

[355] (*footnote original*) EC Panel Report, para. 5.17. We note that it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it. See, for example, *Case Concerning the Administration of the Prince von Pless (Preliminary Objection)* (1933) PCIJ Ser. A/B, No. 52, p. 15; Individual Opinion of President Sir A. McNair, *Anglo-Iranian Oil Co. Case (Preliminary Objection)* (1952) ICJ Rep., p. 116; Separate Opinion of Judge Sir H. Lauterpacht in *Case of Certain Norwegian Loans* (1957) ICJ Rep., p. 43; and Dissenting Opinion of Judge Sir H. Lauterpacht in the *Interhandel Case (Preliminary Objections)* (1959) ICJ Rep., p. 104. See also M. O. Hudson, *The Permanent Court of International Justice 1920–1942* (MacMillan, 1943), pp. 418–419; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. 2 (Grotius Publications, 1986), pp. 530, 755–758; S. Rosenne, *The Law and Practice of the International Court* (Martinus Nijhoff, 1985), pp. 467–468; L. A. Podesta Costa and J. M. Ruda, *Derecho Internacional Público*, Vol. 2 (Tipográfica, 1985), p. 438; M. Diez de Velasco Vallejo, *Instituciones de Derecho International Público* (Tecnos, 1997), p. 759. See also the award of the Iran-United States Claims Tribunal in *Marks & Umman v. Iran*, 8 Iran-United States CTR, pp. 296–97 (1985) (Award No. 53–458–3); J. J. van Hof, *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-U.S. Claims Tribunal* (Kluwer, 1991), pp. 149–150; and Rule 41(2) of the rules applicable to ICSID Arbitration Tribunals: International Centre for Settlement of Investment Disputes, Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

> in a panel is a fundamental prerequisite for lawful panel proceedings. We, therefore, see no reason to accept the European Communities' argument that we must reject the United States' appeal because the United States did not raise its jurisdictional objection before the Panel in a timely manner."[356]

250. In *US – Offset Act (Byrd Amendment)*, the Appellate Body recalled that "[a]n objection to jurisdiction should be raised as early as possible"[357] and clarified that "it would be preferable, in the interests of due process, for the appellant to raise such issues in the Notice of Appeal, so that appellees will be aware that this claim will be advanced on appeal".[358]

2. Article 7.1

(a) "the matter referred to the DSB"

(i) Concept of "matter"

251. In *Guatemala – Cement I*, the Appellate Body addressed the term "matter" and held that the "matter referred to the DSB" consists of two elements; namely, the specific *measures* at issue and the *legal basis of the complaint* (*claims*):

> "The word 'matter' appears in Article 7 of the DSU, which provides the standard terms of reference for panels. . . .when that provision is read together with Article 6.2 of the DSU, the precise meaning of the term 'matter' becomes clear. Article 6.2 specifies the requirements under which a complaining Member may refer a 'matter' to the DSB: in order to establish a panel to hear its complaint, a Member must make, in writing, a 'request for the establishment of a panel' (a 'panel request'). In addition to being the document which enables the DSB to establish a panel, the panel request is also usually identified in the panel's terms of reference as the document setting out 'the matter referred to the DSB'. Thus, 'the matter referred to the DSB' for the purposes of Article 7 of the DSU and Article 17.4 of the *Anti-Dumping Agreement* must be the 'matter' identified in the request for the establishment of a panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a panel request, to 'identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly.' (emphasis added) The '*matter* referred to the DSB', therefore, consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)."[359]

252. In *Brazil – Desiccated Coconut*, Brazil argued that the issue of consistency of its countervailing duty measures with Articles I and II of GATT 1994 was not within the special terms of reference of the Panel, and, therefore, should not have been addressed by the Panel. The Appellate Body ultimately found that Articles I and II of GATT 1994 did not apply to the dispute before it, and as a result declined to make a finding on whether claims relating to these provisions were included in the Panel's terms of reference. However, the Appellate Body made the following general statement concerning this issue:

> "We agree, furthermore, with the conclusions expressed by previous panels under the GATT 1947, as well as under the *Tokyo Round SCM Code* and the *Tokyo Round Anti-dumping Code*, that the 'matter' referred to a panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference. We agree with the approach taken in previous adopted panel reports that a matter, which includes the claims composing that matter, does not fall within a panel's terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference."[360]

(ii) Specific measures at issue

General

253. In *Indonesia – Autos*, the Panel, in a preliminary ruling, considered that the measure at issue was not sufficiently identified in the request for establishment of the Panel and thus it was not within the Panel's terms of reference:

> "We note that this Panel has standard terms of reference. Therefore, in determining whether a measure is before us, we must examine the United States' request for establishment of a panel, which is found in document WT/DS59/6. Consistent with the findings of the Appellate Body in *Bananas III*, we have carefully examined that request to ensure its compliance with both the letter and spirit of Article 6.2 of the Dispute Settlement Understanding. We conclude that the $690 million loan was not 'identified as a specific measure' in that document as required by Article 6.2 of the DSU. Indeed the United States states that the loan was not identified in the U.S. request, because it had not yet been made. Rather, the United States suggests that the loan is properly before the Panel because it is one aspect of the National Car Programme, which the United States considers to be the subject of its request. In our view, however, the United States in its request has clearly identified the measures to be considered by the Panel, and those measures do not include this loan. Accordingly, we con-

[356] Appellate Body Report on *US – 1916 Act*, para. 54.
[357] The Appellate Body referred to its Report on *US – 1916 Act*, para. 54.
[358] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 208.
[359] Appellate Body Report on *Guatemala – Cement I*, para. 72. See also Appellate Body Report on *Guatemala – Cement I*, para. 76 which states "the word 'matter' has the same meaning in Article 17 of the *Anti-Dumping Agreement* as it has in Article 7 of the DSU. It consists of two elements: the specific 'measure' and the 'claims' relating to it, both of which must be properly identified in a panel request as required by Article 6.2 of the DSU."
[360] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 22.

clude that the loan in question is not within the terms of reference of this Panel."[361]

254. In *Australia – Automotive Leather II (Article 21.5 – US)*, Australia argued that a certain loan granted by the Australian Government to a domestic enterprise (the "1999 loan") was not within the scope of the panel's terms of reference. Australia argued that the 1999 loan was not part of the implementation of the DSB's ruling and recommendation in the original case. With respect to the concept of "measures taken to comply" see Section XXI.B.4(b)(ii) below and the Chapter on the *SCM Agreement*, Section IV.B. The Panel stated:

"A 'matter' before a panel consists of the 'measure(s)' at issue, and the claims relating to those measures, as set out in the request for establishment. In this case, the United States' request for establishment clearly identifies both the repayment by Howe and the 1999 loan as the measures at issue. For us to rule, as suggested by Australia, that we are precluded from considering the 1999 loan, would allow Australia to establish the scope of our terms of reference by choosing what measure or measures it will notify, or not notify, to the DSB in connection with its implementation of the DSB's ruling.

The 1999 loan is inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of both its timing and its nature. In our view, the 1999 loan cannot be excluded from our consideration without severely limiting our ability to judge, on the basis of the United States' request, whether Australia has taken measures to comply with the DSB's ruling. In the absence of any compelling reason to do so, we decline to conclude that a measure specifically identified in the request for establishment is not within our terms of reference."[362]

255. In *Australia – Salmon*, the Appellate Body examined whether the Panel had interpreted correctly its terms of reference with respect to the measure and the product at issue in this dispute. Australia argued that the Panel had exceeded its terms of reference both in terms of products and in terms of the measure at issue. In its request for the establishment of a panel, Canada had identified the measure and the product at issue as follows: "The Australian Government's measures prohibiting the importation of fresh, chilled or frozen salmon . . . and any amendments or modifications to it."[363] The Panel stated that the product coverage of this dispute was limited, in accordance with the request for the establishment of a panel, to "fresh, chilled or frozen salmon" and held explicitly that the product coverage "does exclude heat-treated product"[364] and that "heat-treated product falls outside the product coverage of this dispute".[365] As a result, the Appellate Body rejected Australia's claim that the Panel had exceeded its terms of reference with respect to the *product* at issue.[366] However, the Appellate Body reversed the Panel's conclusions with respect to the *measures* at issue. One of the Australian measures at issue was an import prohibition on *all* salmon; another measure, however, allowed imports which had been subject to "heat treatment". The Panel interpreted this latter measure to mean that the heat treatment required applied not only to smoked salmon, but also to other categories of salmon, including fresh, chilled or frozen salmon; specifically, the Panel had held that the "heat treatment" requirement was merely the corollary ("two sides of a single coin") of the import prohibition contained in another measure. The Panel had concluded that imports of fresh, chilled or frozen salmon were prohibited under one measure, unless they received the required "heat treatment" provided for in another measure:

"We recall that the Panel stated that the measure at issue in this dispute 'is QP86A as implemented or confirmed by the 1988 Conditions, the 1996 Requirements and the 1996 Decision, and this in so far as it prohibits the importation into Australia of fresh, chilled or frozen salmon'. As indicated above, the Panel interpreted its terms of reference to include the 1988 Conditions, by considering them to constitute a measure 'prohibiting the importation of fresh, chilled or frozen salmon' unless heat-treated as prescribed. We recall that in the context of its examination of whether Australia's measure was consistent with Article 5.1, the Panel treated the import prohibition and the heat-treatment requirement as 'two sides of a single coin'. It said that a consequence of Australia's sanitary requirement that salmon be heat-treated before it can be imported is that imports of fresh, chilled or frozen salmon are prohibited.

We do not share the Panel's position. In our view, the SPS measure at issue in this dispute can *only* be the measure which is *actually* applied to the product at issue. The product at issue is fresh, chilled or frozen salmon and the SPS measure applicable to fresh, chilled or frozen salmon is the import prohibition set forth in QP86A. The heat-treatment requirement provided for in the 1988 Conditions applies only to smoked salmon and salmon roe, not to fresh, chilled or frozen salmon."[367]

256. In *Brazil – Aircraft (Article 21.5 – Canada II)*, Canada contended that a financing programme created by the Government of Brazil, PROEX, was a prohibited export subsidy since it appeared to be offered not only in the form of traditional PROEX payments, but also in conjunction with, or as part of, export

[361] Panel Report on *Indonesia – Autos*, para. 14.3.
[362] Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, paras. 6.4–6.5.
[363] WT/DS18/2.
[364] Panel Report on *Australia – Salmon*, para. 8.24.
[365] Panel Report on *Australia – Salmon*, para. 8.24.
[366] Appellate Body Report on *Australia – Salmon*, para. 96.
[367] Appellate Body Report on *Australia – Salmon*, paras. 102–103.

financing packages provided by Brazil's development bank. Brazil responded that this was not within the terms of reference of this Panel. The Panel agreed with Brazil that such financing is not identified in Canada's request for establishment of a panel and was thus outside its terms of reference.[368]

257. As regards the concept of specific measure at issue, its scope and the standard of sufficient identification of the specific measures at issue in the request for establishment of a panel pursuant to Article 6.2 of the *DSU*, see Section VI.B.3(c) above.

Terminated measures

258. The Panel on *Japan – Film* gave the following overview of the treatment of terminated measures in GATT/WTO dispute settlement practice:

> "GATT/WTO precedent in other areas, including in respect of virtually all panel cases under Article XXIII:1(a), confirms that it is not the practice of GATT/WTO panels to rule on measures which have expired or which have been repealed or withdrawn.[369] In only a very small number of cases, involving very particular situations, have panels proceeded to adjudicate claims involving measures which no longer exist or which are no longer being applied. In those cases, the measures typically had been applied in the very recent past.[370]"[371]

Before agreement on the Panel's terms of reference

259. The Panel on *US – Gasoline*, in a finding not addressed by the Appellate Body, analysed the question of terminated measures with respect to the "agreement on the panel's terms of reference" and the point in time when the terms of reference had been established. The Panel addressed a particular aspect of the United States' measure at issue and noted that "the Panel's terms of reference were established after the 75 per cent rule had ceased to have any effect, and the rule had not been specifically mentioned in the terms of reference". The Panel also mentioned that the measure was not "likely to be renewed" and also found that its findings on the WTO-inconsistency of other aspects of the measure would in any case have made unnecessary the examination of that specific aspect of the measure:

> "The Panel observed that it had not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the panel's terms of reference were fixed, were not and would not become effective. In the 1978 *Animal Feed Protein* case, the Panel ruled on a discontinued measure, but one that had terminated after agreement on the panel's terms of reference.[372] In the 1980 *Chile Apples* case, the panel ruled on a measure terminated before agreement on the panel's terms of reference; however, the terms of reference in that case specifically included the terminated measure and, it being a seasonal measure, there remained the prospect of its reintroduction.[373] In the present case, the Panel's terms of reference were established after the 75 percent rule had ceased to have any effect, and the rule had not been specifically mentioned in the terms of reference. The Panel further noted that there was no indication by the parties that the 75 percent rule was a measure that, although currently not in force, was likely to be renewed. Finally, the Panel considered that its findings on treatment under the baseline establishment methods under Articles III:4 and XX (b), (d) and (g) would in any case have made unnecessary the examination of the 75 percent rule under Article I:1. The Panel did not therefore proceed to examine this aspect of the Gasoline Rule under Article I:1 of the General Agreement."[374]

260. In *Argentina – Textiles and Apparel*, one of the measures at issue was specific duties on footwear. These duties were included in the Panel's terms of reference, but were withdrawn by Argentina between the request for consultation and the establishment of the Panel. The Panel declined to make a preliminary determination on this matter and made the respective findings in its final Report.[375] In the final Report, the Panel decided not to examine these specific duties on footwear, reasoning:

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[368] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 5.5, footnote 24.

[369] (*footnote original*) See *US – Gasoline* WT/DS2/R, para. 6.19, where the panel observed that "it had not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the panel's terms of reference were fixed, were not and would not become effective". See also Panel Report on *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, circulated on 25 November 1997, pp. 84–86.

[370] (*footnote original*) See, e.g., Panel Report on *US – Wool Shirts and Blouses*, WT/DS33/R, upheld by the Appellate Body, WT/DS33/AB/R, where the panel ruled on a measure that was revoked after the interim review but before issuance of the final report to the parties; Panel Report on *EEC – Measure on Animal Feed Proteins*, adopted on 14 March 1992, BISD 25S/49, where the panel ruled on a discontinued measure, but one that had terminated after the terms of reference of the panel had already been agreed; Panel Report on *United States – Prohibitions on Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91, 106, para. 4.3., where the panel ruled on the GATT consistency of a withdrawn measure but only in light of the two parties' agreement to this procedure; Panel Report on *EEC – Restrictions on Imports of Apples from Chile*, adopted on 10 November 1980, BISD 27S/98, where the panel ruled on a measure which had terminated before agreement on the panel's terms of reference but where the terms of reference specifically included the terminated measure and, given its seasonal nature, there remained the prospect of its reintroduction.

[371] Panel Report on *Japan – Film*, para. 10.58.

[372] (*footnote original*) "*EEC – Measures on Animal Feed Proteins*", L/4599, BISD 25S/49 (adopted on 14 March 1978). See also the Report of the Panel on "*United States – Prohibitions of Imports of Tuna and Tuna Products from Canada*", BISD 29S/91, 106, para. 4.3 (adopted on 22 February 1982).

[373] (*footnote original*) "*EEC – Restrictions on Imports of Apples from Chile*", BISD 27S/98 (adopted on 10 November 1980).

[374] Panel Report on *US – Gasoline*, para. 6.19.

[375] Panel Report on *Argentina – Textiles and Apparel*, para. 6.7.

"Panels and their terms of reference are established by the DSB and panels are not authorized to amend unilaterally their mandate. On the other hand, panels have often been required to determine their jurisdiction over a matter (see for instance *United States – Standards for Reformulated and Conventional Gasoline,*[376] *Japan – Taxes on Alcoholic Beverages,*[377] *Brazil – Measures Affecting Desiccated Coconut,*[378] and *EC – Regime for the Importation, Sale and Distribution of Bananas*[379] *("Bananas III")*). . . .

On several occasions, panels have considered measures that were no longer in force.[380] It appears that in each of those cases, however, there was no objection raised by either party to the panel's consideration of the expired measure. . . .

[T]he Argentine measure under consideration was revoked before the Panel was established and its terms of reference set, i.e. before the Panel started its adjudication process. The *Gasoline* panel report would argue in favour of not considering the Argentine specific duties on footwear. Moreover, as noted by the Appellate Body in the *Shirts and Blouses*[381] case, the aim of dispute settlement is not

> 'to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute'."[382]

261. The Panel on *Argentina – Textiles and Apparel* also held that it would not make a finding on the terminated Argentine measure solely because there might be a possibility of a re-introduction of the terminated measure:

"[T]he United States claims that there is a serious threat of recurrence since Argentina could easily reintroduce the previous import measures, and the United States suggests that Argentina is likely to do so because there is only a weak justification for its safeguard measure on footwear. We cannot evaluate the justification or likely duration of that safeguard measure. Moreover, in the absence of clear evidence to the contrary, we cannot assume that Argentina will withdraw the safeguard measure and reintroduce the specific duties measure in an attempt to evade panel consideration of its measures. We must assume that WTO Members will perform their treaty obligations in good faith, as they are required to do by the WTO Agreement and by international law.[383] We consider, therefore, that there is no evidence that the minimum specific import duties on footwear will be reintroduced."[384]

262. While it ultimately decided that it would not examine the measure withdrawn by Argentina before the establishment of the Panel, the Panel on *Argentina – Textiles and Apparel* nevertheless reserved the right to "refer to some examples of transactions" under the terminated measure:

"Consequently, we will not review the WTO compatibility of the specific duties which used to be imposed on footwear and which have, since the establishment of this Panel, been revoked. However, since these specific duties on footwear were in force for a long period until 14 February 1997, and for our understanding of the type of duties used by Argentina, we may, when reviewing the import regime applied to textiles and apparel, refer to some examples of transactions involving footwear because the type of duties used at the time by Argentina for textiles, apparel and footwear was the same."[385]

263. In *EC – Poultry*, Brazil claimed that the allocation by the European Communities of import licences on the basis of export performance was inconsistent with certain provisions of the *Licensing Agreement*. The European Communities responded, *inter alia*, that the alleged measure was no longer in place. The Panel, in a statement not addressed by the Appellate Body, noted that "Brazil claims that there are certain lingering effects. Therefore, we do not reject this claim on the grounds of mootness."[386]

264. In *US – Certain EC Products*, the Panel had ruled that the "increased bonding requirements as of 3 March on EC listed products", which was a measure no longer in existence, infringed WTO rules.[387] However, the Appellate Body considered that "there is an obvious inconsistency between the finding of the Panel that 'the 3 March Measure is no longer in existence' and the subsequent recommendation of the Panel that the DSB

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[376] (*footnote original*) Panel and Appellate Body Reports adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

[377] (*footnote original*) Panel and Appellate Body Reports adopted on 1 November 1996, WT/DS/8, 10, 11/R and WT/DS8, 10, 11/AB/R.

[378] (*footnote original*) Panel and Appellate Body Reports adopted on 20 March 1997, WT/DS22/R and WT/DS22/AB/R.

[379] (*footnote original*) Panel and Appellate Body Reports adopted on 25 September 1997, WT/DS27/R and WT/DS27/AB/R.

[380] (*footnote original*) See, for instance, the *Gasoline* Panel Report at para. 6.19; Panel and Appellate Body Reports on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/R and WT/DS33/AB/R; Panel Report on *EEC – Measures on Animal Feed Proteins*, adopted on 14 March 1978, BISD 25S/49; and Panel Report on *United States – Prohibition on Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91.

[381] (*footnote original*) See Appellate Body Report on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R, p. 19.

[382] Panel Report on *Argentina – Textiles and Apparel*, paras. 6.11–6.13.

[383] (*footnote original*) See Article 3.10 of the DSU and Article 26 of the Vienna Convention on the Law of Treaties (*Pacta Sunt Servanda)*.

[384] Panel Report on *Argentina – Textiles and Apparel*, para. 6.14.

[385] Panel Report on *Argentina – Textiles and Apparel*, para. 6.15.

[386] Panel Report on *EC – Poultry*, paras. 250–252.

[387] Panel Report on *US – Certain EC Products*, para. 7.1.

request that the United States bring its 3 March Measure into conformity with its WTO obligations." The Appellate Body accordingly concluded that the Panel had erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure that the Panel had found no longer existed.[388]

After agreement on the Panel's terms of reference

265. In *US – Wool Shirts and Blouses*, the United States withdrew the measure at issue shortly before the Panel's final report was circulated, but well after the agreement on the Panel's terms of reference. The Panel issued the report anyway and stated:

> "We note that the United States stated that the restraint, which is the object of the present dispute, was to be withdrawn 'due to a steady decline in imports of woven wool shirts and blouses from India and the adjustment of the industry'. . . . In the absence of an agreement between the parties to terminate the proceedings, we think that it is appropriate to issue our final report regarding the matter set out in the terms of reference of this Panel in order to comply with our mandate, as referred to in paragraph 1.3 of this report, notwithstanding the withdrawal of the US restraint. A number of GATT panels have done so.[389]" [390]

266. In *Indonesia – Autos*, the Panel noted that "in previous GATT/WTO cases, where a measure included in the terms of reference was otherwise terminated or amended after the commencement of the panel proceedings, panels have nevertheless made findings in respect of such a measure".[391, 392]

Amended measures

Measures amended before the establishment of the Panel

267. In *Brazil – Aircraft*, a question arose as to the identity of the measure since regulatory changes relevant to the measure were put in place after consultations were held, but before the panel was established. The Appellate Body determined that the regulatory changes "did not change the essence" of the measure:

> "We are confident that the specific measures at issue in this case are the Brazilian export subsidies for regional aircraft under PROEX. Consultations were held by the parties on these subsidies, and it is these same subsidies that were referred to the DSB for the establishment of a panel. We emphasize that the regulatory instruments that came into effect in 1997 and 1998 *did not change the essence* of the export subsidies for regional aircraft under PROEX." [393]

Measures amended during the Panel proceedings

268. In *Indonesia – Autos*, the Panel considered that, according to GATT/WTO practice, in those cases where a measure was amended (or withdrawn) during the Panel proceedings, the Panel had nevertheless continued its work. See paragraph 266 above.

269. The Panel on *Argentina – Footwear (EC)*, in a finding subsequently not reviewed by the Appellate Body, had to address a situation whereby Argentina had imposed a safeguard measure on footwear and subsequently made several modifications to this measure after the request for establishment had been made. The Panel stated that "it is the provisional and definitive measures in their substance rather than the legal acts in their original or modified legal forms that are most relevant for our terms of reference". The Panel then linked the issue before it to Article 3.3 of the *DSU* and saw the risk that "Members could always keep one step ahead of any WTO dispute settlement proceeding because in such a situation, the complaining Member would indeed, challenge a 'moving target', and panel and Appellate Body's findings could already be overtaken by events when they are rendered and adopted by the DSB":

> "[A]n interpretation whereby these subsequent Resolutions are considered to be measures separate and independent from the definitive safeguard measure, and thus outside our terms of reference, could be contrary to

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388 Appellate Body Report on *US – Certain EC Products*, para. 81.

389 (*footnote original*) See for instance the Panel Report on "EEC – Restrictions on Imports of Dessert Apples, Complaint by Chile" (adopted on 22 June 1989, BISD 36S/93), the Panel Report on "EEC – Restrictions on Imports of Apples, Complaint by the United States" (adopted on 22 June 1989, BISD 36S/135), the Panel Report on "United States – Prohibition of Imports of Tuna and Tuna Products from Canada" (adopted on 22 February 1982, BISD 29S/91) or the Panel Report on "EEC – Measures on Animal Feed Proteins" (adopted on 14 March 1978, BISD 25S/49).

390 Panel Report on *US – Wool Shirts and Blouses*, para. 6.2.

391 (*footnote original*) See, e.g., Panel Report on *United States – Measures Affecting Imports of Wool Shirts and Blouses from India*, WT/DS33, adopted on 23 May 1997 (hereafter called "*Shirts and Blouses*"), the US restriction was withdrawn shortly before the issuance of the panel report; Panel Report on *EEC – Restrictions on Imports of Dessert Apples, Complaint by Chile*, adopted on 22 June 1989, BISD 36S/93; Panel Report on *EEC – Restrictions on Imports of Apples, Complaint by the United States*, adopted on 22 June 1989, BISD 36S/135; Panel Report on *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91; Panel Report on *EEC – Restrictions on Imports of Apples from Chile*, adopted on 10 November 1980, BISD 27S/98; and Panel Report on *EEC – Measures on Animal Feed Proteins*, adopted on 14 March 1978, BISD 25S/49. In the Panel Report on *United States – Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted on 7 November 1989 (hereafter called "" *Section 337*"), the challenged measure was amended during the panel process but the panel refused to take into account such amendment. We note that this is also the line taken by the Appellate Body in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparels and Other Items*, WT/DS56, adopted on 22 April 1998, para. 64.

392 Panel Report on *Indonesia – Autos*, para. 14.9.

393 Appellate Body Report on *Brazil – Aircraft*, para. 132.

> Article 3.3 of the DSU. Such an interpretation could allow a situation where a matter brought to the DSB for prompt settlement is not resolved when the defendant changes the legal form of the measure through a separate but closely related instrument, while the measure in dispute remains essentially the same in substance. In this way, Members could always keep one step ahead of any WTO dispute settlement proceeding because in such a situation, the complaining Member would, indeed, challenge a 'moving target', and panel and Appellate Body's findings could already be overtaken by events when they are rendered and adopted by the DSB."[394]

270. The Panel on *Argentina – Footwear (EC)* therefore found that the modifications in question did "not constitute entirely new safeguard measures in the sense that they were based on a different safeguard investigation, but are instead modifications of the legal form of the original definitive measure, which remains in force in substance and which is the subject of the complaint".[395]

271. The Appellate Body on *Chile – Price Band System* actually referred to the above finding by the Panel on *Argentina – Footwear (EC)* and indicated that "[a]lthough we were not asked to review that particular finding on appeal, we agree with that panel's approach, which is based on sound reasoning and is consistent with our reasoning here".[396] The Appellate Body considered that, as in *Argentina – Footwear (EC)*, Chile's price band system remained "essentially" the same after the amendment and concluded that the measure before it in this appeal included the Law amending the system because "that law amends Chile's price band system without *changing its essence*".[397] The Appellate Body further referred to Articles 3.7 and 3.4 of the *DSU* as well as its decision in *Australia – Salmon*[398] as support for its conclusion and indicated that "[it] consider[ed] it appropriate . . . to rule on the price band system as currently in force in Chile, . . ., to 'secure a positive solution to the dispute' and to make 'sufficiently precise recommendations and rulings so as to allow for prompt compliance'".[399]

272. The Appellate Body on *Chile – Price Band System*, however, indicated that it was not condoning the practice of amending measures and turning them into "moving target[s]":

> "We emphasize that we do not mean to condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shielding a measure from scrutiny by a panel or by us. We do not suggest that this occurred in this case. However, generally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'. If the terms of reference in a dispute are broad enough to include amendments to a measure – as they are in this case – and if it is necessary to consider an amendment in order to secure a positive solution to the dispute – as it is here – then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute."[400]

273. In *Argentina – Textiles and Apparel*, one of the Argentine measures at issue, a statistical tax, was amended during the Appellate Body proceedings. The Appellate Body noted the amendment but proceeded on the basis of the tax as it existed at the time of the request for establishment of the panel.[401]

Ambiguous, vague and unclear measures

274. The Panel on *Turkey – Textiles* dismissed certain arguments that terms used to identify measures in the panel request were too vague, ambiguous or unclear to fall within a panel's terms of reference, indicating that its "terms of reference [were] sufficiently clear":

> "On 25 September 1998 the Panel issued the following ruling on this point:
>
> > 'In assessing Turkey's claim that India's request for the establishment of a panel was not sufficiently precise, we consider that it is important that a panel request, which defines the terms of reference, meets this criterion so as to inform the defending party and potential third parties both of the measures at issue, including the products they cover, and of the legal basis of the complaint. This is necessary to ensure due process and the ability of the defendant to defend itself.'
>
> We have examined India's request for establishment of the panel (WT/DS34/2). While not identified by place and date of publication, the measures are specified by type (i.e. quantitative restrictions), by effective date of entry into force (1 January 1996) and by product coverage (textiles and clothing, a well defined class of products in the WTO).[402] In our view the panel request meets

[394] Panel Report on *Argentina – Footwear (EC)*, para. 8.41.
[395] Panel Report on *Argentina – Footwear (EC)*, para. 8.45.
[396] Appellate Body Report on *Chile – Price Band System*, para. 138.
[397] Appellate Body Report on *Chile – Price Band System*, para. 139.
[398] Appellate Body Report on *Australia – Salmon*, para. 223.
[399] Appellate Body Report on *Chile – Price Band System*, paras. 140–143.
[400] Appellate Body Report on *Chile – Price Band System*, para. 144.
[401] Appellate Body Report on *Argentina – Textiles and Apparel*, Section V.
[402] (*footnote original*) We note also that during the period of consultations Turkey and the EC jointly sent notifications and other communications to the CRTA (WT/REG22/5, WT/REG22/7) and, pursuant to Article 3.3 of the ATC, to the TMB (G/TMB/N/308), in which Turkey lists the new textile import restrictions it adopted following the conclusion of the agreement between the EC and Turkey. In addition, during the meetings of the CRTA (WT/REG22/M1 and M2), and the TMB

the minimum requirements of specificity of Article 6.2 of the DSU as interpreted by the Appellate Body in *Bananas III* and *LAN*.[403] Even if we agree that India's request could have been more detailed, we conclude that Turkey is sufficiently informed of the measures at issue and the products they cover, and that our terms of reference are sufficiently clear. Consequently, we reject Turkey's claim that the Panel should refuse to accept India's request *in limine litis* for its failure to respect the basic requirements of Article 6.2 of the DSU."[404]

275. In *Korea – Alcoholic Beverages*, the Panel considered whether phrases used by the European Communities ("certain alcoholic beverages falling within HS heading 2208") and the US ("other distilled spirits such as whisky, brandy, vodka, gin and admixtures") were specific enough "to satisfy the letter and spirit of Article 6.2". The Panel considered that the requirements of Article 6.2 were satisfied:

"The question of whether a panel request satisfies the requirements of Article 6.2 is to be determined on a case by case basis with due regard to the wording of Article 6.2. . ., the question is whether Korea is put on sufficient notice as to the parameters of the case it is defending. . .

. . .

Korea argues that each imported product must be specifically identified in order to be within the scope of the panel proceeding. The complainants argue that the appropriate imported product is all distilled beverages. They claim, in fact, that for purposes of Article III, there is only one category in issue. They claim to have identified specific examples of such distilled alcoholic beverages for purposes of illustration, not as limits to the category.

The issue of the appropriate categories of products to compare is important to this case. In our view, however, it is one that requires a weighing of evidence. As such it is not an issue appropriate for a preliminary ruling in this case. This is particularly so in light of the Appellate Body's opinion in *Japan – Taxes on Alcoholic Beverages II,*[405] that all imported distilled alcoholic beverages were discriminated against. That element of the decision is not controlling on the ultimate resolution of other cases involving other facts; however, it cannot be considered inappropriate for complainants to follow it in framing their request for a panel in a dispute involving distilled alcoholic beverages. While it is possible that in some cases, the complaint could be considered so vague and broad that a respondent would not have adequate notice of the actual nature of the alleged discrimination, it is difficult to argue that such notice was not provided here in light of the identified tariff heading and the Appellate Body decision in *Japan – Taxes on Alcoholic Beverages II.* Furthermore, we note that the Appellate Body recently found that a panel request based on a broader grouping of products was sufficiently specific for purposes of Article 6.2.[406] We find therefore, that the complainants' requests for a panel satisfied the requirements of Article 6.2 of the DSU."[407]

276. In *Canada – Aircraft*, the Panel considered Canada's claim that certain provisions in Brazil's panel request were too vague. The Panel dismissed such arguments on the basis that whilst the measures may not have been described with sufficient clarity or precision, they had put Canada on notice that, at the very least, such provisions would be an issue in the dispute. The Panel relied on the Appellate Body's findings on "prejudice" in *EC – Computer Equipment* to justify such measures, indicating that the requirements of Article 6.2 had been met because Canada had not suffered any prejudice during the course of the panel proceedings. The Panel commented as follows when referring to the Appellate Body's decision in *EC – Computer Equipment*:

"We consider it appropriate to apply a similar standard in determining whether Brazil's request for establishment meets the requirements of Article 6.2 of the DSU in the present case. In particular, we shall consider whether any alleged imprecision in Brazil's request for establishment affected Canada's due process rights of defence in the course of the Panel proceedings. Indeed, we understand Canada to advocate a similar interpretation of Article 6.2, since Canada asserts that Brazil's 'lack of precision prejudices Canada's due process right to know the case against it. These claims are *therefore* inconsistent with Article 6.2 of the DSU.'[408] (emphasis supplied). Thus, we understand Canada to argue that Brazil's request for establishment would not be inconsistent with Article 6.2 of the DSU if the alleged lack of precision did not prejudice Canada's due process right to know the case against it."[409]

Footnote 402 (*cont.*)
(meetings of 11–12 December 1997), which preceded the request for the establishment of a panel, the parties discussed the issues relating to this dispute. This confirms to us that Turkey is sufficiently informed of the measures challenged by India in this dispute and the products covered by the measures at issue. Moreover, we note that no comments were made on this issue at any of the meetings of the DSB where the present dispute was discussed (WT/DSB/M13, 15, 42 and 43) and that no Member questioned the scope of the terms of reference in this regard.

403 (*footnote original*) Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/AB/R ("*EC – Bananas III*") and *European Communities – Customs Classification of Certain Equipment* adopted on 22 June 1998, WT/DS62, 67, 68/AB/R ("*EC – Computer Equipment*" or "*EC – LAN*").

404 Panel Report on *Turkey – Textiles*, para. 9.3.

405 (*footnote original*) Appellate Body Report on *Japan – Taxes on Alcoholic Beverages* (*Japan – Taxes on Alcoholic Beverages II*), adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at pp. 26, 32.

406 (*footnote original*) Appellate Body Report on *European Communities – Customs Classification of Certain Computer Equipment*, adopted on 22 June 1998 (WT/DS62/AB/R, WT/DS67/AB/R), at paras. 58–73.

407 Panel Report on *Korea – Alcoholic Beverages*, paras. 10.14–10.16.

408 Canada's preliminary submission regarding the jurisdiction of the Panel, dated 23 October 1998, para. 37.

409 Panel Report on *Canada – Aircraft*, para. 9.31.

277. In contrast, the Panel on *Indonesia – Autos* indicated that a loan that had not yet been made could not be covered by a panel's terms of reference:

> "At the first meeting of the Panel with the parties, on 3 December 1997, Indonesia raised a preliminary objection to the United States' claim with respect to a $US 690 million loan to PT TPN, on the basis that this loan was not within the Panel's terms of reference. The arguments of the parties can be found in paragraphs 4.36 to 4.50 of the Descriptive Part of this report. After hearing the arguments of the parties, the Chairman announced the following ruling on behalf of the Panel:
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> . . .
>
> We note that this Panel has standard terms of reference. Therefore, in determining whether a measure is before us, we must examine the United States' request for establishment of a panel,. . .Consistent with the findings of the Appellate Body in *Bananas III*, we have carefully examined that request to ensure its compliance with both the letter and spirit of Article 6.2 of the Dispute Settlement Understanding. We conclude that the $690 million loan was not 'identified as a specific measure' in that document as required by Article 6.2 of the DSU. Indeed the United States states that the loan was not identified in the U.S. request, because it had not yet been made. Rather, the United States suggests that the loan is properly before the Panel because it is one aspect of the National Car Programme, which the United States considers to be the subject of its request. In our view, however, the United States in its request has clearly identified the measures to be considered by the Panel, and those measures do not include this loan. Accordingly, we conclude that the loan in question is not within the terms of reference of this Panel."[410]

Measures in existence since before the entry into force of the WTO Agreements

278. As regards the applicability of the *SPS and TBT Agreements* to measures enacted before the entry into force of the Agreements, see paragraphs 6–7 of the Chapter on the *SPS Agreement* and paragraph 7 of the Chapter on the *TBT Agreement.*

(iii) Claims

General

279. As regards the concept of claim, its scope and the requirement to identify the claims in the request for establishment of a panel pursuant to Article 6.2 of the *DSU*, see paragraphs 215–233 above.

Claims not included in the terms of reference

280. In consideration of the United States' claim under Article 63 of the TRIPS Agreement which had not been included in the request for the establishment of the panel, the Appellate Body in *India – Patents (US)* stated:

> "The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume jurisdiction that it does not have. In this case, Article 63 was not within the Panel's jurisdiction, as defined by its terms of reference. Therefore, the Panel had no authority to consider the alternative claim by the United States under Article 63.
>
> The United States argues that, in the consultations between the parties to this dispute in this case, India had not disclosed the existence of any administrative instructions' for the filing of mailbox applications for pharmaceutical and agricultural chemical products. Therefore the United States asserts that it had no way of knowing that India would rely on this argument before the Panel. The United States maintains that, for this reason, it had not included a claim under Article 63 in its request for the establishment of a panel. All that said, there is, nevertheless, no basis in the DSU for a complaining party to make an additional claim, outside of the scope of a panel's terms of reference, at the first substantive meeting of the panel with the parties. A panel is bound by its terms of reference."[411]

281. The Appellate Body on *India – Patents (US)* found the Panel's ruling that "all legal claims would be considered if they were made prior to the end of [the first substantive] meeting" inconsistent with the letter and spirit of the DSU. The Appellate Body stated:

> "Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: 'Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute'. Yet that is *all* that it says. Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provisions of the DSU. The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume jurisdiction that it does not have.
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> . . .
>
> A Panel is bound by its terms of reference."[412]

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[410] Panel Report on *Indonesia – Autos*, para. 14.3.

[411] Appellate Body Report on *India – Patents (US)*, paras. 92–93.

[412] Appellate Body Report on *India – Patents (US)*, paras. 92–93. In *US – Hot-Rolled Steel*, the issue arose of whether the "general" practice of the US investigating authorities regarding best facts available was within the terms of reference of the Panel. The Panel, which did not rule on whether a general practice could be challenged separately from the statutory measure on which it is based, concluded that Japan's claim in this regard was outside its terms of reference because there was no mention of such claim in Japan's request for the establishment of a panel. Panel Report on *US – Hot-Rolled Steel*, para. 7.22.

282. In *India – Quantitative Restrictions*, India raised before the Panel the issue of the extent to which the Panel should consider the provisions of Article XVIII:B and the 1994 Understanding on Balance-of-payments Provisions in its analysis of the US claims since the United States had not raised any claim regarding violations of those provisions. The Panel decided that although it would not address any claims of the United States based on those provisions, it considered that they were "part of the context of those provisions alleged by the United States to have been violated". The Panel also considered that India had referred to various provisions of Article XVIII:B in its defence. The Panel concluded that "[i]n our view, the defending party is not restricted in the provisions of the . . . 'WTO Agreement'. . . that it can invoke in its defence. In these circumstances, we find it relevant to consider the provisions of Article XVIII:B and the 1994 Understanding as part of the context in deciding on the claims of the United States and to examine them in relation to the defence raised by India."[413]

Claims included in terms of reference

Claims not elaborated in the parties' first written submissions

283. In *EC – Bananas III*, the Panel held that certain claims under *GATS* made by Guatemala, Honduras and Mexico were not to be included within the scope of the case. While these claims had been included in the panel request, the Panel decided not to address them because they had not been elaborated in the three parties' first written submission.[414] The Appellate Body on *EC – Bananas III* reversed the Panel's conclusion, holding that nothing in the *DSU* or *GATT* practice suggested that all claims be set out in a complaining party's first written submission:

> "There is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel. It is the panel's terms of reference, governed by Article 7 of the DSU, which set out the claims of the complaining parties relating to the matter referred to the DSB.
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> . . .
>
> We do not agree with the Panel's statement that a 'failure to make a claim in the first written submission cannot be remedied by later submissions or by incorporating the claims and arguments of other complainants'. Pursuant to Articles 6.2 and 7.1 of the DSU, the terms of reference of the Panel in this case were established in the request for the establishment of the panel, WT/DS27/6, in which the claims specified under the GATS were made by all five Complaining Parties jointly."[415]

284. The Panel in *Japan – Apples*, referring to the above findings of the Appellate Body in *EC – Bananas III*, considered that "it is well established that a complainant is not prevented, as a matter of principle, from developing in its second submission arguments relating to a claim that is within the terms of reference of the panel, even if it did not do so in its first written submission". In that case, the United States had made arguments . . . only during the two substantive hearings with the parties. The Panel indicated that "[s]uch a tactic may seem questionable since nothing prevented the United States from presenting arguments on these claims in its first submission, and such an approach may significantly limit the possibility for the defending party to argue in response, depending on the circumstances of the case, or at least could unduly delay the proceedings". It therefore decided that the most appropriate way to deal with this issue was to give Japan sufficient opportunity to reply.[416]

Abandoned claims

285. In *US – Steel Plate*, India indicated in its first written submission that it would not pursue several claims that had been set out in its request for establishment of the Panel. However, India changed its view later on and informed the Panel of its intention to pursue one of these claims during the first substantive meeting of the Panel with the parties and in its rebuttal submission. In spite of the lack of specific objection by the US which had noted that the claim was within the Panel's terms of reference, the Panel decided that it was not going to rule on India's abandoned and later recovered claim:

> "This situation is not explicitly addressed in either the DSU or any previous panel or Appellate Body report. We do note, however, the ruling of the Appellate Body in *Bananas* to the effect that a claim may not be raised for the first time in a first written submission, if it was not in the request for establishment.[417] One element of the Appellate Body's decision in that regard was the notice aspect of the request for establishment. The request for establishment is relied upon by Members in deciding whether to participate in the dispute as third parties. To allow a claim to be introduced in a first written submission would deprive Members who did not choose to participate as third parties from presenting their views with respect to such a new claim.

[413] Panel Report on *India – Quantitative Restrictions*, paras. 5.18–5.19.
[414] Panel Report on *EC – Bananas III*, paras. 7.57–7.58.
[415] Appellate Body Report on *EC – Bananas III*, paras. 145–147. See also Appellate Body Report on *Chile – Price Band System*, para. 158.
[416] Panel Report on *Japan – Apples*, paras. 8.63–8.66.
[417] (*footnote original*) Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, at para. 143.

> The situation here is, in our view, analogous. That is, to allow a party to resurrect a claim it had explicitly stated, in its first written submission, that it would not pursue would, in the absence of significant adjustments in the Panel's procedures, deprive other Members participating in the dispute settlement proceeding of their full opportunities to defend their interest with respect to that claim. Paragraphs 4 and 7 of Appendix 3 to the DSU provide that parties shall 'present the facts of the case and their arguments' in the first written submission, and that written rebuttals shall be submitted prior to the second meeting. These procedures, in our view, envision that initial arguments regarding a claim should be presented for the first time in the first written submission, and not at the meeting of the panel with the parties or in rebuttal submissions.
>
> With respect to the interests of third parties, the unfairness of allowing a claim to be argued for the first time at the meeting of the panel with the parties, or in rebuttal submissions, is even more pronounced. In such a circumstance, third parties would be entirely precluded from responding to arguments with respect to such a resurrected claim, as they would not have access to those arguments under the normal panel procedures set out in paragraph 6 of Appendix 3 to the DSU. Further, India has identified no extenuating circumstances to justify the reversal of its abandonment of this claim.[418] Thus, in our view, it would be inappropriate in these circumstances to allow India to resurrect its claim in this manner. Therefore, we will not rule on India's claim under AD Agreement Articles 6.6 and 6.8 and Annex II, paragraph 7 regarding failure to exercise special circumspection in using information supplied in the petition.[419]"[420]

Whether a party has made a specific claim

286. In *US – Certain EC Products*, the United States asked the Appellate Body to reverse the Panel's finding under Article 23.2(a) on the basis that the Panel request of the European Communities was insufficient to "present the problem clearly" as required by Article 6.2 of the *DSU* and that the European Communities had never requested or argued for findings under Article 23.2(a). The Appellate Body considered that the fact that a claim of inconsistency with a given provision may be within the Panel's terms of reference does not mean that the complainant has actually made such a claim. The Appellate Body further ruled that in the absence of a specific claim of inconsistency by the complainant, the burden to present a prima facie case of violation would not be met:

> "[A]s the request for the establishment of a panel of the European Communities included a claim of inconsistency with Article 23, a claim of inconsistency with Article 23.2(a) is within the Panel's terms of reference. However, the fact that a claim of inconsistency with Article 23.2(a) of the DSU can be considered to be within the Panel's terms of reference does not mean that the European Communities actually made such a claim. An analysis of the Panel record shows that, with the exception of two instances during the Panel proceedings, the European Communities did not refer *specifically* to Article 23.2(a) of the DSU. Furthermore, in response to a request from the United States to clarify the scope of its claim under Article 23, the European Communities asserted only claims of violation of Articles 23.1 and 23.2(c) of the DSU; no mention was made of Article 23.2(a). Our reading of the Panel record shows us that, throughout the Panel proceedings in this case, the European Communities made arguments relating only to its claims that the United States acted inconsistently with Article 23.1 and Article 23.2(c) of the DSU.
>
> . . .
>
> . . . As the European Communities did not make a specific claim of inconsistency with Article 23.2(a), it did not adduce any evidence or arguments to demonstrate that the United States made a 'determination as to the effect that a violation has occurred' in breach of Article 23.2(a) of the DSU. And, as the European Communities did not adduce any evidence or arguments in support of a claim of violation of Article 23.2(a) of the DSU, the European Communities could not have established, and did not establish, a *prima facie* case of violation of Article 23.2(a) of the DSU.[421]"[422]

287. In *Chile – Price Band System*, Chile had asked the Appellate Body to reverse the Panel's finding on inconsistency of Chile's price band system with Article II:1(b) second sentence on the ground that Argentina had not actually made a claim under that second sentence. The Appellate Body concluded that, although Argentina's request for the establishment of a panel was phrased broadly enough to include a claim under both sentences of Article II:1(b) of the *GATT 1994*, a close examination of Argentina's submissions revealed that the only claim

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[418] (*footnote original*) This is **not**, for example, a case where a complainant obtained, through the dispute settlement process, information in support of a claim to which it did not otherwise have access.

[419] (*footnote original*) We note that, since we do not reach India's alternative claims in this dispute, as discussed below in para. 7.80, we also would not have reached this claim in any event.

[420] Panel Report on *US – Steel Plate*, paras. 7.27–7.29.

[421] (*footnote original*) We recall that in our Report in *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities – Hormones*"), we held that:

> . . . a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.

See WT/DS26/AB/R, WT/DS44/AB/R, adopted 13 February 1998, para. 104.

[422] Appellate Body Report on *US – Certain EC Products*, paras. 111, 112 and 114.

made by Argentina was under the first sentence of that Article.[423] The Appellate Body considered that, in this case, the Panel "had neither a 'right' nor a 'duty' to develop its own legal reasoning to support a claim under the second sentence" and stressed that "the Panel was not entitled to make a claim for Argentina, or to develop its own legal reasoning on a provision that was not at issue":

> "In *EC – Hormones*,[424] and in *US – Certain EC Products*,[425] we affirmed the capacity of panels to develop their own legal reasoning in a context in which it was clear that the complaining party had made a claim on the matter before the panel. It was also clear, in both those cases, that the complainant had advanced arguments in support of the finding made by the panel – even though the arguments in support of the claim were not the same as the interpretation eventually adopted by the Panel. The situation in this appeal is altogether different. No claim was properly made by Argentina under the *second* sentence of Article II:1(b). No legal arguments were advanced by Argentina under the *second* sentence of Article II:1(b). Therefore, those rulings have no relevance to the situation here.
>
> Contrary to what Argentina argues, given our finding that Argentina has not made a *claim* under the *second* sentence of Article II:1(b), the Panel in this case had neither a 'right' nor a 'duty' to develop its own legal reasoning to support a claim under the second sentence. The Panel was not entitled to make a claim for Argentina,[426] or to develop its own legal reasoning on a provision that was not at issue.[427]"[428]

288. In *Argentina – Footwear (EC)*, Argentina had claimed that the Panel had violated Article 7.2 of the *DSU* and exceeded its terms of reference, because it had relied on alleged violations of Article 3 of the *Agreement on Safeguards* even though the request for the establishment of a Panel only alleged violations of Articles 2 and 4 of the *Agreement on Safeguards*.[429] In this case, the Appellate Body did not consider that the Panel was not entitled to rule on Article 3 of the *Agreement on Safeguards* and stated that it "fail[ed] to see how any panel could be expected to make an 'objective assessment of the matter', as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims":

> "We note that the very terms of Article 4.2(c) of the *Agreement on Safeguards* expressly incorporate the provisions of Article 3. Thus, we find it difficult to see how a panel could examine whether a Member had complied with Article 4.2(c) without also referring to the provisions of Article 3 of the *Agreement on Safeguards*. More particularly, given the express language of Article 4.2(c), we do not see how a panel could ignore the publication requirement set out in Article 3.1 when examining the publication requirement in Article 4.2(c) of the *Agreement on Safeguards*. And, generally, we fail to see how the Panel could have interpreted the requirements of Article 4.2(c) *without* taking into account in some way the provisions of Article 3. What is more, we fail to see how any panel could be expected to make an 'objective assessment of the matter', as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims."[430]

3. Article 7.2

289. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body defined the two instances where a panel is obliged to address issues that affect its own jurisdiction:

> "We believe that a panel comes under a duty to address issues in at least two instances. First, as a matter of due process, and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute. Second, panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regard, we have previously observed that "[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings."[431] For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed."[432]

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[423] Appellate Body Report on *Chile – Price Band System*, para. 165.
[424] (*footnote original*) Appellate Body Report, para. 156.
[425] (*footnote original*) Appellate Body Report, para. 123. We note that the discussion above referring to our finding in *US – Certain EC Products* that a claim had not been made refers to the alleged claim under Article 23.2 of the DSU. The finding regarding a panel's ability to develop its own legal reasoning referred to a claim under Article 21.5 of the DSU, which had been made.
[426] (*footnote original*) Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277, paras. 129–130.
[427] (*footnote original*) Argentina also seeks to rely on our reasoning in *Canada – Periodicals*, where we said that the relationship between the first and second sentences of Article III:2 of the GATT 1994 was such that we could move from an examination of the first sentence of that Article to an examination of the second sentence as "part of a logical continuum." Argentina's appellee's submission, para. 154. We do not agree with Argentina that our reasoning in *Canada – Periodicals* is relevant in this regard. In our view, the first and second sentences of Article II:1(b) prescribe distinct obligations, and do not form part of a logical continuum.
[428] Appellate Body Report on *Chile – Price Band System*, paras. 167–168.
[429] Appellate Body Report on *Argentina – Footwear (EC)*, para. 71.
[430] Appellate Body Report on *Argentina – Footwear (EC)*, para. 74.
[431] (*footnote original*) Appellate Body Report, *United States – 1916 Act*, *supra*, footnote 32, para. 54.
[432] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

290. For information concerning the consideration by the Panel of provisions not included as violations in the terms of reference but referred to by the defendant in its defence, see paragraph 282 above. For judicial economy, see Section XXXVI.F below. Concerning the consideration by the Panel of provisions not included in the complainant's claims, see paragraphs 329–332 below.

4. Article 7.3

(a) Special terms of reference

291. In *Brazil – Desiccated Coconut*, upon a request from Brazil for consultations on the terms of reference, the DSB authorized the DSB Chairman to "draw up terms of reference in consultation with the parties, in accordance with Article 7.3 of the DSU". The Philippines and Brazil had agreed on the following special terms of reference:

> "To examine, in the light of the relevant provisions in GATT 1994 and the Agreement on Agriculture, the matter referred to the DSB by the Philippines in document WT/DS22/5, taking into account the submission made by Brazil in document WT/DS22/3 and the record of discussions at the meeting of the DSB on 21 February 1996, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[433]

VIII. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8
Composition of Panels

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

3. Citizens of Members whose governments[6] are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

(*footnote original*) [6] In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panellists may be drawn as appropriate. That list shall include the roster of non-governmental panellists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panellists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panellists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. If there is no agreement on the panellists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panellists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

8. Members shall undertake, as a general rule, to permit their officials to serve as panellists.

9. Panellists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

10. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests,

[433] WT/DS22/6.

include at least one panellist from a developing country Member.

11. Panellists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

1. Article 8.4: indicative list of panellists

292. In accordance with the proposals for the administration of the indicative list of panellists approved by the DSB on 31 May 1995, the list is completely updated every two years. At its meeting on 27 September 1995, the DSB approved the list of governmental and non-governmental panellists which contained names of individuals and an indication of their sectoral experience. The DSB also agreed that at each of its regular meetings new names may be proposed by delegations for inclusion in the indicative list.[434] To this end the Secretariat regularly circulates details of either the consolidated list or new names of potential panellists to be added to that list as approved by the DSB.[435]

2. Articles 8.6 and 8.7: panel composition

293. In *Guatemala – Cement II*, Guatemala requested the Panel to rule that its composition was inconsistent with WTO and international law principles, and that therefore the Panel lacked competence to review the matter before it. Specifically, Guatemala considered that the presence on this Panel of a member who served on *Guatemala – Cement I* detracted from the objectivity and independence that a panel should have when reviewing a matter brought before it. Mexico disagreed, arguing that the Panel was composed in conformity with the *DSU*. The Panel issued the following preliminary ruling[436] rejecting Guatemala's preliminary objection as follows:

> "In order to determine whether the substance of Guatemala's preliminary objection is an issue that is susceptible of a ruling by the Panel, we have carefully analysed the provisions of the DSU governing panel composition. It is clear that Article 8.6 of the DSU imposes primary responsibility for panel composition on the parties to the dispute. In cases where the parties are unable to agree on the composition of a panel, such as this one, Article 8.7 of the DSU imposes responsibility for panel composition on the Director General. According to Article 8 of the DSU, therefore, the composition of a panel is determined by the parties to the dispute and, in certain circumstances, by the Director General. Neither Article 8 nor any other provision of the DSU prescribes any role for the panel in the panel composition process. For this reason, we find that we are unable to rule on the substance of the issue raised by Guatemala.
>
> Should Guatemala persist with its substantive concerns regarding the composition of the Panel, Guatemala may avail itself of the procedure provided for in the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes."[437]

IX. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9
Procedures for Multiple Complainants

1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.

3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panellists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

1. Article 9.1: "a single panel should be established . . . whenever feasible"

294. In *India – Patents (EC)*, India requested the Panel to dismiss the European Communities' complaint as inadmissible on procedural grounds. India argued that since it was "feasible" for the European Communities to have brought its complaint simultaneously with the United States' complaint (WT/DS50), the European Communities was required to do so. India contended

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[434] WT/DSB/2.

[435] See, for example, WT/DSB/4; WT/DSB/5 and Add.1–4; WT/DSB/12; WT/DSB/13; WT/DSB17; WT/DSB/19 and Add.1–5; and WT/DSB/33 and Add.1.

[436] For more information about preliminary rulings, see Section XXXVI.C below.

[437] Panel Report on *Guatemala – Cement II*, para. 8.11.

that this was supported by a strict interpretation of Articles 9.1 and 10.4 of the *DSU*. The Panel considered that the terms of Article 9.1 are directory or recommendatory, not mandatory. Further to concluding that it was not feasible for the DSB to establish a single panel, the Panel found that there was no violation of Article 9.1:

> "In order to assess India's argument, we need to consider: (i) the nature of the requirement contained in Article 9.1; (ii) the rights generally of Members under the DSU; and (iii) whether it was feasible to establish a single panel in this particular case.
>
> Given their ordinary meaning, the terms of Article 9.1 are directory or recommendatory, not mandatory. They direct that a single panel *should* (not 'shall') be established, and that direction is limited to cases where it is *feasible*. We disagree with India that the addressee of Article 9.1 is not clear. Article 9.1 is clearly a code of conduct for the DSB because its provisions pertain to the establishment of a panel, the authority for which is exclusively reserved for the DSB. As such, Article 9.1 should not affect substantive and procedural rights and obligations of individual Members under the DSU.
>
> Indeed, the text of Article 9.1, as well as the text of Article 9.2, which is part of the context of Article 9.1, make it clear that Article 9 is not intended to limit the rights of WTO Members. In our view, one of those rights is the freedom to determine whether and when to pursue a complaint under the DSU. According to Article 3.7 of the DSU, '[t]he aim of dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred'. It would be inconsistent with this aim of the dispute settlement mechanism to attempt to force Members to take decisions earlier than they wish on whether to request a panel in a dispute, or to continue consultations aimed at securing a mutually acceptable solution.
>
> As to feasibility, it is not disputed by the parties that the complaints by the United States (WT/DS50) and the EC (WT/DS79) relate to the same matter, i.e. India's compliance with Article 70.8 and 70.9 of the TRIPS Agreement. Was it then 'feasible' for the DSB to establish a single panel at the time of the United States' panel request in November 1996? The answer is no, because at that time the EC had not requested the establishment of a panel. Indeed, the EC was not even entitled to make such a request as it was not until 28 April 1997 that the EC requested consultations with India on this matter."[438]

(a) Relationship with other paragraphs of Article 9

(i) Article 9.2

295. In *India – Patents (EC)*, the Panel considered that the text of Article 9.2 was "part of the context of Article 9.1". In this regard, see paragraph 294 above.

2. Article 9.2: separate reports

(a) General

296. In *EC – Bananas III*, the European Communities requested the Panel, pursuant to Article 9 of the *DSU*, to prepare four panel reports in this case – one each for the claims of Ecuador, Guatemala and Honduras (who filed a joint first submission), Mexico and the United States. The Panel interpreted Article 9 as requiring it to grant the request and considered that one of the objectives of Article 9 was to ensure that a respondent is not later faced with a demand for compensation or threatened by retaliation under Article 22 of the *DSU* in respect of uncured inconsistencies with WTO rules that were not complained of by one of the complaining parties participating in a panel proceeding:

> "We interpret the terms of Article 9 to require us to grant the EC request. However, in light of the fact that the Complainants presented joint oral submissions to the Panel, joint responses to questions and a joint rebuttal submission, as well as the fact that they have collectively endorsed the arguments made in each other's first submissions, we must also take account of the close interrelationship of the Complainants' arguments.
>
> In our view, one of the objectives of Article 9 is to ensure that a respondent is not later faced with a demand for compensation or threatened by retaliation under Article 22 of the DSU in respect of uncured inconsistencies with WTO rules that were not complained of by one of the complaining parties participating in a panel proceeding. Our reports must bear this objective in mind.
>
> For purposes of determining whether a Complainant in this matter has made a claim, we have examined its first written submission, as we consider that document determines the claims made by a complaining party. To allow the assertion of additional claims after that point would be unfair to the respondent, as it would have little or no time to prepare a response to such claims. In this regard, we note that paragraph 12(c) of the Appendix 3 to the DSU on 'Working Procedures' foresees the simultaneous submission of the written rebuttals by complaining and respondent parties, a procedure that was followed in this case. To allow claims to be presented in the rebuttal submissions would mean that the respondent would have an opportunity to rebut the claims only in its oral presentation during the second meeting. In our view, the failure to make a claim in the first written submission cannot be remedied by later submissions or by incorporating the claims and arguments of other complainants."[439]

(b) Timing of the request for separate reports

297. In *US – Offset Act (Byrd Amendment)*, the Panel had rejected the request by the United States for a

[438] Panel Report on *India – Patents (EC)*, paras. 7.13–7.16.
[439] Panel Report on *EC – Bananas III*, paras. 7.55–7.57.

separate report for the dispute brought by Mexico on the grounds that the request had been filed too late in the process (two months after the issuance of the descriptive part) and no explanation had been provided on why it was not filed it earlier. The Panel considered that requests made under Article 9.2 "should be made in a timely manner, since any need to prepare separate reports may affect the manner in which a panel organises its proceedings". On appeal, the Appellate Body clarified that the text of Article 9.2 does not make the right to request separate reports dependent upon any conditions such as timing. The Appellate Body however noted that while the text of Article 9.2 of the *DSU* contains no requirement for the request for a separate panel report to be made *by a certain time*, the text does not explicitly provide that such requests may be made *at any time*. In its view, this provision cannot be read in isolation from the other *DSU* provisions, in particular Article 3.3 which calls for the "prompt" settlement of disputes:

> "By its terms, Article 9.2 accords to the requesting party a broad right to request a separate report. The *text* of Article 9.2 does not make this right dependent on any conditions. Rather, Article 9.2 explicitly provides that a panel 'shall' submit separate reports 'if one of the parties to the dispute so requests'. Thus the text of Article 9.2 of the DSU contains no requirement for the request for a separate panel report to be made *by a certain time*. We observe, however, that the text does not explicitly provide that such requests may be made *at any time*.
>
> Having made these observations, we note that Article 9.2 must not be read in isolation from other provisions of the DSU, and without taking into account the overall object and purpose of that Agreement. The overall object and purpose of the DSU is expressed in Article 3.3 of that Agreement which provides, relevantly, that the 'prompt settlement' of disputes is 'essential to the effective functioning of the WTO.' If the right to a separate panel report under Article 9.2 were 'unqualified', this would mean that a panel would have the obligation to submit a separate panel report, pursuant to the request of a party to the dispute, *at any time during the panel proceedings*. Moreover, a request for such a report could be made for whatever reason – or indeed, *without any reason* – even on the day that immediately precedes the day the panel report is due to be circulated to WTO Members at large. Such an interpretation would clearly undermine the overall object and purpose of the DSU to ensure the 'prompt settlement' of disputes."[440]

298. In *US – Steel Safeguards*, the United States requested the issuance of separate reports three days before the issuance of the descriptive part to the parties. The Panel considered that the United States' request for separate panel reports "was *not necessarily* made in an *untimely* fashion". The Panel used the word "necessarily" because it considered that despite the fact that the request was made when the Panel's process was quite advanced, this "did not necessarily prevent the Panel from settling the dispute in a prompt fashion".[441]

(c) Panel discretion

299. In *US – Offset Act (Byrd Amendment)*, when reviewing the Panel's rejection of the request by the United States for separate reports on the grounds of its untimely filing (see paragraph 297 above), the Appellate Body noted that, as mandated by Article 9.2, the rights of the other parties in the proceedings must be taken into account when making a decision. Recalling its conclusions in *EC – Hormones* on the panels' discretion in dealing with procedural issues, the Appellate Body considered that the Panel had acted within its discretion when rejecting the late request for separate reports:

> "[W]e note that the first sentence in Article 9.2 provides that it is for the panel to 'organize its examination and present its findings in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired'. Our comments in *EC – Hormones* about panels' discretion in dealing with procedural issues are pertinent here:
>
> > '. . . the DSU and in particular its Appendix 3, leave panels a *margin of discretion* to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling.'[442] (emphasis added)
>
> In our view, the Panel acted within its 'margin of discretion' by denying the United States' request for a separate panel report. We do not believe that we should lightly disturb panels' decisions on their procedure, particularly in cases such as the one at hand, in which the Panel's decision appears to have been reasonable and in accordance with due process. We observe that, on appeal, the United States is not claiming that it suffered any prejudice from the denial of its request for a separate panel report.[443] We also note that the first sentence

[440] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, paras. 310–311 and 315–316.

[441] Panel Report on *US – Steel Safeguards*, para. 7.724.

[442] (*footnote original*) Appellate Body Report, *EC – Hormones*, footnote 138 to para.152.

[443] (*footnote original*) The United States submits that a showing of prejudice is not required by the text of Article 9.2. In response to questioning at the oral hearing, the United States added that, although it was not aware of any prejudice that it would have suffered in this case, prejudice could have resulted if, for example, Mexico had chosen to cross-appeal the claim related to Article 5 of the *SCM Agreement*, which only Mexico raised before the Panel.

of Article 9.2 refers to the rights of all the parties to the dispute. The Panel correctly based its decision on an assessment of the rights of all the parties, and not of one alone."[444]

(d) Structure of separate reports

300. In *EC – Bananas III*, the European Communities requested the Panel, pursuant to Article 9 of the *DSU*, to prepare four panel reports in this case – one each for the claims of Ecuador, Guatemala and Honduras (who filed a joint first submission), Mexico and the United States. The Panel agreed and issued four separate reports with identical descriptive parts but with findings sections that differed according to the claims of the various respondents:

> "[W]e have decided that the description of the Panel's proceedings, the factual aspects and the parties' arguments should be identical in the four reports. In the 'Findings' section, however, the reports differ to the extent that the Complainants' initial written submissions to the Panel differ in respect of alleging inconsistencies with the requirements of specific provisions of specific agreements . . ."[445]

301. In *US – Steel Safeguards*, further to the request by the United States to issue separate reports, the Panel issued its Reports in the form of one document constituting eight panel reports. The document included a common cover page, descriptive part and findings but individualized conclusions:

> "In exercising our 'margin of discretion' under Article 9.2 of the DSU, and taking into account the particularities of this dispute, the Panel decides to issue its Reports in the form of one document constituting eight Panel Reports. For WTO purposes, this document is deemed to be eight separate reports, each of the reports relating to each one of the eight complainants in this dispute. The document comprises a common cover page and a common Descriptive Part. This reflects the fact that the eight steel safeguard disputes were reviewed through a single panel process. This single document also contains a common set of Findings in relation to each of the claims that the Panel has decided to address. In our exercise of judicial economy, we have mainly addressed the complainants' common claims and on that basis, we were able to issue a common set of Findings which, we believed, resolved the dispute. Finally, this document also contains Conclusions and Recommendations that are particularised for each of the complainants, with a separate number (symbol) for each individual complainant."[446]

302. In *Canada – Wheat Exports and Grain Imports*, the DSB had successively established two panels to resolve the dispute (the "March Panel" and the "July Panel"). See paragraph 304 below in this regard. In response to a question posed by the Panel, the parties indicated that they did not wish the two Panels to issue separate reports in separate documents. The two Panels saw no compelling reason to proceed differently and therefore decided to issue their separate reports in the form of a single document.[447]

(e) Relationship with other paragraphs of Article 9

(i) Article 9.1

303. In *India – Patents (EC)*, the Panel considered that the text of Article 9.2 was "part of the context of Article 9.1". In this regard, see paragraph 294 above.

3. Article 9.3: multiple panels

(a) Multiple panels with same complainant

304. In *Canada – Wheat Exports and Grain Imports*, the Panel, in a preliminary ruling,[448] found that certain portions of the United States' panel request which dealt with Article XVII of the *GATT 1994* claim failed to satisfy the requirements of Article 6.2 of the *DSU* insofar as they did not identify the specific measures at issue.[449] In response to this preliminary ruling, the United States asked for the suspension of the Panel's work. During that suspension, the United States filed a second request for establishment of a panel remedying the insufficiencies of its first request in respect of its claims under Article XVII. The DSB established a second panel to resolve the dispute. Both Panels had the same panellists. As regards the organization of the two reports, see paragraph 302 above.

(b) Third-party rights for complainants in parallel proceedings

305. In *EC – Hormones*, the European Communities argued that the Panel had made decisions that granted certain additional third-party rights to Canada and the United States that were not justifiable under Article 9.3 of the *DSU*. More specifically, the European Communities appealed the Panel's decision to hold a joint meeting with scientific experts, to give the United States and Canada access to all information submitted in both proceedings and to invite the United States to participate and make a statement at the second substantive meeting

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[444] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, paras. 315–316.

[445] Panel Report on *EC – Bananas III*, para. 7.58. As for the Panel's reasoning in accepting the request, see para. 296 of this Chapter.

[446] Panel Reports on *US – Steel Safeguards*, para. 7.725.

[447] Panel Report on *Canada – Wheat Exports and Grain Imports*, paras. 6.1–6.2.

[448] For more information on preliminary rulings, see Section XXXVI.C.

[449] Panel Report on *Canada – Wheat Exports and Grain Imports*, 6.10.

in the proceeding where Canada was the complaining party. The Appellate Body rejected the European Communities' arguments and upheld each of the Panel's decisions in this respect. In relation to holding one joint meeting with scientific experts, the Appellate Body stated:

"We consider the explanation of the Panel quite reasonable, and its decision to hold a joint meeting with the scientific experts consistent with the letter and spirit of Article 9.3 of the DSU. Clearly, it would be an uneconomical use of time and resources to force the Panel to hold two successive but separate meetings gathering the same group of experts twice, expressing their views twice regarding the same scientific and technical matters related to the same contested European Communities measures. We do not believe that the Panel has erred by addressing the European Communities procedural objections only where the European Communities could make a precise claim of prejudice. It is evident to us that a procedural objection raised by a party to a dispute should be sufficiently specific to enable the panel to address it.

. . .

Having access to a common pool of information enables the panel and the parties to save time by avoiding duplication of the compilation and analysis of information already presented in the other proceeding. Article 3.3 of the DSU recognizes the importance of avoiding unnecessary delays in the dispute settlement process and states that the prompt settlement of a dispute is essential to the effective functioning of the WTO. In this particular case, the Panel tried to avoid unnecessary delays, making an effort to comply with the letter and spirit of Article 9.3 of the DSU."[450]

306. The Appellate Body on *EC – Hormones* also considered reasonable the Panel's decision to grant the United States access to all information in the proceedings initiated by Canada and to grant Canada access to all information in the proceedings initiated by the United States and saw a link between granting such access and the attempt to "harmonize" timetables in multiple panel proceedings:

"The decision of the Panel to use and provide all information to the parties in both disputes was taken in view of its previous decision to hold a joint meeting with the experts. The European Communities asserts that it cannot see how providing information in one of the proceedings to a party in the other helps to harmonize timetables. We can see a relation between timetable harmonization within the meaning of Article 9.3 of the DSU and economy of effort. In disputes where the evaluation of scientific data and opinions plays a significant role, the panel that is established later can benefit from the information gathered in the context of the proceedings of the panel established earlier. Having access to a common pool of information enables the panel and the parties to save time by avoiding duplication of the compilation and analysis of information already presented in the other proceeding. Article 3.3 of the DSU recognizes the importance of avoiding unnecessary delays in the dispute settlement process and states that the prompt settlement of a dispute is essential to the effective functioning of the WTO. In this particular case, the Panel tried to avoid unnecessary delays, making an effort to comply with the letter and spirit of Article 9.3 of the DSU. Indeed, as noted earlier, despite the fact that the Canadian proceeding was initiated several months later than that of the United States, the Panel managed to finish both Panel Reports at the same time."

307. Regarding the participation of the United States in the second substantive meeting of the Panel, as requested by Canada, the Appellate Body in *EC – Hormones* recalled the Panel's findings and agreed:

"[The Panel held:]

'This decision was, *inter alia*, based on the fact that our second meeting was held the day after our joint meeting with the scientific experts and that the parties to this dispute would, therefore, most likely comment on, and draw conclusions from, the evidence submitted by these experts to be considered in both cases. Since in the panel requested by the United States the second meeting was held before the joint meeting with scientific experts, we considered it appropriate, in order to safeguard the rights of the United States in the proceeding it requested, to grant the United States the opportunity to observe our second meeting in this case and to make a brief statement at the end of that meeting.'[451]

The explanation of the Panel appears reasonable to us. If the Panel had not given the United States an opportunity to participate in the second substantive meeting of the proceedings initiated by Canada, the United States would not have had the same degree of opportunity to comment on the views expressed by the scientific experts that the European Communities and Canada enjoyed. Although Article 12.1 and Appendix 3 of the DSU do not specifically require the Panel to grant this opportunity to the United States, we believe that this decision falls within the sound discretion and authority of the Panel, particularly if the Panel considers it necessary for ensuring to all parties due process of law. In this regard, we note that in *European Communities – Bananas*,[452] the panel considered that particular circumstances justified the grant to third parties of rights somewhat broader than those explicitly envisaged in Article 10 and Appendix 3 of the DSU. We conclude that, in the case before us, circumstances justified the Panel's deci-

[450] Appellate Body Report on *EC – Hormones*, paras. 152–153. See also Appellate Body Report on *US – 1916 Act*, para. 150.
[451] (*footnote original*) Canada Panel Report, para. 8.20.
[452] (*footnote original*) Adopted 25 September 1997, WT/DS27/AB/R.

sion to allow the United States to participate in the second substantive meeting of the proceedings initiated by Canada."[453]

308. In *US – 1916 Act*, the Appellate Body held that issues of third-party rights were not addressed by Article 9 of the *DSU*. See also paragraph 317 below. The Appellate Body stated:

"Although the European Communities and Japan invoke Article 9 of the DSU, and, in particular, Article 9.3, in support of their position, we note that Article 9 of the DSU, which concerns procedures for multiple complaints related to the same matter, does not address the issue of the rights of third parties in such procedures."[454]

309. For further information on enhanced third-party rights, see Section X.B.2(a) below.

X. ARTICLE 10

A. TEXT OF ARTICLE 10

Article 10
Third Parties

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

B. INTERPRETATION AND APPLICATION OF ARTICLE 10

1. Article 10

(a) General

310. The Appellate Body on *US – 1916 Act* confirmed that "[u]nder the DSU, as it currently stands, third parties are only entitled to the participatory rights provided for in Articles 10.2 and 10.3 and paragraph 6 of Appendix 3".[455]

311. In *US – FSC (Article 21.5 – EC)*, the Appellate Body confirmed the above statement and summarized its prior Reports as follows:

"In respect of the provisions of the DSU governing third party rights, we have already observed that, as the DSU currently stands, the rights of third parties in panel proceedings are limited to the rights granted under Article 10 and Appendix 3 to the DSU.[456] Beyond those minimum guarantees, panels enjoy a discretion to grant additional participatory rights to third parties in particular cases, as long as such 'enhanced' rights are consistent with the provisions of the DSU and the principles of due process.[457] However, panels have no discretion to circumscribe the rights guaranteed to third parties by the provisions of the DSU."[458]

2. Article 10.2

(a) Enhanced third-party rights

312. The Panel on *EC – Bananas III* considered requests by Members to be allowed to participate more broadly in the Panel proceedings than provided for under the relevant provisions of the *DSU*. More specifically, these Members requested that they be granted the right of presence at all meetings of the Panel with the parties and the right to make statements at all such meetings. Furthermore, these Members also demanded the right to receive copies of all submissions and other materials and to be granted permission to make written submissions to both meetings of the Panel. While the DSB took note of these statements, there was no consensus on such participation.[459] Several of these countries later confirmed their requests in letters addressed to the Chairman of the DSB. The Panel began by considering the provisions of the *DSU* and GATT practice:

"The rights of third parties are dealt with in Article 10 and Appendix 3 of the Dispute Settlement Understanding. Article 10 provides that third parties 'shall have an opportunity to be heard by the panel and to make written submissions to the panel'. It also provides that third parties are entitled to receive the submissions of the parties made to the first substantive panel meeting. Paragraph 6 of Appendix 3 specifies that third parties shall be invited 'to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the

[453] Appellate Body Report on *EC – Hormones*, paras. 154–155.
[454] Appellate Body Report on *US – 1916 Act*, para. 144.
[455] Appellate Body Report on *US – 1916 Act*, para. 145.
[456] (*footnote original*) Appellate Body Report, *United States – Anti-Dumping Act of 1916* ("*US – 1916 Act*"), WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 145.
[457] (*footnote original*) Appellate Body Report, *US – 1916 Act*, *supra*, footnote 208, para. 150. See also Appellate Body Report, *EC-Hormones*, *supra*, footnote 40, para. 154.
[458] Appellate Body Report on *US – FSC (Article 21.5 – European Communities)*, para. 243.
[459] WT/DSB/M/16, item 1, pp. 1–5.

entirety of this session'. Under prior GATT practice, more expansive rights were granted to third parties in several disputes, including the two prior disputes involving bananas and in the *Semiconductors* case.[460] In those cases, however, the extension of such rights had been the subject of agreement between the parties at that time. No such agreement existed between the parties in the present dispute."[461]

313. After the first substantive meeting, the Panel on *EC – Bananas III* made the following ruling:

"We thereafter ruled as follows:

(a) The Panel has decided, after consultations with the parties in conformity with DSU Article 12.1, that members of governments of third parties will be permitted to observe the second substantive meeting of the Panel with the parties. The Panel envisages that the observers will have the opportunity also to make a brief statement at a suitable moment during the second meeting. The Panel does not expect them to submit additional written material beyond responses to the questions already posed during the first meeting.

(b) The Panel based its decision, *inter alia*, on the following considerations:

(i) the economic effect of the disputed EC banana regime on certain third parties appeared to be very large;

(ii) the economic benefits to certain third parties from the EC banana regime were claimed to derive from an international treaty between them and the EC;

(iii) past practice in panel proceedings involving the banana regimes of the EC and its member States; and

(iv) the parties to the dispute could not agree on the issue.

As a consequence of our ruling, the third parties in these proceedings enjoyed broader participatory rights than are granted to third parties under the DSU."[462]

314. After granting certain enhanced third-party rights, the Panel on *EC – Bananas III* declined to grant further such rights, including participation in the interim review process:

"Following the second substantive meeting of the Panel with the parties, several of the third parties asked for further participatory rights, including participation in the interim review process. We consulted the parties and found that, as before, they had diverging views on the appropriateness of granting this request. We decided that no further participatory rights should be extended to third parties, except, in accord with normal practice, to permit them to review the draft of the summary of their arguments in the Descriptive Part. In this regard, we noted that Article 15 of the DSU, which deals with the interim review process, refers only to parties as participants in that process. In our view, to give third parties all of the rights of parties would inappropriately blur the distinction drawn in the DSU between parties and third parties."[463]

315. In *EC – Hormones*, the Appellate Body upheld the Panel's decisions to grant additional participatory rights to the United States and Canada, specifically to have access to all information from the proceedings initiated by the other country, respectively, and for the United States to observe and to make a statement at the second substantive meeting in the proceeding initiated by Canada. See paragraphs 307–308 above.

316. In contrast to the *EC – Hormones* dispute, the Panel on *US – 1916 Act* refused to grant the European Communities and Japan enhanced third-party rights in each other's case. The Panel, in a finding subsequently upheld by the Appellate Body, held:[464]

"We conclude from the reports in the *EC – Hormones* cases that enhanced third party rights were granted primarily because of the specific circumstances in those cases.

We find that no similar circumstances exist in the present matter, which does *not* involve the *consideration of complex facts or scientific evidence*. Moreover, *none* of the parties *requested* that the panels *harmonise their timetables or hold concurrent deliberations* in the two procedures (WT/DS136 and WT/DS162). In fact, the European Communities was not in favour of delaying the proceedings in WT/DS136 and the United States objected to concurrent deliberations."[465]

317. The Appellate Body on *US – 1916 Act* confirmed its finding in the *EC – Hormones* case that the grant of additional third-party rights is within "the sound discretion" of a Panel and rejected the arguments by the European Communities and Japan:

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[460] (*footnote original*) Panel Report on "*EEC – Import Regime for Bananas*", issued on 11 February 1994 (not adopted), DS38/R, p.4, para. 8; Panel Report on "*EEC – Member States' Import Regimes for Bananas*", issued on 3 June 1993 (not adopted), DS32/R, p.2, para. 9; Panel Report on "*Japan – Trade in Semiconductors*", adopted on 4 May 1988, BISD 35S/116, 116–117, para. 5. See also Panel Report on "*EEC – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*", issued on 7 February 1985 (not adopted), L/5776, p.2, para. 1.5; Interim Panel Report on "*United Kingdom – Dollar Area Quotas*", adopted on 30 July 1973, BISD 20S/230, 231, para. 3.

[461] Panel Report on *EC – Bananas III*, para. 7.5.

[462] Panel Report on *EC – Bananas III*, para. 7.8.

[463] Panel Report on *EC – Bananas III*, para. 7.9.

[464] Appellate Body Report on *US – 1916 Act*, para. 150. See also para. 305 of this Chapter.

[465] Panel Report on *US – 1916 Act (EC)*, paras. 6.33–6.34. See also Panel Report on *US – 1916 Act (Japan)*, paras. 6.33–6.34.

"The rules relating to the participation of third parties in panel proceedings are set out in Article 10 of the DSU, and, in particular, paragraphs 2 and 3 thereof, and in paragraph 6 of Appendix 3 to the DSU.

. . .

Although the European Communities and Japan invoke Article 9 of the DSU, and, in particular, Article 9.3, in support of their position, we note that Article 9 of the DSU, which concerns procedures for multiple complaints related to the same matter, does not address the issue of the rights of third parties in such procedures.

Under the DSU, as it currently stands, third parties are only entitled to the participatory rights provided for in Articles 10.2 and 10.3 and paragraph 6 of Appendix 3.

. . .

Pursuant to Article 12.1, a panel is required to follow the Working Procedures in Appendix 3, unless it decides otherwise after consulting the parties to the dispute.

In support of their argument that the Panel should have granted them 'enhanced' third party rights, the European Communities and Japan refer to the considerations that led the panel in *European Communities – Hormones* to grant third parties 'enhanced' participatory rights, and stress the similarity between *European Communities – Hormones* and the present cases.

. . .

In our Report in *European Communities – Hormones*, we stated:

> Although Article 12.1 and Appendix 3 of the DSU do not specifically require the Panel to grant . . . ['enhanced' third party rights] to the United States, we believe that this decision falls within the sound discretion and authority of the Panel, particularly if the Panel considers it necessary for ensuring to all parties due process of law.[466]

A panel's decision whether to grant "enhanced" participatory rights to third parties is thus a matter that falls within the discretionary authority of that panel. Such discretionary authority is, of course, not unlimited and is circumscribed, for example, by the requirements of due process. In the present cases, however, the European Communities and Japan have not shown that the Panel exceeded the limits of its discretionary authority. We, therefore, consider that there is no legal basis for concluding that the Panel erred in refusing to grant 'enhanced' third party rights to Japan or the European Communities."[467]

318. In *EC – Tariff Preferences*, certain third parties requested the Panel to extend enhanced third-party rights to them; other third parties requested the Panel to grant the same rights to all third parties. The Panel decided to grant enhanced rights to all third parties on the following grounds:

"Having carefully considered the arguments of the parties and third parties in this case, the Panel considers as follows:

(a) There are significant similarities between this case and that of *EC – Bananas III (WT/DS27)* in terms of economic impact of the preference programmes on third-party developing countries. Both those third parties that are beneficiaries under the EC's Drug Arrangements and those that are excluded have a significant economic interest in the matter before this Panel.

(b) The outcome of this case could have a significant trade-policy impact on the US as a preference-giving country.

(c) As a matter of due process, it is appropriate to provide the same procedural rights to all third parties in this dispute.

(d) In granting any additional rights to third parties, it is important to guard against an inappropriate blurring of the distinction drawn in the DSU between parties and third parties."[468]

(b) "Substantial interest"

319. The Appellate Body referred briefly to Article 10.2 in its finding in *EC – Bananas III* that no "legal interest" is required for a Member to bring a case under the *DSU*. See paragraph 158 above.

3. Article 10.3

(a) "Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel"

320. As regards the access to second written submissions (rebuttals) by third parties in Article 21.5 panel proceedings, see Section XXI.B.4(c)(iv) below.

4. Third-party rights in preliminary ruling proceedings

321. In this regard, see Sections XXX.B.3(e) and XXXVI.C.1(d) below.

5. Third-party rights under Article 22.6

322. With respect to third-party rights under Article 22.6 of the *DSU*, see the excerpts from the reports of the decisions by the arbitrator referenced in paragraph 695 below.

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[466] (*footnote original*) Appellate Body Report [on *EC – Hormones*], para. 154.
[467] Appellate Body Report on *US – 1916 Act*, paras. 139–150.
[468] Panel Report on *EC – Tariff Preferences*, para. 7 of Annex A.

6. Authority of the panel to direct a Member to be a third party

323. In *Turkey – Textiles*, Turkey argued that the European Communities should be a party to the dispute because the measure taken by Turkey was done so pursuant to a regional trade agreement between Turkey and the European Communities. The Panel ruled:

> "In the absence of any relevant provision in the DSU, in light of international practice,[469] and noting the position of the EC to this point, we consider that we do not have the authority to direct that a WTO Member be made third-party or that it otherwise participate throughout the panel process."[470]

7. Essential parties

324. In *Turkey – Textiles*, Turkey claimed that the Panel should dismiss India's claims because the measures were taken pursuant to a regional trade agreement between Turkey and the European Communities and the latter therefore should have been a party to the dispute. The Panel addressed the concept of "essential parties" first by referring to the case law of the International Court of Justice (ICJ), more specifically to the *Military and Paramilitary Activities in and Against Nicaragua* and the *Phosphate Lands in Nauru* cases:[471]

> "The practice of the ICJ indicates that if a decision between the parties to the case can be reached without an examination of the position of the third state (i.e. in the WTO context, a Member) the ICJ will exercise its jurisdiction as between the parties. In the present dispute, there are no claims against the European Communities before us that would need to be determined in order for the Panel to assess the compatibility of the Turkish measures with the WTO Agreement."[472]

325. After analysing the practice of the ICJ with respect to the "essential parties" concept, the Panel on *Turkey – Textiles* noted:

> "[T]here is no WTO concept of 'essential parties'. Based on our terms of reference and the fact that we have decided (as further discussed hereafter) not to examine the GATT/WTO compatibility of the Turkey-EC customs union, we consider that the European Communities was not an essential party to this dispute; the European Communities, had it so wished, could have availed itself of the provisions of the DSU, which we note have been interpreted with a degree of flexibility by previous panels,[473] in order to represent its interests. We recall in this context that Panel and Appellate Body reports are binding on the parties only.[474]
>
> Under WTO rules, the European Communities and Turkey are Members with equal and independent rights and obligations. For Turkey, it is not at all inconceivable that it adopted the measures in question in order to have its own policy coincide with that of the European Communities. However, in doing so, it should have been aware, in respect of the measures it has chosen, that its circumstances were different from those of the European Communities in relation to the Agreement on Textiles and Clothing ('ATC') and thus could reasonably have been anticipated to give rise to responses which focussed on that distinction."[475]

XI. ARTICLE 11

A. TEXT OF ARTICLE 11

Article 11
Function of Panels

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

B. INTERPRETATION AND APPLICATION OF ARTICLE 11

1. Standard of review under the DSU

326. In *US – Cotton Yarn*, the Appellate Body indicated that its Reports on *Argentina – Footwear (EC)*, *US – Lamb* and *US – Wheat Gluten* (see paragraphs 381–385 below), all concerning disputes under the *Agreement on Safeguards*, "spell out key elements of a panel's standard of review under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations". The Appellate Body stated:

> "This standard may be summarized as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether

[469] (*footnote original*) The Panel examined relevant principles of international law, including the practice of the International Court of Justice in the *Military and Paramilitary Activities in and Against Nicaragua* case ([1984], ICJ Reports, pp. 430–431) and the *Phosphate Lands in Nauru* case ([1992], ICJ Reports, pp. 259–262) cases (preliminary objections).
[470] Panel Report on *Turkey – Textiles*, para. 9.5.
[471] Panel Report on *Turkey – Textiles*, paras. 9.8–9.9.
[472] Panel Report on *Turkey – Textiles*, para. 9.10.
[473] (*footnote original*) See for instance the Panel Reports on *EC – Bananas III*, paras. 7.4–7.9; and *EC – Hormones*, paras. 8.12–8.15.
[474] (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 13.
[475] Panel Report on *Turkey – Textiles*, paras. 9.11–9.12.

> the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority."[476]

327. In *EC – Hormones*, the European Communities argued in its appeal that the Panel had failed to apply an appropriate standard of review in assessing certain acts of, and scientific evidentiary material submitted by, the European Communities. The Appellate Body held that the applicable standard of review under Article 11 of the *DSU* is neither *de novo* review, nor "total deference", but rather the "objective assessment of the facts":

> "The standard of review appropriately applicable in proceedings under the *SPS Agreement*, of course, must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.[477] To adopt a standard of review not clearly rooted in the text of the *SPS Agreement* itself, may well amount to changing that finely drawn balance; and neither a panel nor the Appellate Body is authorized to do that.
>
> . . . Article 11 of the DSU bears directly on [the] matter [of standard of review] and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements.
>
> So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo* review as such, nor 'total deference', but rather the 'objective assessment of the facts'."[478]

328. As regards the application of the standard of review of Article 11 of the *DSU* to disputes concerning safeguard and countervailing measures, see Sections XI.B.6(a) and XI.B.6(d) below respectively.

2. "objective assessment of the matter before it"

(a) "the matter before it"

(i) General

329. As regards the concept of "matter", see Section VII.B.2(a)(i) above.

330. In *EC – Poultry*, the Appellate Body warned that "[a]n allegation that a panel has failed to conduct the 'objective assessment of the matter before it' required by Article 11 of the DSU is a very serious allegation. Such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself."[479]

(ii) Finding on a claim not made by the complainant

331. In *Chile – Price Band System*, the Appellate Body considered that the Panel had exceeded its mandate and thus acted inconsistently with Article 11 because it had "made a finding on a claim that was *not* made by Argentina" and "in so doing, the Panel assessed a provision that was not a part 'of the matter before it'":

> "In this case, the Panel made a finding on a claim that was *not* made by Argentina. Having determined that the duties resulting from Chile's price band system could not be assessed under the first sentence[480] of Article II:1(b) of the GATT 1994, the Panel then proceeded to examine the measure under the second sentence of that provision. In so doing, the Panel assessed a provision that was not a part 'of the matter before it'. As we have explained, the terms of reference were broad enough to have included a claim under the second sentence of Article II:1(b). However, Argentina did not articulate a claim under that sentence; nor did Argentina submit any arguments on the consistency of Chile's price band system with the second sentence.[481] Therefore, as with our finding in *US – Certain EC Products,*[482] the second sentence of Article II:1(b) was not the subject of a claim before the Panel. Because it made a finding on a provision that was not before it, the Panel, therefore, did not make an objective assessment *of the matter before it*, as required by Article 11. Rather, the Panel made a finding on a matter that was *not* before it. In doing so, the Panel acted *ultra petita* and inconsistently with Article 11 of the DSU."[483]

(iii) Reference in Panel's reasoning to provisions not included in the claims

332. In *Argentina – Footwear (EC)*, the Appellate Body considered Argentina's argument that the Panel violated Article 7.2 of the *DSU* and exceeded its terms of

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[476] Appellate Body Report on *US – Cotton Yarn*, para. 74.
[477] (*footnote original*) See, for example, S. P. Croley and J. H. Jackson, "WTO Dispute Panel Deference to National Government Decisions, The Misplaced Analogy to the U.S. Chevron Standard-of-Review Doctrine", in E.-U. Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer, 1997) 185, p. 189; P. A. Akakwam, "The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations" (1996), 5:2 *Minnesota Journal of Global Trade* 277, pp. 295–296.
[478] Appellate Body Report on *EC – Hormones*, paras. 115–117.
[479] Appellate Body Report on *EC – Poultry*, para. 133.
[480] (*footnote original*) Panel Report, para. 7.104.
[481] See para. 287 of this Chapter.
[482] See para. 286 of this Chapter.
[483] Appellate Body Report on *Chile – Price Band System*, para. 173.

reference, because the Panel not only considered, but also relied on, alleged violations of Article 3 of the *Agreement on Safeguards* even though the request for the establishment of a Panel submitted by the European Communities only alleged violations of Articles 2 and 4 of the *Agreement on Safeguards*.[484] The Appellate Body considered that it "fail[ed] to see how any panel could be expected to make an 'objective assessment of the matter', as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims":

> "We note that the very terms of Article 4.2(c) of the *Agreement on Safeguards* expressly incorporate the provisions of Article 3. Thus, we find it difficult to see how a panel could examine whether a Member had complied with Article 4.2(c) without also referring to the provisions of Article 3 of the *Agreement on Safeguards*. More particularly, given the express language of Article 4.2(c), we do not see how a panel could ignore the publication requirement set out in Article 3.1 when examining the publication requirement in Article 4.2(c) of the *Agreement on Safeguards*. And, generally, we fail to see how the Panel could have interpreted the requirements of Article 4.2(c) *without* taking into account in some way the provisions of Article 3. What is more, we fail to see how any panel could be expected to make an 'objective assessment of the matter', as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims."[485]

(iv) Consideration of parties' arguments by the Panel

333. In *EC – Poultry*, Brazil argued in its appeal that the Panel had not made "an objective assessment of the matter before it" because, in Brazil's view, the Panel had failed to consider various arguments made by Brazil regarding GATT/WTO jurisprudence. The Appellate Body rejected this argument:

> "In *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, we stated that nothing in Article 11 'or in previous GATT practice *requires* a panel to examine *all* legal claims made by the complaining party', and that '[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.' Just as a panel has the discretion to address only those *claims* which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim. So long as it is clear in a panel report that a panel has reasonably considered a claim, the fact that a particular argument relating to that claim is not specifically addressed in the 'Findings' section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the 'objective assessment of the matter before it' required by Article 11 of the DSU."[486]

334. In *Australia – Automotive Leather II (Article 21.5 – US)*, both parties argued that the task of the Panel was to choose between the positions articulated by each party. The Panel disagreed and stated:

> "That neither party has argued a particular interpretation before us, and indeed, that both have argued that we should not reach issues of interpretation that they have not raised, cannot, in our view, preclude us from considering such issues if we find this to be necessary to resolve the dispute that is before us. A panel's interpretation of the text of a relevant WTO Agreement cannot be limited by the particular arguments of the parties to a dispute."[487]

(v) Due process implications

335. In *Chile – Price Band System*, the Appellate Body concluded that the Panel had made a finding on a claim that had not been made by Argentina.[488] Chile had claimed that, by making a finding on that claim, the Panel had deprived Chile of a fair right of response. The Appellate Body agreed with Chile and found that the Panel had acted inconsistently with Article 11 of the *DSU* by denying Chile the due process of a fair right of response.[489] In support of this finding, the Appellate Body considered that "in making 'an objective assessment of the matter before it', a panel is also duty bound to ensure that due process is respected":

> "Article 11 imposes duties on panels that extend beyond the requirement to assess evidence objectively and in good faith . . . This requirement is, of course, an indispensable aspect of a panel's task. However, in making 'an objective assessment of the matter before it', a panel is also duty bound to ensure that due process is respected. Due process is an obligation inherent in the WTO dispute settlement system. A panel will fail in the duty to respect due process if it makes a finding on a matter that is not before it, because it will thereby fail to accord to a party a fair right of response. In this case, because the Panel did not give Chile a fair right of response on this issue, we find that the Panel failed to accord to Chile the due process rights to which it is entitled under the DSU."[490]

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[484] Appellate Body Report on *Argentina – Footwear (EC)*, para. 71.
[485] Appellate Body Report on *Argentina – Footwear (EC)*, para. 74. As regards the Panel's mandate limitations concerning the assessment of only specific claims, see paras. 286–287 of this Chapter.
[486] Appellate Body Report on *EC – Poultry*, para. 135.
[487] Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.19.
[488] See para. 287 of this Chapter.
[489] As regards the right of response in the context of due process, see paras. 928–930 of this Chapter.
[490] Appellate Body Report on *Chile – Price Band System*, para. 176.

(vi) Consultation of experts

336. In *India – Quantitative Restrictions*, India argued in its appeal that the Panel had acted inconsistently with Article 11 of the *DSU* because it had delegated to the IMF its duty to make an objective assessment. The Appellate Body disagreed with India and stated:

> "The Panel gave considerable weight to the views expressed by the IMF in its reply to these questions. However, nothing in the Panel Report supports India's argument that the Panel delegated to the IMF its judicial function to make an objective assessment of the matter. A careful reading of the Panel Report makes clear that the Panel did not simply accept the views of the IMF. The Panel critically assessed these views and also considered other data and opinions in reaching its conclusions."[491]

3. "objective assessment of the facts"

(a) Extent of panels' duty/discretion to examine the evidence

(i) Duty to examine all evidence

337. In the first appeal presenting an Article 11 challenge to a Panel's fact-finding,[492] *EC – Hormones,* the Appellate Body stressed that "[t]he duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts." The Appellate Body further considered that "[t]he wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts".[493]

338. In *Korea – Dairy*, Korea argued in its appeal that the Panel should have looked solely at the evidence submitted by the European Communities as the complaining party to determine whether the European Communities had met its burden of proof of making a prima facie case. The Appellate Body disagreed and stated that "under Article 11 of the DSU, a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof."[494] With respect to the burden of proof issue in this context, see also paragraph 1000 below.

(ii) Panels' discretion as trier and weigher of the facts

339. In *EC – Hormones*, the Appellate Body stressed the role of the Panel as the trier of the facts and considered that the "[d]etermination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts".[495] It further stated that "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings".[496] It also said that "[t]he Panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly".[497]

340. In *Australia – Salmon*, with respect to the evaluation of evidence, the Appellate Body considered that "[p]anels . . . are not required to accord to factual evidence of the parties the same meaning and weight as do the parties".[498] The Appellate Body came to a similar conclusion in *EC – Bed Linen (Article 21.5 – India)*. See paragraph 354 below.

341. In *Korea – Alcoholic Beverages*, the Appellate Body reiterated the role of the Panel as the trier of the facts with the corresponding discretion to examine and weigh the evidence. The Appellate Body, however, held that this discretion "is not, of course, unlimited" since it is always subject to the panel's duty to render an objective assessment of the matter before it:[499]

> "The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review. This is true, for instance, with respect to the Panel's treatment of the Dodwell Study, the Sofres Report and the Nielsen Study. We cannot second-guess the Panel in appreciating either the evidentiary value of such studies or the consequences, if any, of alleged defects in those studies. Similarly, it is not for us to review the relative weight ascribed

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[491] Appellate Body Report on *India – Quantitative Restrictions*, para. 149.

[492] Prior to *EC – Hormones*, an Article 11 claim was raised on appeal in *US – Wool Shirts and Blouses*, but that claim addressed solely the issue of "whether Article 11 of the *DSU* entitles a complaining party to a finding on each of the legal claims it makes to a panel". See Appellate Body Report on *US – Wool Shirts and Blouse*, p. 17. As such, the claim did not challenge the panel's "assessment of the facts of the case". In addition, in *Canada – Periodicals*, the appellant raised the issue of Article 11 when challenging the panel's reliance on a "hypothetical example" to make a determination of "like products" under Article III:2 of the GATT 1994. *See* Appellate Body Report on *Canada – Periodicals*, p. 5. The Appellate Body, however, made no ruling on Article 11 (pp. 20–23).

[493] Appellate Body Report on *EC – Hormones*, para. 133.

[494] Appellate Body Report on *Korea – Dairy*, para. 137.

[495] Appellate Body Report on *EC – Hormones*, para. 132.

[496] Appellate Body Report on *EC – Hormones*, para. 135.

[497] Appellate Body Report on *EC – Hormones*, para. 138.

[498] Appellate Body Report on *Australia – Salmon*, para. 267.

[499] As regards the Panel's duty to render an objective assessment of the facts, see Section XI.B.1.

to evidence on such matters as marketing studies, methods of production, taste, colour, places of consumption, consumption with 'meals' or with 'snacks', and prices.

A panel's discretion as trier of facts is not, of course, unlimited. That discretion is always subject to, and is circumscribed by, among other things, the panel's duty to render an objective assessment of the matter before it. In *European Communities – Hormones*, we dealt with allegations that the panel had 'disregarded', 'distorted' and 'misrepresented' the evidence before it."[500]

342. The Panel on *Australia – Automotive Leather II* observed that any evidentiary rulings that the Panel makes must be consistent with its obligation under Article 11 to conduct "an objective assessment of the matter before it". In the Panel's view, "a decision to limit the facts and arguments that the United States may present during the course of this proceeding to those set forth in the request for consultations would make it difficult, if not impossible, for us to fulfil our obligation to conduct an 'objective assessment' of the matter before us".[501]

343. In *US – Wheat Gluten*, the Appellate Body again referred to the Panel as the trier of facts in respect of its discretion to consider the evidence in a given case and recalled its prior jurisprudence on the scope of the review that the Appellate Body can undertake of the Panel's findings pursuant to Article 17.6 of the *DSU* (see also Section XVII.B.4 below):

"[W]e recall that, in previous appeals, we have emphasized that the role of the Appellate Body differs from the role of panels. Under Article 17.6 of the DSU, appeals are 'limited to *issues of law* covered in the panel report and *legal* interpretations developed by the panel'. (emphasis added) By contrast, we have previously stated that, under Article 11 of the DSU, panels are:

> . . . charged with the mandate to determine the *facts* of the case and to arrive at *factual findings*. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof.[502] (emphasis added)

We have also stated previously that, although the task of panels under Article 11 relates, in part, to its assessment of the *facts*, the question whether a panel has made an 'objective assessment' of the facts is a *legal* one, that may be the subject of an appeal.[503] (emphasis added) However, in view of the distinction between the respective roles of the Appellate Body and panels, we have taken care to emphasize that a panel's appreciation of the evidence falls, in principle, 'within the *scope of the panel's discretion as the trier of facts*'.[504] (emphasis added). In assessing the panel's appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence. As is clear from previous appeals, we will not interfere lightly with the panel's exercise of its discretion.[506]"[507]

344. The Panel on *EC – Bed Linen* examined the European Communities' objection to the inclusion by India in its submission of reports of the consultations between the parties which took place before the establishment of the Panel. Although the Panel made no findings on the European Communities' claims, it provided its thoughts about the difference between questions concerning the admissibility of evidence, and the weight to be accorded to the evidence in making its decisions. In doing so, it referred to the Panel on *Australia – Automotive Leather II* (see paragraph 342 above):

"[I]t seems that the evidence concerning the consultations is at best unnecessary, and may be irrelevant. That said, however, merely because the evidence is unnecessary or irrelevant does not require us to exclude it.

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[500] (*footnote original*) Appellate Body Report on *Korea – Alcoholic Beverages*, paras. 161–162. See also Appellate Body Report on *India – Quantitative Restrictions*, paras. 143–144.

[501] Panel Report on *Australia – Automotive Leather II*, para. 9.25.

[502] (*footnote original*) Appellate Body Report, *Korea – Dairy Safeguard, supra*, footnote 29, para. 137.

[503] (*footnote original*) Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, at 183, para. 132.

[504] (*footnote original*) Appellate Body Report, *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, paras. 161 and 162.

[506] (*footnote original*) Appellate Body Report, *European Communities – Hormones*, *supra*, footnote 138, at 183–188, paras. 131–142; Appellate Body Report, *European Communities – Poultry*, *supra*, footnote 119, paras. 131–136; Appellate Body Report, *Australia – Salmon*, *supra*, footnote 119, paras. 262–267; Appellate Body Report, *Korea – Alcoholic Beverages*, *supra*, footnote 139, paras. 159–165; Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, paras. 140–142; Appellate Body Report, *India – Quantitative Restrictions on Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, paras. 149 and 151; and, Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, footnote 29, paras. 137 and 138.

[507] Appellate Body Report on *US – Wheat Gluten*, paras. 150–151. See also Appellate Body Report on *EC – Sardines*, para. 299.

> . . . we consider that it is not necessary to limit the facts and arguments India may present, even if we might consider those facts or arguments to be irrelevant or not probative on the issues before us. In our view, there is a significant and substantive difference between questions concerning the admissibility of evidence, and the weight to be accorded evidence in making our decisions. That is, we may choose to allow parties to present evidence, but subsequently not consider that evidence, because it is not relevant or necessary to our determinations or is not probative on the issues before it. In our view, there is little to be gained by expending our time and effort in ruling on points of 'admissibility' of evidence *vel non*.
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> In addition, we note that, under Article 13.2 of the DSU, Panels have a general right to seek information 'from any relevant source'. In this context, we consider that, as a general rule, panels have wide latitude in admitting evidence in WTO dispute settlement. The DSU contains no rule that might restrict the forms of evidence that panels may consider. Moreover, international tribunals are generally free to admit and evaluate evidence of every kind, and to ascribe to it the weight that they see fit. As one legal scholar has noted:
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> > 'The inherent flexibility of the international procedure, and its tendency to be free from technical rules of evidence applied in municipal law, provide the "evidence" with a wider scope in international proceedings . . . . Generally speaking, international tribunals have not committed themselves to the restrictive rules of evidence in municipal law. They have found it justified to receive every kind and form of evidence, and have attached to them the probative value they deserve under the circumstances of a given case'.[508]
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> It has clearly been held in the WTO that information obtained in consultations may be presented in subsequent panel proceedings.[509]"[510]

345. In *US – Carbon Steel*, the Appellate Body summarized its previous jurisprudence on the extent of panels' duty to examine the evidence:

> "As we have observed previously, Article 11 requires panels to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence.[511] Nor may panels make affirmative findings that lack a basis in the evidence contained in the panel record.[512] Provided that panels' actions remain within these parameters, however, we have said that 'it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings',[513] and, on appeal, we 'will not interfere lightly with a panel's exercise of its discretion'.[514]"[515]

346. The Appellate Body on *US – Carbon Steel*, further underlined that "although panels enjoy a *discretion*, pursuant to Article 13 of the DSU,[516] to seek information 'from any relevant source', Article 11 of the DSU imposes no *obligation* on panels to conduct their own fact-finding exercise, or to fill in gaps in the arguments made by parties."[517]

347. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body ruled that it is not "an error, let alone an egregious error", for a panel to decline to accord to the evidence the weight that one of the parties sought to have accorded to it.[518] In this regard, see paragraph 354 below. Specifically, India had argued that the Panel had not made an objective assessment of the facts of the case because the Panel had distorted the evidence by placing greater weight on the statements made by the European Communities than on those made by India. The Appellate Body stressed that "the weighing of the evidence is within the discretion of the Panel as the trier of facts, and there is no indication in this case that the Panel exceeded the bounds of this discretion".[519]

348. The Appellate Body on *Japan – Apples* considered that a panel was not obliged to give precedence to the *importing* Member's approach to scientific evidence and risk over the views of the experts when analysing and assessing scientific evidence to determine whether a complainant established a prima facie case under Article 2.2.[520] As regards the examination of scientific evidence by panels in SPS disputes, see Section III.B.(c) of the Chapter on the *SPS Agreement*. In addition, the Appellate Body summarized its previous jurisprudence

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[508] (*footnote original*) Kazazi, Mojtaba, *Burden of Proof and Related Issues – A Study of Evidence Before International Tribunals*, Malanczuk, Peter, ed., Kluwer Law International, The Hague, pp. 180, 184.

[509] (*footnote original*) *Korea – Taxes on Alcoholic Beverages*, Panel Report, WT/DS75/R–WT/DS84/R, adopted 17 February 1999, para. 10.23 (issue not raised on appeal). This is unlike the situation before many international tribunals, which often refuse to admit evidence obtained during settlement negotiations between the parties to a dispute. The circumstances of such settlement negotiations are clearly different from WTO dispute settlement consultations, which are, as the Appellate Body has noted, part of the means by which facts are clarified before a panel proceeding.

[510] Panel Report on *EC – Bed Linen*, paras. 6.32–6.35.

[511] (*footnote original*) Appellate Body Report, *EC – Hormones*, para. 133.

[512] (*footnote original*) Appellate Body Report, *US – Wheat Gluten*, paras. 161–162.

[513] (*footnote original*) Appellate Body Report, *EC – Hormones*, para. 135.

[514] (*footnote original*) Appellate Body Report, *US – Wheat Gluten*, para. 151.

[515] Appellate Body Report on *US – Carbon Steel*, para. 142.

[516] (*footnote original*) As we have stated, "[T]his is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision." (Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84.)

[517] Appellate Body Report on *US – Carbon Steel*, para. 153.

[518] Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 177.

[519] Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 181.

[520] Appellate Body Report on *Japan – Apples*, paras. 165–166.

on the panels' discretion as trier and weigher of the evidence:

"Since *EC – Hormones*, the Appellate Body has consistently emphasized that, within the bounds of their obligation under Article 11 to make an objective assessment of the facts of the case, panels enjoy a 'margin of discretion' as triers of fact.[521] Panels are thus 'not required to accord to factual evidence of the parties the same meaning and weight as do the parties'[522] and may properly 'determine that certain elements of evidence should be accorded more weight than other elements'.[523]

Consistent with this margin of discretion, the Appellate Body has recognized that 'not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts.'[524] When addressing claims under Article 11 of the DSU, the Appellate Body does not 'second-guess the Panel in appreciating either the evidentiary value of . . . studies or the consequences, if any, of alleged defects in [the evidence]'.[525] Indeed:

> '[i]n assessing the panel's appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence.'[526]

Where parties challenging a panel's fact-finding under Article 11 have failed to establish that a panel exceeded the bounds of its discretion as the trier of facts, the Appellate Body has not 'interfere[d]' with the findings of the panel.[527]"[528]

349. In *US – Wheat Exports and Grain Imports*, the Appellate Body, referring to its prior jurisprudence, ruled that the Panel's decision not to rely on some of the facts submitted by one of the parties "would not, by itself, constitute legal error":

"As we said earlier,[529] the Appellate Body has previously held that 'it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings'.[530] Accordingly, the Panel's decision not to rely on some of the facts that the United States claims to have submitted would not, by itself, constitute legal error. To succeed in its claim that the Panel disregarded the evidence submitted to it, the United States would have to demonstrate that the Panel exceeded its discretion and that the Panel made, in effect, an 'egregious error'[531]"[532]

(iii) Egregious error calling into question the good faith of a panel

350. In *EC – Hormones*, the European Communities argued in its appeal that the Panel had disregarded or distorted the evidence submitted by the European Communities as well as the testimony provided by the experts advising the Panel. The European Communities claimed that the Panel had failed to make an objective assessment of the facts as required by Article 11 of the *DSU*. The Appellate Body disagreed with the European Communities and set forth the standard, for a violation of Article 11, as "an egregious error that calls into question the good faith of a panel". The Appellate Body concluded by holding that "[a] claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice":

"Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review.

The question which then arises is this: when may a panel be regarded as having failed to discharge its duty under Article 11 of the DSU to make an objective assessment of the facts before it? Clearly, not every error in the appreciation of the evidence (although it may give rise to

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[521] (*footnote original*) Appellate Body Report, *EC – Asbestos*, para. 161. See also, for example, Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 125; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 161–162; Appellate Body Report, *Japan – Agricultural Products II*, paras. 141–142; Appellate Body Report, *US – Wheat Gluten*, para. 151; Appellate Body Report, *Australia – Salmon*, para. 266; and Appellate Body Report, *Korea – Dairy*, para. 138.

[522] (*footnote original*) Appellate Body Report, *Australia – Salmon*, para. 267.

[523] (*footnote original*) Appellate Body Report, *EC – Asbestos*, para. 161.

[524] (*footnote original*) Appellate Body Report, *EC – Hormones*, para. 133.

[525] (*footnote original*) Appellate Body Report, *EC – Asbestos*, para. 177, quoting Appellate Body Report, *Korea – Alcoholic Beverages*, para. 161.

[526] (*footnote original*) Appellate Body Report, *EC – Asbestos*, para. 159, quoting Appellate Body Report, *US – Wheat Gluten*, para. 151.

[527] (*footnote original*) Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 170; Appellate Body Report, *US – Carbon Steel*, para. 142, quoting Appellate Body Report, *US – Wheat Gluten*, para. 151.

[528] Appellate Body Report on *Japan – Apples*, paras. 221–222.

[529] (*footnote original*) *Supra*, para. 181, quoting from Appellate Body Report, *US – Carbon Steel*, para. 142.

[530] (*footnote original*) Appellate Body Report, *EC – Hormones*, para. 135. The Appellate Body further observed that "The Panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly." (Appellate Body Report, *EC – Hormones*, para. 138.)

[531] (*footnote original*) Appellate Body Report, *EC – Hormones*, para. 133; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 177.

[532] Appellate Body Report on *US – Wheat Exports and Grain Imports*, para. 186.

a question of law) may be characterized as a failure to make an objective assessment of the facts. In the present appeal, the European Communities repeatedly claims that the Panel disregarded or distorted or misrepresented the evidence submitted by the European Communities and even the opinions expressed by the Panel's own expert advisors. The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. 'Disregard' and 'distortion' and 'misrepresentation' of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.

. . .

[I]t is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings.

. . .

The Panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly."[533]

351. In *Australia – Salmon*, Australia argued in its appeal that the Panel had failed to make an objective assessment of the matter before it and had not applied the appropriate standard of review pursuant to Article 11 of the *DSU*. The Appellate Body noted Australia's argument that the Panel "partially or wholly ignored relevant evidence placed before it, or misrepresented evidence in a way that went beyond a mere question of the weight attributed to it, but constituted an egregious error amounting to an error of law". The Appellate Body stated:

"[I]n response to Australia's contention that the Panel failed to accord 'due deference' to matters of fact it put forward, we note that Article 11 of the DSU calls upon panels to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements'. Therefore, the function of this Panel was to assess the facts in a manner consistent with its obligation to make such an 'objective assessment of the matter before it'. We believe the Panel has done so in this case. Panels, however, are not required to accord to factual evidence of the parties the same meaning and weight as do the parties."[534]

352. In *Korea – Alcoholic Beverages*, Korea argued in its appeal that the Panel had breached its obligation under Article 11 of the *DSU* by applying a "double standard" in assessing the evidence before it. The Appellate Body again referred to the "egregious error" standard:

"We are bound to conclude that Korea has not succeeded in showing that the Panel has committed any egregious errors that can be characterized as a failure to make an objective assessment of the matter before it. Korea's arguments, when read together with the Panel Report and the record of the Panel proceedings, do not disclose that the Panel has distorted, misrepresented or disregarded evidence, or has applied a 'double standard' of proof in this case. It is not an error, let alone an egregious error, for the Panel to fail to accord the weight to the evidence that one of the parties believes should be accorded to it."[535]

353. In *Japan – Agricultural Products II*, the Appellate Body examined Japan's claim that the Panel had not complied with Article 11 of the *DSU* when it made a finding under Article 2.2 of the *SPS Agreement* concerning the varietal testing requirement as it applies to apples, cherries, nectarines and walnuts. More specifically, Japan claimed the Panel had not properly examined evidence, had treated expert views in an arbitrary manner and had not properly evaluated the evidence before it. The Appellate Body referred to its previous decision in *EC – Hormones* and reiterated that "[o]nly egregious errors constitute a failure to make an objective assessment of the facts as required by Article 11 of the DSU":

"As we stated in our Report in *European Communities – Hormones*, not every failure by the Panel in the appreciation of the evidence before it can be characterized as failure to make an objective assessment of the facts as required by Article 11 of the DSU. Only egregious errors constitute a failure to make an objective assessment of the facts as required by Article 11 of the DSU.

In our view, Japan has not demonstrated that the Panel, in its examination of the consistency of the varietal testing requirement with Article 2.2, has made errors of the gravity required to find a violation of Article 11 of the DSU. We, therefore, conclude that the Panel did not

[533] Appellate Body Report on *EC – Hormones*, paras. 132–133, 135 and 138. See also Appellate Body Report on *Japan – Apples*, para. 222.
[534] Appellate Body Report on *Australia – Salmon*, para. 267.
[535] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 164.

abuse its discretion contrary to the requirements of Article 11 of the DSU."[536]

354. In *EC – Bed Linen (Article 21.5 – India)*, India claimed in appeal that the Panel had failed to meet its obligation under Article 11 of the *DSU* to examine the facts of the case objectively. The Appellate Body ruled that it is not "an error, let alone an egregious error", for a panel to decline to accord to the evidence the weight that one of the parties sought to have accorded to it.

"India has not persuaded us that the Panel in this case exceeded its discretion as the trier of facts. In our view, the Panel assessed and weighed the evidence submitted by both parties, and ultimately concluded that the European Communities had information on all relevant economic factors listed in Article 3.4. It is not 'an error, let alone an egregious error',[537] for the Panel to have declined to accord to the evidence the weight that India sought to have accorded to it. We, therefore, reject India's argument that, by failing to *shift* the burden of proof, the Panel did not properly discharge its duty to assess objectively the facts of the case as required by Article 11 of the DSU."[538]

(b) Municipal law

355. In response to India's assertion that municipal law is a fact that must be established before an international tribunal by the party relying on it and that the Panel should have sought guidance from India on matters relating to the interpretation of Indian law, the Appellate Body in *India – Patents (US)* stated:

"In public international law, an international tribunal may treat municipal law in several ways. Municipal law may serve as evidence of facts and may provide evidence of state practice. However, municipal law may also constitute evidence of compliance or non-compliance with international obligations. For example, in *Certain German Interests in Polish Upper Silesia*, the Permanent Court of International Justice observed:

> 'It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures. *The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.*'[539] (emphasis added)

. . . It is clear that an examination of the relevant aspects of Indian municipal law and, in particular, the relevant provisions of the Patents Act as they relate to the 'administrative instructions', is essential to determining whether India has complied with its obligations under Article 70.8(a). There was simply no way for the Panel to make this determination without engaging in an examination of Indian law. But, as in the case cited above before the Permanent Court of International Justice, in this case, the Panel was not interpreting Indian law 'as such'; rather, the Panel was examining Indian law solely for the purpose of determining whether India had met its obligations under the *TRIPS Agreement*. To say that the Panel should have done otherwise would be to say that only India can assess whether Indian law is consistent with India's obligations under the *WTO Agreement*. This, clearly, cannot be so.

Previous GATT/WTO panels also have conducted a detailed examination of the domestic law of a Member in assessing the conformity of that domestic law with the relevant GATT/WTO obligations. For example, in *United States – Section 337 of the Tariff Act of 1930*, the panel conducted a detailed examination of the relevant United States' legislation and practice, including the remedies available under Section 337 as well as the differences between patent-based Section 337 proceedings and federal district court proceedings, in order to determine whether Section 337 was inconsistent with Article III:4 of the GATT 1947. This seems to us to be a comparable case."[540]

356. In connection with the examination of Sections 301–310 of the US Trade Act of 1974, the Panel in *US – Section 301 Trade Act* stated that it would not "interpret US law 'as such', the way we would, say, interpret provisions of the covered agreements". Rather, the Panel held that it was instead "called upon to establish the meaning of Sections 301–310 as factual elements":

"Our mandate is to examine Sections 301–310 solely for the purpose of determining whether the US meets its WTO obligations. In doing so, we do not, as noted by the Appellate Body in *India – Patents (US)*, interpret US law 'as such', the way we would, say, interpret provisions of the covered agreements. We are, instead, called upon to establish the meaning of Sections 301–310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations. The rules on burden of proof for the establishment of facts referred to above also apply in this respect.[541]

. . .

[536] Appellate Body Report on *Japan – Agricultural Products II*, paras. 141–142.
[537] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164.
[538] Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 177.
[539] (*footnote original*) [1926], PCIJ Rep., Series A, No. 7, p. 19.
[540] Appellate Body Report on *India – Patents (US)*, paras. 65–67.
[541] (*footnote original*) In this respect, the International Court of Justice ("ICJ"), referring to an earlier judgment by the Permanent Court of International Justice ("PCIJ") noted the

> We note, finally, that terms used both in Sections 301–310 and in WTO provisions, do not necessarily have the same meaning. For example, the word 'determination' need not always have the same meaning in Sections 304 and 306 as it has in Article 23.2(a) of the DSU. Thus, conduct not meeting, say, the threshold of a 'determination' under Sections 304 and 306, is not by this fact alone precluded from meeting the threshold of a 'determination' under Article 23.2(a) of the DSU. By contrast, the fact that a certain act is characterized as a 'determination' under domestic legislation, does not necessarily mean that it must be construed as a determination under the covered agreements."[542]

357. In *Brazil – Aircraft (Article 21.5 – Canada)*, the Appellate Body, upholding the Panel, stressed that a WTO Member's domestic law does not excuse that Member from fulfilling its international obligations:

> "We note Brazil's argument before the Article 21.5 Panel that Brazil has a contractual obligation under domestic law to issue PROEX bonds pursuant to commitments that have already been made, and that Brazil could be liable for damages for breach of contract under Brazilian law if it failed to respect its contractual obligations.[543] In response to a question from us at the oral hearing, however, Brazil conceded that a WTO Member's domestic law does not excuse that Member from fulfilling its international obligations. Like the Article 21.5 Panel,[544] we do not consider that any private contractual obligations, which Brazil may have under its domestic law, are relevant to the issue of whether the DSB's recommendation to 'withdraw' the prohibited export subsidies permits the continued issuance of NTN-I bonds under letters of commitment issued before 18 November 1999."[545]

358. In *US – 1916 Act (EC)*, in connection with the examination of the 1916 Act, the European Communities argued that the Panel should not be influenced by the terms used by the United States courts whereas the United States argued that "the proper interpretation of the 1916 Act is a question of fact to be established, as it is an accepted principle of international law that municipal law is a fact to be proven before international tribunals".[546] Referring to paragraph 66 of the Appellate Body Report in *India – Patents (US)*, the Panel stated:

> "[O]ur understanding of the term 'examination' as used by the Appellate Body is that panels need not accept at face value the characterisation that the respondent attaches to its law. A panel may analyse the operation of the domestic legislation and determine whether the description of the functioning of the law, as made by the respondent, is consistent with the legal structure of that Member. This way, it will be able to determine whether or not the law as applied is in conformity with the obligations of the Member concerned under the WTO Agreement.[547]"[548]

359. The Panel on *US – 1916 Act (EC)* then noted that both complaining parties and the defending party relied on United States court cases in their claims. In connection with the consideration of the case law relating to the 1916 Act, the Panel stated:

> "We recall that the International Court of Justice, in the *Elettronica Sicula S.p.A (ELSI)* case, referred to the judgement of the Permanent Court of International Justice in the *Brazilian Loans* case – to which the United States also refers in its submissions – and noted that:
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> > 'Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and 'If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law' (*Brazilian Loans*, PCIJ, Series A, Nos. 20/21, p. 124).'[549]
>
> We are fully aware that our role is to clarify the existing provisions of the covered agreements so as to determine the compatibility of a domestic law with those agreements. We are also aware that, in the *Brazilian Loans* case, the PCIJ was asked to apply domestic legislation to a given case. We are nevertheless of the view that there is nothing in the text of the DSU, nor in the practice of the Appellate Body, that prevents us from 'weigh[ing] the jurisprudence of municipal [US] courts' if it is 'uncertain or divided'. This would not require us to develop our own independent interpretation of US law, but simply to select among the relevant judgements the interpretation

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following: "Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and 'If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law' (*Brazilian Loans*, PCIJ, Series A, Nos. 20/21, p. 124)" (*Elettronica Sicula S.p.A. (ELSI)*, Judgment, ICJ Reports 1989, p. 47, para. 62).

542 Panel Report on *US – Section 301 Trade Act*, paras. 7.18 and 7.20. See also Panel Report on *US – Steel Plate*, para. 90.

543 (*footnote original*) Article 21.5 Panel Report, para. 6.16.

544 (*footnote original*) *Ibid.*

545 Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 46.

546 Panel Report on *US – 1916 Act (EC)*, para. 6.46.

547 (*footnote original*) This is evidenced by the examples used by the Appellate Body (*ibid.*, para. 67):

> "Previous GATT/WTO panels also have conducted a detailed examination of the domestic law of a Member in assessing the conformity of that domestic law with the relevant GATT/WTO obligations. For example, in *United States – Section 337 of the Tariff Act of 1930* [footnote omitted], the panel conducted a detailed examination of the relevant United States' legislation and practice, including the remedies available under Section 337 as well as the difference between patent-based Section 337 proceedings and federal district court proceedings, in order to determine whether Section 337 was inconsistent with Article III:4 of the GATT 1947."

548 Panel Report on *US – 1916 Act (EC)*, para. 6.51.

549 (*footnote original*) ICJ, *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (*United States of America* v. *Italy*), ICJ Reports 1989, p. 15, at p.47, para. 62.

most in conformity with the US law, as necessary in order to resolve the matter before us.[550]"[551]

360. The Panel on *US – 1916 Act (EC)* also examined the legislative history to determine the intent of Congress to assist their understanding of the actual scope and operation of the 1916 Act. In so doing, the Panel considered public declarations of various United States officials and stated:

"[W]e should determine whether they could actually generate legal obligations for the United States under international law. For instance, since they are subsequent to the notification by the United States of its 'grandfathered' legislation under the GATT 1947, it might be argued that they implicitly modified that notification by stating that the 1916 Act was 'grandfathered'. We recall that the International Court of Justice has developed, *inter alia* in its judgement in the *Nuclear tests* case,[552] criteria on when a statement by a representative of a State could generate international obligations for that State. In the present case, we are reluctant to consider the statements made by senior US officials in testimonies or letters to the US Congress or to members thereof as generating international obligations for the United States. First, we recall that the constitution of the United States provides for a strict separation of the judicial and executive branches. With the exception of criminal prosecutions, the application of the 1916 Act falls within the exclusive responsibility of the federal courts. Under those circumstances, a statement by the executive branch of government in a domestic forum can only be of limited value. Second, with the possible exception of the statement of US Trade Representative Clayton Yeutter, they were not made at a sufficiently high level compared with the statements considered by the International Court of Justice in the *Nuclear Tests* case, where essentially declarations by a head of State and of members of the French government were at issue. Moreover, the statements referred to in the present case were not directly addressed to the general public. Finally, they were not made on behalf of the United States, but – at best – on behalf of the executive branch of government. This aspect would not be essential if the statements had been made in an international forum, where the executive branch represents the State.[553] However, in the present case, the statements were addressed to the US legislative branch. Therefore, we cannot consider them as creating obligations for the United States under international law."[554]

361. In *US – Shrimp (Article 21.5 – Malaysia)*, the Panel had examined the United States municipal law at issue taking into account the status of such law at the time of its review. Malaysia wanted the Panel to take into account a CTI ruling (*Turtle Island*) which was still declaratory. The Appellate Body agreed with the Panel and considered that it would have been an exercise in speculation on the part of the Panel to predict either when or how that case might be concluded, or to assume that injunctive relief ultimately would be granted and that the United States Court of Appeals or the Supreme Court of the United States eventually would compel the Department of State to modify the Revised Guidelines. The Appellate Body insisted that "the Panel was correct not to indulge in such speculation, which would have been contrary to the duty of the Panel, under Article 11 of the DSU, to make 'an objective assessment of the matter . . . including an objective assessment of the facts of the case'".[555]

362. The Appellate Body on *US – Hot-Rolled Steel* stressed that, "[a]lthough it is not the role of panels or the Appellate Body to interpret a Member's domestic legislation as such, it is permissible, indeed essential, to conduct a detailed examination of that legislation in assessing its consistency with WTO law.[556]"[557]

363. In *US – Section 211 Appropriations Act*, the Appellate Body stressed that "municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations":

"Our rulings in these previous appeals are clear: the municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations. Under the DSU, a panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the *WTO Agreement*. Such an assessment is a legal characterization by a panel. And, therefore, a panel's assessment of municipal law as to its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU.

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[550] (*footnote original*) We do not consider that this would be engaging in *interpreting* US law, with the risks highlighted by the United States in its submissions. Our approach is in line with the reasoning of the PCIJ in the *Brazilian Loans* case, which, even though it had to apply domestic law, was prudent in its approach to the domestic case-law:

"It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case." (PCIJ, Series A, Nos. 20/21, p. 124)

[551] Panel Report on *US – 1916 Act (EC)*, para. 6.53.

[552] (*footnote original*) ICJ, *Nuclear Tests case*, judgements of 20 December 1974, ICJ Reports 1974, p. 253 (*Australia* v. *France*), p. 457 (*New Zealand* v. *France*). See, e.g., Patrick Daillier & Alain Pellet, Droit International Public, 5th edition (1994), pp. 354–358.

[553] (*footnote original*) See also Article 7 of the Vienna Convention.

[554] Panel Report on *US – 1916 Act (EC)*, para. 6.63.

[555] Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, para. 95.

[556] (*footnote original*) Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, paras. 66 and 67.

[557] Appellate Body Report on *US – 1916 Act (EC)*, para. 200.

> To address the legal issues raised in this appeal, we must, therefore, necessarily examine the Panel's interpretation of the meaning of Section 211 under United States law. An assessment of the consistency of Section 211 with the Articles of the *TRIPS Agreement* and of the Paris Convention (1967) that have been invoked by the European Communities necessarily requires a review of the Panel's examination of the meaning of Section 211. Likewise, that assessment necessarily requires a review also of the Panel's examination of the meaning of both the CACR and the Lanham Act, to the extent that they are relevant for assessing the meaning of Section 211. This is an interpretation of the meaning of Section 211 solely for the purpose of determining whether the United States has fulfilled its obligations under the *TRIPS Agreement*. The meaning given by the Panel to Section 211 is, thus, clearly within the scope of our review as set out in Article 17.6 of the DSU."[558]

364. In *US – Softwood Lumber IV*, the Appellate Body indicated the following:

> "[W]e observe that the arguments put forward by Canada relating to the nature of 'personal property', raise issues concerning the relevance, for WTO dispute settlement, of the way in which the municipal law of a WTO Member classifies or regulates things or transactions. Previous Appellate Body Reports confirm that an examination of municipal law or particular transactions governed by it might be relevant, as evidence, in ascertaining whether a financial contribution exists.[559] However, municipal laws – in particular those relating to property – vary amongst WTO Members. Clearly, it would be inappropriate to characterize, for purposes of applying any provisions of the WTO covered agreements, the same thing or transaction differently, depending on its legal categorization within the jurisdictions of different Members. Accordingly, we emphasize that municipal law classifications are not determinative of the issues raised in this appeal."[560]

(c) Drawing adverse inferences

365. In *Canada – Aircraft*, the Appellate Body addressed the issue whether panels have the authority to draw adverse inferences from a party's refusal to provide information. In this dispute, Canada refused to provide Brazil, during consultations, with information on the financing activities of a particular agency, such information being subsequently also requested by the Panel. On appeal, Brazil submitted that the Panel erred by not drawing the inference that the information withheld by Canada was adverse to Canada and supportive of Brazil's claim that the agency's debt financing was a prohibited export subsidy under Article 3.1(a) of the *SCM Agreement*. The Appellate Body held that it is within the discretion of panels to draw adverse inferences and that in this particular case the Panel, in deciding not to draw adverse inferences, had not abused this discretion inconsistently with the provisions of the *DSU*:

> "There is no logical reason why the Members of the WTO would, in conceiving and concluding the *SCM Agreement*, have granted panels the authority to draw inferences in cases involving actionable subsidies that *may* be illegal *if* they have certain trade effects, but not in cases that involve prohibited export subsidies for which the adverse effects are presumed. To the contrary, the appropriate inference is that the authority to draw adverse inferences from a Member's refusal to provide information belongs *a fortiori* also to panels examining claims of prohibited export subsidies. Indeed, that authority seems to us an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement: a view supported by the general practice and usage of international tribunals.
>
> Clearly, in our view, the Panel had the legal authority and the discretion to draw inferences from the facts before it – including the fact that Canada had refused to provide information sought by the Panel.
>
> . . .
>
> Yet, we do not believe that the record provides a sufficient basis for us to hold that the Panel erred in law, or abused its discretionary authority, in concluding that Brazil had not done enough to compel the Panel to make the inferences requested by Brazil. For this reason, we let the Panel's finding of *not proven* remain, and we decline Brazil's appeal on this issue."[561]

366. In *US – Wheat Gluten*, the European Communities argued, *inter alia*, that the Panel had failed to "draw the necessary adverse inferences from the United States' refusal to submit . . . requested information"; the European Communities claimed that this failure was an error of law and that the Panel consequently had violated Article 11 of the *DSU*. The Appellate Body declined this ground of the appeal; in its analysis, it noted that generally "the appellant should [when alleging that a panel should have drawn adverse inferences], at least: identify the facts on the record from which the

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[558] Appellate Body Report on *US – Section 211 Appropriations Act*, paras. 105–106.

[559] (*footnote original*) In *US – FSC*, for example, a consideration of the meaning of United States tax law was required to determine whether the taxation measure at issue in those proceedings represented the foregoing of "revenue that is otherwise due", as contemplated by Article 1.1(a)(1)(ii) of the *SCM Agreement*. (Appellate Body Report, *US – FSC*, para. 90.) We recall as well that, in *India – Patents (US)*, the Appellate Body observed that panels must often complete a detailed examination of the relevant aspects of a Member's domestic law to determine whether a situation regulated by the covered agreements exists. (Appellate Body Report, *India – Patents (US)*, paras. 65–71.) See also Appellate Body Report, *US – Section 211 Appropriations Act*, paras. 103–106.

[560] Appellate Body Report on *US – Softwood Lumber IV*, para. 56.

[561] Appellate Body Report on *Canada – Aircraft*, paras. 202–203 and 205. With respect to the drawing of adverse inferences under the SCM Agreement, see also Annex V in the Chapter on *SCM Agreement*.

Panel should have drawn inferences; indicate the factual or legal inferences that the panel should have drawn from those facts; and, finally, explain why the failure of the panel to exercise its discretion by drawing these inferences amounts to an error of law under Article 11 of the DSU".

> "We . . . characterized the drawing of inferences as a 'discretionary' task falling within a panel's duties under Article 11 of the DSU. In *Canada – Aircraft*, which involved a similar factual situation, the panel did not draw any inferences 'adverse' to Canada's position. On appeal, we held that there was no basis to find that the panel had improperly exercised its discretion since 'the full *ensemble* of the facts on the record' supported the panel's conclusion.[562]
>
> In its appeal, the European Communities places considerable emphasis on the failure of the Panel to draw 'adverse' inferences from the refusal of the United States to provide information requested by the Panel. As we emphasized in *Canada – Aircraft*, under Article 11 of the DSU, a panel must draw inferences on the basis of *all of the facts of record* relevant to the particular determination to be made.[563] Where a party refuses to provide information requested by a panel under Article 13.1 of the DSU, that refusal will be one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn. However, if a panel were to ignore or disregard other relevant facts, it would fail to make an 'objective assessment' under Article 11 of the DSU. In this case, as the Panel observed, there *were* other facts of record that the Panel was required to include in its 'objective assessment'. Accordingly, we reject the European Communities' arguments to the extent that they suggest that the Panel erred in not drawing 'adverse' inferences simply from the refusal of the United States to provide certain information requested from it by the Panel under Article 13.1 of the DSU.
>
> In reviewing the inferences the Panel drew from the facts of record, our task on appeal is not to redo afresh the Panel's assessment of those facts, and decide for ourselves what inferences we would draw from them. Rather, we must determine whether the Panel improperly exercised its discretion, under Article 11, by failing to draw certain inferences from the facts before it. In asking us to conduct such a review, an appellant must indicate clearly the manner in which a panel has improperly exercised its discretion. Taking into account the full *ensemble* of the facts, the appellant should, at least: identify the facts on the record from which the Panel should have drawn inferences; indicate the factual or legal inferences that the panel should have drawn from those facts; and, finally, explain why the failure of the panel to exercise its discretion by drawing these inferences amounts to an error of law under Article 11 of the DSU.
>
> In this appeal, the European Communities makes, what we regard to be, broad and general statements that the Panel erred by not drawing 'adverse' inferences from the facts. Besides the fact that the United States refused to provide certain information requested by the Panel under Article 13.1 of the DSU, the European Communities does not identify, in any specific manner, *which facts* supported a particular inference. Nor does the European Communities identify *what inferences* the Panel should have drawn from those facts, other than that the inferences should have been favourable to the European Communities. Besides the simple refusal of the United States to provide information requested by the Panel, which we have already addressed, the European Communities does not offer any other specific reasons why the Panel's failure to exercise its discretion by drawing the inferences identified by the European Communities amounts to an error of law under Article 11 of the DSU. Therefore, we decline this ground of appeal."[564]

(d) Timing of submission of evidence

367. In *Argentina – Textiles and Apparel*, Argentina argued that the Panel had acted inconsistently with Article 11 of the *DSU* by allowing certain evidence offered by the United States two days before the second substantive meeting of the Panel with the parties. The Appellate Body noted that "the Working Procedures in their present form do not constrain panels with hard and fast rules on deadlines for submitting evidence" and, accordingly, did not find a violation of Article 11:

> "Article 11 of the DSU does not establish time limits for the submission of evidence to a panel. Article 12.1 of the DSU directs a panel to follow the Working Procedures set out in Appendix 3 of the DSU, but at the same time authorizes a panel to do otherwise after consulting the parties to the dispute. The Working Procedures in Appendix 3 also do not establish precise deadlines for the presentation of evidence by a party to the dispute.[565] It is true that the Working Procedures 'do not prohibit' submission of additional evidence after the first substantive meeting of a panel with the parties. It is also true, however, that the Working Procedures in Appendix 3 do contemplate two distinguishable stages in a proceeding before a panel. . . .

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[562] (*footnote original*) Appellate Body Report on *Canada – Aircraft*, paras. 204 and 205.

[563] (*footnote original*) Appellate Body Report on *Canada – Aircraft*, paras. 204 and 205.

[564] Appellate Body Report on *US – Wheat Gluten*, paras. 173–176.

[565] (*footnote original*) As we have observed in two previous Appellate Body Reports, we believe that detailed, standard working procedures for panels would help to ensure due process and fairness in panel proceedings. See *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted 25 September 1997, WT/DS27/AB/R, para. 144; *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted 16 January 1998, WT/DS50/AB/R, para. 95.

Under the Working Procedures in Appendix 3, the complaining party should set out its case in chief, including a full presentation of the facts on the basis of submission of supporting evidence, during the first stage. The second stage is generally designed to permit 'rebuttals' by each party of the arguments and evidence submitted by the other parties.

As noted above, however, the Working Procedures in their present form do not constrain panels with hard and fast rules on deadlines for submitting evidence. The Panel could have refused to admit the additional documentary evidence of the United States as unseasonably submitted. The Panel chose, instead, to admit that evidence, at the same time allowing Argentina two weeks to respond to it. Argentina drew attention to the difficulties it would face in tracing and verifying the manually processed customs documents and in responding to them, since identifying names, customs identification numbers and, in some cases, descriptions of the products had been blacked out. The Panel could well have granted Argentina more than two weeks to respond to the additional evidence. However, there is no indication in the panel record that Argentina explicitly requested from the Panel, at that time or at any later time, a longer period within which to respond to the additional documentary evidence of the United States. Argentina also did not submit any countering documents or comments in respect of any of the additional documents of the United States.

[W]hile another panel could well have exercised its discretion differently, we do not believe that the Panel here committed an abuse of discretion amounting to a failure to render an objective assessment of the matter as mandated by Article 11 of the DSU."[566]

368. In *Korea – Alcoholic Beverages*, Korea requested the Panel to issue a preliminary ruling rejecting certain evidence submitted by the European Communities after the second substantive meeting. Korea alleged that its rights of defence had been violated by the late submission of such evidence:

"Korea complains that its rights of defence were violated by the late submission of a market study (the Trendscope survey) by the European Communities. Korea had submitted a study done by the AC Nielsen Company as part of its responses to questions arising from the first substantive meeting of the Panel. The European Communities responded to this with, among other things, the Trendscope survey presented at the Second Meeting of the Panel. The Panel gave Korea a week to respond to this and critique the results, methodology and questions used in the Trendscope survey. Korea argues that this time was insufficient, that it did not have copies in Korean of all the questions asked, and that it did not have time to provide further questions or comments based upon the answers.

We do not consider that Korea's rights under the DSU were violated. The European Communities submitted its rebuttal survey at the next available opportunity after receiving Korea's Nielsen survey. Had Korea chosen to submit its survey at the first substantive meeting and the European Communities failed to respond at the next opportunity (in such a case, it would have been in the rebuttal submission), there obviously would have been more merit to the claim because then the European Communities, it could have been argued, delayed submitting their evidence. As it transpired, the European Communities submitted a new piece of evidence at the next available opportunity which Korea then was able to examine for a week in order to provide comments. The survey was not of a particularly complex type and, in our view, Korea had adequate time to respond given the nature of the evidence. The Trendscope survey is not critical evidence to the complainants' case; it serves as a supplement to arguments already made. If we considered that it represented critical evidence, Korea's request for further time for comment would have been given greater weight. While all parties to litigation might prefer open-ended potential for rebutting the other side's submissions, we believe that for practical reasons submissions must be cut-off at some point and such a point was reached in this case. Thus, neither the timing nor the importance of the evidence in question support a finding that Korea's rights have been violated in this instance."[567]

369. In *Canada – Aircraft*, Canada requested the Panel to issue a preliminary ruling on the question of whether the complaining party may adduce new evidence or allegations after the end of the first substantive meeting. Canada argued that it would suffer prejudice under the accelerated procedure under Article 4 of the *SCM Agreement* as a result of the late submission of allegations or evidence. The Panel, in a finding not addressed by the Appellate Body, ruled that it was not bound to exclude the submission of new allegations after the first substantive meeting and that it could not see any legal basis for so doing:

"[A]n absolute rule excluding the submission of evidence by a complaining party after the first substantive meeting would be inappropriate, since there may be circumstances in which a complaining party is required to adduce new evidence in order to address rebuttal arguments made by the respondent. Furthermore, there may be instances, as in the present case,[568] where a party is required to submit new evidence at the request of the panel. For these

[566] Appellate Body Report on *Argentina – Textiles and Apparel*, paras. 79–81.

[567] Panel Report on *Korea – Alcoholic Beverages*, paras. 5.24–5.25.

[568] (*footnote original*) At the time of the second substantive meeting, we asked the parties a series of questions that could have led to the submission of new evidence or arguments. In order to ensure due process, we allowed each party 18 days (*i.e.*, equivalent to the time between the deadline for the respondent's first submission and the deadline for rebuttal submissions) in which to comment on any new evidence or arguments adduced by the other party in response to our questions.

reasons, we rejected Canada's request for a preliminary ruling that the Panel should not accept new evidence submitted by Brazil after the first substantive meeting.

[W]e are not bound to exclude the submission of new allegations after the first substantive meeting. We can see nothing in the DSU, or in the Appendix 3 Working Procedures, that would require the submission of new allegations to be treated any differently than the submission of new evidence. Indeed, one could envisage situations in which the respondent might present information to a panel during the first substantive meeting that could reasonably be used as a basis for a new allegation by the complaining party. Provided the new allegation falls within the panel's terms of reference, and provided the respondent party's due process rights of defence are respected, we can see no reason why any such new allegation should necessarily be rejected by the panel as a matter of course, simply because it is submitted after the first substantive meeting with the parties. We consider that this approach is consistent with the Appellate Body's ruling in *European Communities – Bananas* that '[t]here is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel. It is the panel's terms of reference, governed by Article 7 of the DSU, which set out the claims of the complaining parties relating to the matter referred to the DSB.'[569]"[570]

370. In *US – Offset Act (Byrd Amendment)*, Canada asked the Panel to accept as evidence a letter which it submitted after the first substantive meeting. In spite of the United States' objections, the Panel issued a preliminary ruling accepting the evidence. The Panel noted that the letter at issue did not come into the possession of Canada until after the first substantive meeting. The Panel also noted that the information contained in the letter was in the public domain, and that the information was pertinent to the proceedings since it related to an issue which it had been asked to consider.[571]

371. In *EC – Sardines*, the Appellate Body explained that the interim review stage is not an appropriate time to introduce new evidence:

"The interim review stage is not an appropriate time to introduce new evidence. We recall that Article 15 of the DSU governs the interim review. Article 15 permits parties, during that stage of the proceedings, to submit comments on the draft report issued by the panel,[572] and to make requests 'for the panel to review precise aspects of the interim report'.[573] At that time, the panel process is all but completed; it is only – in the words of Article 15 – 'precise aspects' of the report that must be verified during the interim review. And this, in our view, cannot properly include an assessment of new and unanswered evidence. Therefore, we are of the view that the Panel acted properly in refusing to take into account the new evidence during the interim review, and did not thereby act inconsistently with Article 11 of the DSU."[574]

372. The Panel in *Japan – Apples* accepted evidence that became available only after the establishment of the Panel, as the other party had had an opportunity to comment:

"A related question is whether the Panel should consider evidence that became available only after the establishment of the Panel. Our approach in this regard should be pragmatic. Besides the situation contemplated in paragraph 11 of our Working Procedures, we decided not to reject evidence submitted by a party on which the other party had had an opportunity to comment, whether it took advantage of such an opportunity or not. This is without prejudice to the admissibility of such evidence on other grounds or the weight that we might eventually give to such evidence.

. . .

. . . We are of the view that our obligation, pursuant to Article 11 of the DSU, to make an objective assessment of the matter before us, including an objective assessment of the facts of the case, imposes on us an obligation not to exclude *a priori* any evidence submitted in due time by any party. However, the fact that we accepted the evidence at issue as a matter of principle is, as stated in the latter above, without prejudice to the weight that we will ultimately give to these exhibits in our discussion of the substance of this case. We also note that, consistent with the practice of panels, we provided Japan with the opportunity to comment on the substance of these documents."[575]

373. In *US – Steel Safeguards*, the Panel sent a letter to all parties that included a series of preliminary rul-

[569] (*footnote original*) Appellate Body Report on *EC – Bananas III*, para. 145.
[570] Panel Report on *Canada – Aircraft*, paras. 9.73–9.74.
[571] Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.2.
[572] (*footnote original*) Article 15.1 of the DSU provides:

> Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

[573] (*footnote original*) Article 15.2 of the DSU provides:

> Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, *a party may submit a written request for the panel to review precise aspects of the interim report* prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members. (emphasis added)

[574] Appellate Body Report on *EC – Sardines*, para. 301.
[575] Panel Report on *Japan – Apples*, paras. 8.49 and 8.56.

ings[576] on organizational matters. Among the issues, the Panel referred to the United States' request to replace the term "rebuttal submissions" in paragraph 11 of the Panel's Working Procedures regarding the timing of the submission of evidence, with the word "rebuttals". For the United States the word "submission" is ordinarily taken to mean written submissions and thus the reference to "rebuttal submissions" would exclude the application of that paragraph to evidence in rebuttals made orally. The complainants disagreed and argued that the suggested amendment would allow, for example, new arguments and evidence to be adduced orally at the Panel's second substantive meeting. The Panel, after referring to the Appellate Body Report on *Argentina – Textiles and Apparel* (see paragraph 367 above), redrafted paragraph 11 "to ensure due process and to ensure that new evidence is not adduced at a late stage in the panel process, while simultaneously ensuring that all parties and the Panel are fully informed of all relevant evidence".[577] The new paragraph 11 read as follows:

> "Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions, or answers to questions or provided that good cause is shown. In all cases, the other party(ies) shall be accorded a period of time for comment, as appropriate."

(e) Temporal scope of the review

374. In *US – Cotton Yarn*, the Appellate Body considered that a panel reviewing the due diligence exercised by a Member in making its determination under Article 6 of the *ATC* has to put itself in the place of that Member at the time it makes its determination and thus "must not consider evidence which did not exist *at that point in time*". In this regard, see paragraph 391 below.

(f) Evidence obtained during consultations

375. With respect to the issue of whether information obtained during consultations may be used in the subsequent panel proceedings, see paragraphs 135–136 above. See also paragraphs 342 and 344 above.

(g) Relationship with Article 13

376. As regards the panels' right to seek information, see Section XIII.B below.

4. Objective assessment of whether the investigating authority's explanation is reasoned and adequate: not a "*de novo*" review

377. In this respect, see paragraphs 381–386 below.

5. "make such other findings"

378. In *US – Wool Shirts and Blouses*, the Appellate Body relied, *inter alia*, on the phrase "make such other findings" in order to confirm the ability of panels to exercise judicial economy. See paragraph 1030 below.

379. In *Canada – Aircraft*, Canada asked the Panel to make a ruling on the Panel's jurisdiction before the deadline set for the submission of the written submission of the parties. The Panel stated:

> "In our view, there is no requirement in the DSU for panels to rule on preliminary issues prior to the parties' first written submissions. Nor is there any established practice to this effect, for there are numerous panel reports where rulings on preliminary issues have been reserved until the final report. Furthermore, there may be cases where the panel wishes to seek further clarification from the parties before providing a preliminary ruling."[578]

6. Standard of review in trade remedy cases

(a) Agreement on Safeguards

(i) Application of general standard of review under Article 11 of the DSU

380. In *US – Cotton Yarn*, the Appellate Body indicated that its Reports in *Argentina – Footwear (EC)*, *US – Lamb* and *US – Wheat Gluten* (see paragraphs 381–385 below), all concerning disputes under the *Agreement on Safeguards*, "spell out key elements of a panel's standard of review under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations".

(ii) Objective assessment of whether the investigating authority's explanation is reasoned and adequate: not a "de novo" review

381. In *Argentina – Footwear (EC)*, Argentina argued in its appeal that the Panel correctly articulated the standard of review but alleged that the Panel erred in applying that standard of review by conducting a "*de facto de novo* review" of the findings and conclusions of the Argentine authorities. The Appellate Body rejected Argentina's argument, stating as follows:

> "We have stated, on more than one occasion, that, for all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels.
>
> . . .
>
> Based on our review of the Panel's reasoning, we find that the Panel correctly stated the appropriate standard

[576] For "preliminary rulings", see Section XXXVI.C.
[577] Appellate Body Report on *US – Steel Safeguards*, para. 5.3.
[578] Panel Report on *Canada – Aircraft*, para. 9.15.

of review, as set forth in Article 11 of the DSU. And, with respect to its *application* of the standard of review, we do not believe that the Panel conducted a *de novo* review of the evidence, or that it substituted its analysis and judgement for that of the Argentine authorities. Rather, the Panel examined whether, as required by Article 4 of the *Agreement on Safeguards*, the Argentine authorities had considered all the relevant facts and had adequately explained how the facts supported the determinations that were made. Indeed, far from departing from its responsibility, in our view, the Panel was simply fulfilling its responsibility under Article 11 of the DSU in taking the approach it did. To determine whether the safeguard investigation and the resulting safeguard measure applied by Argentina were consistent with Article 4 of the *Agreement on Safeguards*, the Panel was obliged, by the very terms of Article 4, to assess whether the Argentine authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination."[579]

382. In *Korea – Dairy*, the Panel considered Korea's request for the Panel not to engage in a *de novo* review of its national authorities' determination to impose a safeguard. More specifically, Korea argued that the standard of review of Article 11 implies that the function of the Panel is to assess whether Korea (i) examined the relevant facts before it at the time of the investigation; and (ii) provided an adequate explanation of how the facts before it as a whole supported the determination made. Furthermore, Korea claimed that a certain deference or latitude should be left to the national authorities in this respect. The Panel held that it could not grant "total deference" to the national authorities but agreed that it could not substitute its assessment for that of the national authority:

"We consider that for the Panel to adopt a policy of total deference to the findings of the national authorities could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU. This conclusion is supported, in our view, by previous panel reports that have dealt with this issue.[580] However, we do not see our review as a substitute for the proceedings conducted by national investigating authorities. Rather, we consider that the Panel's function is to assess objectively the review conducted by the national investigating authority, in this case the KTC. For us, an objective assessment entails an examination of whether the KTC had examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Agreement on Safeguards), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea."[581]

383. In *US – Lamb*, the Appellate Body held that, in considering a claim under the *Agreement on Safeguards*, a panel's objective assessment involves both a *formal* aspect (whether the competent authorities have evaluated "all relevant factors") and a *substantive* aspect (whether the competent authorities have given a reasoned and adequate explanation for their determination):

"[A]n 'objective assessment' of a claim under Article 4.2(a) of the *Agreement on Safeguards* has, in principle, two elements. First, a panel must review whether competent authorities have evaluated *all relevant factors*, and, second, a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination.[582] Thus, the panel's objective assessment involves a *formal* aspect and a *substantive* aspect. The formal aspect is whether the competent authorities have evaluated 'all relevant factors'. The substantive aspect is whether the competent authorities have given a reasoned and adequate explanation for their determination.

This dual character of a panel's review is mandated by the nature of the specific obligations that Article 4.2 of the *Agreement on Safeguards* imposes on competent authorities. Under Article 4.2(a), competent authorities must, as a formal matter, evaluate 'all relevant factors'. However, that evaluation is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere 'check list'. Under Article 4.2(a), competent authorities must conduct a substantive evaluation of 'the "*bearing*", or the "*influence*" or "*effect*"'[583] or '*impact*' that the relevant factors have on the 'situation of [the] domestic industry'. (emphasis added) By conducting such a substantive evaluation of the relevant factors, competent authorities are able to make a proper overall determination, *inter alia*, as to whether the domestic industry is seriously injured or is threatened with such injury as defined in the Agreement."[584]

[579] Appellate Body Report on *Argentina – Footwear (EC)*, paras. 118 and 121.

[580] (*footnote original*) We recall that in *US – Underwear*, paras. 7.53–54, a case dealing with a safeguard action under the ATC, the panel reached the conclusions that the standard of review was that established in Article 11 of the DSU and commented on the implications of such standard of review for safeguard measures. See also the Panel Report in *Brazil – Countervailing Duty Proceeding Concerning Imports of Milk Powder from the European Community*, SCM/179: "It was incumbent upon the investigating authorities to provide a reasoned opinion explaining how such facts and arguments had led to their finding", para. 286.

[581] Panel Report on *Korea – Dairy*, para. 7.30.

[582] (*footnote original*) Clearly, a claim under Article 4.2(a) might not relate at the same time to both aspects of the review envisaged here, but only to one of these aspects. For instance, the claim may be that, although the competent authorities evaluated all relevant factors, their explanation is either not reasoned or not adequate.

[583] (*footnote original*) Appellate Body Report, *United States – Wheat Gluten Safeguard*, *supra*, footnote 19, para. 71.

[584] Appellate Body Report on *US – Lamb*, paras. 103–104. See also Appellate Body Report on *Steel Safeguards*, para. 279.

384. In *US – Lamb*, the Appellate Body further stated that the panel must examine whether the explanation given by the competent authorities in their published report is reasoned and adequate without conducting a *de novo* review of the evidence nor substituting the authorities' conclusions:

> "It follows that the precise nature of the examination to be conducted by a panel, in reviewing a claim under Article 4.2 of the *Agreement on Safeguards*, stems, in part, from the panel's obligation to make an 'objective assessment of the matter' under Article 11 of the DSU and, in part, from the obligations imposed by Article 4.2, to the extent that those obligations are part of the claim. Thus, as with any claim under the provisions of a covered agreement, panels are required to examine, in accordance with Article 11 of the DSU,[585] whether the Member has complied with the obligations imposed by the particular provisions identified in the claim. By examining whether the explanation given by the competent authorities in their published report is reasoned and adequate, panels can determine whether those authorities have acted consistently with the obligations imposed by Article 4.2 of the *Agreement on Safeguards*.
>
> We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities. To the contrary, in our view, in examining a claim under Article 4.2(a), a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an 'objective assessment' of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate.
>
> In this respect, the phrase '*de novo* review' should not be used loosely. If a panel concludes that the competent authorities, in a particular case, have *not* provided a reasoned or adequate explanation for their determination, that panel has not, thereby, engaged in a *de novo* review. Nor has that panel substituted its own conclusions for those of the competent authorities. Rather, the panel has, consistent with its obligations under the DSU, simply reached a conclusion that the determination made by the competent authorities is inconsistent with the specific requirements of Article 4.2 of the *Agreement on Safeguards*."[586]

385. In *US – Wheat Gluten*, the Appellate Body considered the duties of competent authorities and stated that an investigation by a competent authority requires a proper degree of activity. Their "duties of investigation and evaluation preclude them from remaining passive in the face of possible short-comings in the evidence submitted".[587] They "must undertake additional investigative steps, when the circumstances so require, in order to fulfil their obligation to evaluate all relevant factors".[588] In this case, the Appellate Body found that the Panel had applied a standard of review which fell short of what is required by Article 11 of the *DSU* by concluding that the report of the investigating authority contained an adequate explanation. In the Appellate Body's view, the Panel had heavily relied upon supplementary information supplied by the United States during the Panel proceedings.[589]

386. In *US – Cotton Yarn*, the Appellate Body, after referring to its rulings in the above-mentioned cases, summarized the panel standard of review; see paragraph 326 above.

387. In *US – Steel Safeguards*, the Appellate Body reminded the parties of the importance of providing a reasoned and adequate explanation of the facts supporting the imposition of safeguards measures, thereby

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[585] (*footnote original*) We note, however, that Article 17.6 of the *Anti-Dumping Agreement* sets forth a special standard of review for claims under that Agreement.

[586] Appellate Body Report on *US – Lamb*, paras. 105–107. See also Appellate Body Report on *US – Steel Safeguards*, para. 302.

[587] Appellate Body Report on *US – Wheat Gluten*, para. 55.

[588] Appellate Body Report on *US – Wheat Gluten*, para. 55. See also Appellate Body Report on *US – Cotton Yarn*, para. 73.

[589] Appellate Body Report on *US – Wheat Gluten*, paras. 161–162. The Appellate Body found as follows:

> "Although the Panel's conclusion on this issue was that the *USITC Report* contained an adequate explanation of the allocation methodologies, the Panel's reasoning discloses that the Panel clearly did not consider this to be the case. The Panel did not feel able to rely solely or, even, principally, on the explanation actually provided in the USITC Report and, instead, relied heavily on supplementary information provided by the United States in response to the Panel's questions. Indeed, the most important part of the Panel's reasoning on this issue is based on those 'clarifications'. We consider that the Panel's conclusion is at odds with its treatment and description of the evidence supporting that conclusion. We do not see how the Panel could conclude that the USITC Report *did* provide an adequate explanation of the allocation methodologies, when it is clear that the Panel itself saw such deficiencies in that Report that it placed extensive reliance on 'clarifications' that were not contained in the USITC Report.
>
> By reaching a conclusion regarding the USITC Report which relied so heavily on supplementary information provided by the United States during the Panel proceedings – information not contained in the USITC Report – the Panel applied a standard of review which falls short of what is required by Article 11 of the DSU."

enabling panels to make their objective assessment as required under Article 11 of the *DSU*:

> "It bears repeating that a panel will not be in a position to assess objectively, as it is required to do under Article 11 of the DSU, whether there has been compliance with the prerequisites that must be present before a safeguard measure can be applied, if a competent authority is not required to provide a 'reasoned and adequate explanation' of how the facts support its determination of those prerequisites, including 'unforeseen developments' under Article XIX:1(a) of the GATT 1994. A panel must not be left to *wonder* why a safeguard measure has been applied.
>
> It is precisely by 'setting forth findings and reasoned conclusions on all pertinent issues of fact and law', under Article 3.1, and by providing 'a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined', under Article 4.2(c), that competent authorities provide panels with the basis to 'make an objective assessment of the matter before it' in accordance with Article 11. As we have said before, a panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the competent authorities.[590] Therefore, the 'reasoned conclusions' and 'detailed analysis' as well as 'a demonstration of the relevance of the factors examined' that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations under the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994. This is all the more reason why they must be made explicit by a competent authority.
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> . . .
>
> [W]e cannot accept the United States' interpretation that a failure to explain a finding does not support the conclusion that the USITC 'did not actually *perform* the analysis correctly, thereby breaching Article 2.1, 4.2, or 4.2(b) [of the *Agreement on Safeguards*]'.[591] As we stated above, because a panel may not conduct a *de novo* review of the evidence before the competent authority, it is the *explanation* given by the competent authority for its determination that alone enables panels to determine whether there has been compliance with the requirements of Article XIX of the GATT 1994 and of Articles 2 and 4 of the *Agreement on Safeguards*. It may well be that, as the United States argues, the competent authorities have performed the appropriate analysis correctly. However, where a competent authority has not provided a reasoned and adequate explanation to support its determination, the panel is not in a position to conclude that the relevant requirement for applying a safeguard measure has been fulfilled by that competent authority. Thus, in such a situation, the panel has no option but to find that the competent authority has not performed the analysis correctly."[592]

(b) Transitional safeguard measure under the Agreement on Textiles and Clothing

(i) Application of general standard of review under Article 11 of the DSU

388. The Panel on *US – Underwear* examined the standard of review to be applied in cases involving the *Agreement on Textiles and Clothing* and noted that Article 11 of the *DSU* is the relevant provision. In a finding not reviewed by the Appellate Body, the Panel held that "the task of the Panel is to examine the consistency of the US action with the international obligations of the United States, and not the consistency of the US action with the US domestic statute implementing the international obligations of the United States". The Panel went on to state:

> "[A] policy of total deference to the findings of the national authorities could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU.
>
> . . .
>
> [T]he Panel's function should be to assess objectively the review conducted by the national investigating authority, in this case the CITA. We draw particular attention to the fact that a series of panel reports in the anti-dumping and subsidies/countervailing duties context have made it clear that it is not the role of panels to engage in a *de novo* review.[593] In our view, the same is true for panels operating in the context of the ATC, since they would be called upon, as in the context of cases dealing with anti-dumping and/or subsidies/countervailing duties, to review the consistency of a determination by a national investigating authority imposing a restriction under the relevant provisions of the relevant WTO legal instruments, in this case the ATC. In our view, the task of the Panel is to examine the consistency of the US action with the international obligations of the United States, and not the consistency of the US action with the US domestic statute implementing the international obligations of the United States. Consequently, the ATC constitutes, in our view, the relevant legal framework in this matter.
>
> We have therefore decided, in accordance with Article 11 of the DSU, to make an objective assessment of the Statement issued by the US authorities on 23 March 1995 (the 'March Statement) which, as the parties to the

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[590] Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.

[591] United States' appellant's submission, para. 73. (original emphasis)

[592] Appellate Body Report on *US – Steel Safeguards*, paras. 298–299 and 303.

[593] (*footnote original*) See GATT Panel Reports on Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States, BISD 40S/205; United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway; and United States – Initiation of a Countervailing Duty Investigation into Softwood Lumber Products from Canada, BISD 34S/194.

> dispute agreed, constitutes the scope of the matter properly before the Panel without, however, engaging in a *de novo* review. In our view, an objective assessment would entail an examination of whether the CITA had examined all relevant facts before it (including facts which might detract from an affirmative determination in accordance with the second sentence of Article 6.2 of the ATC), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of the United States."[594]

389. In *US – Wool Shirts and Blouses*, the Panel examined whether a certain transitional safeguard measure imposed by the United States was consistent with Article 6. India, the complainant, claimed that the Panel should examine whether the United States had acted reasonably, while the United States argued that it should be "entitled to the benefit of reasonable doubt", as it had been so entitled in a certain GATT case. The Panel responded as follows:

> "[A]lthough the DSU does not contain any specific reference to standards of review, we consider that Article 11 of the DSU . . . is relevant here[.]
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> . . .
>
> Pursuant to Article 11 of the DSU, we must determine what is 'the matter before [the Panel]'. This Panel was established pursuant to Article 8.10 of the ATC and Article 6 of the DSU. . . .
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> . . .
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> The only restraint discussed under Article 6 of the ATC is the proposed restraint by the importing Member. Therefore, pursuant to Article 11 of the DSU, the function of this Panel, established pursuant to Article 8.10 of the ATC and Article 6 of the DSU, is limited to making an objective assessment of the facts surrounding the application of the specific restraint by the United States (and contested by India) and of the conformity of such restraint with the relevant WTO agreements."[595]

390. In support of the proposition referenced in paragraph 389 above, the Panel on *US – Wool Shirts and Blouses* referred to "an important distinction between the role of panels under the DSU and the role of the TMB under the ATC as regards safeguard actions".[596]

391. In *US – Cotton Yarn*, the Appellate Body considered for the first time a panel's standard of review under Article 11 in a dispute under the *Agreement on Textiles and Clothing*, an issue that had already been considered by Panels in *US – Underwear* and *US – Wool Shirts and Blouses* when examining the consistency of transitional safeguard measures with Article 6 of the *ATC*.[597] The Appellate Body considered that the Panel, in assessing the due diligence of the United States in making a determination under Article 6.2 of the *Agreement on Textiles and Clothing*, had exceeded its mandate under Article 11 of the *DSU* by considering certain evidence that could not possibly have been examined by the United States when it made that determination. In this regard, the Appellate Body considered:

> "Unlike Article 3 of the *Agreement on Safeguards*, which provides explicitly for an investigation by competent authorities of a Member, Article 6 of the *ATC* does not specify either the organ or the procedure through which a Member makes its 'determination'. Nevertheless, the . . . principles concerning the standard of review under Article 11 of the DSU with respect to the *Agreement on Safeguards* apply equally, in our view, to a panel's review of a Member's determination under Article 6 of the *ATC*. We note that Article 6 does not require the participation of all interested parties in the process leading to the determination. We consider, therefore, that the exercise of due diligence by a Member is all the more important in reaching a determination under Article 6 of the *ATC*.
>
> . . .
>
> In our view, a *panel* reviewing the due diligence exercised by a Member in making its determination under Article 6 of the *ATC* has to put itself in the place of that Member at the time it makes its determination. Consequently, a panel must not consider evidence which did not exist *at that point in time*.[598] A Member cannot, of course, be faulted for not having taken into account what it could not have known when making its determination. If a panel were to examine such evidence, the panel would, in effect, be conducting a *de novo* review and it would be doing so without having had the benefit of the views of the interested parties. The panel would be assessing the due diligence of a Member in reaching its conclusions and making its projections with the benefit of hindsight and would, in effect, be reinvestigating the market situation and substituting its own judgement for that of the Member. In our view, this would be inconsistent with the standard of a panel's review under Article 11 of the DSU."[599]

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[594] Panel Report on *US – Underwear*, paras. 7.10 and 7.12–7.13.

[595] Panel Report on *US – Wool Shirts and Blouses*, paras. 7.16–7.17.

[596] Panel Report on *US – Wool Shirts and Blouses*, para. 7.18.

[597] The Appellate Body, in reference to its previous decisions regarding the standard of review in cases under the *Agreement on Safeguards* (see paras. 381–385 above), indicated that "in describing the duties of competent authorities, we simultaneously define the duties of panels in reviewing the investigations and determinations carried out by competent authorities". Appellate Body Report on *US – Cotton Yarn*, para. 73.

[598] (*footnote original*) We do not rule upon other forms of evidence, such as an expert opinion submitted to a panel that is based on data which existed when the Member made its determination. (Appellate Body Report, *United States – Lamb Safeguard, supra*, [. . .], paras. 114–116) . . .

[599] Appellate Body Report on *US – Cotton Yarn*, paras. 76 and 78. As regards the scope of the review under Article 6 of the *Agreement on Textiles and Clothing*, see Section VII.B(c) of the Chapter on the *Agreement on Textiles and Clothing*.

(c) Anti-dumping measures

392. See the excerpts from the reports of the Panels and Appellate Body referenced in the Chapter on the *Anti-Dumping Agreement*, Sections V.B.3(a)(iv) and XVII.B.7(a). See also paragraphs 393–394 below.

(d) Countervailing measures

(i) Application of general standard of review under the DSU

393. The Appellate Body on *US – Lead and Bismuth II* rejected the argument that, "by virtue of the Declaration, the standard of review specified in Article 17.6 of the *Anti-Dumping Agreement* also applies to disputes involving countervailing duty measures under Part V of the *SCM Agreement*".[600] The Appellate Body emphasized the hortatory language of the Declaration and the fact that the Declaration does not provide for the application of any particular standards of review to be applied:

> "By its own terms, the *Declaration* does not impose an obligation to apply the standard of review contained in Article 17.6 of the *Anti-Dumping Agreement* to disputes involving countervailing duty measures under Part V of the *SCM Agreement*. The *Declaration* is couched in hortatory language; it uses the words 'Ministers *recognize*'. Furthermore, the *Declaration* merely acknowledges 'the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.' It does not specify any specific action to be taken. In particular, it does not prescribe a standard of review to be applied.
>
> This *Decision* provides for review of the standard of review in Article 17.6 of the *Anti-Dumping Agreement* to determine if it is 'capable of general application' to other covered agreements, including the *SCM Agreement*. By implication, this *Decision* supports our conclusion that the Article 17.6 standard applies only to disputes arising under the *Anti-Dumping Agreement*, and not to disputes arising under other covered agreements, such as the *SCM Agreement*. To date, the DSB has not conducted the review contemplated in this *Decision*."[601]

394. In *US – Softwood Lumber VI*, the Panel was called on to consider a case involving a single injury determination with respect to both subsidized and dumped imports. The claims therefore involved identical or almost identical provisions of the *SCM Agreement* and the *Anti-Dumping Agreement*. The Panel concluded that given its understanding of the applicable standards of review under Article 11 of the *DSU* and Article 17.6 of the *Anti-Dumping Agreement*, it was neither necessary nor appropriate to conduct separate analyses of the injury determination under the two agreements. In arriving at this conclusion, the Panel relied on the *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*:

> "In light of Canada's clarification of its position, and based on our understanding of the applicable standards of review under Article 11 of the DSU and Article 17.6 of the AD Agreement, we do not consider that it is either necessary or appropriate to conduct separate analyses of the USITC determination under the two Agreements.
>
> We consider this result appropriate in view of the guidance in the Declaration of Ministers relating to Dispute Settlement under the AD and SCM Agreements. While the Appellate Body has clearly stated that the Ministerial Declaration does not require the application of the Article 17.6 standard of review in countervailing duty investigations,[602] it nonetheless seems to us that in a case such as this one, involving a single injury determination with respect to both subsidized and dumped imports, and where most of Canada's claims involve identical or almost identical provisions of the AD and SCM Agreements, we should seek to avoid inconsistent conclusions".[603]

7. Dissenting/separate opinions

395. The following table refers to dissenting/separate opinions that occurred in panel reports up to 31 December 2004:

WT/- (Complainant)	Short Title	Dissenting Opinion or Concurring Statement	Panel or Appellate Body Report
DS69 – Brazil	*EC – Poultry*	Not able to endorse the conclusion reached by the Panel	Panel Report Paras. 289–292
DS135 – Canada	*EC – Asbestos*	Concurring statement on "like product" issue	AB Report Paras. 149–154
DS165 – EC	*US – Certain EC Products*	One panellist's view	Panel Report Paras. 6.60–6.61

[600] Appellate Body Report on *US – Lead and Bismuth II*, para. 48.
[601] Appellate Body Report on *US – Lead and Bismuth II*, paras. 49–50.
[602] (*footnote original*) Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("*US – Lead and Bismuth II*"), WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601 at para. 49.
[603] Panel Report on *US – Softwood Lumber VI*, paras. 7.17–7.18.

Table (*cont.*)

WT/- (Complainant)	Short Title	Dissenting Opinion or Concurring Statement	Panel or Appellate Body Report
DS213 – EC	*US – Carbon Steel*	Dissenting opinion regarding the application of *de minimis* standard to sunset reviews	Panel Report Paras. 10.1–10.15
DS246 – India	*EC – Tariff Preferences*	Dissenting opinion on whether Enabling Clause is an exception to GATT Article I and whether the complainant has the burden to raise the claim and prove it	Panel Report Paras. 6.15–6.22
DS264 – Canada	*US – Softwood Lumber V*	Dissenting opinion regarding whether zeroing is prohibited in original investigations	Panel Report Paras. 9.1–9.21

396. As regards the separate opinions in Article 22.6 arbitrations, see Section XXII.B.9(d) below. For the concurrent statements in Appellate Body Reports, see Section XVII.B.7 below.

8. Relationship with other Articles

(a) Articles 12 and 13

397. With respect to the relationship between Article 11, and Articles 12 and 13 of the *DSU*, see the excerpts from the reports of the panels and Appellate Body referenced in paragraphs 417, 429 and 431 below.

(b) Article 19

398. The Panel on *India – Autos* considered how Articles 11 and 19 of the *DSU* should be interpreted to deal with events occurring in the course of proceedings that question the appropriateness of a recommendation that a measure inconsistent with a covered agreement be brought into conformity with that agreement under Article 19.1 of the DSU:

> "If only as a matter of logic, there can be no sense in making such a recommendation if a Panel is of the view that the violation at issue has ceased to exist when its recommendation is being made.[604, 605] The Panel does not believe that Articles 11 and 19 of the DSU should be interpreted to demand that a panel must make a formalistic statement that a measure needs to be brought into compliance when it is faced with factual and legal arguments that this is no longer the case and must do so without being entitled to resolve those contentions.
>
> . . .
>
> [T]he Panel felt that it would not be making an 'objective assessment of the matter before it', or assisting the DSB in discharging its responsibilities under the DSU in accordance with Article 11 of the DSU, had it chosen not to address the impact of events having taken place in the course of the proceedings, in assessing the appropriateness of making a recommendation under Article 19.1 of the DSU.
>
> This is, in the Panel's view, an entirely distinct question from the issue of *how* India might appropriately remedy this situation and bring its measures into conformity in the future. The Panel does not seek here to engage in such an analysis. Any future issues arising as to whether India has complied with any recommendations resulting from the adoption of this report would be for a compliance panel to assess.
>
> It should be highlighted in concluding this section that the decision taken by this Panel to proceed in this way in the particular circumstances of this case is in no way intended to imply that panels have a general duty to systematically re-evaluate the existence of any violations identified before proceeding with making their recommendations under Article 19.1. This Panel is simply responding to the particular arguments placed before it, where the parties disagree as to the implications of subsequent events on the Panel's power to make recommendations and rulings. The principal aim of the Panel in proceeding in this manner is to discharge its duty in the most efficient way towards resolving the matter at issue in this dispute."[606]

9. Relationship with non-WTO law

399. In *EC – Bananas III*, the European Communities asserted "that the Panel should not have conducted an objective examination of the requirements of the Lomé Convention, but instead should have deferred to the 'common' EC and ACP views on the appropriate interpretation of the Lomé Convention". The Appellate Body expressly agreed with the following statement of the Panel:

> "We note that since the GATT Contracting Parties incorporated a reference to the Lomé Convention into

[604] (*footnote original*) This was recalled by the Appellate Body in its report on *US – Certain EC Products*, where it observed that "there is an obvious inconsistency between the finding of the Panel that 'the 3 March Measure is no longer in existence' and the subsequent recommendation of the Panel that the DSB request that the United States bring its measure into conformity with its WTO obligations. The Panel erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure which the Panel has found no longer exists" (*US – Certain EC Products*, Report of the Appellate Body, WT/DS165/AB/R, adopted on 10 January 2001, para. 81).

[605] The Appellate Body in *US – Certain EC Products* confirmed this line of thought at paras. 81–82.

[606] Panel Report on *India – Autos*, paras. 8.25–8.30.

the Lomé waiver, the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver."[607]

XII. ARTICLE 12

A. TEXT OF ARTICLE 12

Article 12
Panel Procedures

1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.

2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

3. After consulting the parties to the dispute, the panellists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 9 of Article 4, if relevant.

4. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

5. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.

6. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

7. Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

8. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.

9. When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.

10. In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

11. Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

[607] Appellate Body Report on *EC – Bananas III*, para. 167.

B. INTERPRETATION AND APPLICATION OF ARTICLE 12

1. Article 12.1: Working Procedures

400. As regards the Panel's standard Working Procedures and the additional procedures developed through practice, see Section XXX.B below.

2. Article 12.2: flexibility

401. In *Australia – Salmon*, the Appellate Body warned panels to be careful to observe due process[608] when complying with the Article 12.2 requirement of flexibility in panel procedures:

> "We note that Article 12.2 of the DSU provides that '[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.' However, a panel must also be careful to observe due process, which entails providing the parties adequate opportunity to respond to the evidence submitted."[609]

3. Article 12.6

(a) "submissions"

(i) Legal right to have a submission considered by the Panel

402. In *US – Shrimp*, the Appellate Body considered whether panels have the right to accept so-called *amicus curiae* briefs. With respect to this issue, see also paragraphs 419–420 and 1049 below. In this context, the Appellate Body made a general statement on the issue of access to the dispute settlement process of the WTO. After noting that the access is limited to the Members of the WTO, the Appellate Body stated:

> "[U]nder the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions; they do not, however, dispose of the issue here presented by the appellant's first claim of error. We believe this interpretative issue is most appropriately addressed by examining what a panel is *authorized* to do under the DSU."[610]

(ii) Meaning of the term "second written submission"

403. In *US – Steel Safeguards*, the Panel sent a letter to all parties including a series of preliminary rulings[611] on organizational matters. Among the issues, the Panel referred to the United States' request to replace the reference to "rebuttal submissions" in paragraph 11 of its Working Procedures with the word "rebuttals". This paragraph dealt with the timing of the submission of factual evidence.[612] In support of this proposal, the United States made the argument that the word "submission" is ordinarily taken to mean written submissions. Hence, the reference to "rebuttal submissions" in paragraph 11 would restrict the application of the qualification in that paragraph to rebuttals made in writing and would not extend to rebuttals made orally. The complainants argued in response that the suggested amendment would allow, for example, new arguments and evidence to be adduced orally at the Panel's second substantive meeting. The Panel disagreed and, recalling the comments made by the Appellate Body in the case *Argentina – Textiles and Apparel*,[613] indicated that they had drafted paragraph 11 to ensure due process and that new evidence was not adduced at a late stage in the panel process, while simultaneously ensuring that all parties and the Panel were kept fully informed of all relevant evidence.

(b) "Any subsequent written submissions shall be submitted simultaneously"

404. In *US – FSC (Article 21.5 – EC)*, the respondent, the United States, requested on 12 February 2001 that the Article 21.5 compliance panel deviate from the provision in Article 12.6 of the *DSU* which provides that the sequential first written submissions are to be followed by simultaneous written rebuttals. The United States argued that the European Communities had had new material from the submission of the United States to rebut in its rebuttal submission while the United States did not. The Panel denied the request. In this regard, see paragraph 616 below.

4. Article 12.7

(a) "basic rationale behind any findings and recommendations"

405. In *Korea – Alcoholic Beverages*, the Appellate Body, although refraining from attempting to define the scope of the obligation in Article 12.7, considered that the Panel had not failed to set out the basic rationale for its findings and recommendations as required by Article

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[608] See paras. 919–930 of this Chapter on due process issues.
[609] Appellate Body Report on *Australia – Salmon*, para. 272.
[610] Appellate Body Report on *US – Shrimp*, para. 101. See also Appellate Body Report on *US – Lead and Bismuth II*, paras. 40–41.
[611] For "preliminary rulings", see Section XXXVI.C.
[612] Paragraph 11 of the Panel's Working Procedures read as follows: Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions, or answers to questions or provided that good cause is shown. In all cases, the other party(ies) shall be accorded a period of time for comment, as appropriate. Panel Report on *US – Steel Safeguards*, para. 6.1.
[613] WT/DS56/AB/R, para. 79.

12.7 of the *DSU* because it had provided a "detailed and thorough" rationale for its findings:

> "Korea claims that the Panel has failed to fulfil its obligation under Article 12.7 of the DSU to set out the basic rationale behind its findings and recommendations. Korea maintains that 'much' of the Panel Report contains contradictions and that it is vague.
>
> . . .
>
> In this case, we do not consider it either necessary, or desirable, to attempt to define the scope of the obligation provided for in Article 12.7 of the DSU. It suffices to state that the Panel has set out a detailed and thorough rationale for its findings and recommendations in this case. The Panel went to some length to take account of competing considerations and to explain why, nonetheless, it made the findings and recommendations it did. The rationale set out by the Panel may not be one that Korea agrees with, but it is certainly more than adequate, on any view, to satisfy the requirements of Article 12.7 of the DSU. We, therefore, conclude that the Panel did not fail to set out the basic rationale for its findings and recommendations as required by Article 12.7 of the DSU."[614]

406. Similarly, the Appellate Body on *Chile – Alcoholic Beverages* concluded that the Panel had set out a "basic rationale" for its finding and recommendation on the issue of "not similarly taxed", as required by Article 12.7 of the *DSU*, because it had "identified the legal standard it applied, examined the relevant facts, and provided reasons for its conclusion that dissimilar taxation existed".[615]

407. In *Argentina – Footwear (EC)*, the Appellate Body, although not agreeing with all the Panel's reasoning, considered that it had met its obligation under Article 12.7 because the Panel had "conducted *extensive* factual and legal analyses of the competing claims made by the parties, set out numerous factual findings based on detailed consideration of the evidence before the Argentine authorities as well as other evidence presented to the Panel, and provided extensive explanations of how and why it reached its factual and legal conclusions".[616]

408. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body analysed the term "basic rationale" and considered that Article 12.7 establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations. The Appellate Body, however, indicated that it did not believe that it is either possible or desirable to determine, in the abstract, the minimum standard of reasoning that will constitute a "basic rationale" for the findings and recommendations made by a panel:

> "In considering the scope of the duties imposed on panels under Article 12.7, we turn first to the dictionary meaning of 'basic', which includes both 'fundamental; essential' and 'constituting a minimum . . . at the lowest acceptable level'.[617] 'Rationale' means both 'a reasoned exposition of principles; an explanation or statement of reasons' and 'the fundamental or underlying reason for or basis of a thing; a justification'.[618] The 'basic rationale' which a panel must provide is directly linked, by the wording of Article 12.7, to the 'findings and recommendations' made by a panel. We, therefore, consider that Article 12.7 establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations. Panels must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations.
>
> In our view, the duty of panels under Article 12.7 of the DSU to provide a 'basic rationale' reflects and conforms with the principles of fundamental fairness and due process that underlie and inform the provisions of the DSU.[619] In particular, in cases where a Member has been found to have acted inconsistently with its obligations under the covered agreements, that Member is entitled to know the reasons for such finding as a matter of due process. In addition, the requirement to set out a 'basic rationale' in the panel report assists such Member to understand the nature of its obligations and to make informed decisions about: (i) what must be done in order to implement the eventual rulings and recommendations made by the DSB; and (ii) whether and what to appeal. Article 12.7 also furthers the objectives, expressed in Article 3.2 of the DSU, of promoting security and predictability in the multilateral trading system and of clarifying the existing provisions of the covered agreements, because the requirement to provide 'basic' reasons contributes to other WTO Members' understanding of the nature and scope of the rights and obligations in the covered agreements.
>
> We do not believe that it is either possible or desirable to determine, in the abstract, the minimum standard of reasoning that will constitute a 'basic rationale' for the findings and recommendations made by a panel.[620]

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[614] Appellate Body Report on *Korea – Alcoholic Beverages*, paras. 166 and 168.

[615] Appellate Body on *Chile – Alcoholic Beverages*, para. 78.

[616] Appellate Body on *Argentina – Footwear (EC)*, para. 149.

[617] (*footnote original*) *The New Shorter Oxford English Dictionary*, Lesley Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 188.

[618] (*footnote original*) Ibid., Vol. II, p. 2482.

[619] (*footnote original*) We have also examined these principles in other contexts. See, for example, Appellate Body Report, *United States – Hot-Rolled Steel*, *supra*, footnote 59, paras. 101 and 193; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 158; and Appellate Body Report, *United States – FSC*, *supra*, footnote 24, para. 166.

[620] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages*, WT/DS75/AB/R, WT/DS83/AB/R, adopted 17 February 1999, para. 168. [In this case, Korea had claimed in

> Whether a panel has articulated adequately the 'basic rationale' for its findings and recommendations must be determined on a case-by-case basis, taking into account the facts of the case, the specific legal provisions at issue, and the particular findings and recommendations made by a panel. Panels must identify the relevant facts and the applicable legal norms. In applying those legal norms to the relevant facts, the reasoning of the panel must reveal how and why the law applies to the facts. In this way, panels will, in their reports, disclose the essential or fundamental justification for their findings and recommendations.[621]
>
> This does not, however, necessarily imply that Article 12.7 requires panels to expound at length on the reasons for their findings and recommendations. We can, for example, envisage cases in which a panel's 'basic rationale' might be found in reasoning that is set out in other documents, such as in previous panel or Appellate Body reports – provided that such reasoning is quoted or, at a minimum, incorporated by reference. Indeed, a panel acting pursuant to Article 21.5 of the DSU would be expected to refer to the initial panel report, particularly in cases where the implementing measure is closely related to the original measure, and where the claims made in the proceeding under Article 21.5 closely resemble the claims made in the initial panel proceedings."[622]

409. The Appellate Body on *Mexico – Corn Syrup (Article 21.5 – US)* further noted that for purposes of transparency and fairness to the parties, an Article 21.5 panel[623] "should strive to present the essential justification for its findings and recommendations in its own report":

> "Having regard to these circumstances, we are of the view that the Panel Report, read together with the original panel report, leaves no doubt about the reasons for the Panel's additional finding under Article 3.1 of the *Anti-Dumping Agreement*. We, therefore, find that the Panel did not fail to provide a 'basic rationale' for that finding.
>
> . . .
>
> We wish to add that for purposes of transparency and fairness to the parties, even a panel proceeding under Article 21.5 of the DSU should strive to present the essential justification for its findings and recommendations in its own report. In this case, in particular, we consider that the Panel's finding under Article 3.1 of the *Anti-Dumping Agreement* would have been better supported by a direct quotation from or, at least, an explicit reference to, the relevant reasoning set out in the original panel report."[624]

410. The Appellate Body on *US – Steel Safeguards* also considered that the Panel had complied with Article 12.7 by providing a detailed explanation on how the investigating authority had failed to provide a reasoned and adequate explanation:

> "Based on our review of the Panel's reasoning, it appears to us that the Panel considered in detail the evidence that was before the USITC, and provided detailed explanations of how and why it concluded that the USITC had failed to demonstrate, through a reasoned and adequate explanation, that the alleged 'unforeseen developments' *resulted* in increased imports of *each* product subject to a safeguard measure . . .
>
> In our view, in making these statements, the Panel has sufficiently set out in its Reports the 'basic rationale' for its finding that the USITC failed to explain how, though 'plausible', the 'unforeseen developments' identified in the report in fact *resulted* in increased imports of the specific products subject to the safeguard measures at issue."[625]

5. Articles 12.8 and 12.9: deadlines for Panel review

(a) General

411. The table in paragraph 412 shows the duration of the panel review process as regards reports adopted not later than 31 December 2004.

(b) Notification of delay in the issuance of a panel report to the parties

412. The following table shows the disputes where panels notified the DSB of a delay in the issuance of a report to the parties as provided for in Article 12.9 of the *DSU*:

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its appeal that the Panel had failed to comply with its obligations under Article 12.7 of the *DSU* to state the basic rationale behind its findings and recommendations. The Appellate Body did not define the term "basic rationale", but noted that the Panel had "set out a detailed and thorough rationale for its findings and recommendations in this case":

> "In this case, we do not consider it either necessary, or desirable, to attempt to define the scope of the obligation provided for in Article 12.7 of the DSU. It suffices to state that the Panel has set out a detailed and thorough rationale for its findings and recommendations in this case. The Panel went to some length to take account of competing considerations and to explain why, nonetheless, it made the findings and recommendations it did. The rationale set out by the Panel may not be one that Korea agrees with, but it is certainly more than adequate, on any view, to satisfy the requirements of Article 12.7 of the DSU. We, therefore, conclude that the Panel did not fail to set out the basic rationale for its findings and recommendations as required by Article 12.7 of the DSU."]

621 (*footnote original*) Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, para. 78.

622 Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 106–109.

623 For more information about panel proceedings under Article 21.5, see Section XXI.B.4.

624 Appellate Body on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 124 and 126.

625 Appellate Body Report on *US – Steel Safeguards*, paras. 503–504. See also paras. 505–507.

WT/DS No.	Complainant	Title
WT/DS2 WT/DS4	Venezuela Brazil	*US – Standards for Reformulated and Conventional Gasoline*
WT/DS7	Canada	*EC – Trade Description of Scallops*
WT/DS8 WT/DS10 WT/DS11	EC Canada US	*Japan – Taxes on Alcoholic Beverages*
WT/DS12 WT/DS14	Peru Chile	*EC – Trade Description of Scallops*
WT/DS18	Canada	*Australia – Measures Affecting Importation of Salmon*
WT/DS22	Philippines	*Brazil – Measures Affecting Desiccated Coconut*
WT/DS24	Costa Rica	*US – Restrictions on Imports of Cotton and Man-Made Underwear*
WT/DS26	US	*EC – Measures Concerning Meat and Meat Products (Hormones)*
WT/DS27	Ecuador, Guatemala, Honduras, Mexico, US	*EC – Regime for the Importation, Sale and Distribution of Bananas*
WT/DS31	US	*Canada – Certain Measures Concerning Periodicals*
WT/DS34	India	*Turkey – Restrictions on Imports of Textiles and Clothing Products*
WT/DS44	US	*Japan – Measures Affecting Consumer Photographic Film and Paper*
WT/DS54 WT/DS55 WT/DS59 WT/DS64	EC Japan US Japan	*Indonesia – Certain Measures Affecting the Automobile Industry*
WT/DS56	US	*Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*
WT/DS58	India, Malaysia, Pakistan and Thailand	*US – Import Prohibition of Certain Shrimp and Shrimp Products*
WT/DS60	Mexico	*Guatemala – Anti-Dumping Investigation regarding Portland Cement from Mexico*
WT/DS62 WT/DS67 WT/DS68	US US US	*EC – Customs Classification of Some Computer Equipment* *UK – Customs Classification of Certain Computer Equipment* *Ireland – Customs Classification of Certain Computer Equipment*
WT/DS72	New Zealand	*EC – Measures Affecting Butter Products*
WT/DS75 WT/DS84	EC US	*Korea – Taxes on Alcoholic Beverages*
WT/DS76	US	*Japan – Measures Affecting Agricultural Products*
WT/DS79	EC	*India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*
WT/DS87 WT/DS110	EC	*Chile – Taxes on Alcoholic Beverages*
WT/DS90	US	*India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*
WT/DS98	EC	*Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*
WT/DS99	Korea	*US – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabyte or above from Korea*
WT/DS108	EC	*US – Tax Treatment for "Foreign Sales Corporation"*
WT/DS114	EC	*Canada – Patent Protection of Pharmaceutical Products*
WT/DS121	EC	*Argentina – Safeguard Measures on Imports of Footwear*
WT/DS135	Canada	*EC – Measures Affecting Asbestos and Products Containing Asbestos*
WT/DS136 WT/DS162	EC Japan	*US – Anti-Dumping Act of 1916*
WT/DS139 WT/DS142	Japan EC	*Canada – Certain Automotive Industry Measures* *Canada – Certain Measures Affecting the Automobile Industry*
WT/DS141	India	*EC – Anti-Dumping Duties on Imports of Cotton-Type Bed-Linen from India*
WT/DS146 WT/DS175	EC US	*India – Measures Affecting the Automotive Sector*
WT/DS152	EC	*US – Sections 301–310 of the Trade Act of 1974*
WT/DS155	EC	*Argentina – Measures on the Export of Bovine Hides and the Import of Finished Leather*
WT/DS160	EC	*US – Section 1105 of the US Copyright Act*

Table (*cont.*)

WT/DS No.	Complainant	Title
WT/DS161 WT/DS169	US Australia	*Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*
WT/DS163	US	*Korea – Measures Affecting Government Procurement*
WT/DS166	EC	*US – Definitive Safeguard Measures on Imports of Wheat Gluten from the EC*
WT/DS174 WT/DS290	US Australia	*EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*
WT/DS176	EC	*US – Section 211 Omnibus Appropriations Act of 1998*
WT/DS177 WT/DS178	New Zealand Australia	*US – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australia*
WT/DS184	Japan	*US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*
WT/DS189	EC	*Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*
WT/DS192	Pakistan	*US – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*
WT/DS202	Korea	*US – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*
WT/DS204	United States	*Mexico – Measures Affecting Telecommunications Services*
WT/DS206	India	*US – Anti-Dumping and Countervailing Measures on Steel Plate from India*
WT/DS207	Argentina	*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*
WT/DS211	Turkey	*Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*
WT/DS212	EC	*US – Countervailing Measures Concerning Certain Products from the EC*
WT/DS213	EC	*US – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*
WT/DS217	Australia, Brazil, Chile, the EC, India, Indonesia, Japan, Korea and Thailand	*US – Continued Dumping and Subsidy Offset Act of 2000*
WT/DS234	Canada and Mexico	
WT/DS219	Brazil	*EC – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*
WT/DS221	Canada	*US – Section 129(C)(1) of the Uruguay Round Agreements Act*
WT/DS222	Brazil	*Canada – Export Credits and Loan Guarantees for Regional Aircraft*
WT/DS231	Peru	*EC – Trade Description of Sardines*
WT/DS238	Chile	*Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches*
WT/DS241	Brazil	*Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*
WT/DS243	India	*US – Rules of Origin for Textiles and Apparel Products*
WT/DS244	Japan	*US – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*
WT/DS245	United States	*Japan – Measures Affecting the Importation of Apples*
WT/DS246	India	*EC – Conditions for the Granting of Tariff Preferences to Developing Countries*
WT/DS248 WT/DS249 WT/DS251 WT/DS252 WT/DS253 WT/DS254 WT/DS258 WT/DS259	EC Japan Korea China Switzerland Norway New Zealand Brazil	*US – Definitive Safeguard Measures on Imports of Certain Steel Products*
WT/DS257	Canada	*US – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*
WT/DS264	Canada	*US – Final Dumping Determination on Softwood Lumber from Canada*
WT/DS265 WT/DS266 WT/DS283	Australia Brazil Thailand	*EC – Export Subsidies on Sugar*

Table (*cont.*)

WT/DS No.	Complainant	Title
WT/DS267	Brazil	*US – Subsidies on Upland Cotton*
WT/DS268	Argentina	*US – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*
WT/DS269 WT/DS286	Brazil Thailand	*EC – Customs Classification of Frozen Boneless Chicken Cuts*
WT/DS276	United States	*Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*
WT/DS277	Canada	*US – Investigation of the International Trade Commission in Softwood Lumber from Canada*
WT/DS282	Mexico	*US – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*
WT/DS285	Antigua and Barbuda	*US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*
WT/DS291 WT/DS292 WT/DS293	US Canada Argentina	*EC – Measures Affecting the Approval and Marketing of Biotech Products*
WT/DS295	US	*Mexico – Definitive Anti-Dumping Measures on Beef and Rice – Complaint with respect to Rice*
WT/DS296	Korea	*US – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*
WT/DS301	Korea	*EC – Measures Affecting Trade in Commercial Vessels*
WT/DS302	Honduras	*Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*

6. Article 12.10

(a) "the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation"

413. In *India – Quantitative Restrictions*, India requested additional time to prepare and present its first written submission, pursuant to Article 12.10 of the *DSU*. The Panel, "in light of this provision, and considering the administrative reorganization taking place in India as a result of the recent change in government", decided to grant an additional period of time (10 days) to India.[626]

7. Article 12.11

(a) Explicit indication in the panel's report of how special and differential provisions were taken into account

414. In *India – Quantitative Restrictions*, the Panel considered that "Article 12.11 of the DSU requires us to indicate explicitly the form in which account was taken of relevant provisions on special and differential treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures." The Panel then noted that its analysis of Article XVIII:B of *GATT 1994*, which embodies the principle of special and differential treatment in relation to measures taken for balance-of-payments purposes, reflected its consideration of the relevant provisions on special and differential treatment.[627]

415. In *US – Offset Act (Byrd Amendment)*, India and Indonesia argued that the Act undermined Article 15 of the *Anti-Dumping Agreement* on special and differential treatment for developing countries. The United States responded that Article 15 was not part of the terms of reference of the Panel as it had not been identified in any of the complaining parties' requests for establishment of a panel. The Panel, although acknowledging that Article 15 was not mentioned in the request, noted that Article 12.11 of the *DSU* required it to explicitly indicate how it had taken into account the relevant special and differential provisions of the covered agreements which are raised by developing countries in the proceedings:

> "We note that there is no reference to AD Article 15 in the various requests for establishment of this Panel. Generally, therefore, AD Article 15 would not fall within our terms of reference.[628] However, we note that DSU Article 12.11 requires panels to 'explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures'. Since we consider AD Article 15 to be

[626] Panel Report on *India – Quantitative Restrictions*, para. 5.10.
[627] Panel Report on *India – Quantitative Restrictions*, para. 5.157.
[628] (*footnote original*) See, for example, *EC – Bananas III*, para. 142 (WT/DS27/AB/R).

relevant, and since that provision has been raised by developing country Members in the present proceedings, we are bound to consider that provision, even though it was not referred to in the various requests for establishment. In doing so, we note that certain developing country Members attach importance to price undertakings as a 'constructive' alternative to anti-dumping duties."[629]

416. In *Mexico – Telecoms*, the Panel explained the manner in which it had taken into account in its findings, pursuant to Article 12.11, the relevant GATS special and differential provisions for developing country Members:

"The Panel notes that, pursuant to Article 12.11 of the DSU, it has taken into account in its findings GATS provisions on differential and more-favourable treatment for developing country Members. In particular, the Panel has examined Mexico's arguments that commitments of such Members have to be interpreted in the light of Article IV of the GATS, paragraph 5 of the preamble to the GATS, and paragraph 5(g) of the Annex on Telecommunications. The Panel emphasizes that its findings in no way prevent Mexico from actively pursuing the development objectives referred to in these provisions by extending telecommunications networks and services at affordable prices in a manner consistent with its GATS commitments."[630]

XIII. ARTICLE 13

A. TEXT OF ARTICLE 13

Article 13
Right to Seek Information

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

B. INTERPRETATION AND APPLICATION OF ARTICLE 13

1. Article 13.1

(a) "right to seek information and technical advice from any individual or body"

417. In *EC – Hormones*, the Appellate Body examined the European Communities' challenge of the Panel's selection and use of experts and stated that a Panel has the discretion to decide whether to seek advice from individual scientific experts or from a group of such experts, and may, in the former case, establish *ad hoc* rules for such consultations:

"Both Article 11.2 of the *SPS Agreement* and Article 13 of the DSU enable panels to seek information and advice as they deem appropriate in a particular case . . . . We find that in disputes involving scientific or technical issues, neither Article 11.2 of the *SPS Agreement,* nor Article 13 of the DSU prevents panels from consulting with individual experts. Rather, both the *SPS Agreement* and the DSU leave to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate. The rules and procedures set forth in Appendix 4 of the DSU apply in situations in which expert review groups have been established. However, this is not the situation in this particular case. Consequently, once the panel has decided to request the opinion of individual scientific experts, there is no legal obstacle to the panel drawing up, in consultation with the parties to the dispute, *ad hoc* rules for those particular proceedings."[631]

418. In *US – Shrimp*, the Panel received a brief from three non-governmental organizations. The complaining parties in the dispute requested the Panel not to consider the contents of the briefs submitted by the organizations while the United States urged the Panel to take into account any relevant information in the two briefs that the Panel acknowledged receiving. The Panel found that "[a]ccepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied. We therefore informed the parties that we did not intend to take these documents into consideration."[632] The Appellate Body found that the Panel had erred in its legal interpretation of Article 13 of the *DSU* and held that accepting non-requested information from non-governmental sources was not incompatible with the provisions of the *DSU*. The Appellate Body began by emphasizing the "comprehensive nature" of a

[629] Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.87.
[630] Panel Report on *Mexico – Telecoms*, para. 8.3.
[631] Appellate Body Report on *EC – Hormones*, para. 148.
[632] Panel Report on *US – Shrimp*, para. 7.8.

panel's authority to seek information in the context of a dispute:

> "The comprehensive nature of the authority of a panel to 'seek' information and technical advice from 'any individual or body' it may consider appropriate, or from 'any relevant source', should be underscored. This authority embraces more than merely the choice and evaluation of the *source* of the information or advice which it may seek. A panel's authority includes the authority to decide *not to seek* such information or advice at all. We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case, to ascertain the *acceptability* and *relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received.
>
> The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to 'make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements* . . . .' (emphasis added)"[633]

419. The Appellate Body on *US – Shrimp* subsequently held that the word "seek" in the phrase "seek information" should not be given an excessively "formal and technical" reading. The Appellate Body opined that given the breadth of a panel's mandate to seek information without "unduly delaying the panel process", "for all practical and pertinent purposes, the distinction between 'requested' and 'non-requested' information vanishes":

> "That the Panel's reading of the word 'seek' is unnecessarily formal and technical in nature becomes clear should an 'individual or body' first ask a panel for permission to file a statement or a brief. In such an event, a panel may decline to grant the leave requested. If, in the exercise of its sound discretion in a particular case, a panel concludes *inter alia* that it could do so without 'unduly delaying the panel process', it could grant permission to file a statement or a brief, subject to such conditions as it deems appropriate. The exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute. In this kind of situation, for all practical and pertinent purposes, the distinction between 'requested' and 'non-requested' information vanishes.
>
> A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*. The fact that a panel may *motu proprio* have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will *not* be deluged, as it were, with non-requested material, *unless that panel allows itself to be so deluged*.
>
> Moreover, acceptance and rejection of the information and advice of the kind here submitted to the Panel need not exhaust the universe of possible appropriate dispositions thereof. The Panel suggested instead, that, if any of the parties wanted 'to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so.' In response, the United States then designated Section III of the document submitted by CIEL/CMC as an annex to its second submission to the Panel, and the Panel gave the appellees two weeks to respond. We believe that this practical disposition of the matter by the Panel in this dispute may be detached, as it were, from the legal interpretation adopted by the Panel of the word 'seek' in Article 13.1 of the DSU. When so viewed, we conclude that the actual disposition of these briefs by the Panel does not constitute either legal error or abuse of its discretionary authority in respect of this matter. The Panel was, accordingly, entitled to treat and take into consideration the section of the brief that the United States appended to its second submission to the Panel, just like any other part of the United States pleading.
>
> . . .
>
> We find, and so hold, that the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU. At the same time, we consider that the Panel acted within the scope of its authority under Articles 12 and 13 of the DSU in allowing any party to the dispute to attach the briefs by non-governmental organizations, or any portion thereof, to its own submissions."[634]

420. While in *US – Shrimp* the Appellate Body held that panels have the authority to accept so-called *amicus curiae* briefs (see paragraph 419 above), in *US – Lead and Bismuth II*, the Appellate Body recognized that it also had the authority to accept *amicus curiae* briefs, albeit on a different legal basis. See paragraphs 1043–1051 below.

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[633] Appellate Body Report on *US – Shrimp*, paras. 104 and 106.
[634] Appellate Body Report on *US – Shrimp*, paras. 107–110.

421. The Appellate Body on *Japan – Agricultural Products II* agreed with the Panel's finding that "[I]n deciding whether a fact or claim can. . .be accepted, we consider that we are called upon to examine and weigh all the evidence validly submitted to us, including the opinions we received from the experts advising the Panel in accordance with Article 13 of the DSU." The Appellate Body recalled its statement about the "comprehensive nature" of a panel's authority to engage in fact finding; however, it emphasized that a panel could not use this authority so as to relieve a complaining party of its burden of proof and the concomitant duty to make a prima facie case. With respect to this aspect of the burden of proof issue, see paragraph 1000 below.

422. In *India – Quantitative Restrictions*, the Panel consulted with the IMF on India's balance-of-payments situation. In this context, the question arose whether in the light of Article XV:2, which speaks of consultations between the Contracting Parties and the IMF, a panel could engage in such consultations with the IMF. The United States, the complaining party, opined that the terms of Article XV:2 of *GATT 1994*, read as per paragraph 2(b) of the Incorporation Clause of *GATT 1994* in Annex 1A of the *WTO Agreement*, require the WTO to consult with the IMF in specific matters, and the WTO, by definition, includes panels. India, in contrast, argued that to interpret the terms of Article XV to refer to panels meant to ignore the division of functions between the different bodies of the WTO, and that only the General Council and the BOP Committee were covered by this provision. The Panel stated:

> "Article 13.1 of the DSU entitles the Panel to consult with the IMF in order to obtain any relevant information relating to India's monetary reserves and balance-of-payments situation which would assist us in assessing the claims submitted to us.
>
> . . . We do not find it necessary for the purposes of this case to decide the extent to which Article XV:2 may require panels to consult with the IMF or consider as dispositive specific determinations of the IMF. As will be seen in Section V.G *infra*, we accept in the circumstances of this case certain assessments of the IMF. In this regard, however, we note that whether or not the provisions of Article XV:2 extend to panels, the Panel has the responsibility of making an objective assessment of the facts of the case and the conformity with GATT 1994, as incorporated into the WTO Agreement, of the Indian measures at issue, in accordance with Article 11 of the DSU."[635]

423. For information relating to *amicus curiae* submissions, see Section XXXVI.G below.

(b) Right to disregard information submitted

424. In *US – Section 110(5) Copyright Act*, the Arbitrators decided to seek additional information from United States collective management organizations. One such organization submitted some of the information requested but attached a number of conditions concerning the use of that information, in particular the obligation for the Arbitrators to submit "any proposed public document" to its counsel in order for it to confirm that the confidentiality of the information submitted had been effectively protected. The Arbitrators understood that the term "any proposed public document" could actually apply to their Award. Therefore, pursuant to their Working Procedures and to general practice under public international law, the Arbitrators considered that "such a condition was incompatible with the confidentiality of their deliberations, which extends to the content of their report until it is made public". The Arbitrators also feared that such conditions, if they were to be accepted, could make access to evidence more difficult in future cases under the *DSU*. As a result, they decided not to use the information submitted.[636]

425. As regards the possibility of the panel's drawing adverse inferences, see Section XI.B.3(c) above.

(c) "A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate"

426. The Appellate Body on *Canada – Aircraft* addressed the issue of the authority of a panel to request a party to a dispute to submit information concerning that dispute. The Appellate Body stated:

> "It is clear from the language of Article 13 that the discretionary authority of a panel may be exercised to request and obtain information, not just 'from any individual or body' within the jurisdiction of a Member of the WTO, but also from *any Member*, including *a fortiori* a Member who is a party to a dispute before a panel. This is made crystal clear by the third sentence of Article 13.1, which states: '*A Member* should respond promptly and fully to *any request by a panel for such information as the panel considers necessary and appropriate*.'"[637]

427. In *Canada – Aircraft*, Canada argued in its appeal that it was not legally bound to comply with the Panel's request to provide information relating to the disputed

[635] Panel Report on *India – Quantitative Restrictions*, para. 5.12–5.13. On the right/obligation to consult the IMF, see Appellate Body Report on *Argentina – Textiles and Apparel*, paras. 82–86.

[636] Award of the Arbitrators on *US – Section 110(5) Copyright Act*, para. 1.10.

[637] Appellate Body Report on *Canada – Aircraft*, para. 185.

financing of the subject transaction. The Appellate Body held:

> "[W]e are of the view that the word 'should' in the third sentence of Article 13.1 is, in the context of the whole of Article 13, used in a normative, rather a merely exhortative, sense. Members are, in other words, under a duty and an obligation to 'respond promptly and fully' to requests made by panels for information under Article 13.1 of the DSU."[638]

428. See also the discussion on adverse inferences in Section XI.B.3(c) above.

2. Article 13.2

(a) "seek information from any relevant source"

429. In *Argentina – Textiles and Apparel*, Argentina argued on appeal that the Panel had failed to make "an objective assessment of the matter" because it had not acceded to the request of the parties in seeking information from, and consulting with, the IMF concerning certain aspects of the statistical tax. The Appellate Body held that "[j]ust as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all":

> "The DSU gives panels different means or instruments for complying with Article 11; among these is the right to 'seek information and technical advice' provided in Article 13 of the DSU.
>
> . . .
>
> Pursuant to Article 13.2 of the DSU, a panel may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter at issue. This is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision. We recall our statement in *EC Measures Concerning Meat and Meat Products (Hormones)* that Article 13 of the DSU enables a panel to seek information and technical advice as it deems appropriate in a particular case, and that the DSU leaves 'to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate.' Just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all.
>
> . . .
>
> In this case, we find that the Panel acted within the bounds of its discretionary authority under Articles 11 and 13 of the DSU in deciding not to seek information from, nor to consult with, the IMF."[639]

430. In *Australia – Automotive Leather II*, Australia argued that the United States was limited to relying on the facts and arguments set forth in its request for consultations. Australia argued that the requirement that the request for consultations "include a statement of available evidence" pursuant to Article 4.2 of the *SCM Agreement*, in conjunction with the expedited nature of proceedings, requires a panel to limit the complaining party to using the evidence and arguments set forth in the request for consultations. The Panel held that the expedited nature of the proceedings under Article 4 of the *SCM Agreement* did not limit the Panel's general right to seek information:

> "[W]e note that panels have, under Article 13.2 of the DSU, a general right to seek information 'from any relevant source'. Indeed, it is a common feature of panel proceedings for panellists to question parties about the facts and arguments underlying their positions. There is nothing in Article 4 of the SCM Agreement to suggest that this right is somehow limited by the expedited nature of dispute settlement proceedings conducted under that provision. If Australia's position were correct, a panel might be constrained from seeking out relevant information from the party, in this case the United States, that was limited to reliance on the facts set forth in its request for consultations. Similarly, under Australia's view, the defending party might introduce information during the panel proceedings, which the complaining party, in this case the United States, would not be able to rebut, as it would be limited to reliance on the facts set forth in its request for consultations. We do not believe Article 4.2 requires this result."[640]

431. The Appellate Body on *EC – Sardines* rejected the claim of the European Communities that the Panel had failed to conduct "an objective assessment of the facts of the case", as required by Article 11 of the *DSU*. The European Communities had alleged impropriety in relation to the Panel's decision not to seek information from the Codex Commission:

> "Article 13.2 of the DSU provides that '[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.' This provision is clearly phrased in a manner that attributes discretion to panels, and we have interpreted it in this vein. Our statements in *EC – Hormones*, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* ("*Argentina – Textiles and Apparel*"),[641] and *US – Shrimp*, all support the conclusion that, under Article 13.2 of the DSU, panels enjoy

[638] Appellate Body Report on *Canada – Aircraft*, para. 187.
[639] Appellate Body Report on *Argentina – Textiles and Apparel*, paras. 82, 84 and 86.
[640] Panel Report on *Australia – Automotive Leather II*, para. 9.28.
[641] (*footnote original*) Appellate Body Report, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003.

discretion as to *whether or not* to seek information from external sources.[642] In this case, the Panel evidently concluded that it did not need to request information from the Codex Commission, and conducted itself accordingly. We believe that, in doing so, the Panel acted within the limits of Article 13.2 of the DSU. A contravention of the duty under Article 11 of the DSU to make an objective assessment of the facts of the case cannot result from the due exercise of the discretion permitted by another provision of the DSU, in this instance Article 13.2 of the DSU."[643]

XIV. ARTICLE 14

A. TEXT OF ARTICLE 14

Article 14
Confidentiality

1. Panel deliberations shall be confidential.

2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

3. Opinions expressed in the panel report by individual panelists shall be anonymous.

B. INTERPRETATION AND APPLICATION OF ARTICLE 14

432. In *Brazil – Aircraft (Article 21.5 – Canada II)*, Brazil strongly objected to the alleged disclosure of its confidential statements to the representatives of private parties who were not members of Canada's delegation. Brazil submitted that the alleged disclosure by Canada was a serious breach of Canada's obligations to respect the rules of confidentiality contained in Article 14 of the *DSU* and paragraph 3 of the Panel's Working Procedures. According to Brazil, nothing in the Panel's Working Procedures or the *DSU* authorizes disclosure of confidential documents to persons who are not members of a delegation. The Panel held that it did not think that Article 14 of the *DSU* was relevant to this issue since it "focuses on panels and their obligations in respect of confidentiality; it does not address itself to the obligations of the parties in respect of confidentiality".[644]

XV. ARTICLE 15

A. TEXT OF ARTICLE 15

Article 15
Interim Review Stage

1. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

3. The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article 12.

B. INTERPRETATION AND APPLICATION OF ARTICLE 15

1. Scope of the interim review

433. In *Australia – Salmon*, Australia had requested a review of the whole of the Panel's report during the interim review on the grounds that a large part of the legal reasoning of the interim report was not based on an objective assessment of the matter before the Panel and contained a number of factual inaccuracies and assertions not supported by evidence before the Panel. The Panel recalled that Article 15 provides for the review of "precise aspects" of the interim report and not of the whole of the report. The Panel therefore dismissed Australia's request.[645]

2. Confidentiality of interim reports

434. In *US – Steel Safeguards*, the Panel addressed the issue of the confidentiality of interim reports because it had discovered that the parties had not respected the

[642] (*footnote original*) In *EC – Hormones*, we stated that Article 13 of the DSU "enable[s] panels to seek information and advice as they deem appropriate in a particular case". (Appellate Body Report, *supra*, footnote, 17 para. 147.) In *Argentina – Textiles and Apparel*, we stated that, pursuant to Article 13.2 of the DSU, "just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all". (Appellate Body Report, *supra*, footnote 236, para. 84.) In *US – Shrimp*, we considered that "a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case." (Appellate Body Report, *supra*, footnote 50, para. 104) (original emphasis).

[643] Appellate Body Report on *EC – Sardines*, para. 302.

[644] Panel Report on *Canada – Aircraft (Article 21.5 – Canada II)*, footnote 13.

[645] Panel Report on *Australia – Salmon*, para. 7.3.

confidentiality obligation and had disclosed aspects of the interim reports:

> "[W]e would like to address the issue of confidentiality of the Interim Reports. When, on 26 March 2002, we transmitted our Interim Reports to the parties, we clearly indicated that such Reports were confidential. Indeed, pursuant to the DSU, all panel proceedings remain confidential until the Panel Report is circulated to WTO Members. We had also explicitly emphasized at all our meetings with the parties that the panel proceedings were confidential. This was accepted by the parties and reflected in the Panel's working procedures and in all our relevant correspondence with the parties. Therefore, we are concerned to discover that parties have not respected this confidentiality obligation and have disclosed aspects of the Panel's Interim Reports. We consider that this lack of respect of a specific requirement imposed by the DSU and the Panel's working procedures is regrettable and should not remain unmentioned."[646]

3. Introduction of new evidence at the interim review stage

435. In *EC – Sardines*, the Appellate Body explained that the interim review stage is not an appropriate time to introduce new evidence:

> "The interim review stage is not an appropriate time to introduce new evidence. We recall that Article 15 of the DSU governs the interim review. Article 15 permits parties, during that stage of the proceedings, to submit comments on the draft report issued by the panel,[647] and to make requests "for the panel to review precise aspects of the interim report".[648] At that time, the panel process is all but completed; it is only – in the words of Article 15 – 'precise aspects' of the report that must be verified during the interim review. And this, in our view, cannot properly include an assessment of new and unanswered evidence. . ."[649]

XVI. ARTICLE 16

A. TEXT OF ARTICLE 16

Article 16
Adoption of Panel Reports

1. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.

2. Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting[7] unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

(*footnote original*) [7] If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.

B. INTERPRETATION AND APPLICATION OF ARTICLE 16[650]

1. Article 16.4

(a) Time-period under Article 16.4

436. On 2 December 2004, Australia, Brazil, Thailand and the European Communities requested that a meeting of the DSB be held on 13 December 2004 for the DSB to agree to postpone consideration of the Panel reports in *EC – Export Subsidies on Sugar* and to agree an extension of the corresponding time-period under Article 16.4 of the DSU until 31 January 2005. The request included the following procedural agreement reached by the parties concerned:

> "1. In order to take account of the end of year period, and to avoid inconveniencing the appeal procedure, the above parties agree that the 60 day time-period in Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) as applicable to the above disputes will be extended to 31 January

[646] Panel Report on *US – Steel Safeguards*, para. 9.41.

[647] (*footnote original*) Article 15.1 of the DSU provides:

> Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

[648] (*footnote original*) Article 15.2 of the DSU provides:

> Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, *a party may submit a written request for the panel to review precise aspects of the interim report* prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members. (emphasis added)

[649] Appellate Body Report on *EC – Sardines*, para. 301.

[650] As regards the status of adopted Panel reports, see paras. 80–81 of this Chapter.

2005, and that the agreement of the Dispute Settlement Body (DSB) to this extension will be sought at a meeting of the DSB to be requested for 13 December 2004.

2. This extension is agreed on the understanding that the rights of the parties to the disputes with respect to adoption or appeal of the panel reports are preserved, as if such adoption or appeal had been requested within the 60 days specified in Article 16.4 of the DSU.

3. The European Communities (EC) will file its notice of appeal of the panel reports in these disputes on 13 January 2005, provided the DSB agreement set out in paragraph 1 is obtained.

4. If for any reason the EC does not file its notice of appeal on 13 January 2005, the complainants may, individually or jointly, request a DSB meeting for adoption of the panel reports within the extended 60 day period.

5. The parties also agree that the complainants will request a second meeting of the DSB for 14 - December 2004 for the adoption of the panel reports within the original 60 day period should this prove necessary, but that this request will be withdrawn should the DSB agreement set out in paragraph 1 above be obtained."[651]

437. At the DSB meeting of 13 December 2004, the DSB took note of the request and agreed that it would adopt the Panel Reports, upon request, on or before 31 January 2005, unless the DSB decided otherwise by consensus not to do so or a party notified the DSB of its decision to appeal.[652]

XVII. ARTICLE 17

A. TEXT OF ARTICLE 17

Article 17
Appellate Review

Standing Appellate Body

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

5. As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

7. The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

8. The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Procedures for Appellate Review

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

[651] WT/DS265/24, WT/DS266/24 and WT/DS283/5.
[652] WT/DSB/179, paras. 8 and 9.

11. Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.

12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

Adoption of Appellate Body Reports

14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.[8] This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

(*footnote original*) [8] If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

B. INTERPRETATION AND APPLICATION OF ARTICLE 17

1. General

438. In *Canada – Periodicals*, the Appellate Body stressed that "a Panel finding that has not been specifically appealed in a particular case should not be considered to have been endorsed by the Appellate Body. Such a finding may be examined by the Appellate Body when the issue is raised properly in a subsequent appeal."[653]

2. Article 17.1

(a) Establishment of the Appellate Body

439. At its meeting of 10 February 1995, the DSB established the Appellate Body in accordance with Article 17.1 of the *DSU*.[654]

3. Article 17.2

(a) Appointment of Members of the Appellate Body

440. On 6 December 1994, the Preparatory Committee to the WTO approved its recommendations for the procedures for the appointment of Appellate Body members.[655] As of 31 December 2004, the members of the Appellate Body are Mr Georges M. Abi-Saab, Ms Merit E. Janow, Mr Luiz Olavo Baptista, Mr A. V. Ganesan, Mr John Lockart, Mr Giorgio Sacerdoti and Mr Yasuhei Taniguchi.

4. Article 17.5

(a) "In no case shall the proceedings exceed 90 days"

441. The following table shows the duration of the appeal review proceedings for those Reports circulated not later than 31 December 2004:

WT/DS No.	Case Name	Date of Notice of Appeal	Date of Circulation	No. of Days
DS2	*US – Gasoline*	21 February 1996	29 April 1996	68
DS8, DS10, DS11	*Japan – Alcoholic Beverages II*	8 August 1996	4 October 1996	57
DS18	*Australia – Salmon*	22 July 1998	20 October 1998	90
DS22	*Brazil – Desiccated Coconut*	16 December 1996	21 February 1997	67
DS24	*US – Underwear*	11 November 1996	10 February 1997	91
DS26, DS48	*EC – Hormones*	24 September 1997	16 January 1998	114
DS27	*EC – Bananas III*	11 June 1997	9 September 1997	90
DS33	*US – Wool Shirts and Blouses*	24 February 1997	25 April 1997	60
DS31	*Canada – Periodicals*	29 April 1997	30 June 1997	62
DS34	*Turkey – Textiles*	26 July 1999	22 October 1999	88
DS46	*Brazil – Aircraft*	3 May 1999	2 August 1999	91
DS46	*Brazil – Aircraft (Article 21.5 – Canada)*	22 May 2000	21 July 2000	60
DS50	*India – Patents (US)*	15 October 1997	19 December 1997	65
DS56	*Argentina – Textiles and Apparel*	21 January 1998	27 March 1998	65
DS62, DS67, DS68	*EC – Computer Equipment*	24 March 1998	5 June 1998	73
DS69	*EC – Poultry*	29 April 1998	13 July 1998	75
DS58	*US – Shrimp*	13 July 1998	12 October 1998	91
DS58	*US – Shrimp (Article 21.5 – Malaysia)*	23 July 2001	22 October 2001	91

[653] Appellate Body Report on *Canada – Periodicals*, footnote 28 to para. 19.

[654] WT/DSB/M/1.

[655] PC/IPL/13.

Table (*cont.*)

WT/DS No.	Case Name	Date of Notice of Appeal	Date of Circulation	No. of Days
DS60	*Guatemala – Cement*	4 August 1998	2 November 1998	90
DS70	*Canada – Aircraft*	3 May 1999	2 August 1999	91
DS70	*Canada – Aircraft (Article 21.5 – Brazil)*	22 May 2000	21 July 2000	60
DS75, DS84	*Korea – Alcoholic Beverages*	20 October 1998	18 January 1999	90
DS76	*Japan – Agricultural Products II*	24 November 1998	22 February 1999	90
DS87, DS110	*Chile – Alcoholic Beverages*	13 September 1999	13 December 1999	91
DS90	*India – Quantitative Restrictions*	25 May 1999	23 August 1999	90
DS98	*Korea – Dairy*	15 September 1999	14 December 1999	90
DS103, DS113	*Canada – Dairy Products*	15 July 1999	13 October 1999	90
DS103, DS113	*Canada – Dairy (Article 21.5 – New Zealand and US)*	4 September	3 December 2001	90
DS103, DS113	*Canada – Dairy (Article 21.5 – New Zealand and US II)*	23 September 2002	20 December 2002	88
DS108	*US – FSC*	26 November 1999	24 February 2000	90
DS108	*US – FSC (Article 21.5 – EC)*	15 October 2001	14 January 2002	91
DS121	*Argentina – Footwear*	15 September 1999	14 December 1999	90
DS122	*Thailand – H-Beams*	23 October 2000	12 March 2001	140
DS132	*Mexico – Corn Syrup (Article 21.5 – US)*	24 July 2001	22 October 2001	90
DS135	*EC – Asbestos*	23 October 2000	12 March 2001	140
DS136, DS162	*US – 1916 Act*	29 May 2000	28 August 2000	91
DS138	*US – Lead and Bismuth*	27 January 2000	10 May 2000	104
DS139, DS142	*Canada – Autos*	2 March 2000	31 May 2000	90
DS141	*EC – Bed Linen*	1 December 2000	1 March 2001	90
DS141	*EC – Bed Linen (Article 21.5 – India)*	8 January 2003	8 April 2003	90
DS146, DS175	*India – Autos*	31 January 2002	19 March 2002	47
DS161, DS169	*Korea – Various Measures on Beef*	11 September 2000	11 December 2000	91
DS165	*US – Certain EC Products*	12 September 2000	11 December 2000	90
DS166	*US – Wheat Gluten*	26 September 2000	22 December 2000	87
DS170	*Canada – Patent Term*	19 June 2000	18 September 2000	91
DS176	*US – Section 211 Appropriations Act*	4 October 2001	2 January 2002	90
DS177, DS178	*US – Lamb*	31 January 2001	1 May 2001	90
DS184	*US – Hot-Rolled Steel*	25 April 2001	24 July 2001	90
DS192	*US – Cotton Yarn*	9 July 2001	8 October 2001	91
DS202	*US – Line Pipe*	19 November 2001	15 February 2002	88
DS207	*Chile – Price Band System*	24 June 2002	23 September 2002	91
DS212	*US – Countervailing Measures on Certain EC Products*	9 September 2002	9 December 2002	91
DS213	*US – Carbon Steel*	30 August 2002	28 November 2002	90
DS217, DS234	*US – Offset Act (Byrd Amendment)*	18 October 2002	16 January 2003	90
DS219	*EC – Tube or Pipe Fittings*	23 April 2003	22 July 2003	90
DS231	*EC – Sardines*	28 June 2002	26 September 2003	90
DS244	*US – Corrosion-Resistant Steel Sunset Review*	15 September 2003	15 December 2003	91
DS245	*Japan – Apples*	28 August 2003	26 November 2003	90
DS246	*EC – Tariff Preferences*	8 January 2004	7 April 2004	90

Table (*cont.*)

WT/DS No.	Case Name	Date of Notice of Appeal	Date of Circulation	No. of Days
DS248, DS249, DS251, DS252, DS253, DS254, DS258, DS259	*US – Steel Safeguards*	11 August 2003	10 November 2003	91
DS257	*US – Softwood Lumber IV*	21 October 2003[656]	19 January 2004	90
DS264	*US – Softwood Lumber V*	13 May 2004	11 August 2004	89
DS267	*US – Subsidies on Upland Cotton*	18 October 2004	3 March 2005	136
DS268	*US – Oil Country Tubular Goods Sunset Reviews*	31 August 2004	29 November 2004	90
DS276	*Canada – Wheat Exports and Grain Imports*	1 June 2004	30 August 2004	90

(b) Extension of deadline for circulation of Appellate Body Report

442. In *EC – Hormones*, the Appellate Body informed the DSB that it was not going to be able to circulate its Report on time, due to the exceptional nature of this case, the time needed for translation and the intervention of the Christmas holiday period. The Appellate Body announced that it expected to circulate its Report to WTO Members by Friday, 16 January 1998.[657] The appeal process thus lasted 114 days.

443. In *US – Lead and Bismuth II*, a Member of the Division hearing the appeal, Mr Christopher Beeby, passed away. Accordingly, the parties in the appeal (European Communities and the United States) agreed to a two-week extension of the 90-day time-limit for the consideration of the appeal and thus agreed that the Report would be circulated no later than 10 May 2000.[658] The appeal process thus lasted 104 days.

444. In *EC – Asbestos*, the Appellate Body informed the DSB that, due to the exceptional workload of the Appellate Body, and in the light of the agreement of the participants, Canada and the European Communities, the Appellate Body Report in this appeal would be circulated to WTO Members no later than Monday, 12 March 2001.[659] The appeal process thus lasted 140 days.

445. In *Thailand – H-Beams*, on 20 December 2001, the Appellate Body informed the DSB that, due to the exceptional workload of the Appellate Body, and in the light of the agreement of the participants in this appeal, the Appellate Body Report in the appeal would be circulated to Members of the WTO no later than 12 March 2001.[660] The appeal process thus lasted 140 days.

5. Article 17.6: scope of appellate review

(a) "issues of law . . . and legal interpretations"

(i) Factual findings versus legal findings

446. In *Canada – Periodicals*, the Appellate Body made reference to the limits of its mandate under Articles 17.6 and 17.13 as follows:

> "We are mindful of the limitation of our mandate in Articles 17.6 and 17.13 of the *DSU*. According to Article 17.6, an appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the Panel. The determination of whether imported and domestic products are 'like products' is a process by which legal rules have to be applied to facts. In any analysis of Article III:2, first sentence, this process is particularly delicate, since 'likeness' must be construed narrowly and on a case-by-case basis."[661]

447. In *EC – Bananas III*, the Appellate Body identified several findings of the Panel as being factual findings and thus outside its scope of review:

> "On the first issue, the Panel found that the procedural and administrative requirements of the activity function rules for importing third-country and non-traditional ACP bananas differ from, and go significantly beyond, those required for importing traditional ACP bananas. This is a factual finding. . . .
>
> . . .
>
> It is, however, evident from the terms of its finding that the Panel concluded, as a matter of fact, that the *de facto* discrimination did continue to exist after the entry into force of the GATS. This factual finding is beyond review by the Appellate Body. Thus, we do not reverse or

[656] Original Notice of Appeal filed on 2 October 2003 – withdrawn on 3 October 2003.
[657] Appellate Body Report on *EC – Hormones*, communication from the Appellate Body – WT/DS26/11, WT/DS48/9.
[658] Appellate Body Report on *US – Lead and Bismuth II*, para. 8.
[659] Appellate Body Report on *EC – Asbestos*, para. 8.
[660] Appellate Body Report on *Thailand – H-Beams*, para. 7.
[661] Appellate Body Report on *Canada – Periodicals*, p. 22.

modify the Panel's conclusion in paragraph 7.308 of the Panel Reports.

. . .

In our view, the conclusions by the Panel on whether Del Monte is a Mexican company, the ownership and control of companies established in the European Communities that provide wholesale trade services in bananas, the market shares of suppliers of Complaining Parties' origin as compared with suppliers of EC (or ACP) origin, and the nationality of the majority of operators that 'include or directly represent' EC (or ACP) producers, are all factual conclusions. Therefore, we decline to rule on these arguments made by the European Communities."[662]

448. In *EC – Hormones*, the Appellate Body made a distinction between factual[663] and legal findings and stressed that factual findings "are, in principle, not subject to [its] review":

"Under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a panel report and legal interpretations developed by the panel. Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body. The determination of whether or not a certain event did occur in time and space is typically a question of fact; for example, the question of whether or not Codex has adopted an international standard, guideline or recommendation on [one of the growth hormones at issue] is a factual question. . . . The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question."[664]

449. In *Australia – Salmon*, the Appellate Body confirmed that "[t]he Panel's consideration and weighing of the evidence in support of [the] claims relates to its assessment of the facts and, therefore, falls outside the scope of appellate review under Article 17.6 of the DSU".[665]

450. The Appellate Body on *Korea – Alcoholic Beverages* further indicated that the panel's examination and weighing of the evidence submitted fall within the scope of its discretion as the trier of facts (in this regard, see Section XI.B.3(a)(ii) above):

"The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review. This is true, for instance, with respect to the Panel's treatment of the Dodwell Study, the Sofres Report and the Nielsen Study. We cannot second-guess the Panel in appreciating either the evidentiary value of such studies or the consequences, if any, of alleged defects in those studies. Similarly, it is not for us to review the relative weight ascribed to evidence on such matters as marketing studies, methods of production, taste, colour, places of consumption, consumption with 'meals' or with 'snacks', and prices."[666]

451. In *US – Wheat Gluten*, the Appellate Body again referred to the Panel as the trier of the facts (see Section XI.B.3(a)(ii) above) in respect of its discretion to consider the evidence in a given case and summarized its prior jurisprudence on the scope of review that the Appellate Body can undertake of the Panel's findings pursuant to Article 17.6 of the *DSU*:

"[W]e recall that, in previous appeals, we have emphasized that the role of the Appellate Body differs from the role of panels. Under Article 17.6 of the DSU, appeals are 'limited to *issues of law* covered in the panel report and *legal* interpretations developed by the panel'. (emphasis added) By contrast, we have previously stated that, under Article 11 of the DSU, panels are:

> . . . charged with the mandate to determine the *facts* of the case and to arrive at *factual findings*. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof.[667] (emphasis added)

We have also stated previously that, although the task of panels under Article 11 relates, in part, to its assessment of the *facts*, the question whether a panel has made an 'objective assessment' of the facts is a *legal* one, that may be the subject of an appeal.[668] (emphasis added) However, in view of the distinction between the respective roles of the Appellate Body and panels, we have taken care to emphasize that a panel's appreciation of the evidence falls, in principle, 'within the *scope of the panel's discretion as the trier of facts*'.[669] (emphasis added) . . . a panel's appreciation of the evidence falls, in

[662] Appellate Body Report on *EC – Bananas III*, paras. 206, 237 and 239.

[663] Examples of factual findings that the Appellate Body have refrained from reviewing are Appellate Body Report on *EC – Bananas III*, paras. 206, 237 and 239; Appellate Body Report on *Australia – Salmon*, paras. 259–261 (see para. 449 below); Appellate Body Report on *Japan – Agricultural Products II*, para. 98; Appellate Body Report on *India – Quantitative Restrictions*, paras. 143–144.

[664] Appellate Body Report on *EC – Hormones*, para. 132.

[665] Appellate Body Report on *Australia – Salmon*, para. 261.

[666] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 161.

[667] (*footnote original*) Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, footnote 29, para. 137.

[668] (*footnote original*) Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, at 183, para. 132.

[669] (*footnote original*) Appellate Body Report, *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, paras. 161 and 162.

principle, 'within the *scope of the panel's discretion as the trier of facts*'.[670] (emphasis added) . . ."[671]

452. In *US – Section 211 Appropriations Act*, the Appellate Body considered that the examination by the Panel of the municipal law[672] of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement is a legal characterization by a panel and thus subject to review by the Appellate Body:

". . . the municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations. Under the DSU, a panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the *WTO Agreement*. Such an assessment is a legal characterization by a panel. And, therefore, a panel's assessment of municipal law as to its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU."[673]

453. In *US – Softwood Lumber V*, the United States submitted that one of the issues raised by Canada on appeal – whether the United States' investigating authorities exercised its discretion in calculating wood chip offset revenue for Tembec in an "objective" and "even-handed" manner – was a factual issue and, accordingly, beyond the scope of appellate review. The Appellate Body first noted that the United States did not dispute the general proposition that an investigating authority must make its determinations in an objective and even-handed manner, as the Panel had found that the USDOC did in this case, but did not find such an obligation in Article 2.2.1.1 of the *Anti-Dumping Agreement*. The Appellate Body disagreed with the United States since, in its view, the issue raised by Canada was a question of law. For the Appellate Body, "[t]he fact that such an 'obligation [is] not found in Article 2.2.1.1' is not dispositive. Whether a particular approach of an investigating authority is, or is not, even-handed is, ultimately, a matter of the 'legal characterization'[674] of facts and, as such, a matter of law."[675]

(ii) Relevance of the characterization of a finding by the Panel

454. In *Chile – Price Band System*, the Appellate Body noted that the Panel's characterization of a finding "as a factual matter" does not mean that the issue is shielded from appellate review:

"[T]he Panel's characterization of its finding 'as a factual matter' does not mean that the issue whether Chile's price band system is a border measure similar to a variable import levy or a minimum import price is shielded from appellate review. This is a question of law, and not of fact, and thus is clearly within our jurisdiction under Article 17.6 of the DSU.[676] As we said in our Report in *EC – Hormones,* the assessment of the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is an issue of legal characterization. The mere assertion by a panel that its conclusion is a 'factual matter' does not make it so. . . . All the same, in reviewing the Panel's assessment of Chile's price band system, we are mindful of the need to give due deference to the discretion of the Panel, as the 'trier of fact', to weigh the evidence before it."[677]

(iii) Statements of panels not amounting to "legal findings"

455. In *US – Wool Shirts and Blouses*, the Appellate Body declined to address a particular statement by the Panel appealed by India. The Appellate Body held that the statement was not a legal finding, but rather a "descriptive and gratuitous comment":

"India appealed the following statement relating to Article 6.10 of the *ATC* at paragraph 7.20 of the Panel Report:

> 'During the review process, the TMB is not limited to the initial information submitted by the importing Member as parties may submit additional and other information in support of their positions, which, *we understand*, may relate to subsequent events.' (emphasis added)

In our view, this statement by the Panel is purely a descriptive and gratuitous comment providing background concerning the Panel's understanding of how the TMB functions. We do not consider this comment by the Panel to be 'a legal finding or conclusion' which the Appellate Body 'may uphold, modify or reverse'.[678]"[679]

456. In *EC – Poultry*, the Appellate Body addressed the issue of the allocation of a tariff-rate quota share to a non-Member and the participation of non-Members in the "others" category of a tariff-rate quota. In this context the Appellate Body stated that it was mindful of the mandate under Article 17.6 of the *DSU* and held that,

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[670] (*footnote original*) Appellate Body Report, *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, paras. 161 and 162.

[671] Appellate Body Report on *US – Wheat Gluten*, paras. 150–151.

[672] As regards the consideration of municipal law by panels, see Section XI.B.3(b).

[673] Appellate Body Report on *US – Section 211 Appropriations Act*, para. 106.

[674] Appellate Body Report, *EC – Hormones*, para. 132.

[675] Appellate Body Report on *US – Softwood Lumber V*, para. 163.

[676] (*footnote original*) Article 17.6 of the DSU provides: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."

[677] Appellate Body Report on *Chile – Price Band System*, para. 224.

[678] (*footnote original*) Within the meaning of Article 17.13 of the *DSU*.

[679] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 17.

contrary to Brazil's claim, the Panel had not made any legal findings on this issue:

> "It is true that in footnote 140 of the Panel Report, the Panel states that paragraph 7.75 of the *EC – Bananas* panel reports and 'particularly the use of the phrase "all suppliers other than Members with a substantial interest in supplying the product" . . . indicates that the *Banana III* panel did not take the view that allocation of quota shares to non-Members under Article XIII:2(d) was not permitted'. We do not consider this comment made in a footnote by the Panel to be either a 'legal interpretation developed by the panel' within the meaning of Article 17.6 of the DSU or a 'legal finding' or 'conclusion' that the Appellate Body may 'uphold, modify or reverse' under Article 17.13 of the DSU. It is undisputed in this case that there is no *allocation* of a country-specific share in the tariff-rate quota to a non-Member. There is, therefore, no finding nor any 'legal interpretation developed by the panel' that may be the subject of an appeal of which the Appellate Body may take cognizance."[680]

(iv) Review of new issues

457. In *EC – Tube or Pipe Fittings*, the Appellate Body rejected the European Communities' argument that a particular issue was not properly before the Appellate Body, stating that the issue was identified during the Panel proceedings.[681]

(v) Review of new arguments

458. In *Canada – Aircraft*, Brazil had raised an argument during the appellate review which it had not raised during the Panel review. The Appellate Body, although it found that this new argument was beyond the scope of appellate review, stated that "new arguments are not *per se* excluded from the scope of appellate review, simply because they are new":

> "In our view, this new argument raised by Brazil is beyond the scope of appellate review. Article 17.6 of the DSU provides that '[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel'. In principle, new arguments are not *per se* excluded from the scope of appellate review, simply because they are new. However, for us to rule on Brazil's new argument, we would have to solicit, receive and review new facts that were not before the Panel, and were not considered by it. In our view, Article 17.6 of the DSU manifestly precludes us from engaging in any such enterprise."[682]

459. The Appellate Body on *US – FSC* declined to address a "new" argument regarding double taxation under the last sentence of footnote 59 of the *SCM Agreement* because it considered that this new argument did not involve either an "issue of law covered in the panel report" or "legal interpretations developed by the panel":

> "The argument which the United States asks us to address under the fifth sentence of footnote 59 involves two separate legal issues: first, that the FSC measure is a measure 'to avoid double taxation of foreign-source income' within the meaning of footnote 59; and second, that, in consequence, the FSC measure is *excluded* from the prohibition in Article 3.1(a) of the *SCM Agreement* against export subsidies. In our view, examination of the substantive issues raised by this particular argument would be outside the scope of our mandate under Article 17.6 of the DSU, as this argument does not involve either an 'issue of law covered in the panel report' or 'legal interpretations developed by the panel'. The Panel was simply not asked to address the issues raised by the United States' new argument. Further, the new argument now made before us would require us to address legal issues quite different from those which confronted the Panel and which may well require proof of new facts. . . . We, therefore, decline to examine the United States' argument that the FSC measure is a measure 'to avoid double taxation' within the meaning of footnote 59, and we reserve our opinion on this issue."[683]

(vi) Review of new facts

460. In *US – Offset Act (Byrd Amendment)*, the Appellate Body stated that it had no authority to consider new facts on appeal:

> "Article 17.6 is clear in limiting our jurisdiction to issues of law covered in panel reports and legal interpretations developed by panels. We have no authority to consider new facts on appeal. The fact that the documents are 'available on the public record' does not excuse us from the limitations imposed by Article 17.6. We note that the other participants have not had an opportunity to comment on those documents and, in order to do so, may feel required to adduce yet more evidence. We would also be precluded from considering such evidence."[684]

(b) "Completing the analysis"

461. In *US – Gasoline*, the Appellate Body, further to reversing the Panel's conclusions on the first part of Article XX(g) of *GATT 1994* and having completed the Article XX(g) analysis in that case, examined the measure's consistency with the provisions of the chapeau of Article XX, based on the legal findings contained in the Panel Report.

462. In *Canada – Periodicals*, the Appellate Body reversed the Panel's findings on the issue of "like products" under Article III:2 of *GATT 1994*. The Appellate

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[680] Appellate Body Report on *EC – Poultry*, para. 107.
[681] Appellate Body Report on *EC – Tube or Pipe Fittings*, paras. 183–184.
[682] Appellate Body Report on *Canada – Aircraft*, para. 211.
[683] Appellate Body Report on *US – FSC*, para. 103.
[684] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 222.

Body then addressed the question whether it could "complete the Panel's analysis", specifically whether it could proceed to make a determination whether the goods at issue were "directly competitive or substitutable" within the meaning of Article III:2, second sentence, of *GATT 1994*. The Appellate Body held that it could do so, noting that Article III:2, first sentence and Article III:2, second sentence were part of a "logical continuum":[685]

> "We are mindful of the limitation of our mandate in Articles 17.6 and 17.13 of the *DSU*. According to Article 17.6, an appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the Panel. The determination of whether imported and domestic products are 'like products' is a process by which legal rules have to be applied to facts. In any analysis of Article III:2, first sentence, this process is particularly delicate, since 'likeness' must be construed narrowly and on a case-by-case basis. We note that, due to the absence of adequate analysis in the Panel Report in this respect, it is not possible to proceed to a determination of like products.
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> . . .
>
> We believe the Appellate Body can, and should, complete the analysis of Article III:2 of the GATT 1994 in this case by examining the measure with reference to its consistency with the second sentence of Article III:2, provided that there is a sufficient basis in the Panel Report to allow us to do so. The first and second sentences of Article III:2 are closely related. The link between the two sentences is apparent from the wording of the second sentence, which begins with the word 'moreover'. It is also emphasized in *AD* Article III, paragraph 2, which provides: 'A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where . . .'. An examination of the consistency of Part V.1 of the Excise Tax Act with Article III:2, second sentence, is therefore part of a logical continuum.
>
> The Appellate Body found itself in a similar situation in *United States – Gasoline*. Having reversed the Panel's conclusions on the first part of Article XX(g) and having completed the Article XX(g) analysis in that case, the Appellate Body then examined the measure's consistency with the provisions of the chapeau of Article XX, based on the legal findings contained in the Panel Report.[686]
>
> As the legal obligations in the first and second sentences are two closely-linked steps in determining the consistency of an internal tax measure with the national treatment obligations of Article III:2, the Appellate Body would be remiss in not completing the analysis of Article III:2. In the case at hand, the Panel made legal findings and conclusions concerning the first sentence of Article III:2, and because we reverse one of those findings, we need to develop our analysis based on the Panel Report in order to issue legal conclusions with respect to Article III:2, second sentence, of the GATT 1994."[687]

463. In *EC – Hormones*, the Appellate Body, having reversed the Panel's findings under Article 5.5 of the *SPS Agreement*, refused to complete the analysis by examining the measure under Article 5.6. According to the Appellate Body; it "cannot be assumed that all the findings of fact necessary to proceed to a determination of consistency or inconsistency of the EC measures with the requirements of Article 5.6 have been made by the Panel".[688]

464. In *EC – Poultry*, the Appellate Body, referring to its previous rulings on *US – Gasoline* and *Canada – Periodicals*, held that, having reversed the Panel's finding on Article 5.1(b) of the *Agreement on Agriculture*, it should complete its analysis of the c.i.f. import price by making a finding with respect to the consistency of the EC regulation with Article 5.5, which was not addressed by the Panel for reasons of judicial economy:

> "We are aware of the provisions of Article 17 of the DSU that state our jurisdiction and our mandate. Article 17.6 of the DSU provides: 'An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel'. Article 17.13 of the DSU states: 'The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.' In certain appeals, however, the reversal of a panel's finding on a legal issue may require us to make a finding on a legal issue which was not addressed by the panel. This occurred, for example, in the appeals in *United States – Standards for Reformulated and Conventional Gasoline*[689] and in *Canada – Certain Measures Concerning Periodicals*.[690] And, in this appeal, as we have reversed the Panel's finding on Article 5.1(b), we believe we should complete our analysis of the c.i.f. import price by making a finding with respect to the consistency of the EC regulation with Article 5.5, which was not addressed by the Panel for reasons of judicial economy."[691]

465. In *Australia – Salmon*, the Appellate Body noted that "[b]ecause the Panel finds that the difference in the level of protection in respect of the three natural hormones, when used for growth promotion purposes, and the level of protection in respect of natural hormones present endogenously in meat and other foods is unjus-

[685] Appellate Body Report on *US – Gasoline*, pp. 22–29.
[686] (*footnote original*) WT/DS2/AB/R, adopted 20 May 1996, pp. 22–29.
[687] Appellate Body Report on *Canada – Periodicals*, pp. 24–26.
[688] Appellate Body Report on *EC – Hormones*, para. 222.
[689] (*footnote original*) Adopted 20 May 1996, WT/DS2/AB/R, pp. 13–29.
[690] (*footnote original*) Adopted 30 July 1997, WT/DS31/AB/R, pp. 23–24.
[691] Appellate Body Report on *EC – Poultry*, para. 156.

tifiable, the Panel regards it as unnecessary to decide whether the difference in the levels of protection set by the European Communities in respect of natural hormones used as growth promoters and in respect of the same hormones when used for therapeutic or zootechnical purposes, is justified". The Appellate Body then decided to complete the Panel's analysis:

> "In certain appeals, when we reverse a panel's finding on a legal issue, we may examine and decide an issue that was not specifically addressed by the panel, in order to complete the legal analysis and resolve the dispute between the parties. This occurred, for example, in the appeals in *United States – Gasoline*, *Canada – Certain Measures Concerning Periodicals*, *European Communities – Measures Affecting the Importation of Certain Poultry Products ('European Communities – Poultry')*, and *United States – Import Prohibition of Certain Shrimp and Shrimp Products*.
>
> As we have reversed the Panel's finding that the SPS measure at issue, erroneously identified as the heat-treatment requirement, is not based on a risk assessment, we believe that – to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record – we should complete the legal analysis and determine whether the actual SPS measure at issue, i.e., Australia's *import prohibition* on fresh, chilled or frozen ocean-caught Pacific salmon, is based on a risk assessment."[692]

466. In *Argentina – Footwear (EC)*, the Appellate Body upheld the conclusions of the Panel that Argentina's investigation in that case was inconsistent with the requirements of Articles 2 and 4 of the *Agreement on Safeguards*. The Appellate Body then stated that, as there was no legal basis for the safeguard measure at issue, it was not necessary to complete the analysis:

> "As a consequence, there is *no legal basis* for the safeguard measures imposed by Argentina. For this reason, we do not believe that it is necessary to complete the analysis of the Panel relating to the claim made by the European Communities under Article XIX of the GATT 1994 by ruling on whether the Argentine authorities have, in their investigation, demonstrated that the increased imports in this case occurred 'as a result of unforeseen developments'."[693]

467. In *Korea – Dairy*, the Appellate Body considered the European Communities' request that the Appellate Body complete the Panel's reasoning and find that by imposing a safeguard measure in circumstances where the alleged increase in imports was not "as a result of unforeseen developments" within the meaning of Article XIX:1(a) of *GATT 1994*, Korea also violated its obligations under Article XIX of the *GATT 1994*. The Appellate Body declined to do so, noting there were insufficient factual findings:

> "In the absence of any factual findings by the Panel or undisputed facts in the Panel record relating to whether the alleged increase in imports was, indeed, 'a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . .', we are not in a position, within the scope of our mandate set forth in Article 17 of the DSU, to complete the analysis and make a determination as to whether Korea acted inconsistently with its obligations under Article XIX:1(a). Accordingly, we are unable to come to a conclusion on whether or not Korea violated its obligations under Article XIX:1(a) of the GATT 1994."[694]

468. The Appellate Body on *Korea – Dairy* also noted that in determining whether Korea violated the second sentence of Article 5.1 of the *Agreement on Safeguards*, it would have to determine whether the quantitative restrictions imposed by Korea were below the average level of imports in the last three representative years for which statistics were available, and if so, whether Korea had given a reasoned explanation as required by the second sentence of Article 5.1. Similarly, with regard to its conclusions referenced in paragraph 467 above, the Appellate Body held that it did not have a sufficient factual basis on which to complete the analysis:

> "The Panel did not make any factual findings on the average level of imports of skimmed milk powder preparations in the last three representative years. The average level of imports in that period was also contested by the parties. Accordingly, we are not in a position, within the scope of our mandate under Article 17 of the DSU, to complete the analysis in this case and make a determination as to the consistency of Korea's safeguard measure with the second sentence of Article 5.1."[695]

469. Similarly, the Appellate Body in *Canada – Autos* could not complete the Panel's analysis in the absence of sufficient facts in the Panel's record:

> "In *Australia – Salmon*, we stated that where we have reversed a finding of a panel, we should attempt to complete a panel's legal analysis 'to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record'. Here, as we have stated, the Panel did not identify the precise levels of the CVA requirements applicable to specific manufacturers. In addition, there are not sufficient undisputed facts in the Panel record that would enable us to examine this issue ourselves. As a result, it is impossible for us to assess whether the use of domestic over imported goods is a condition 'in law' for satisfying the CVA requirements,

[692] Appellate Body Report on *Australia – Salmon*, paras. 117–118.
[693] Appellate Body Report on *Argentina – Footwear (EC)*, para. 98.
[694] Appellate Body Report on *Korea – Dairy*, para. 92.
[695] Appellate Body Report on *Korea – Dairy*, para. 102.

and, therefore, is a condition for receiving the import duty exemption."[696]

470. In *EC – Asbestos*, the Appellate Body specified the conditions under which it would hold itself competent to "complete the analysis" of a panel. It held that it would do so when there were sufficient factual findings made by the Panel and the additional analysis required was "closely related" to the findings actually made by the Panel. Finally, the Appellate Body noted that the rules it would have had to apply, had it decided to "complete the analysis" in the present case, would have meant applying provisions which had "not previously been the subject of any interpretation or application by either panels or the Appellate Body". Ultimately, the Appellate Body decided not to complete the panel's analysis in this respect:

"As we have reached a different conclusion from the Panel's regarding the applicability of the *TBT Agreement* to the measure, we now consider whether it is appropriate for us to rule on the claims made by Canada relating to the *TBT Agreement*. In previous appeals, we have, on occasion, completed the legal analysis with a view to facilitating the prompt settlement of the dispute, pursuant to Article 3.3 of the DSU.[697] However, we have insisted that we can do so only if the factual findings of the panel and the undisputed facts in the panel record provide us with a sufficient basis for our own analysis. If that has not been the case, we have not completed the analysis.[698]

The need for sufficient facts is not the only limit on our ability to complete the legal analysis in any given case. In *Canada – Periodicals*, we reversed the panel's conclusion that the measure at issue was inconsistent with Article III:2, first sentence, of the GATT 1994, and we then proceeded to examine the United States' claims under Article III:2, second sentence, which the panel had not examined at all. However, in embarking there on an analysis of a provision that the panel had not considered, we emphasized that 'the first and second sentences of Article III:2 are *closely related*' and that those two sentences are "part of a *logical continuum*."[699] (emphasis added)

In this appeal, Canada's outstanding claims were made under Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement*. We observe that, although the *TBT Agreement* is intended to 'further the objectives of GATT 1994', it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the *TBT Agreement* imposes obligations on Members that seem to be *different* from, and *additional* to, the obligations imposed on Members under the GATT 1994.

As the Panel decided not to examine Canada's four claims under the *TBT Agreement*, it made no findings, at all, regarding any of these claims. Moreover, the meaning of the different obligations in the *TBT Agreement* has not previously been the subject of any interpretation or application by either panels or the Appellate Body. Similarly, the provisions of the Tokyo Round *Agreement on Technical Barriers to Trade*, which preceded the *TBT Agreement* and which contained obligations similar to those in the *TBT Agreement*, were also never the subject of even a single ruling by a panel."[700]

471. Similarly, in *US – Hot-Rolled Steel*, the Appellate Body could not complete the analysis of the Panel:

"In these circumstances, Japan requests that we rule on its claim, under Article 2.4 of the *Anti-Dumping Agreement*, that, in relying on downstream sales, USDOC failed to make proper 'allowances' in respect of the additional costs and profits of the downstream sellers, reflected in the price of these sales. . . .

. . .

[696] Appellate Body Report on *Canada – Autos*, para. 145.

[697] (*footnote original*) See, for instance, Appellate Body Report, *United States – Gasoline*, *supra*, footnote 15, at 18 ff; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals* ("*Canada – Periodicals*"), WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449, at 469 ff; Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paras. 222 ff; Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, paras. 156 ff; Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/AB/R, adopted 6 November 1998, paras. 117 ff, 193 ff and 227 ff; Appellate Body Report, *United States – Shrimp*, *supra*, footnote 14, paras. 123 ff; Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, paras. 112 ff; Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, paras. 133 ff; Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, paras. 43 ff; and Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*United States – Wheat Gluten*"), WT/DS166/AB/R, adopted 19 January 2001, paras. 80 ff and 127 ff.

In addition, after modifying the panel's reasoning, we have, on occasion, applied our interpretation of the legal provisions at issue to the facts of the case (see, for instance, Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998, paras. 48 ff; Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, adopted 27 October 1999, paras. 138 ff; Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, paras. 109 ff).

[698] (*footnote original*) See Appellate Body Report, *Australia – Salmon*, *supra*, footnote 48, paras. 209 ff, 241 ff and 255; Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, paras. 91 ff and 102 ff; Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, paras. 133 ff and 144 ff; Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("*Korea – Beef*"), WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, paras. 128 ff.

[699] (*footnote original*) *Supra*, footnote 48, at 469.

[700] Appellate Body Report on *EC – Asbestos*, paras. 78–81.

> Our examination of this issue must be based on the factual findings of the Panel or uncontested facts in the Panel record. As the Panel did not examine this issue, and as the parties do not agree on the relevant facts, we find that there is not an adequate factual record for us to complete the analysis by examining Japan's claim under Article 2.4 of the *Anti-Dumping Agreement*."[701]

472. Also in *Canada – Dairy (Article 21.5 – New Zealand and US)*, the Appellate Body could not complete the Panel's analysis in the absence of factual findings in the record:

> "[T]he Panel did not find it necessary to make any factual findings on the costs of production and the facts relating to this issue were not the subject of agreement between the parties. Moreover, the Panel proceedings were conducted without the parties arguing their case, or the Panel making enquiries, from the perspective of the average total cost of production standard we have adopted.
>
> In these circumstances, we are unable to complete the analysis by determining whether the supply of CEM involves 'payments' under Article 9.1(c) of the *Agreement on Agriculture*. Yet, we do not wish to be understood as holding that the supply of CEM does *not* involve 'payments' under Article 9.1(c). We are simply not in a position to make a ruling on this issue."[702]

473. In *US – Section 211 Appropriations Act*, on the contrary, the Appellate Body found sufficient factual findings in the record of the Panel so as to be able to complete its analysis:

> "In the past, we have completed the analysis where there were sufficient factual findings in the panel report or undisputed facts in the panel record to enable us to do so, and we have not completed the analysis where there were not. In one instance, we declined to complete the analysis with respect to a 'novel' issue that had not been argued in sufficient detail before the panel.
>
> . . .
>
> [W]e conclude that the Panel record contains sufficient factual findings and facts undisputed between the participants to permit us to complete the analysis regarding the consistency of Sections 211(a)(2) and (b) – in respect of trade names – with Article 2.1 of the *TRIPS Agreement* in conjunction with Article 2(1) of the Paris Convention (1967) and Article 3.1 of the *TRIPS Agreement,* with Article 4 of the *TRIPS Agreement*, with Article 42 of the *TRIPS Agreement,* and with Article 2.1 of that Agreement in conjunction with Article 8 of the Paris Convention (1967)."[703]

474. In *US – Steel Safeguards*, the Appellate Body, after considering whether it needed to complete the Panel's analysis, decided that it was not necessary.[704]

475. In *US – Softwood Lumber IV*, the Appellate Body could not complete the Panel's analysis in the absence of sufficient factual findings:

> "[W]e are unable to complete the legal analysis of Canada's claim that the United States acted inconsistently with Article 14(d) of the *SCM Agreement*. We observe, in this regard, that panels sometimes make alternative factual findings that serve to assist the Appellate Body in completing the legal analysis should it disagree with legal interpretations developed by the panel, but this is not the case in the Panel Report before us."[705]

6. Article 17.9: Working procedures of the Appellate Body

(a) "Working procedures shall be drawn up by the Appellate Body"

476. In this regard, see Section XXXII below.

7. Article 17.11: concurring opinions (Rule 3.2)

477. In *EC – Asbestos*, one Member of the Division hearing the appeal made a concurring statement regarding the findings on "like product" in the Appellate Body Report:

> "One Member of the Division hearing this appeal wishes to make a concurring statement. At the outset, I would like to make it abundantly clear that I agree with the findings and conclusions reached, and the reasoning set out in support thereof, by the Division, in: Section V (*TBT Agreement*); Section VII (Article XX(b) of the GATT 1994 and Article 11 of the DSU); Section VIII (Article XXIII:1(b) of the GATT 1994); and Section IX (Findings and Conclusions) of the Report. This concurring statement, in other words, relates only to Section VI ("Like Products" in Article III:4 of the GATT 1994) of the Report.
>
> More particularly, in respect of Section VI of the Report, I join in the findings and conclusions set out in: paragraphs 116, 126, 128, 131, 132, 141, 147 and 148. I am bound to say that, in truth, I agree with a great deal more than just the bare findings and conclusions contained in these eight paragraphs of the Report. It is, however, as a practical matter, not feasible to sort out and identify which part of which paragraph, of the sixty-odd paragraphs comprising Section VI of our Report in which I join. Nor is it feasible to offer a detailed statement with respect to the portions that would then remain. Accordingly, I set out only two related matters below.
>
> . . .

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[701] Appellate Body Report on *US – Hot-Rolled Steel*, paras. 174 and 180.
[702] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 235–236.
[703] Appellate Body Report on *US – Section 211 Appropriations Act*, paras. 343 and 352.
[704] Appellate Body Report on *US – Steel Safeguards*, paras. 430–431.
[705] Appellate Body Report on *US – Softwood Lumber IV*, para. 118.

> . . . Moreover, in future concrete contexts, the line between a 'fundamentally' and 'exclusively' economic view of 'like products' under Article III:4 may well prove very difficult, as a practical matter, to identify. It seems to me the better part of valour to reserve one's opinion on such an important, indeed, philosophical matter, which may have unforeseeable implications, and to leave that matter for another appeal and another day, or perhaps other appeals and other days. I so reserve my opinion on this matter."[706]

478. As regards dissenting/separate opinions in panel reports, see Section XI.B.7 above. For separate opinions in Article 22.6 arbitrations, see Section XXII.B.9(d) below.

8. Article 17.13: "may uphold, modify or reverse the legal findings and conclusions of the panel"

479. In *US – Wool Shirts and Blouses*, the Appellate Body refused to examine a given statement by the Panel on the grounds that "this statement by the Panel is purely a descriptive and gratuitous comment providing background concerning the Panel's understanding of how the TMB functions. We do not consider this comment by the Panel to be 'a legal finding or conclusion' which the Appellate Body 'may uphold, modify or reverse'" within the meaning of Article 17.13 of the *DSU*.[707]

480. In *Canada – Periodicals*, the Appellate Body made reference to the limits of its mandate under Articles 17.6 and 17.13. See paragraph 446 above.

481. In *EC – Poultry*, the Appellate Body refused to address a certain issue raised on appeal on the grounds that they did "not consider this comment made in a footnote by the Panel to be either a 'legal interpretation developed by the panel' within the meaning of Article 17.6 of the DSU or a 'legal finding' or 'conclusion' that the Appellate Body may 'uphold, modify or reverse' under Article 17.13 of the DSU".[708]

XVIII. ARTICLE 18

A. TEXT OF ARTICLE 18

Article 18
Communications with the Panel or Appellate Body

1. There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

B. INTERPRETATION AND APPLICATION OF ARTICLE 18

1. Article 18.2

(a) Disclosure of "written submissions"

(i) Difference between "submissions" and "statements"

482. In *Argentina – Poultry Anti-Dumping Duties*, Brazil informed the Panel of its intention to make its first written submission (except the exhibits) available to the public, after providing Argentina with an opportunity to indicate whether the submission should be revised to exclude any information deemed confidential. Argentina objected and submitted that a Member is only entitled to disclose written statements of its position. According to Argentina, Article 18.2 of the *DSU* draws a clear distinction between "written submissions" and position "statements". The Panel disqualified Argentina's interpretation as being formalistic:

> "On substance, we agree with Canada that Argentina's interpretation[709] of Article 18.2 of the *DSU* results in a formalistic distinction between the terms 'written submission' and 'statement'. In doing so, Argentina negates that a party's written submissions to a panel necessarily contain statements of that party's positions. In our view, the first two sentences of Article 18.2 of the *DSU* should not be read in formalistic isolation of one another. Read together, and in context of one another, the first two sentences of Article 18.2 of the *DSU* mean that while one party shall not disclose the submissions of another party, each party is entitled to disclose statements of its own positions, subject to the confidentiality requirement set forth in the third sentence of Article 18.2 of the *DSU*. We recall that a party's written submissions to a panel necessarily contain statements of that party's positions. In our view, therefore, disclosing submissions to a panel is one way for a party to disclose statements of its positions. If a party chooses to make public the totality of the statements of its own position contained in its written submission, it is entitled to do so, provided the confidentiality requirement of the third

[706] Appellate Body Report on *EC – Asbestos*, paras. 149–150 and 154.
[707] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 17 and footnote 26.
[708] Appellate Body Report on *EC – Poultry*, para. 107.
[709] (*footnote original*) We are referring to the arguments set forth in Argentina's submission of 15 August 2002.

sentence of Article 18.2 of the *DSU* is respected. Since Argentina has not argued that Brazil violated its confidentiality obligation, we do not consider that Brazil's decision to disclose the entirety of the statements of position contained in its first written submission to the Panel (excluding exhibits) was inconsistent with Article 18.2 of the *DSU*."[710]

(ii) Timing of the disclosure

483. Subsequently, in the proceedings in *Argentina – Poultry Anti-Dumping Duties*, Argentina withdrew its objection to the disclosure of Brazil's written submission. However, it did not agree with the timing of that disclosure. According to Argentina, Brazil should not have revealed its submissions until after publication of the Panel report. The Panel again disagreed with Argentina on this point since, in its view, Article 18.2 of the *DSU* does not impose any time-limits for the disclosure:

"Furthermore, we note that, by the time of our first substantive meeting with the parties, Argentina was no longer arguing that Brazil was not entitled to make the entirety of its written submissions to the Panel available to the public during the Panel proceedings. Implicitly, therefore, Argentina ultimately agreed that Brazil was entitled to make its written submission available to the public pursuant to Article 18.2 of the *DSU*. Although Argentina argued that Brazil should not have done so until after publication of the Panel's report, we find no basis for this argument in Article 18.2 of the *DSU*. Article 18.2 sets no temporal limits on Members' rights and obligations under that provision. Nor do we find any basis for this argument in paragraph 11 of the Panel's Working Procedures, which concerns the preparation of the descriptive part of the Panel's report.[711] We see nothing in this provision which would impose any limits on rights accruing to Members under Article 18.2 of the *DSU*."[712]

(b) Non-confidential versions of written submissions

484. In *US – Steel Safeguards*, the Panel sent a letter to all parties including a series of preliminary rulings on organizational matters. Among the issues, the Panel dealt with the United States' request to require production of non-confidential versions of written submissions within 14 days following the filing of the written submissions. The Panel responded as follows:

"The Panel recalls that, although the production of a non-confidential summary is mandatory upon request by any WTO Member, it is also WTO practice for panels to leave parties to agree on the date for production of such summaries, if any deadline is to apply. Accordingly, the Panel urges the parties to agree as early as possible on deadlines for production of such non-confidential summaries so as to ensure that appropriate information relating to the present dispute is disclosed to the public."[713]

(c) Business confidential information (BCI)

485. In *Canada – Aircraft*, the Panel adopted special Procedures Governing Business Confidential Information that went beyond the protection afforded by Article 18.2 of the *DSU*. The Procedures state that the Business Confidential Information is to be stored in a safe in a locked room at the premises of the relevant Geneva missions, with restrictions imposed on access to the locked room and safe. The Procedures also provide for either party to visit the other party's Geneva mission and review the proposed location of the safe and propose any changes. In a subsequent submission, Canada stated that it could not submit BCI under the revised Procedures because they did not provide the requisite level of protection. The Panel stated:

"[T]he important distinction between the 4 November 1998 Procedures, and the final Procedures, is that the latter would facilitate the work of the parties in preparing themselves for these 'fast-track' proceedings, without impairing the protection afforded to the substance of the BCI. The timetable of the proceedings is such that party representatives would be likely to spend large periods of time in Geneva. As noted above, Canada itself has recognised the need for a party to have 'reasonable access' to BCI submitted by the other party. In the context of a fast-track case in particular, we do not consider that there is 'reasonable access' to the BCI if a party is required to adjust its work in respect of that BCI to the official working hours of the WTO Secretariat, excluding evenings and weekends. Under the final Procedures, authorised representatives of the parties would have had the convenience of access to the BCI of the other party at any time of day or night, rather than during the working hours of the WTO Secretariat. In our view, the final Procedures therefore strike a reasonable balance between (1) the need for 'reasonable access' to BCI by the Panel and the other disputing parties, and (2) the need to provide private business

[710] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.14.

[711] (*footnote original*) Paragraph 11 of the Panel's Working Procedures provides that "[t]he descriptive part of the Panel's report will include the procedural and factual background to the present dispute. There will be no description of the main arguments of the parties and third parties as such. Instead, the Panel will attach the parties' submissions (including first and second written submissions, written versions of the first and second oral statements, and each parties' replies to questions from the other party and from the Panel) to its report. Upon request of a party, specific portions of a submission designated by that party as confidential at the time of its submission will not be included in the submission attached to the Panel's report."

[712] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.15.

[713] Panel Report on *US – Steel Safeguards*, para. 5.3.

interests with adequate protection for their proprietary business information."[714]

486. In *Canada – Aircraft* and *Brazil – Aircraft*, the Appellate Body made a preliminary ruling on 11 June 1999 that it was not necessary to adopt additional procedures to protect business confidential information in the appellate proceeding. The Appellate Body held that the existing provisions concerning confidentiality of dispute settlement proceedings were sufficient for the purposes at issue:

"Pursuant to Article 17.9 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the 'DSU'), the Appellate Body has the authority to draw up its own Working Procedures. Under Rule 16.1 of our *Working Procedures for Appellate Review*, a Division of the Appellate Body may adopt additional procedures for the orderly conduct of a particular appeal, provided that any such additional procedures are not inconsistent with the DSU, the other covered agreements and the *Working Procedures for Appellate Review*. We have concluded, however, that it is not necessary, under all the circumstances of this case, to adopt *additional* procedures to protect 'business confidential information' during these appellate proceedings.

We note that, with respect to 'business confidential information' submitted to the Panel that remains currently in the possession of the participants, Article XII of the Panel Procedures Governing Business Confidential Information required the parties, '[a]t the conclusion of the Panel', to 'return any printed or binary-encoded Business Confidential information in their possession to the party that submitted such Business Confidential (sic)' and to 'destroy all tapes and transcripts of the Panel hearings that contain Business Confidential information, unless the parties mutually agree otherwise.' It thus appears that each participant has an obligation, under the Panel Procedures, to return any Business Confidential information submitted by the other participant. The WTO Secretariat, assisting the Panel, was required, by the Panel Procedures, to 'transmit any printed or binary-encoded Business Confidential information, plus all tapes and transcripts of the panel hearings that contain Business Confidential Information, to the Appellate Body as part of the record of the Panel proceedings.' That information will be kept in a secure, locked cabinet in the Appellate Body Secretariat.

We also note that *all* Members are obliged, by the provisions of the DSU, to treat these proceedings of the Appellate Body, including written submissions and other documents filed by the participants and the third participants, as confidential. We are confident that the participants and the third participants in this appeal will *fully respect* their obligations under the DSU, recognizing that a Member's obligation to maintain the confidentiality of these proceedings extends also to the individuals whom that Member selects to act as its representatives, counsel and consultants.

Accordingly, we decline the request of Brazil and Canada. The reasons for this ruling will be set out more fully in the Appellate Body Report in this appeal."[715]

487. In its final ruling in *Canada – Aircraft*, the Appellate Body determined that it had no further reasons to add to the first two paragraphs of its preliminary ruling, referenced in paragraph 486 above. Noting that its ruling applies only to the request for additional procedures to protect business confidential information, the Appellate Body stated:

"[T]he provisions of Articles 17.10 and 18.2 apply to all Members of the WTO, and oblige them to maintain the confidentiality of any submissions or information submitted, or received, in an Appellate Body proceeding. Moreover, those provisions oblige Members to ensure that such confidentiality is fully respected by any person that a Member selects to act as its representative, counsel or consultant.

. . .

For these reasons, we do not consider that it is necessary, under all the circumstances of this case, to adopt *additional* procedures for the protection of business confidential information in these appellate proceedings."[716]

488. In *EC – Bananas III (US) (Article 22.6 – EC)*, the United States requested the Arbitrators to establish procedures for the handling of business confidential information similar to those established in several pending panel procedures.[717] Under the United States proposal, there would be two levels of BCI: regular BCI and super BCI. Regular BCI was described as company-specific information that was non-public and sensitive, but that could be extrapolated from other public and non-public information available to governments and the company's competitors. Super BCI was described as non-public, sensitive company-specific information that could not be so extrapolated.[718] The European Communities objected to the proposal on the grounds that working procedures on confidentiality should not be adopted on a case-by-case basis, but rather by WTO Members as a whole.[719] The Arbitrators finally adopted BCI procedures where, while agreeing with the United States that special rules were justified in light of the type

[714] Panel Report on *Canada – Aircraft*, para. 9.68.
[715] Appellate Body Report on *Canada – Aircraft*, para. 141 and Appellate Body Report on *Brazil – Aircraft*, para. 119.
[716] Appellate Body Report on *Canada – Aircraft*, paras. 145 and 147 and Appellate Body Report on *Brazil – Aircraft*, paras. 123 and 125.
[717] The United States referred to the Panel Report on *Brazil – Aircraft*; Panel Report on *Canada – Aircraft*; Panel Report on *Australia – Automotive Leather II*.
[718] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 2.2–2.3.
[719] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 2.4.

of information involved, they did not accept the need for special treatment of super BCI.[720]

489. In *Brazil – Aircraft (Article 22.6 – Brazil)*, Brazil insisted in the course of the proceedings on the confidentiality of certain documents it had provided to the Arbitrators. The Arbitrators, who were mindful of the serious problems that could be caused by the disclosure of certain commercial or financial information, decided to prepare two versions of their report. The first version, including the details of their calculations and all the information relied upon, was issued exclusively to the parties on a confidential basis. The second version, in which the most commercially sensitive information had been removed, was circulated to the Members.[721]

490. In *Canada – Wheat Exports and Grain Imports*, the Panel, in a preliminary ruling,[722] having rejected the parties' specific proposals for the protection of confidential information, adopted its own procedures for the protection of such information.[723]

(d) Confidentiality implications of private counsel's intervention[724]

(i) General

491. In *Thailand – H-Beams*, an industry association submitted an *amicus* brief which cited Thailand's confidential submission. Thailand then claimed that Poland's private counsel might have violated WTO rules of confidentiality by providing Thailand's submission to the said association. Although Poland and the lawyer concerned denied the alleged breach of confidentiality, the Appellate Body rejected the *amicus* brief in a preliminary ruling:

> "The terms of Article 17.10 of the DSU are clear and unequivocal: '[t]he proceedings of the Appellate Body shall be confidential'. Like all obligations under the DSU, this is an obligation that all Members of the WTO, as well as the Appellate Body and its staff, must respect. WTO Members who are participants and third participants in an appeal are fully responsible under the DSU and the other covered agreements for any acts of their officials as well as their representatives, counsel or consultants. We emphasized this in *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, para. 145, where we stated that:
>
> > . . . the provisions of Articles 17.10 and 18.2 apply to all Members of the WTO, and oblige them to maintain the confidentiality of any submissions or information submitted, or received, in an Appellate Body proceeding. Moreover, *those provisions oblige Members to ensure that such confidentiality is fully respected by any person that a Member selects to act as its representative, counsel or consultant.* (emphasis added)
>
> We note that Poland has made substantial efforts to investigate this matter, and to gather information from its legal counsel, Hogan & Hartson L.L.P. We note as well the responses from the third participants, the European Communities, Japan and the United States. Furthermore, Poland has accepted the proposal made by Hogan & Hartson L.L.P. to withdraw as Poland's legal counsel in this appeal. On the basis of the responses we have received from Poland and from the third participants, and on the basis of our own examination of the facts on the record in this appeal, we believe that there is *prima facie* evidence that CITAC received, or had access to, Thailand's appellant's submission in this appeal.
>
> We see no reason to accept the written brief submitted by CITAC in this appeal. Accordingly, we have returned this brief to CITAC."[725]

492. The Panel on *Brazil – Aircraft (Article 21.5 – Canada II)* rejected Brazil's arguments that Canada had acted inconsistently with the requirements of the *DSU* or the Panel's working procedures by providing advisers who were not designated as members of its delegation with access to information submitted to the Panel by Brazil. A member of the Canadian delegation at a meeting of the Panel with the parties had provided a copy of Brazil's written version of its oral statement to persons who were not members of its delegation. Further, Canada had "shared [Brazil's submissions and statements] with members of a private law firm retained by a Canadian aircraft manufacturer".[726] The Panel advised as follows:

> "In our view, it emerges from [Article 18.2 of the DSU] that Canada must keep confidential all information submitted to this Panel by Brazil.[727] However, as the Appellate Body has noted, 'a Member's obligation to maintain the confidentiality of [. . .] proceedings extends *also* to the individuals whom that Member selects to act as its representatives, counsel and consultants.'[728] Thus, the

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[720] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 2.5.

[721] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 2.13–2.14.

[722] For more information about preliminary rulings, see Section XXXVI.C.

[723] Panel Report on *Canada – Wheat Exports and Grain Imports*, para. 6.8.

[724] As regards other aspects of the intervention by private counsels in WTO dispute settlement proceedings, see Section XXXVI.E below.

[725] Appellate Body Report on *Thailand – H-Beams*, para. 74.

[726] (*footnote original*) Canada's Response to Panel Question 31 (Annex A-4).

[727] (*footnote original*) This is subject, of course, to the provisions of the last sentence of Article 18.2 of the *DSU*, which allow a party to panel proceedings to disclose to the public non-confidential summaries of the information contained in the written submissions of the other party, if such summaries are requested.

[728] (*footnote original*) Original Appellate Body Report on *Canada – Aircraft*, *supra*, para. 141 (emphasis added). The Appellate Body made the quoted statement in respect of appellate review proceedings. We do not see, however, why the same reasoning should not extend, by analogy, to panel proceedings.

Appellate Body clearly assumed that Members may provide confidential information also to *non*-government advisors.

We see nothing in Article 18.2 of the *DSU*, or any other provision of the *DSU*,[729] to suggest that Members may share such confidential information with non-government advisors only if those advisors are members of an official delegation at a panel meeting.[730] Indeed, paragraph 13 of this Panel's Working Procedures expressly provides that:

> The parties and third parties to this proceeding have the right to determine the composition of their own delegations. Delegations may include, as representatives of the government concerned, private counsel and advisers. The parties and third parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations, *as well as any other advisors consulted by a party* or third party, act in accordance with the rules of the DSU and the working procedures of this Panel, particularly in regard to confidentiality of the proceedings. Parties shall provide a list of the participants of their delegation before or at the beginning of the meeting with the Panel. (emphasis added)

It is apparent from the second and third sentences of paragraph 13 of the Working Procedures that the 'other advisors' referred to are advisors who are *not* part of a Member's delegation at a panel meeting. It is equally clear to us that paragraph 13 is based on the premise that parties to panel proceedings *may* give their 'other advisors' access to confidential information submitted by the other party.[731] Were it otherwise, there would be no point in requiring parties to safeguard the confidentiality of panel proceedings in respect of such 'other advisors'.[732]

On the basis of the foregoing, we are unable to accept Brazil's argument that Canada acted inconsistently with the requirements of the *DSU* or this Panel's Working Procedures by giving advisors not designated as members of its delegation access to information submitted to this Panel by Brazil.[733]

In reaching this conclusion, we note, however, that, pursuant to paragraph 13 of the Working Procedures, Canada must ensure that any advisors who were not members of its official delegation respect the confidentiality of the present proceedings."[734]

493. In relation to the involvement of private lawyers, the Panel on *Brazil – Aircraft (Article 21.5 – Canada II)* indicated that it had no basis for questioning a confidentiality agreement between the relevant private lawyers and the Canadian Government. For the Panel, confidentiality rules are not to be used by a panel to "stifle" necessary communication between Member governments and their advisers, provided adequate safeguards are in place.

> "We note Canada's statement that the members of the law firm which have had access to Brazil's submissions have been part of its litigation team and have served as 'advisors' to the Government of Canada. Since no members of a private law firm were part of Canada's delegation to the meeting of the Panel with the parties, the private lawyers Canada says were advising it fall within the 'other advisors' category within the meaning of paragraph 13 of the Panel's Working Procedures. It was (and is), therefore, the responsibility of Canada to ensure that those private lawyers maintain the confidentiality of the documents submitted by Brazil.
>
> Based on Canada's representations, we also understand that the law firm in question has an attorney-client relationship with a Canadian regional aircraft manufacturer. We think that the dual role performed by the law firm – as advisor to the Government of Canada and attorney for a Canadian regional aircraft manufacturer – places the law firm in a particularly delicate position as far as the protection of Brazil's submissions, statements and exhibits is concerned.[735] In our view, it is crucial, in such circumstances, that Canada put in place appropriate safeguards to ensure non-disclosure of confidential information.
>
> . . .
>
> We agree that maintaining confidentiality in accordance with the obligations of the *DSU* is important. On the other

[729] (*footnote original*) Contrary to Brazil, we do not think that Article 14 of the *DSU* is relevant to the issue before us. Article 14 focuses on panels and their obligations in respect of confidentiality; it does not address itself to the obligations of the parties in respect of confidentiality.

[730] (*footnote original*) The following statement by the Panel in *Korea – Alcoholic Beverages* supports this view:

> We note that written submissions of the parties which contain confidential information may, in some cases, be provided to non-government advisors who are not members of an official delegation at a panel meeting. The duty of confidentiality extends to all governments that are parties to a dispute and to all such advisors *regardless of whether they are designated as members of delegations and appear at a panel meeting.* (Panel Report on *Korea – Alcoholic Beverages*, *supra*, para. 10.32, emphasis added)

[731] (*footnote original*) Brazil is correct in pointing out that paragraph 13 does not *expressly* authorize disclosure of confidential information to "other advisors", but, in our view, it does so by implication. We stress, however, that paragraph 13 talks about "advisors" and not other members of the public, such as private parties interested in the outcome of particular panel proceedings.

[732] (*footnote original*) We note that there is nothing in the other paragraphs of this Panel's Working Procedures to suggest that confidential information may be disclosed to non-government advisors only if those advisors are members of an official delegation to a panel meeting.

[733] (*footnote original*) It should be pointed out that Brazil did not, in these proceedings, submit any business confidential information.

[734] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 3.5–3.10.

[735] (*footnote original*) We recall that Brazil's concern is with the confidentiality of its arguments and statements. Business confidential information, which might require other procedures and safeguards, is not, as already mentioned, involved in this situation.

hand, in applying the rules on confidentiality we must be careful not to stifle necessary communication between Member governments and their advisors, as long as appropriate safeguards are in place. In the absence of arguments and evidence to the contrary, we have no basis for questioning Canada's representation that the relevant private lawyers are subject to a confidentiality agreement with the Government of Canada.[736]"[737]

(ii) Joint representation

494. The Panel in *EC – Tariff Preferences* addressed the issue of whether the joint representation of the complaining party and a third party by the same legal counsel (in this regard, see Section XXXVI.E.3 below on conflict of interest) breached any confidentiality rules under the *DSU*. The Panel considered that all Members involved in the dispute settlement process have the obligation of ensuring confidentiality as required under Article 18.2 and Article 14.1 as well as the Working Procedures of the *DSU*. The Panel also noted that this obligation extended to all representatives of the parties, including their legal counsel:

"Although the European Communities does not specify which provision(s) of the DSU may be of concern, the Panel considers that the most relevant DSU rule that could be implicated is Article 18.2, whose first sentence states that '[w]ritten submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute'. A related rule is Article 14.1 of the DSU which provides that '[p]anel deliberations shall be confidential'. Article 10 of the DSU and paragraph 12 of the Working Procedures, Appendix 3 to the DSU, which set out steps of the panel's work, could also be implicated, as third parties are permitted limited participation at various stages of panel proceedings, as compared to the parties. In particular, third parties are not provided the right to participate in the interim review process under either Article 10 or the Working Procedures. In the view of the Panel, Article 18.2 of the DSU would be the more typical and relevant rule, where third parties only receive the first submissions of the parties to the Panel and only participate in a single, special third-party session.

As a general matter, the Panel considers that Members involved in the dispute settlement process have the obligation of ensuring confidentiality, as required by Article 18.2, Article 14.1[738] and the Working Procedures, regardless of who serves as their legal counsel. Needless to say, this obligation of Members involved in the dispute settlement process must be respected by all of their representatives, including legal counsel. In addition, as a general professional discipline, it is the responsibility of counsel to maintain the confidentiality of all communications between it and the party (or third party) it represents. In this regard, the Panel again notes that bar associations in many jurisdictions have elaborated rules of conduct dealing explicitly with confidentiality between clients and their legal counsel.[739]"[740]

495. The Panel in *EC – Tariff Preferences* further considered that the issue of confidentiality did not arise thanks to the enhanced third-party rights given to all third parties during the proceedings. The Panel also considered that the European Communities had not provided evidence demonstrating any disclosure of confidential information by the legal counsel to the third party that it simultaneously represented:

"In this dispute, India argues that the issue of confidentiality does not arise for India and Paraguay because of the enhanced rights granted to all third parties. On the other hand, the European Communities responds that the problem is mitigated but not totally disposed of, as there is still the possibility of access to Panel documents, including the Interim Report by third party Paraguay, due to the use of the same legal counsel.[741] However, the Panel considers that due to the enhanced third-party rights pursuant to which all third parties receive all submissions of the parties to the Panel and participate in all meetings of the Panel with the parties, Paraguay was actually accorded the right to share all submissions and Panel documents which were distributed before the end of the Second Substantive Meeting of the Panel. After the Panel's Second Substantive Meeting, no third party was given further enhanced right to participate in the process and, particularly, to influence the Panel's Findings. Paraguay has not gained any litigation advantage over other third parties in this dispute through its use of the same legal counsel as India. The Panel also notes that the European Communities has not provided any argument or evidence to indicate that in fact there is a disclosure of confidential information, including the Interim Report of the Panel, to Paraguay due to the joint representation of India and Paraguay by the same legal counsel. Under such circumstances, the Panel finds that the confidentiality issue has not arisen in this dispute."[742]

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[736] (*footnote original*) Since Brazil has not responded to Canada's argument that the private lawyers in question are subject to a confidentiality agreement, there are no grounds for assuming that that agreement inadequately protects confidential information.

[737] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 3.11–3.15.

[738] (*footnote original*) It could be argued that the Interim Report of a panel constitutes part of its "deliberations" before it is finalized and issued to the parties.

[739] (*footnote original*) See, e.g., American Bar Association, Model Rules of Professional Conduct, Rule 1.6; New York State Bar Association, Lawyer's Code of Professional Responsibility, DR 4–101; Canadian Bar Association, Code of Professional Conduct, Chapter IV; Law Society of Upper Canada, Rules of Professional Conduct, Rule 2.03; Council of the Bars and Law Societies of the European Union, Code of Conduct for Lawyers in the European Union, Rules 2.3; Bar of England and Wales, Code of Conduct, Rules 603, 608 and 702.

[740] Panel Report on *EC – Tariff Preferences*, paras. 7.15–7.16.

[741] (*footnote original*) Communication of the European Communities to the Panel on 4 June 2003.

[742] Panel Report on *EC – Tariff Preferences*, para. 7.17.

XIX. ARTICLE 19

A. TEXT OF ARTICLE 19

Article 19
Panel and Appellate Body Recommendations

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[9] bring the measure into conformity with that agreement.[10] In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

(*footnote original*) [9] The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.
(*footnote original*) [10] With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

B. INTERPRETATION AND APPLICATION OF ARTICLE 19

1. Article 19.1

(a) "bring the measure into conformity with that agreement"

(i) Measure in force

496. In *India – Autos*, the Panel noted that Article 19 "envisages a situation where a violation *is* in existence".[743]

497. In *Chile – Price Band System*, the Panel remarked that, pursuant to Article 19.1, "a panel is required to make the recommendation to bring a measure which it has found inconsistent into conformity *if* that measure is still in force. Conversely, when a panel concludes that a measure *was* inconsistent with a covered agreement, the said recommendation cannot and should not be made."[744]

(ii) Measure no longer in existence

498. In *US – Certain EC Products*, the Panel had recommended that the DSB request the United States to bring its measure into conformity with its obligations under the WTO Agreement.[745] However, the Appellate Body, having upheld the Panel's finding that the "measure at issue in this dispute [was] no longer in existence", concluded that the Panel's recommendation was incongruent:

> "[T]here is an obvious inconsistency between the finding of the Panel that 'the 3 March Measure is no longer in existence' and the subsequent recommendation of the Panel that the DSB request that the United States bring its 3 March Measure into conformity with its WTO obligations. The Panel erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure which the Panel has found no longer exists."[746]

499. In *Chile – Price Band System*, the Panel refrained from issuing recommendations on the grounds that the measures at issue were no longer in existence. The Panel however considered that this fact did not preclude it from making *findings* on those measures if such considerations were necessary to secure a positive solution to the dispute. In particular, the Panel stated that:

> "Article 19.1 DSU would not prevent us from making *findings* regarding the consistency of an expired provisional safeguard measure, if we were to consider that the making of such findings is necessary 'to secure a positive solution' to the dispute. We would not, however, formulate *recommendations* with regard to those measures."[747]

(iii) Relevance of events that occurred during the proceedings

500. In *India – Autos*, the Panel noted that certain events occurred in the course of the proceedings that had affected the existence or persistence of the alleged violations whereby the respondent had requested such events be taken into account when making recommendations under Article 19.1. In these circumstances, the Panel felt that it would not be making an "objective assessment of the matter before it", had it chosen not to address the impact of events that took place in the course of the proceedings, in assessing the appropriateness of making a recommendation under Article 19.1.[748]

(b) "the panel . . . may suggest ways in which the Member concerned could implement the recommendation"

(i) Panel's discretion to suggest ways to implement

General

501. In *US – Steel Plate*, the Panel indicated that it was "free to suggest ways in which we believe the [defendant] could appropriately implement our recommendation".[749]

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[743] Panel Report on *India – Autos*, para. 8.15.
[744] Panel Report on *Chile – Price Band System*, para. 7.112.
[745] Panel Report on *US – Certain EC Products*, para. 7.3.
[746] Appellate Body Report on *US – Certain EC Products*, para. 81. See also para. 129.
[747] Panel Report on *Chile – Price Band System*, para. 7.112. See also para. 7.124.
[748] Panel Report on *India – Autos*, paras. 8.27–8.28.
[749] Panel Report on *US – Steel Plate*, para. 8.8. See also Panel Report on *US – Softwood Lumber VI*, para. 8.8.

502. In *US – Softwood Lumber V*, the Panel considered that "[b]y virtue of Article 19.1, panels have discretion ('may') to suggest ways in which a Member could implement the relevant recommendation. However, a panel is not required to make a suggestion should it not deem it appropriate to do so."[750]

503. As regards the effect of a finding of violation of Article 3.1 of the *SCM Agreement* on the Panel's discretion to suggest ways to implement, in light of the Article 4.7 of the *SCM Agreement* withdrawal requirement, see Section III.B.1(e) of the Chapter on the *SCM Agreement*. See also paragraph 534 below.

Suggestions made by Panel of ways to implement

504. In *US – Underwear*, the Panel recommended the DSB to request the United States bring its measure into compliance with United States obligations under the *Agreement on Textiles and Clothing* by removing the measure inconsistent with the United States' obligation. The Panel went further in suggesting the following:

> "We find that such compliance can best be achieved and further nullification and impairment of benefits accruing to Costa Rica under the ATC best be avoided by prompt removal of the measure inconsistent with the obligations of the United States. We further suggest that the United States bring the measure challenged by Costa Rica into compliance with US obligations under the ATC by immediately withdrawing the restriction imposed by the measure."[751]

505. In *EC – Bananas III (Article 21.5 – Ecuador)*, the Panel made the following recommendations to the European Communities to bring its banana import regime into conformity with WTO rules after noting that previous implementation attempts had been only partly successful:

> "First, the European Communities could choose to implement a tariff-only system for bananas, without a tariff quota. This could include a tariff preference (at zero or another preferential rate) for ACP bananas. If so, a waiver for the tariff preference may be necessary unless the need for a waiver is obviated, for example, by the creation of a free-trade area consistent with Article XXIV of GATT. This option would avoid the need to seek agreement on tariff quota shares.
>
> Second, the European Communities could choose to implement a tariff-only system for bananas, with a tariff quota for ACP bananas covered by a suitable waiver.
>
> Third, the European Communities could maintain its current bound and autonomous MFN tariff quotas, either without allocating any country-specific shares or allocating such shares by agreement with all substantial suppliers consistently with the requirements of the chapeau to Article XIII:2. The MFN tariff quota could be combined with the extension of duty-free treatment (or preferential duties) to ACP imports."[752]

506. In *India – Patents (US)*, the Panel declined the United States' request to the Panel to suggest the manner in which India should implement its obligation, since in its opinion it would have impaired India's right to choose how to implement the TRIPS Agreement pursuant to Article 1.1.[753] However it did suggest that India take into account the interests of persons who would have filed patent applications if India had had an appropriate mechanism in place:

> "[I]n establishing a mechanism that preserves novelty and priority in respect of applications for product patents in respect of pharmaceutical and agricultural chemical inventions during the transitional period, India should take into account the interests of those persons who would have filed patent applications had an appropriate mechanism been maintained since the expiry of the Patents Ordinance 1994, as well as those who have already filed such applications under that Ordinance or the administrative practices currently in place."[754]

507. In *Guatemala – Cement I*, the Panel concluded that Guatemala had violated the provisions of the *Anti-Dumping Agreement* by initiating an investigation when there was not sufficient evidence to justify such an initiation under Article 5.3 of the Agreement. Therefore it suggested that the anti-dumping measure be revoked. The Panel stated:

> "[T]he entire investigation rested on an insufficient basis, and therefore should never have been conducted. This is, in our view, a violation which cannot be corrected effectively by any actions during the course of the ensuing investigation. Therefore, we suggest that Guatemala revoke the existing anti-dumping measure on imports of Mexican cement, because, in our view, this is the only appropriate means of implementing our recommendation."[755]

508. In *India – Quantitative Restrictions*, the Panel suggested that a reasonable period of time be granted to India in order to remove the imports restrictions which were not justified under Article XVIII:B. The Panel also brought to the attention of the DSB some factors to be taken into consideration that had an added importance for the principle of special and differential treatment. The Panel suggested

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[750] Panel Report on *US – Softwood Lumber V*, para. 8.6. See also Panel Report on *Argentina – Poultry Anti-Dumping Duties*. para. 8.5 and *EC – Tube or Pipe Fittings*, para. 8.11.
[751] Panel Report on *US – Underwear*, para. 8.3.
[752] Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.155–6.158.
[753] Panel Report on *India – Patents (US)*, para. 5.65.
[754] Panel Report on *India – Patents (US)*, para. 6.2.
[755] Panel Report on *Guatemala – Cement I*, para. 8.6.

> "that the parties negotiate an implementation/phase-out period. Should it be impossible for them to do so, we suggest that the reasonable period of time, whether determined by arbitration (Article 21.3(c) of the DSU) or other means, be set in light of the above-listed factors."[756]

509. In *US – Lead and Bismuth II*, the European Communities had requested the Panel "to suggest that the United States amend its countervailing duty laws to recognize the principle that a privatization at market price extinguishes subsidies". However, according to the Panel, the European Communities had not identified any provision of the United States' law that required the imposition of countervailing duties in the circumstances of the present dispute. Thus, the Panel was unable to make the suggestion requested by the European Communities. However it noted that the United States had continued to apply its change-in-ownership methodology during the course of the dispute. It therefore suggested

> "that the United States takes all appropriate steps, including a revision of its administrative practices, to prevent the aforementioned violation of Article 10 of the SCM Agreement from arising in the future."[757]

510. In *Guatemala – Cement II*, the Panel suggested that Guatemala revoke its anti-dumping measure on imports of grey Portland cement from Mexico. However, it declined Mexico's request that the Panel suggest to Guatemala that it should refund the anti-dumping duties:

> "In respect of Mexico's request that we suggest that Guatemala refund the anti-dumping duties collected, we note that Guatemala has now maintained a WTO-inconsistent anti-dumping measure in place for a period of three and a half years. . . . Mexico's request raises important systemic issues regarding the nature of the actions necessary to implement a recommendation under Article 19.1 of the DSU, issues which have not been fully explored in this dispute. Thus, we decline Mexico's request to suggest that Guatemala refund the anti-dumping duties collected."[758]

511. In *US – Cotton Yarn*, Pakistan requested the Panel to suggest that the most appropriate way for the United States to implement the Panel's ruling would be to rescind the safeguard action forthwith. The Panel agreed and held as follows:

> "In this case, we recommend that the Dispute Settlement Body request that the United States bring the measure at issue into conformity with its obligations under the ATC. We suggest that this can best be achieved by prompt removal of the import restriction."[759]

512. In *US – Offset Act (Byrd Amendment)*, the Panel considered that, "although there could potentially be a number of ways in which the United States could bring the [concerned measure] into conformity", it found it "difficult to conceive of any method which would be more appropriate and/or effective than the repeal of the . . . measure". Therefore, the Panel suggested that the United States repeal the WTO-inconsistent measures.[760]

513. In *Argentina – Poultry Anti-Dumping Duties*, the Panel "[could] not perceive how Argentina could properly implement [the] recommendation without revoking the anti-dumping measure at issue in this dispute. Accordingly, [the Panel suggested] that Argentina repeals Resolution No. 574/2000 imposing definitive anti-dumping measures on eviscerated poultry from Brazil."[761]

Panel declines to suggest ways to implement

514. In *India – Patents (US)*, the Panel declined the United States' request to the Panel to suggest a manner in which India should implement its obligation, since in its opinion it would impair India's right to choose how to implement the TRIPS Agreement pursuant to Article 1.1.[762] However it did suggest to India to take into account the interests of those persons who would have filed patent applications. In this regard, see paragraph 506 above.

515. In *US – DRAMS*, the Panel declined to make any suggestions on the grounds that there was a range of possible ways through which the United States could appropriately implement the Panel's recommendation.[763]

516. In *US – Lead and Bismuth II*, the European Communities had requested the Panel to suggest that the United States amend its countervailing duty laws to recognize the principle that a privatization at market price extinguishes subsidies. However, according to the Panel, the European Communities had not identified any provision of United States' law that required the imposition of countervailing duties in the circumstances of that dispute; and thus, it was unable to make the suggestion requested by the European Communities. See paragraph 509 above in this regard.

517. In *Guatemala – Cement II*, the Panel declined Mexico's request that the Panel suggest to Guatemala that it should refund the anti-dumping duties. The

[756] Panel Report on *India – Quantitative Restrictions*, paras. 7.5–7.7.
[757] Panel Report on *US – Lead and Bismuth II*, para. 8.1.
[758] Panel Report on *Guatemala – Cement II*, para. 9.7.
[759] Panel Report on *US – Cotton Yarn*, para. 8.5.
[760] Panel Report on *US – Offset Act (Byrd Amendment)*, para. 8.6.
[761] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 8.7.
[762] Panel Report on *India – Patents (US)*, para. 5.65.
[763] Panel Report on *US – DRAMS*, para. 7.4. See also Panel Report on *US – Steel Plate*, para. 7.110.

Panel, however, suggested that Guatemala revoke its anti-dumping measure on imports of grey Portland cement from Mexico. In this regard see paragraph 510 above.

518. In *US – Stainless Steel*, Korea requested the Panel to suggest that the United States revoke its anti-dumping orders on stainless steel plate and sheet from Korea. The Panel noted that the *Anti-Dumping Agreement* comprised 18 separate articles and numerous obligations; thus violations might have different forms and implications. The Panel further recalled that Korea's claims related to the determinations of the Department of Commerce regarding the margin of dumping. It found that the determinations were inconsistent with the *Anti-Dumping Agreement* in a number of respects, but it could not say that had the Department of Commerce acted consistently with the *Anti-Dumping Agreement*, it would not have found the existence of dumping. In this case the Panel concluded:

> "Under these circumstances, while there can be little doubt that revocation would be *one* way that the United States could implement our recommendation, we are not prepared to conclude at this time that it is the only way to do so. Accordingly, we decline Korea's request to suggest that the United States revoke the anti-dumping duties at issue in this dispute."[764]

519. In *US – Hot Rolled Steel*, the Panel declined to make specific suggestions in accordance with Japan's requests. It considered that the modalities of the implementation of its recommendations were for the United States to determine.[765] It further noted that Japan's request for reimbursement raised important systemic issues that had not been fully explored in the dispute.[766]

520. In *US – Line Pipe*, the Panel declined Korea's request for a specific suggestion on ways in which the United States might implement the recommendations, stating that there might be other ways in which the United States could implement its recommendation.[767]

521. In *US – Steel Plate*, the Panel indicated that it was "free to suggest ways in which we believe the [defendant] could appropriately implement our recommendation" but decided not to do so in that case.[768]

522. In *Chile – Price Band System*, the Panel recommended that the DSB request Chile to bring its price band system measure into conformity with its obligations under the *Agreement on Agriculture* and the *GATT 1994*. However it declined to make any recommendation with respect to the safeguard measures Argentina had challenged.[769]

523. In *EC – Sardines*, Peru requested the Panel to make a specific suggestion, i.e. that the European Communities permit Peru without any further delay to market its sardines in accordance with the naming standard consistent with the *TBT Agreement*. However, the Panel declined to make the suggestion stating that the authority under Article 19.1 was a discretionary one.[770]

524. In *US – Countervailing Measures on Certain EC Products*, the European Communities requested the Panel to suggest possible means of implementation by the United States, *inter alia*, the revocation of a number of countervailing duty orders. According to the European Communities, the Panel should do this on the grounds that the United States had shown a lack of good faith with respect to their previous dispute settlement proceedings. The Panel declined to do so and explained that its findings were sufficiently clear and that WTO Members have discretion in how they bring their measures into conformity with their WTO obligations.[771]

525. In *EC – Tariff Preferences*, India requested the Panel to suggest to the European Communities that it bring its measure into conformity with its obligations under *GATT 1994* by obtaining a waiver. The Panel did not consider it appropriate to make such a suggestion to the European Communities in light of the fact that there was more than one way that the European Communities could bring its measure into conformity and because the European Communities had requested a waiver which was still pending.[772]

526. In *US – Oil Country Tubular Goods Sunset Reviews*, Argentina requested that the Panel suggest to the United States that it bring its measures into conformity with its WTO obligations by revoking the anti-dumping order and repealing or amending the laws and regulations at issue. However, the Panel saw "no particular reason to make such a suggestion and therefore decline[d] Argentina's request".[773]

527. In *EC – Tube or Pipe Fittings*, Brazil requested the Panel to suggest that the European Communities repeal its anti-dumping duty order and reimburse all the anti-dumping duties collected thereunder. The Panel declined to do so.[774]

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[764] Panel Report on *US – Stainless Steel*, para. 7.10.
[765] Panel Report on *US – Hot Rolled Steel*, para. 8.11.
[766] Panel Report on *US – Hot Rolled Steel*, para. 8.13.
[767] Panel Report on *US – Line Pipe*, para. 8.6.
[768] Panel Report on *US – Steel Plate*, para. 8.8.
[769] Panel Report on *Chile – Price Band System*, para. 8.3.
[770] Panel Report on *EC – Sardines*, para. 8.3.
[771] Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 6.43.
[772] Panel Report on *EC – Tariff Preferences*, para. 8.3.
[773] Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, paras. 8.3–8.5.
[774] Panel Report on *EC – Tube or Pipe Fittings*, paras. 8.9 and 8.11.

(ii) Choice of means of implementation

528. In *US – Steel Plate*, the Panel referred to Article 21.3, which concerns the defendant's duty to inform the DSB of its intentions in respect of implementation, as supporting its statement that "while a panel may suggest ways of implementing its recommendation, the choice of means of implementation is decided, in the first instance, by the Member concerned".[775]

529. In *US – Countervailing Measures on Certain EC Products*, the Panel rejected a request by the European Communities to make suggestions on the way that the United States should bring its measure into conformity and pointed out that "the Members have discretion in how to bring a measure found to be WTO-inconsistent into conformity with WTO obligations".[776]

(iii) Surveillance of implementation

530. In *Brazil – Aircraft (Article 21.5 – Canada)*, Canada requested that the Panel suggest that the parties develop mechanisms that would allow Canada to verify compliance with the original recommendation of the DSB. The Panel stated:

> "In our view, Article 19.1 appears to envision suggestions regarding what could be done to a measure to bring it into conformity or, in case of a recommendation under Article 4.7 of the *SCM Agreement*, what could be done to 'withdraw' the prohibited subsidy. It is not clear if Article 19.1 also addresses issues of surveillance of those steps. That said, any agreement that WTO Members might reach among themselves to improve transparency regarding the implementation of WTO obligations can only be encouraged."[777]

2. Article 19.2

531. In *Chile – Alcoholic Beverages*, Chile claimed that through its findings, the Panel had added to the rights and obligations of WTO Members under the *WTO Agreement*, contrary to Article 19.2 of the *DSU*. The Appellate Body rejected this argument. See paragraphs 20 and 83 above.

3. Relationship with other Articles

(a) Article 11

532. With respect to the relationship with Article 11 of the *DSU*, see paragraph 398 above.

(b) Articles 16, 21 and 22

533. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body concluded that a reading of Articles 16.4 and 19.1, 21.1, 21.3 and 22.1, taken together, clarifies that "an *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim".[778]

4. Relationship with other WTO Agreements

(a) Article 4.7 of the SCM Agreement

534. In *Australia – Automotive Leather II (Article 21.5 – US)*, the Panel addressed the issue of the relationship between the recommendation to "bring the measure into conformity" under Article 19.1 and the recommendation to "withdraw the subsidy" under Article 4.7 of the *SCM Agreement*. In this context and considering whether Article 4.7 allowed "retroactive" remedies, the Panel rejected the argument that "Article 19.1 of the DSU, even in conjunction with Article 3.7 of the DSU, requires the limitation of the specific remedy provided for in Article 4.7 of the SCM Agreement to purely prospective action." The Panel held that:

> "An interpretation of Article 4.7 of the SCM Agreement which would allow exclusively 'prospective' action would make the recommendation to 'withdraw the subsidy' under Article 4.7 indistinguishable from the recommendation to 'bring the measure into conformity' under Article 19.1 of the DSU, thus rendering Article 4.7 redundant.
>
> . . .
>
> . . . Article 19.1 of the DSU is not the basis of the recommendation in a case involving prohibited subsidies, such as this one. Rather, the recommendation to 'withdraw the subsidy' is required by Article 4.7 of the SCM Agreement . . . Thus, to the extent that 'withdraw the subsidy' requires some action that is different from 'bring the measure into conformity', it is that different action which prevails."[779]

535. See also Section IV.B.6 of the Chapter on the *SCM Agreement*.

XX. ARTICLE 20

A. TEXT OF ARTICLE 20

Article 20
Time-frame for DSB Decisions

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the

[775] Panel Report on *US – Steel Plate*, para. 8.8.
[776] Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 6.43.
[777] Panel Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 7.3.
[778] Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 93.
[779] Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, paras. 6.31 and 6.41.

panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where either the panel or the Appellate Body has acted, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, to extend the time for providing its report, the additional time taken shall be added to the above periods.

B. INTERPRETATION AND APPLICATION OF ARTICLE 20

536. A table showing the time-frames as regards panel and Appellate Body reports adopted not later than 31 December 2004 is included in Section XXXVII below.

XXI. ARTICLE 21

A. TEXT OF ARTICLE 21

Article 21
Surveillance of Implementation of Recommendations and Rulings

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

3. At a DSB meeting held within 30 days[11] after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

(*footnote original*) [11] If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

(a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.[12] In such arbitration, a guideline for the arbitrator[13] should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

(*footnote original*) [12] If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.
(*footnote original*) [13] The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

8. If the case is one brought by a developing country Member, in considering what appropriate action might

be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

B. INTERPRETATION AND APPLICATION OF ARTICLE 21

1. Article 21.1

(a) "prompt compliance"

(i) Concept of compliance

537. The Arbitrator in *Argentina – Hides and Leather (Article 21.3)* defined the concept of "compliance" or "implementation" as a technical concept with a specific content: "the withdrawal or modification of a measure, or part of a measure, the establishment or application of which by a Member of the WTO constituted the violation of a provision of a covered agreement":

> "[T]he non-conforming measure is to be brought into a state of conformity with specified treaty provisions either by *withdrawing* such measure completely, or by *modifying* it by excising or correcting the offending portion of the measure involved. Where the non-conforming measure is a statute, a repealing or amendatory statute is commonly needed. Where the measure involved is an administrative regulation, a new statute may or may not be necessary, but a repealing or amendatory regulation is commonly required.[780] *
>
> It thus appears that the concept of compliance or implementation prescribed in the DSU is a technical concept with a specific content: The withdrawal or modification of a measure, or part of a measure, the establishment or application of which by a Member of the WTO constituted the violation of a provision of a covered agreement . . ."[781]

538. In *Argentina – Hides and Leather (Article 21.3)*, the Arbitrator differentiated the concept of "compliance" within the meaning of the DSU from the removal or modification of the underlying economic/social/other conditions which may have caused the enactment or application of the WTO-inconsistent governmental measure:

> "Compliance within the meaning of the DSU is distinguishable from the removal or modification of the underlying economic or social or other conditions the existence of which might well have caused or contributed to the enactment or application of the WTO-inconsistent governmental measure in the first place. Those economic or other conditions might, in certain situations, survive the removal or modification of the non-conforming measure; nevertheless, the WTO Member concerned will have complied with the DSB recommendations and rulings and with its obligations under the relevant covered agreement. To my mind, it is *inter alia* for the above reason that the need for structural adjustment of the industry or industries in respect of which the WTO-inconsistent measure was promulgated and applied, has generally been regarded, in prior arbitrations under Article 21.3(c) of the DSU, as *not* bearing upon the determination of a 'reasonable period of time' for implementation of DSB recommendations and rulings.[782]"[783]

(ii) Promptness of compliance

Flexibility

539. In *Chile – Alcoholic Beverages (Article 21.3)*, the Arbitrator considered that the existence of a certain element of flexibility in respect of time in complying with the recommendations and rulings of the DSB "would appear to be essential if 'prompt' compliance, in a world of sovereign states, is to be a balanced conception and objective":

> "The DSU clearly stressed the systemic interest of all WTO Members in the Member concerned complying 'immediately' with the recommendations and rulings of the DSB. Reading Articles 21.1 and 21.3 together, 'prompt' compliance is, in principle, 'immediate' compliance. At the same time, however, should 'immediate' compliance be 'impracticable' – it may be noted that the DSU does not use the far more rigorous term 'impossible' – the Member concerned becomes entitled to a 'reasonable period of time' to bring itself into a state of conformity with its WTO obligations. Clearly, a certain element of flexibility in respect of time is built into the notion of compliance with the recommendations and rulings of the DSB. That element would appear to be essential if 'prompt' compliance, in a world of sovereign states, is to be a balanced conception and objective."[784]

540. In *US – 1916 Act (Article 21.3)*, the Arbitrator further indicated that an implementing Member "may rea-

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[780] (*footnote original*) The non-conforming measure might also assume other forms: e.g., an executive or administrative practice actually carried out but not specifically mandated or authorized by statute or administrative regulation; or a "quasi-judicial" determination by an administrative body. Since the Argentine measures involved in this arbitration are not of these kinds, it is not necessary to examine the requirements of compliance where those other kinds of measures are concerned.

[781] Award of the Arbitrator on *Argentina – Hides and Leather (Article 21.3)*, paras. 40–41. See also the Award of the Arbitrator on *US – Offset Act (Byrd Amendment) (Article 21.3)*, para. 49.

[782] (*footnote original*) Award of the Arbitrator under Article 21.3(c) of the DSU, *Indonesia – Automobile Industry*, WT/DS54/15, *supra*, footnote 10 para. 23; and Award of the Arbitrator under Article 21.3(c) of the DSU, *Canada – Pharmaceutical Patents*, *supra*, footnote 9 para. 52.

[783] Award of the Arbitrator on *Argentina – Hides and Leather (Article 21.3)*, para. 41.

[784] Award of the Arbitrator on *Chile – Alcoholic Beverages (Article 21.3)*, para. 38. As regards the concept of "flexibility" when considering the reasonable period of time, see also Awards of the Arbitrator, *Canada – Patent Term*, para. 64; *US – 1916 Act*, para. 39; *US – Section 110(5) Copyright Act*, paras. 38–39 and *Chile – Price Band System (Article 21.3)*, para. 39.

sonably be expected to use all the flexibility available within its normal legislative procedures to enact the required legislation as speedily as possible".[785]

Time after adoption of report(s)

541. In *US – Section 110(5) Copyright Act (Article 21.3)*, the Arbitrator further indicated that, in order to effect "prompt compliance", an implementing Member must use the time after adoption of a panel and/or Appellate Body report to begin to implement the recommendations and rulings of the DSB:

> "[A]n implementing Member must use the time after adoption of a panel and/or Appellate Body report to begin to implement the recommendations and rulings of the DSB. Arbitrators will scrutinize very carefully the actions an implementing Member takes in respect of implementation during the period after adoption of a panel and/or Appellate Body report and prior to any arbitration proceeding. If it is perceived by an arbitrator that an implementing Member has not adequately begun implementation after adoption so as to effect 'prompt compliance', it is to be expected that the arbitrator will take this into account in determining the 'reasonable period of time'."[786]

542. In the same vein, the Arbitrator on *Chile – Price Band System (Article 21.3)* considered that a Member's obligation to implement the recommendations and rulings of the DSB is triggered by the adoption of the report(s) at issue and thus a Member "must at the very least promptly *commence* and continue concrete steps towards implementation":

> "A Member's obligation to implement the recommendations and rulings of the DSB is triggered by the DSB's adoption of the relevant panel and/or Appellate Body reports. Although Article 21.3 acknowledges circumstances where *immediate* implementation is 'impracticable', in my view the implementation process should not be prolonged through a Member's inaction (or insufficient action) in the first months following adoption. In other words, whether or not a Member is able to *complete* implementation promptly, it must at the very least promptly *commence* and continue concrete steps towards implementation. Otherwise, inaction or dilatory conduct by the implementing Member would exacerbate the nullification or impairment of the rights of other Members caused by the inconsistent measure. It is for this reason that arbitral awards under Article 21.3(c) calculate 'reasonable period[s] of time' as from the date of adoption of panel and/or Appellate Body reports."[787]

Relationship with Article 21.3(c)

543. As regards the interpretation of Article 21.3(c) in the context of the obligation of "prompt compliance" under Article 21.1, see paragraph 557 below.

2. Article 21.2

(a) "interests of developing country Members"

544. In *Indonesia – Autos (Article 21.3)*, the Arbitrator, in determining the "reasonable period of time" pursuant to Article 21.3(c) of the *DSU*, took into account not only Indonesia's status as a developing country in determining the "reasonable period of time", but also the fact that "it is a developing country that is currently in a dire economic and financial situation":

> "Although the language of this provision is rather general and does not provide a great deal of guidance, it is a provision that forms part of the context for Article 21.3(c) of the DSU and which I believe is important to take into account here. Indonesia has indicated that in a 'normal situation', a measure such as the one required to implement the recommendations and rulings of the DSB in this case would become effective on the date of issuance. However, this is not a 'normal situation'. Indonesia is not only a developing country; it is a developing country that is currently in a dire economic and financial situation. Indonesia itself states that its economy is 'near collapse'. In these very particular circumstances, I consider it appropriate to give full weight to matters affecting the interests of Indonesia as a developing country pursuant to the provisions of Article 21.2 of the DSU. I, therefore, conclude that an additional period of six months over and above the six-month period required for the completion of Indonesia's domestic rule-making process constitutes a reasonable period of time for implementation of the recommendations and rulings of the DSB in this case."[788]

545. In *Chile – Alcoholic Beverages (Article 21.3)*, the Arbitrator held that taking into account the interests of developing countries in determining the "reasonable period of time" pursuant to Article 21.3(c), should not result in different "*kinds* of considerations that may be taken into account". However, the arbitrator stressed that "because Article 21.2 is in the DSU, it is not simply to be disregarded" and that it "usefully enjoins, *inter alia*, an arbitrator functioning under Article 21.3(c) to be generally mindful of the great difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and rulings of the DSB":

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[785] Award of the Arbitrator, *US – 1916 Act (Article 21.3)*, para. 39. See also Awards of the Arbitrator on *US – Section 110(5) Copyright Act (Article 21.3)*, paras. 38–39; *Canada – Patent Term (Article 21.3)*, para. 64; and *Chile – Price Band System (Article 21.3)*, para. 49.

[786] Award of the Arbitrator on *US – Section 110(5) Copyright Act (Article 21.3)*, para. 46.

[787] Award of the Arbitrator on *Chile – Price Band System (Article 21.3)*, para. 43.

[788] Award of the Arbitrator on *Indonesia – Autos (Article 21.3)*, para. 24. See also Award of the Arbitrator on *Argentina – Hides and Leather (Article 21.3)*, para. 51.

"It is not necessary to assume that the operation of Article 21.2 will essentially result in the application of 'criteria' for the determination of 'the reasonable period of time' – understood as the *kinds* of considerations that may be taken into account – that would be 'qualitatively' different for developed and for developing country Members. I do not believe Chile is making such an assumption. Nevertheless, although cast in quite general terms, because Article 21.2 is in the DSU, it is not simply to be disregarded. As I read it, Article 21.2, whatever else it may signify, usefully enjoins, *inter alia*, an arbitrator functioning under Article 21.3(c) to be generally mindful of the great difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and rulings of the DSB."[789]

546. In *Chile – Price Band System (Article 21.3)*, the Arbitrator, while agreeing with the Arbitrator in *Chile – Alcoholic Beverages (Article 21.3)* on the importance of being generally mindful of the difficulties that a developing country may face upon implementation of rulings and recommendations of the DSB (see paragraph 545 above), noted that the current case differed from the latter since this was the first arbitration where both the complainant and the defendant were developing country Members. The Arbitrator concluded that given the unusual circumstances of this case, he was "not swayed towards either a longer or shorter period of time by the '[p]articular attention' [to be paid] to the interests of developing countries":

"I agree with the following statement by the arbitrator in *Chile – Alcoholic Beverages* that 'an arbitrator functioning under Article 21.3(c) [must] be *generally mindful* of the great difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and rulings of the DSB.'[790] This arbitration is, however, the first arbitration under Article 21.3(c) to include developing countries as both complainant *and* respondent. The period of time for implementation of the recommendations and rulings of the DSB in this case is thus a 'matter[] affecting the interests' of both Members: the general difficulties facing Chile as a developing country in revising its long-standing PBS, and the burden imposed on Argentina as a developing country whose access to the Chilean agricultural market is impeded by the PBS, contrary to WTO rules.

Furthermore, Chile has not pointed to additional *specific* obstacles that it faces *as a developing country* under present circumstances. This is a matter which I should take into account in evaluating whether a longer period of time may be needed for implementation. The absence of presently-existing, concrete difficulties in Chile's position as a developing country stands in contrast to previous arbitrations, wherein Members have identified, not simply their positions as developing countries, but also 'severe'[791] or 'dire'[792] economic and financial situations existing at the time of the proposed period of implementation. In contrast, the acuteness of Argentina's burden as a developing country complainant that has been successful in establishing the WTO-inconsistency of a challenged measure, is amplified by Argentina's daunting financial woes at present. Accordingly, I recognize that Chile may indeed face obstacles as a developing country in its implementation of the recommendations and rulings of the DSB, and that Argentina, likewise, faces continuing hardship as a developing country so long as the WTO-inconsistent PBS is maintained. In the unusual circumstances of this case, therefore, I am not swayed towards either a longer or shorter period of time by the '[p]articular attention'[793] I pay to the interests of developing countries."[794]

547. In *US – Offset Act (Byrd Amendment) (Article 21.3)*, the Arbitrator had difficulty in comprehending how the fact that various complainants were developing country Members could affect the determination of the reasonable period of time for the developed country Member to implement the DSB recommendations:

"I am, furthermore, mindful of my obligation, pursuant to Article 21.2, to pay '[p]articular attention . . . to matters affecting the interests of developing country Members'. I note that, by its wording, Article 21.2 does not distinguish between situations where the developing country Member concerned is an implementing or a complaining party. However, I also note that the Complaining Parties have not explained *specifically* how developing country Members' interests should affect my determination of the reasonable period of time for implementation. It is useful to recall, once again, that the term 'reasonable period of time' has been consistently interpreted to signify the 'shortest period possible within the legal system of the Member'. Therefore, I have some difficulty in seeing how the fact that several Complaining Parties are developing country Members should have an effect on the determination of the shortest period possible within the legal system of the United States to implement the recommendations and rulings of the DSB in this case."[795]

548. In *EC – Tariff Preferences (Article 21.3)*, the European Communities requested the Arbitrator to take into account the interests of the developing countries which

[789] Award of the Arbitrator on *Chile – Alcoholic Beverages (Article 21.3)*, para. 45.
[790] (*footnote original*) Award of the Arbitrator, *Chile – Alcoholic Beverages*, para. 45 (emphasis added).
[791] (*footnote original*) Award of the Arbitrator, *Argentina – Hides and Leather*, para. 51.
[792] (*footnote original*) Award of the Arbitrator, *Indonesia – Autos*, para. 24.
[793] (*footnote original*) Article 21.2 of the DSU.
[794] Award of the Arbitrator on *Chile – Price Band System (Article 21.3)*, paras. 55–56.
[795] Award of the Arbitrator on *US – Offset Act (Byrd Amendment) (Article 21.3)*, para. 81.

were at the time beneficiaries of measures found to be inconsistent with WTO law (the Drug Arrangements). The Arbitrator recalled that some arbitrators had taken Article 21.2 of the *DSU* into account in assessing the difficulties faced by an implementing Member that was a developing country,[796] or where both parties were developing countries.[797] The Arbitrator pointed out that until then no arbitrator had determined whether the reference to "developing country Members" in Article 21.2 should be interpreted to include, in the context of an Article 21.3(c) arbitration, Members not party to the arbitration. The Arbitrator, however, decided that it was unnecessary for him to decide this issue.[798]

3. Article 21.3(c)

(a) Mandate of the arbitrator

549. The Arbitrator defined his mandate in *EC – Hormones (Article 21.3)* as follows:

> "It is not within my mandate under Article 21.3(c) of the DSU, to suggest ways or means to the European Communities to implement the recommendations and rulings of the Appellate Body Report and Panel Reports. My task is to determine the reasonable period of time within which implementation must be completed. Article 3.7 of the DSU provides, in relevant part, that 'the first objective of the dispute settlement mechanism is *usually to secure the withdrawal of the measures concerned* if these are found to be inconsistent with the provisions of any of the covered agreements' (emphasis added). Although withdrawal of an inconsistent measure is the *preferred* means of complying with the recommendations and rulings of the DSB in a violation case,[799] it is not necessarily the *only* means of implementation consistent with the covered agreements. An implementing Member, therefore, has a measure of discretion in choosing the *means* of implementation, as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements."[800]

550. In *US – Hot-Rolled Steel (Article 21.3)*, the Arbitrator confirmed that it is for the implementing WTO Member to determine the proper scope and content of anticipated legislation. However, he also indicated that "the degree of complexity of the contemplated implementing legislation may be relevant for the arbitrator, to the extent that such complexity bears upon the length of time that may reasonably be allocated to the enactment of such legislation":

> "I do not believe that an arbitrator acting under Article 21.3(c) of the DSU is vested with jurisdiction to make any determination of the proper scope and content of implementing legislation, and hence do not propose to deal with it. The degree of complexity of the contemplated implementing legislation may be relevant for the arbitrator, to the extent that such complexity bears upon the length of time that may reasonably be allocated to the enactment of such legislation. But the proper scope and content of anticipated legislation are, in principle, left to the implementing WTO Member to determine."[801]

551. In *Chile – Price Band System (Article 21.3)*, the Arbitrator further explained that, although the manner of implementation is up to the Member concerned, the more information provided on the details of the implementing measure, the greater the guidance to an Arbitrator in selecting a reasonable period of time:

> "The fact that an Article 21.3(c) arbitration focuses on the period of time for implementation, however, does not render the substance of the implementation, that is, the precise means or manner of implementation, immaterial from the perspective of the arbitrator. In fact, the more information that is known about the details of the implementing measure, the greater the guidance to an arbitrator in selecting a reasonable period of time, and the more likely that such period of time will fairly balance the legitimate needs of the implementing Member against those of the complaining Member. Nevertheless, the arbitrator should still avoid deciding what a Member must do for proper implementation[802]. . . ."[803]

(b) "reasonable period of time"

(i) Availability of the reasonable period of time

552. In *US – Offset Act (Byrd Amendment) (Article 21.3)*, the Arbitrator indicated that Article 21.3 "makes clear that 'prompt compliance', in principle, implies

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[796] See, for example, Award of the Arbitrator, *Indonesia – Autos*, para. 24; Award of the Arbitrator, *Chile – Alcoholic Beverages*, para. 45; and Award of the Arbitrator, *Argentina – Hides and Leather*, para. 51.

[797] Award of the Arbitrator, *Chile – Price Band System*, paras. 55 and 56. See also Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 81.

[798] Award of the Arbitrator in *EC – Tariff Preferences (Article 21.3)*, para. 59.

[799] (*footnote original*) By contrast, in a non-violation case, brought under Article XXIII:1(b) of the GATT 1994, Article 26.1(b) of the DSU states explicitly that "there is no obligation to withdraw".

[800] Award of the Arbitrator on *EC – Hormones (Article 21.3)*, para. 38. See also the Awards of the Arbitrator on *Australia – Salmon (Article 21.3)*, para. 35; *Korea – Alcoholic Beverages (Article 21.3)*, para. 45, where the Arbitrator indicated that "choosing the means of implementation is, and should be, the prerogative of the implementing Member"; *Canada – Pharmaceutical Patents (Article 21.3)*, paras. 40;; *Chile – Alcoholic Beverages (Article 21.3)*, para. 42, where the Arbitrator confirmed that "[t]he choice and the timing of the detailed operating steps in enacting a new law are properly left to the Member concerned"; *Chile – Price Band System (Article 21.3)*, para. 32; *US – Offset Act (Byrd Amendment) (Article 21.3)*, para. 48; *EC – Tariff Preferences (Article 21.3)*, para. 30.

[801] Award of the Arbitrator on *US – Hot-Rolled Steel (Article 21.3)*, para. 30.

[802] (*footnote original*) Award of the Arbitrator, *US – Hot-Rolled Steel*, para. 30.

[803] Award of the Arbitrator on *Chile – Price Band System (Article 21.3)*, para. 37.

'immediate[ ]' compliance" and, accordingly deduced that a "'reasonable period of time' for implementation is not available unconditionally to an implementing Member. Rather, an implementing Member is entitled to a reasonable period of time for implementation only where, pursuant to Article 21.3, 'it is impracticable to comply immediately with the recommendations and rulings' of the DSB."[804]

(ii) Concept of "reasonableness"

553. In *US – Hot-Rolled Steel (Article 21.3)*, the Arbitrator considered that the essence of "reasonableness", as articulated by the Appellate Body in *US – Hot-Rolled Steel* in the context of the *Anti-Dumping Agreement*, was equally pertinent in the context of Article 21.3(c) of the *DSU*:

> "In *US – Hot-Rolled Steel*, the implementation of which is involved here, the Appellate Body had occasion to interpret the phrase 'reasonable period' found in Article 6.8 of the *Anti-Dumping Agreement* and 'reasonable time' used in paragraph 1 of Annex II of that Agreement. 'The word "reasonable"', the Appellate Body stated:
>
> > . . . implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is 'reasonable' in one set of circumstances may prove to be less than 'reasonable' in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time under Article 6.8 and Annex II of the *Anti-Dumping Agreement*, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation.
> >
> > In sum, a 'reasonable period' must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of 'reasonableness', and in a manner that allows for account to be taken of the particular circumstances of each case.[805]
>
> Although, in the above excerpt, the Appellate Body dealt with the *Anti-Dumping Agreement*, and not the DSU, the essence of 'reasonableness' so articulated is, in my view, equally pertinent for an arbitrator faced with the task of determining what constitutes 'a reasonable period of time' in the context of the DSU."[806]

(iii) Length of the reasonable period of time

The 15-month guideline

554. The Arbitrator on *EC – Hormones (Article 21.3)* considered that "the ordinary meaning of the terms of Article 21.3(c) indicates that 15 months is a 'guideline for the arbitrator', and not a rule".[807]

555. In *Canada – Pharmaceutical Patents (Article 21.3)*, the Arbitrator noted that "the 15-month period is a 'guideline', and not an average, or usual, period. It is expressed also as a *maximum* period, subject only to any 'particular circumstances' mentioned in the second sentence."[808]

556. In *EC – Bananas III (Article 21.3)*, the European Communities requested a period of 15 months and one week based on the alleged complexity and difficulty of amending the then existing import regime for bananas. The Arbitrator confirmed that the 15-month period provided for in Article 21.3(c) is a guideline and that the "reasonable period of time" may be shorter or longer than 15 months, depending upon the "particular circumstances" (see paragraph 593 below):

> "When the 'reasonable period of time' is determined through binding arbitration, as provided for under Article 21.3(c) of the DSU, this provision states that a 'guideline' for the arbitrator should be that the 'reasonable period of time' should not exceed 15 months from the date of the adoption of a panel or Appellate Body report. Article 21.3(c) of the DSU also provides, however, that the 'reasonable period of time' may be shorter or longer than 15 months, depending upon the 'particular circumstances.'"[809]

The shortest period possible

557. The Arbitrator on *EC – Hormones (Article 21.3)* considered that, when read in the context of the requirement of "prompt compliance" of Article 21.1, the "reasonable period of time" should be the "shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB". The Arbitrator held, *inter alia*, that "when implementation can be effected by administrative means, the reasonable period of time should be considerably shorter than 15 months":

> "The ordinary meaning of the terms of Article 21.3(c) indicates that 15 months is a 'guideline for the arbitra-

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[804] Award of the Arbitrator on *US – Offset Act (Byrd Amendment) (Article 21.3)*, para. 40.

[805] (*original footnote*) Appellate Body Report [on *US – Hot-Rolled Steel*], paras. 84–85.

[806] Award of the Arbitrator on *US – Hot-Rolled Steel (Article 21.3)*, paras. 25–26. See also the Award of the Arbitrator on *US – Offset Act (Byrd Amendment) (Article 21.3)*, para. 42.

[807] Award of the Arbitrator on *EC – Hormones (Article 21.3)*, para. 25.

[808] Award of the Arbitrator on *Canada – Pharmaceutical Patents (Article 21.3)*, para. 45. See also Award of the Arbitrator on *Chile – Alcoholic Beverages (Article 21.3)*, para. 39. In *US – Hot-Rolled Steel (Article 21.3)*, the Arbitrator further indicated that he ". . . d[id] not see any basis for reading the 15-month guideline as establishing a fixed maximum or 'outer limit' for 'a reasonable period of time'. Neither, of course, does the 15-month guideline constitute a floor or 'inner limit' of 'a reasonable period of time'." Award of the Arbitrator on *US – Hot-Rolled Steel (Article 21.3)*, para. 25. See also the Awards of the Arbitrator on *Chile – Price Band System (Article 21.3)*, para. 33; and *US – Offset Act (Byrd Amendment) (Article 21.3)*, para. 41.

[809] Award of the Arbitrator on *EC – Bananas III (Article 21.3)*, para. 18. See also the Awards of the Arbitrator on *Australia – Salmon (Article 21.3)*, para. 30; and *Canada – Autos (Article 21.3)*, para. 39.

tor', and not a rule. This guideline is stated expressly to be that 'the reasonable period of time . . . *should not exceed* 15 months from the date of adoption of a panel or Appellate Body report' (emphasis added). In other words, the 15-month guideline is an outer limit or a maximum in the usual case. For example, when implementation can be effected by administrative means, the reasonable period of time should be considerably shorter than 15 months. However, the reasonable period of time could be shorter or longer, depending upon the particular circumstances, as specified in Article 21.3(c).

Article 21.3(c) also should be interpreted in its context and in light of the object and purpose of the DSU. Relevant considerations in this respect include other provisions of the DSU, including, in particular, Articles 21.1 and 3.3. Article 21.1 stipulates that: '*Prompt compliance* with recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members' (emphasis added). Article 3.3 states: 'The *prompt* settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members' (emphasis added). *The Concise Oxford Dictionary* defines the word, 'prompt', as meaning 'a. acting with alacrity; ready. b. made, done, etc. readily or at once'. Read in context, it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB. In the usual case, this should not be greater than 15 months, but could also be less."[810]

Normal versus extraordinary legislative procedure

558. In *Korea – Alcoholic Beverages (Article 21.3)*, the Arbitrator stated that while the reasonable period of time should be the shortest period possible within the legal system of the Member concerned, the Member in question should not be required to utilize extraordinary legislative procedures to comply with the recommendations and rulings of the DSB:

> "Although the reasonable period of time should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB, this does not require a Member, in my view, to utilize an *extraordinary* legislative procedure, rather than the *normal* legislative procedure, in every case. Taking into account all of the circumstances of the present case, I believe that it is reasonable to allow Korea to follow its *normal* legislative procedure for the consideration and adoption of a tax bill with budgetary implications, that is, to submit the proposed amendments to the next regular session of the National Assembly. For the same reasons, I consider it reasonable that the new tax legislation should be enacted by the National Assembly in the course of the next regular session, and promulgated by the President before the end of this year."[811]

DSB actions as precedents

559. In *US – Hot-Rolled Steel (Article 21.3)*, the United States referred to the extensions of the reasonable period of time agreed by the DSB in two previous disputes to take into account the adjournment of the United States Congress' legislative session,[812] in order to support its position that the reasonable period of time

[810] Award of the Arbitrator on *EC – Hormones (Article 21.3)*, paras. 25–26. See also the Awards of the Arbitrator on *Chile – Alcoholic Beverages (Article 21.3)*, para. 38; *Canada – Pharmaceutical Patents (Article 21.3)*, para. 47; *US – 1916 Act (Article 21.3)*, para. 32; *Chile – Price Band System (Article 21.3)*, para. 34; and *US – Offset Act (Byrd Amendment) (Article 21.3)*, para. 42; *EC – Tariff Preferences (Article 21.3)*, para. 26.

[811] Award of the Arbitrator on *Korea – Alcoholic Beverages (Article 21.3)*, paras. 42–43. In *Chile – Alcoholic Beverages*, the European Communities had argued that the reasonable period of time should be 5 months because Chile could resort to urgency procedures to enact the emendatory bill needed for the implementation. The Arbitrator, however, considered that "the Member concerned has the sovereign prerogative and responsibility of determining for itself the most appropriate, and probably effective, method of implementing the recommendations and rulings of the DSB by securing the passage of the emendatory law. The choice and the timing of the detailed operating steps in enacting a new law are properly left to the Member concerned." Award of the Arbitrator on *Chile – Alcoholic Beverages (Article 21.3)*, para. 42. See also the Award of the Arbitrator on *US – Section 110(5) Copyright Act*, para. 32. In *Chile – Price Band System (Article 21.3)*, Argentina also argued that Chile should be expected to resort to "urgency procedures" in order to effect the "flexibility" that its Constitution allowed and thus more promptly achieve implementation. The Arbitrator, after having established that "an implementing Member 'may reasonably be expected to use all the flexibility available within its normal legislative procedures to enact the required legislation as speedily as possible'" (see para. 540 of this Chapter), indicated that he found "it unreasonable for me to *expect* or assume that Chile will necessarily make use of the 'flexibility' arguably provided by the extraordinary 'urgency procedure' when implementing legislation that modifies the PBS. Indeed, there is sufficient flexibility within the *ordinary* legislative procedure of Chile to enable it to implement the recommendations and rulings of the DSB in this case within a time frame of less than the 18 months which it seeks." See Award of the Arbitrator on *Chile – Price Band System (Article 21.3)*, paras. 49–54. See also Award of the Arbitrator on *US – Offset Act (Byrd Amendment) (Article 21.3)*, para. 43.

[812] The United States referred to *US – 1916 Act* and *US – Section 110(5) Copyright Act* where the arbitrators set the reasonable period at 10 months and 12 months, respectively. The United States on 12 July 2001 asked the DSB to modify the reasonable period of time determined by the arbitrators in both cases, that were due to expire, respectively, on 26 July 2001 and 27 July 2001, so that the modified periods would instead end on 31 December 2001, or on the date on which the then current 2001 session of the United States Congress adjourned, whichever was earlier. At its meeting of 24 July 2001, the DSB noted and agreed to the United States' request. In both instances, the complaining parties – the European Communities and Japan in *US – 1916 Act* and the European Communities in *US – Section 110(5) of the US Copyright Act* – having previously reached some understanding with the United States on the matter, did not oppose the requests of the United States. Award of the Arbitrator on *US – Hot-Rolled Steel (Article 21.3)*, para. 39.

should be longer than ten months. The Arbitrator noted that, on both occasions, the complaining parties had agreed to the extension and therefore did not consider that the actions of the DSB in those cases could have "any precedential value":

> "It appears to me that whether the actions of the DSB in those two instances have any precedential value in respect of the present arbitration proceedings, is open to substantial debate. The present proceedings have been precipitated precisely by the failure of the parties to the dispute to reach an agreement on a reasonable period of time to comply under Article 21.3(b) of the DSU."[813]

Burden of proof

560. The Arbitrator on *Canada – Pharmaceutical Patents (Article 21.3)* held that it was for the implementing Member to bear the burden of proof in showing that the duration of any proposed period of implementation is a "reasonable period of time":

> "Based on the wording of Articles 21.3, and on the context provided in Articles 3.3, 21.1 and 21.4 of the DSU, I agree with the arbitrator in *European Communities – Hormones* that 'the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB.'[814] Moreover, as immediate compliance is clearly the preferred option under Article 21.3, it is, in my view, for the implementing Member to bear the burden of proof in showing – '[i]f it is impracticable to comply immediately' – that the duration of any proposed period of implementation, including its supposed component steps, constitutes a 'reasonable period of time'. And the longer the proposed period of implementation, the greater this burden will be."[815]

561. In *EC – Tariff Preferences (Article 21.3)*, India argued that the implementing Member – in this case, the European Communities – bears the burden of demonstrating that the period it proposes is reasonable and that "the already great burden becomes even greater" if this period is more than 15 months. The Arbitrator disagreed and held that, in his view, the European Communities must demonstrate that the period it proposes is reasonable; "but I do not find it necessary in this arbitration to determine whether the burden of proof becomes greater if the period proposed is more than 15 months".[816]

562. As regards the burden of proof concerning the existence or not of "particular circumstances" under Article 21.3(c), see paragraphs 593–594 below.

Examples of amendment of the "reasonable period of time"

563. In the dispute *Canada – Dairy*, on 23 December 1999, Canada informed the Chairman of the DSB that it had reached an agreement with New Zealand and the United States on the reasonable period of time for the implementation of the DSB's rulings.[817]

564. Concerning the *US – FSC* dispute, at its meeting of 12 October 2000, the DSB accepted the United States' request to modify the time-period for compliance.[818]

565. In respect of the dispute *US – Hot-Rolled Steel*, at its meeting on 5 December 2002, the DSB accepted the request of the United States to modify the time period for compliance.[819]

Length of "reasonable period of time" as awarded by Article 21.3(c) arbitration

566. The following table lists the disputes where the determination of the length of the reasonable period of time was subject to arbitration under Article 21.3(c) and the time awarded by the Arbitrator:

WT/DS No.	Short Title	Award Circulated	"Reasonable Period of Time"
DS8 – EC DS10 – Canada DS11 – US	*Japan – Alcoholic Beverages II*	14 February 1997 (WT/DS8/15, WT/DS10/15, WT/DS11/13)	15 months
DS18 – Canada	*Australia – Salmon*	23 February 1999 (WT/DS18/9)	8 months from 6 November 1998
DS26 – US DS48 – Canada	*EC – Hormones*	29 May 1998 (WT/DS26/15, WT/DS48/13)	15 months from 13 February 1998

[813] Award of the Arbitrator on *US – Hot-Rolled Steel (Article 21.3)*, para. 39.
[814] (*footnote original*) *Supra*, footnote 11, para. 26. (Award of the Arbitrator on *EC – Hormones (Article 21.3)*, para. 26.)
[815] Award of the Arbitrator on *Canada – Pharmaceutical Patents (Article 21.3)*, para. 47. See also the Awards of the Arbitrator on *US – 1916 Act (Article 21.3)*, para. 32; and *US – Offset Act (Byrd Amendment) (Article 21.3)*, para. 44.
[816] Award of the Arbitrator on *EC – Tariff Preferences (Article 21.3)*, para. 27.
[817] WT/DS103/10–WT/DS113/10.
[818] WT/DSB/M/90, subsection 1(a).
[819] WT/DSB/M/138.

Table (*cont.*)

WT/DS No.	Short Title	Award Circulated	"Reasonable Period of Time"
DS27 – Ecuador, Guatemala, Honduras, Mexico, US	*EC – Bananas III*	7 January 1998 (WT/DS27/15)	From 25 September 1997 to 1 January 1999
DS54 – EC DS55 – Japan DS59 – US DS64 – Japan	*Indonesia – Autos*	7 December 1998 (WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12)	12 months from 23 July 1998
DS75 – EC DS84 – US	*Korea – Alcoholic Beverages*	4 June 1999 (WT/DS75/16, WT/DS84/14)	11 months and 2 weeks, that is, from 17 February 1999 to 31 January 2000
DS87 – EC DS110 – EC	*Chile – Alcoholic Beverages*	23 May 2000 (WT/DS87/15, WT/DS110/14)	not more than 14 months and 9 days from 12 January 2000, that is to say, until 21 March 2001
DS114 – EC	*Canada – Pharmaceutical Patents*	18 August 2000 (WT/DS114/13)	6 months from adoption of report i.e. expiry date: 7 October 2000
DS136 – EC DS162 – Japan	*US – 1916 Act*	28 February 2001 (WT/DS136/11, WT/DS162/14)	10 months from adoption of reports i.e. expiry date: 26 July 2001 Extended: 31 December 2001
DS139 – Japan DS142 – EC	*Canada – Autos*	4 October 2000 (WT/DS139/12, WT/DS142/12)	8 months from adoption of report i.e. expiry date: 19 February 2001
DS155 – EC	*Argentina – Hides and Leather*	31 August 2001 (WT/DS155/10)	Not more than 12 months and 12 days i.e. expiry date: 28 February 2002
DS160 – EC	*US – Section 110(5) Copyright Act*	15 January 2001 (WT/DS160/12)	12 months from adoption of report i.e. expiry date: 27 July 2001 Extended: 31 December 2001
DS170 – US	*Canada – Patent Term*	28 February 2001 (WT/DS170/10)	10 months from adoption of report i.e. expiry date: 12 August 2001
DS184 – Japan	*US – Hot-Rolled Steel*	19 February 2002 (WT/DS184/13)	15 months from 23 August 2001 i.e. expiry date: 23 November 2002
DS202 – Korea	*US – Line Pipe*	26 July 2002 (WT/DS202/17)	Parties agreed on RPT and no award was issued.
DS207 – Argentina	*Chile – Price Band System*	17 March 2003 (WT/DS207/13)	14 months i.e. expiry date: 23 December 2003
DS217 – Australia, Brazil, Chile, EC, India, Indonesia, Japan, Korea and Thailand DS234 – Canada, Mexico	*US – Offset Act (Byrd Amendment)*	13 June 2003 (WT/DS217/14, WT/DS234/22)	11 months i.e. expiry date: 27 December 2003
DS246 – India	*EC – Tariff Preferences*	20 September 2004 (WT/DS246/14)	14 months, 11 days i.e. expiry date: 1 July 2005
DS264 – Canada	*US – Softwood Lumber V*	13 December 2004 (WT/DS264/13)	Parties agreed on RPT and no award was issued

(iv) The application of WTO-inconsistent measures during the reasonable period of time

567. In *US – Section 129(c)(1) URAA*, the Panel considered that nothing suggests that Members are obliged, during the course of the reasonable period of time, to suspend application of the offending measure or to provide relief for the past effects of such measure:

> "Nothing in Article 21.3 suggests that Members are obliged, during the course of the reasonable period of time, to suspend application of the offending measure, much less to provide relief for past effects. Rather, in the case of antidumping and countervailing duty measures, entries that take place during the reasonable period of time may continue to be liable for the payment of duties.
>
> . . .

> When panels and the Appellate Body have been asked to make recommendations for retroactive relief, they have rejected those requests, recognizing that a Member's obligation under the DSU is to provide prospective relief in the form of withdrawing a measure inconsistent with a WTO agreement, or bringing that measure into conformity with the agreement by the end of the reasonable period of time. In the six years of dispute settlement under the WTO agreements, no panel or the Appellate Body has ever suggested that bringing a WTO-inconsistent antidumping or countervailing duty measure into conformity with a Member's WTO obligations requires the refund of antidumping or countervailing duties collected on merchandise that entered prior to the date of implementation."[820]

568. The Panel on *US – Section 129(c)(1) URAA* also added that Articles 22.1 and 22.2 of the *DSU* confirm not only that a Member may maintain the WTO-inconsistent measure until the end of the reasonable period of time for implementation, but also that neither compensation nor the suspension of concessions or other obligations are available to the complaining Member until the conclusion of that reasonable period of time.[821]

(v) Exception: prohibited subsidies

569. In *Brazil – Aircraft*, the Appellate Body noted that the provisions of Article 21.3 of the *DSU* are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of the *SCM Agreement*:

> "With respect to implementation of the recommendations or rulings of the DSB in a dispute brought under Article 4 of the *SCM Agreement*, there is a significant difference between the relevant rules and procedures of the DSU and the special or additional rules and procedures set forth in Article 4.7 of the *SCM Agreement*. Therefore, the provisions of Article 21.3 of the DSU are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of Part II of the *SCM Agreement*. Furthermore, we do not agree with Brazil that Article 4.12 of the *SCM Agreement* is applicable in this situation. In our view, the Panel was correct in its reasoning and conclusion on this issue. Article 4.7 of the *SCM Agreement*, which is applicable to this case, stipulates a time-period. It states that a subsidy must be withdrawn 'without delay'. That is the recommendation the Panel made."[822]

570. With respect to the period of implementation under Article 4.7 of the *SCM Agreement*, see Section IV.B.6(b) of the Chapter on the *SCM Agreement*.

(c) "particular circumstances"

(i) Concept of "particular circumstances"

571. In *Canada – Pharmaceutical Patents (Article 21.3)*, the Arbitrator defined the term "particular circumstances" in Article 21.3 as "those that can influence what the shortest period possible for implementation may be within the legal system of the implementing Member".[823]

(ii) Relevance of "particular circumstances"

572. In *Chile – Alcoholic Beverages (Article 21.3)*, the Arbitrator pointed out that the shortest period of time *theoretically* possible for the completion of the legislative process is not the *sole* criterion that should be taken into account in determining the reasonable period of time. The Arbitrator further considered that Article 21.3(c) "contemplates a case-specific approach and authorizes the consideration of the 'particular circumstances' of a given case, which may warrant a longer or shorter period":

> "The concept of reasonableness, which is, of course, built into the notion of 'a reasonable period of time' for implementation, inherently involves taking into account the relevant circumstances. In some cases these circumstances may be singular or few in number but in other cases they may be multiple. Determination of a 'reasonable period of time' is not, in principle, appropriately carried out by ascribing decisive or exclusive relevance to one single or even a few *a priori* factors and eschewing consideration of everything else as non-pertinent. Thus, the shortest period of time *theoretically* possible for the completion of the legislative process, even assuming the bill enjoys the necessary parliamentary majority from the beginning and is never the subject of serious debate, is not the *sole* criterion that I should take into account in determining the reasonable period. What Article 21.3(c) of the DSU provides arbitrators with is a '*guide*line', not a fixed command, that the reasonable period should be not more than 15 months from the date of adoption by the DSB of the pertinent Panel and Appellate Body Reports. Article 21.3(c) evidently contemplates a case-specific approach and authorizes the consideration of the 'particular circumstances' of a given case, which may warrant a longer or shorter period."[824]

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[820] Panel Report on *US – Section 129(c)(1) URAA*, paras. 3.90 and 3.93.
[821] Panel Report on *US – Section 129(c)(1) URAA*, para. 3.91.
[822] Appellate Body Report on *Brazil – Aircraft*, para. 192.
[823] Award of the Arbitrator *on Canada – Pharmaceutical Patents (Article 21.3)*, para. 48.
[824] Award of the Arbitrator on *Chile – Alcoholic Beverages (Article 21.3)*, para. 39.

(iii) Factors amounting to "particular circumstances"

Complexity of enacting implementing legislation

573. In *Chile – Alcoholic Beverages (Article 21.3)*, the Arbitrator considered that, "[s]ince compliance here means *adoption of a law* appropriately amending" the Chilean law at issue, the reference to particular circumstances in this case is to "circumstances which rationally bear upon the time necessary for *enactment* of such a law".[825]

574. In *Canada – Pharmaceutical Patents (Article 21.3)*, the Arbitrator mentioned the implementation by administrative or legislative means, the complexity of the proposed implementation and the legally binding force of the component steps leading to implementation as relevant criteria for determining the existence of "particular circumstances":

> "[I]f implementation is by *administrative* means, such as through a regulation, then the 'reasonable period of time' will normally be shorter than for implementation through *legislative* means.
>
> Likewise, the *complexity* of the proposed implementation can be a relevant factor. If implementation is accomplished through extensive new regulations affecting many sectors of activity, then adequate time will be required to draft the changes, consult affected parties, and make any consequent modifications as needed. On the other hand, if the proposed implementation is the simple repeal of a single provision of perhaps a sentence or two, then, obviously, less time will be needed for drafting, consulting, and finalizing the procedure. To be sure, complexity is not merely a matter of the number of pages in a proposed regulation; yet it seems reasonable to assume that, in most cases, the shorter a proposed regulation, the less its likely complexity.
>
> In addition, the *legally binding*, as opposed to the discretionary, nature of the component steps leading to implementation should be taken into account. If the law of a Member dictates a mandatory period of time for a mandatory part of the process needed to make a regulatory change, then that portion of a proposed period will, unless proven otherwise due to unusual circumstances in a given case, be reasonable. On the other hand, if there is no such mandate, then a Member asserting the need for a certain period of time must bear a much more imposing burden of proof. Something required by law must be done; something not required by law need not necessarily be done, depending on the facts and the circumstances in a particular case."[826]

575. In *US – Offset Act (Byrd Amendment) (Article 21.3)*, the Arbitrator refused to take into account in his determination of the "reasonable period of time" both the existence of several legislative options (paragraph 587 below) and the need of the implementing Member to take into account international treaty obligations (paragraph 589 below). The Arbitrator considered that "'complexity' of implementing legislation as a particular circumstance, within the meaning of Article 21.3(c), is a *legal* criterion, to be examined without regard for political contentiousness or other non-legal factors that may surround a measure at issue. I am precluded, by my mandate under Article 21.3(c), from giving consideration to these non-legal factors."[827]

Role in society of the WTO-inconsistent measure

576. In *Chile – Price Band System (Article 21.3)*, the Arbitrator considered that the unique role of the price band system in Chilean society was a relevant factor to take into account in his determination of the reasonable period of time:

> "I am of the view that the PBS is so fundamentally integrated into the policies of Chile, that domestic opposition to repeal or modification of those measures reflects, not simply opposition by interest groups to the loss of protection, but also reflects serious debate, within and outside the legislature of Chile, over the means of devising an implementation measure when confronted with a DSB ruling against the original law. In the light of the longstanding nature of the PBS, its fundamental integration into the central agricultural policies of Chile, its price-determinative regulatory position in Chile's agricultural policy, and its intricacy, I find its unique role and impact on Chilean society is a relevant factor in my determination of the 'reasonable period of time' for implementation."[828]

Flexibility of the legislative system

577. In *EC – Tariff Preferences (Article 21.3)*, the Arbitrator took into account, as a relevant matter, the flexibility in the European Communities' legislative system when determining the reasonable period of time. The Arbitrator, however, stressed that this flexibility does

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[825] Award of the Arbitrator on *Chile – Alcoholic Beverages (Article 21.3)*, para. 41.

[826] Award of the Arbitrator on *Canada – Pharmaceutical Patents (Article 21.3)*, paras. 49–51. See also the Award of the Arbitrator on *US – Offset Act (Byrd Amendment) (Article 21.3)*, para. 57.

[827] Award of the Arbitrator on *US – Offset Act (Byrd Amendment) (Article 21.3)*, para. 61.

[828] Award of the Arbitrator on *Chile – Price Band System (Article 21.3)*, para. 48. On most occasions, however, arbitrators have typically refused to treat mere contentiousness or political sensitivity as a factor warranting a longer period of time for implementation. See, for example, the Awards of the Arbitrator on *Canada – Pharmaceutical Patents*, para. 60; *Canada – Patent Term*, para. 58; *US – Offset Act (Byrd Amendment)*, para. 61; *EC – Tariff Preferences (Article 21.3)*, para. 56.

not, of itself, determine the question of the reasonable period of time for implementation.[829]

Rules on entry into force of legal instruments

578. The Arbitrator on *Korea – Alcoholic Beverages* determined that it was reasonable to include in the reasonable period of time the "thirty-day grace period for enforcement of certain ... instruments" provided in a Korean statute.[830]

579. The Arbitrator on *EC – Bananas III* appeared to take into account the European Communities' statement that "any change in legislation which directly affects the customs treatment of products in connection with importation or exportation, enters into force either on 1 January or 1 July of the relevant year"[831] in determining the reasonable period of time in that dispute.[832]

Institutional changes

580. In *EC – Tariff Preferences (Article 21.3)*, the European Communities argued that the reasonable period of time should be extended because of the enlargement of the European Union, the election of a new European Parliament and the designation of a new Commission. The Arbitrator agreed to consider as circumstances that might prolong the reasonable period of time: the time needed to translate certain instruments into 20 official languages as well as the time needed to respond to potential requests for verification by member States that the necessary qualified majority has been reached when adopting the implementing regulation. The Arbitrator, however, did not take into account the fact that a new Parliament was to be elected and a new Commission designated.[833]

(iv) Factors not qualifying as "particular circumstances"

General

581. In *Canada – Pharmaceutical Patents (Article 21.3)*, the Arbitrator indicated that "the 'particular circumstances' ... do *not* include factors unrelated to an assessment of the shortest period possible for implementation within the legal system of a Member":

> [T]he 'particular circumstances' mentioned in Article 21.3 do *not* include factors unrelated to an assessment of the shortest period possible for implementation within the legal system of a Member. Any such unrelated factors are irrelevant to determining the 'reasonable period of time' for implementation. The determination of a 'reasonable period of time' must be a legal judgement based on an examination of relevant legal requirements."[834]

582. The Arbitrator on *Argentina – Hides and Leather (Article 21.3)* warned about the negative implications for the multilateral trading system of an interpretation of "reasonable period" of time that took into account "time or opportunity to control and manage economic or social conditions which antedate or are contemporaneous with the adoption of the WTO-inconsistent governmental measure":

> "[T]o build into the concept of a 'reasonable period of time' to comply with DSB recommendations and rulings, time or opportunity to control and manage economic or social conditions which antedate or are contemporaneous with the adoption of the WTO-inconsistent governmental measure, may, in the generality of instances, be to defer to an indefinitely receding future the duty of compliance. The implications for the multilateral trading system as we know it today, of such an interpretation of 'reasonable period of time' for compliance are clear and far-reaching and ominous. Such an interpretation would tend to reduce the fundamental duty of 'immediate' or 'prompt' compliance to a figure of speech."[835]

Example of factors not qualifying as "particular circumstances"

Structural adjustments of the implementing Member's affected industries

583. In *Indonesia – Autos (Article 21.3)*, the Arbitrator considered that "the structural adjustments of" a Member's "affected industries" was not a "particular circumstance" to be taken into account under Article 21.3(c):

> "I do not view structural adjustments of Indonesia's affected industries as a 'particular circumstance' which may be taken into account under Article 21.3(c) of the DSU.[836] In virtually every case in which a measure has

[829] Award of the Arbitrator on *EC – Tariff Preferences (Article 21.3)*, para. 36. The Arbitrator considered that the EC legislative system was flexible "in the sense that no mandatory minimum time periods are imposed for any particular step in the implementation process".

[830] Award of the Arbitrator on *Korea – Alcoholic Beverages (Article 21.3)*, para. 47.

[831] Award of the Arbitrator on *EC – Bananas III (Article 21.3)*, para. 9.

[832] Award of the Arbitrator on *EC – Bananas III (Article 21.3)*, para. 19. The Arbitrator concluded, in paragraph 20, that the reasonable period of time should be "from 25 September 1997 to 1 January 1999". In *EC – Tariff Preferences (Article 21.3)*, the Arbitrator, in reference to *EC – Bananas III (Article 21.3)*, regarded the administrative practice of the European Communities pertaining to advance publication of tariff changes and the date on which such changes take effect as a relevant factor in determining the reasonable period of time for implementation. Award of the Arbitrator on *EC – Tariff Preferences (Article 21.3)*, para. 51.

[833] Award of the Arbitrator on *EC – Tariff Preferences (Article 21.3)*, paras. 52–54.

[834] Award of the Arbitrator on *Canada – Pharmaceutical Patents (Article 21.3)*, para. 52.

[835] Award of the Arbitrator on *Argentina – Hides and Leather*, para. 49.

[836] (*footnote original*) I note that the Award of the Arbitrator in *Japan – Taxes on Alcoholic Beverages* WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 February 1997 rejected the argument that adverse effects on producers (and consumers) of the products involved constitute "particular circumstances" that should be taken into account in determining the reasonable period of time under Article 21.3(c) of the DSU.

been found to be inconsistent with a Member's obligations under the GATT 1994 or any other covered agreement, and therefore, must be brought into conformity with that agreement, some degree of adjustment by the domestic industry of the Member concerned will be necessary. This will be the case regardless of whether the Member concerned is a developed or a developing country. Structural adjustment to the withdrawal or the modification of an inconsistent measure, therefore, is not a 'particular circumstance' that can be taken into account in determining the reasonable period of time under Article 21.3(c)."[837]

Limited powers of the executive branch

584. In *Japan – Alcoholic Beverages II (Article 21.3)*, Japan argued that a period of 23 months was a "reasonable period of time" on the basis that there were "particular circumstances" justifying such an extension of the 15-month period. Japan claimed that the limited powers of the executive branch over tax matters and the need for a formal adoption of legislation by the parliament, the adverse effects of the tax increases on Japanese consumers of shochu, and the administrative constraints on the execution of taxation were "particular circumstances" justifying a 23-month period needed to implement the recommendations and rulings of the DSB. The Arbitrator was not persuaded that these circumstances were "particular circumstances" within the meaning of Article 21.3(c) and determined 15 months as the reasonable period of time.[838]

Economic and financial consequences of implementation

585. In *Argentina – Hides and Leather (Article 21.3)*, Argentina had argued that it needed 46 months as the reasonable period of time for implementation in order to control and counter certain economic and financial consequences that would follow from the enactment of legislation implementing the recommendations of the DSB. See paragraph 582 above.

Choice of legislative implementation

586. The Arbitrator on *US – Section 110(5) Copyright Act (Article 21.3)* stated that, although it is an "important issue" whether a Member decides to "simply repeal" a measure or whether "some other approach will be utilized", he failed to see how this issue would "add any additional time to the legislative process as the content of the legislation effecting implementation is precisely the issue that Congress will decide through its normal procedures" (original emphasis).[839]

587. In *US – Offset Act (Byrd Amendment) (Article 21.3)*, the Arbitrator did not consider that the existence of numerous options to implement was relevant to the determination of the "reasonable period of time":

"I do not consider the existence of numerous options to implement the recommendations and rulings of the DSB, as invoked by the United States, to be relevant to my determination of the 'reasonable period of time' for implementation of the recommendations and rulings of the DSB.[840] The weighing and balancing of the respective merits of various legislative alternatives is one of the key functions and aspects of any legislative process. The mere fact that implementation of the recommendations and rulings of the DSB necessitates the choice between several, or even a large number of, alternative options is generally not, in my view, in and of itself, a particular circumstance that would inform my determination of the shortest period possible to implement the recommendations and rulings of the DSB in this case."[841]

Scientific studies or consultations

588. The Arbitrator on *EC – Hormones (Article 21.3)* indicated that, while scientific studies or consultations with experts may form part of the domestic implementation process, the time required to conduct such studies or consultations could not be included in the reasonable period of time:

"An implementing Member . . . has a measure of discretion in choosing the *means* of implementation, as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements.

It would not be in keeping with the requirement of *prompt* compliance to include in the reasonable period of time, time to conduct studies or to consult experts to demonstrate the *consistency* of a measure already judged to be *inconsistent*. That cannot be considered as 'particular circumstances' justifying a longer period than the guideline suggested in Article 21.3(c). This is not to say that the commissioning of scientific studies or

[837] Award of the Arbitrator on *Indonesia – Autos (Article 21.3)*, para. 23. See also Award of the Arbitrator on *Canada – Pharmaceutical Patents (Article 21.3)*, para. 52; and Award of the Arbitrator on *Argentina – Hides and Leather (Article 21.3)*, para. 41.

[838] Award of the Arbitrator on *Japan – Alcoholic Beverages II (Article 21.3)*, para. 27. See also the Award of the Arbitrator on *EC – Bananas III (Article 21.3)*, paras. 6–10.

[839] Award of the Arbitrator on *US – Section 110(5) Copyright Act*, para. 42.

[840] (*footnote original*) I recall that the Arbitrator in *US – Section 110(5) Copyright Act* stated that, although it is an "important issue" whether a Member decides to "simply repeal" a measure or whether "some other approach will be utilized", he failed to see how this issue would

> . . . add any *additional time* to the legislative process, as the *content* of the legislation effecting implementation is precisely the issue that Congress will decide through its normal procedures. (original emphasis)

(Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 42.)

[841] Award of the Arbitrator on *US – Offset Act (Byrd Amendment) (Article 21.3)*, para. 59.

consultations with experts *cannot* form part of a domestic implementation process in a particular case. However, such considerations are not pertinent to the determination of the reasonable period of time."[842]

International treaty obligations

589. In *US – Offset Act (Byrd Amendment) (Article 21.3)*, the Arbitrator did not consider that the need to take into account international treaty obligations in the process of drafting implementing legislation was relevant to the determination of the "reasonable period of time":

"[T]he need to distinguish, in the light of Panel and Appellate Body findings in this dispute, between WTO-consistent and WTO-inconsistent implementation options would appear to be the typical content, and concomitant aspect, of every legislative process aiming at implementing recommendations and rulings of the DSB. I do agree with previous arbitrators that, in principle, the complex nature of implementing measures can be a relevant factor for the determination of the reasonable period of time.[843] Nevertheless, I do not believe that the need to take into account international treaty obligations in the process of drafting implementing legislation, in and of itself, gives rise to the kind of complexity that would warrant additional time for implementation. *Each and every* piece of legislation enacted with a view to implementing recommendations and rulings of the DSB must be designed and drafted in the light of the implementing Member's rights and obligations under the covered agreements. If the need to distinguish between WTO-consistent and WTO-inconsistent implementation options were to qualify, *per se*, as 'complexity', and, therefore, were to give rise to 'particular circumstances' relevant for the determination of the reasonable period of time, then *every* implementation measure under consideration in proceedings pursuant to Article 21.3(c) would have to be considered complex. In other words, 'complexity' would not be a 'particular circumstance'; rather, it would be a standard aspect of every implementation."[844]

Economic harm to the complainant's economic operators

590. In *US – Offset Act (Byrd Amendment) (Article 21.3)*, the complaining parties urged the Arbitrator to consider the economic harm that might be inflicted on their economic operators by another disbursement of collected anti-dumping and countervailing duties to United States' producers. The Arbitrator considered that the economic harm suffered by foreign exporters should not have an impact on the determination of the reasonable period of time:

"In my view, economic harm suffered by foreign exporters does not, and cannot, by definition, impact on what is the 'shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB'.[845] The particular circumstances, within the meaning of Article 21.3(c), can only be of such nature as will influence the evolution and unfolding of the implementation process itself. Factors external to the legislative process itself are of no relevance for the determination of the reasonable period of time for implementation.

I do not wish to imply that economic harm, caused by the WTO-inconsistent measure, to economic agents of the Complaining Parties, or any other WTO Members, is irrelevant in the context of the implementation of the recommendations and rulings of the DSB. Many WTO-inconsistent measures will cause some form of economic harm to exporters of WTO Members.[846] However, the need, and urgency, to remove WTO-inconsistent measures, and to remove the harm to economic agents caused by such measures, is, in my view, already reflected in the principle of 'prompt compliance' under Article 21.1. The same concern, in my view, underlies the well-established principle, under Article 21.3(c), that the reasonable period of time for implementation be the shortest time possible within the legal system of the Member. Thus, it would be supererogatory, and incongruous, to accord renewed consideration to the issue of economic harm when determining the shortest period possible for implementation within the legal system of the implementing Member."[847]

Changes other than those necessary to implement the DSB recommendations

591. The Arbitrator on *Canada – Autos (Article 21.3)* declined to take into account the fact that "it might be more convenient for Canada to implement the DSB's recommendations in this case on the same timeline as it has planned for the reform of its customs administration regime".[848]

592. In *EC – Tariff Preferences (Article 21.3)*, the Arbitrator confirmed that his determination on the reasonable period of time for implementation must have regard only to the shortest period possible within the

[842] Award of the Arbitrator on *EC – Hormones (Article 21.3)*, paras. 38–39. See also the Award of the Arbitrator on *Australia – Salmon*, para. 36.

[843] (*footnote original*) Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 50. I also agree with the example for "complexity" given by the Arbitrator in those proceedings, namely where "implementation is accomplished through extensive new regulations affecting many sectors of activity".

[844] Award of the Arbitrator on *US – Offset Act (Byrd Amendment) (Article 21.3)*, para. 60.

[845] (*footnote original*) See also Award of the Arbitrator, *Canada – Patent Term*, para. 48.

[846] (*footnote original*) See also Award of the Arbitrator, *Canada – Patent Term*, para. 48.

[847] Award of the Arbitrator on *US – Offset Act (Byrd Amendment) (Article 21.3)*, paras. 79–80.

[848] Award of the Arbitrator on *Canada – Autos (Article 21.3)*, para. 55.

legal system of the European Communities to bring its measures (the Drug Arrangements) into conformity with its WTO obligations. In the Arbitrator's view, "the mere fact that the European Communities has decided to incorporate the task of implementation within the larger objective of reforming its overall GSP scheme cannot lead to a determination of a shorter, or longer, period of time".[849]

(v) Burden of proof

593. In *EC – Bananas III (Article 21.3)*, the Arbitrator implicitly found that it was up to the complaining parties to persuade him "that there are 'particular circumstances' in this case to justify a shorter period of time than stipulated by the guideline in Article 21.3(c) of the DSU [15 months]". In the case at issue, the Arbitrator found that he had not been so persuaded by the complaining parties:

> "When the 'reasonable period of time' is determined through binding arbitration, as provided for under Article 21.3(c) of the DSU, this provision states that a 'guideline' for the arbitrator should be that the 'reasonable period of time' should not exceed 15 months from the date of the adoption of a panel or Appellate Body report. Article 21.3(c) of the DSU also provides, however, that the 'reasonable period of time' may be shorter or longer than 15 months, depending upon the 'particular circumstances'.
>
> The Complaining Parties have not persuaded me that there are 'particular circumstances' in this case to justify a shorter period of time than stipulated by the guideline in Article 21.3(c) of the DSU. At the same time, the complexity of the implementation process, demonstrated by the European Communities, would suggest adherence to the guideline, with a slight modification, so that the 'reasonable period' of time for implementation would expire by 1 January 1999."[850]

594. In *EC – Hormones (Article 21.3)*, the Arbitrator held that the burden of proof concerning the existence of particular circumstances falls on any party arguing for a period longer or shorter than 15 months:

> "In my view, the party seeking to prove that there are 'particular circumstances' justifying a shorter or a longer time has the burden of proof under Article 21.3(c). In this arbitration, therefore, the onus is on the European Communities to demonstrate that there are particular circumstances which call for a reasonable period of time of 39 months, and it is likewise up to the United States and Canada to demonstrate that there are particular circumstances which lead to the conclusion that 10 months is reasonable."[851]

(d) Relationship with Article 22

595. In *Chile – Alcoholic Beverages (Article 21.3)*, the Arbitrator considered that when fixing the reasonable period of time one should take into account that, pursuant to Article 22.1, "full and effective implementation is 'preferred'":

> "In assessing the duration of the reasonable period, the provisions of Article 22 of the DSU are also noteworthy. Under Article 22.1, although 'a reasonable period of time' may have elapsed without compliance with the recommendations and rulings of the DSB, *neither* compensation *nor* suspension of concessions or other obligations is to be 'preferred to full implementation', by bringing the measure concerned into conformity with WTO obligations. Thus, in fixing the reasonable period, I should take account of the fact that full and effective implementation is 'preferred'."[852]

(e) Participation by all the original parties

596. In *Japan – Alcoholic Beverages II (Article 21.3)*, it was agreed that all the original parties to the dispute could participate in the arbitration process even though only the United States had requested binding arbitration pursuant to Article 21.3.[853]

(f) Relationship with other WTO Agreements

(i) SCM Agreement

597. As regards the relationship with Article 4.7 of the *SCM Agreement*, see paragraphs 569–570 above.

4. Article 21.5

(a) Function and scope of Article 21.5 proceedings

598. The Appellate Body on *Canada – Aircraft (Article 21.5 – Brazil)* disagreed with the Panel's reasoning that the scope of Article 21.5 dispute settlement proceedings was limited to the issue of whether or not the defendant had implemented the DSB recommendations. In the Appellate Body's view, under Article 21.5, a panel is obliged to examine the consistency of the "measures taken to comply" with WTO law:

> "We have already noted that these proceedings, under Article 21.5 of the DSU, concern the 'consistency' of the revised TPC programme with Article 3.1(a) of the *SCM Agreement*. Therefore, we disagree with the Article 21.5 Panel that the scope of these Article 21.5 dispute

[849] Award of the Arbitrator on *EC – Tariff Preferences (Article 21.3)*, para. 31.

[850] Award of the Arbitrator on *EC – Bananas III (Article 21.3)*, paras. 18–19. See also the Awards of the Arbitrator on *Australia – Salmon (Article 21.3)*, para. 30; *Canada – Autos (Article 21.3)*, para. 39; *US – 1916 Act (Article 21.3)*, paras. 38–39; and *Chile – Price Band System (Article 21.3)*, para. 38.

[851] Award of the Arbitrator on *EC – Hormones (Article 21.3)*, para. 27.

[852] Award of the Arbitrator on *Chile – Alcoholic Beverages (Article 21.3)*, para. 40.

[853] Award of the Arbitrator on *Japan – Alcoholic Beverages II (Article 21.3)*, para. 3.

settlement proceedings is limited to 'the issue of whether or not Canada *has implemented the DSB recommendation*'. The recommendation of the DSB was that the measure found to be a prohibited export subsidy must be withdrawn within 90 days of the adoption of the Appellate Body Report and the original panel report, as modified – that is, by 18 November 1999. That recommendation to 'withdraw' the prohibited export subsidy did not, of course, cover the new measure – because the new measure did not exist when the DSB made its recommendation. It follows then that the task of the Article 21.5 Panel in this case is, in fact, to determine whether the new measure – the revised TPC programme – is consistent with Article 3.1(a) of the *SCM Agreement*.

Accordingly, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU."[854]

599. In *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body further explained that, when the issue concerns the consistency of a new measure "taken to comply", the task of a 21.5 panel is to consider that new measure in its totality, meaning the measure itself and its application, but only in respect of the claims included in the request for establishment of that 21.5 panel:

"As we ruled in our Report in *Canada – Aircraft (21.5*), panel proceedings pursuant to Article 21.5 of the DSU involve, in principle, not the original measure, but a new and different measure that was not before the original panel. Therefore, 'in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measure [. . .] taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings.'

When the issue concerns the consistency of a new measure 'taken to comply', the task of a panel in a matter referred to it by the DSB for an Article 21.5 proceeding is to consider that new measure in its totality. The fulfilment of this task requires that a panel consider both the measure itself and the measure's application. As the title of Article 21 makes clear, the task of panels under Article 21.5 forms part of the process of the '*Surveillance of Implementation of the Recommendations and Rulings*' of the DSB. Toward that end, the task of a panel under Article 21.5 is to examine the 'consistency with a covered agreement of measures taken to comply with the recommendations and rulings' of the DSB. That task is circumscribed by the specific claims made by the complainant when the matter is referred by the DSB for an Article 21.5 proceeding. It is not part of the task of a panel under Article 21.5 to address a claim that has not been made.

Malaysia relies in this appeal on our ruling in *Canada – Aircraft (21.5).* We understand Malaysia to argue, based in part on our ruling in *Canada – Aircraft (21.5),* that the Panel in this case had a duty to review the *totality* of the United States measure, and to assess it for its consistency with the relevant provisions of the GATT 1994. That is indeed a panel's task under Article 21.5 of the DSU. Yet, as we have said, it is not part of a panel's task to go beyond the particular claims that have been made with respect to the consistency of a new measure with a covered agreement when a matter is referred to it by the DSB for an Article 21.5 proceeding. Thus, it would not have been appropriate in this case for the Panel to address a claim that was *not* made by Malaysia when requesting that this matter be referred by the DSB for an Article 21.5 proceeding."[855]

600. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body concisely summarized prior case law on the function and scope of Article 21.5 proceedings:

"We addressed the function and scope of Article 21.5 proceedings for the first time in *Canada – Aircraft (Article 21.5 – Brazil)*. There, we found that Article 21.5 panels are not merely called upon to assess whether 'measures taken to comply' implement specific 'recommendations and rulings' adopted by the DSB in the original dispute.[856] We explained there that the mandate of Article 21.5 panels is to examine either the 'existence' of 'measures taken to comply' or, more frequently, the

[854] Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 40–42. See also Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 78 and 80.

[855] Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, paras. 86–88.

[856] (*footnote original*) Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 40.

'*consistency with a covered agreement*' of implementing measures.[857] This implies that an Article 21.5 panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments, and factual circumstances relating to the measure that was the subject of the *original* proceedings.[858] Moreover, the relevant facts bearing upon the 'measure taken to comply' may be different from the facts relevant to the measure at issue in the original proceedings. It is to be expected, therefore, that the claims, arguments, and factual circumstances relating to the 'measure taken to comply' will not, necessarily, be the same as those relating to the measure in the original dispute.[859] Indeed, a complainant in Article 21.5 proceedings may well raise *new* claims, arguments, and factual circumstances different from those raised in the original proceedings, because a 'measure taken to comply' may be *inconsistent* with WTO obligations in ways different from the original measure. In our view, therefore, an Article 21.5 panel could not properly carry out its mandate to assess whether a 'measure taken to comply' is *fully consistent* with WTO obligations if it were precluded from examining claims additional to, and different from, the claims raised in the original proceedings.[860]"[861]

601. With respect to the relationship between "measures taken to comply" and a panel's terms of reference, see paragraph 254 above. See also the excerpts from the reports of the panels and Appellate Body referenced in the Chapter on the *SCM Agreement*, Section IV.B.6.

(b) The "matter" in Article 21.5 proceedings

(i) General

In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body emphasized that Article 21.5 proceedings are similar to the original proceedings and thus, the "matter" at issue consists of the same elements: (i) the specific measures at issue (in this case, the measures taken to comply) and (ii) the legal basis of the complaint, i.e. the claims.[862]

(ii) Measures concerned by Article 21.5 panel proceedings: measures taken to comply

Concept of "measures taken to comply"

602. In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body held that proceedings under Article 21.5 concern only measures "taken to comply" with the recommendations and rulings of the DSB and interpreted this concept as referring to "measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB":

> "Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB. In our view, the phrase 'measures taken to comply' refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In principle, a measure which has been 'taken to comply with the recommendations and rulings' of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures:[863] the original measure which *gave rise* to the recommendations and rulings of the DSB, and the 'measures taken to comply' which are – or should be – adopted to *implement* those recommendations and rulings. In these Article 21.5 proceedings, the measure at issue is a new measure, the *revised* TPC programme, which became effective on 18 November 1999 and which Canada presents as a 'measure taken to comply with the recommendations and rulings' of the DSB."[864]

603. The Appellate Body on *EC – Bed Linen (Article 21.5 – India)* reiterated that the "measures" at issue in an Article 21.5 proceeding can only be those "measures taken to comply". It further stated that "[i]f a *claim* challenges a *measure* which is not a 'measure taken to comply', that *claim* cannot properly be raised in Article 21.5 proceedings".[865]

Scope of the measures taken to comply

604. In *EC – Bed Linen (Article 21.5 – India)*, the Panel declined to consider India's claim on the "other factors" analysis after finding that the original panel had dismissed the claim and India had not appealed.[866] The

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[857] (*footnote original*) *Ibid.*, paras. 40–41. The panels in *EC – Bananas III (Article 21.5 – Ecuador)* (paras. 6.8–6.9) and *Australia – Salmon (Article 21.5 – Canada)* (para. 7.10.9) reached essentially the same conclusion.

[858] (*footnote original*) Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

[859] (*footnote original*) *Ibid.*

[860] (*footnote original*) As we put it in *Canada – Aircraft (Article 21.5 – Brazil)*:

> Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the DSU.

(Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.) We defined the function of Article 21.5 proceedings in the same vein in our Report in *US – Shrimp (Article 21.5 – Malaysia)* (para. 87).

[861] Appellate Body Report on *EC – Bed Linen (Article 21.5)*, para. 79.

[862] Appellate Body Report on *EC – Bed Linen (Article 21.5)*, para. 78.

[863] (*footnote original*) We recognize that, where it is alleged that there exist *no* "measures taken to comply", a panel may find that there is *no* new measure.

[864] Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36. See also Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 78–79.

[865] Appellate Body Report on *EC – Bed Linen (Article 21.5)*, para. 78.

[866] Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.53.

Appellate Body concurred, explaining that there is no reason to conclude that a "part of the redetermination that merely incorporates elements of the original determination . . . would constitute an inseparable element of a measure taken to comply with the DSB rulings in the original dispute". In its view, the "other factors" analysis was such an element – an unrevised element of the original measure – that "the investigating authorities of the European Communities were able to treat ... separately" when conducting the redetermination:

> "We agree with India that the investigating authorities of the European Communities were required to revise the original determination of dumping and injury in order to comply with the DSB recommendations and rulings. Towards this end, the European Communities recalculated the dumping margins *without* applying the practice of 'zeroing' that had been found to be inconsistent with WTO obligations in the original dispute. According to the recalculation, two of the *individually* examined Indian producers were *not* dumping. The investigating authorities deducted the imports attributable to those two producers from the *volume* of dumped imports, and, accordingly, the volume of dumped imports in the redetermination was *lower* than in the original determination. According to EC Regulation 1644/2001, the investigating authorities of the European Communities also 're-examined' whether a causal link between the two *revised* elements – dumped imports and the injury to the domestic industry – still existed, and the Panel reviewed that re-examination.
>
> The *amount* of dumped imports will, of course, have an impact on the assessment of the *effects* of the 'dumped imports' for the purposes of determining *injury*. It is clear, therefore, that the revised findings on dumping and injury could have a bearing on whether a causal link exists between dumping and injury. But whilst a revised finding of *dumping* will, in all likelihood, have an impact on the 'effect of *dumped* imports', we see no reason to conclude as well that this revised finding would have any impact on the 'effects . . . of known factors *other than* the dumped imports' in this dispute. Accordingly, we are of the view that the investigating authorities of the European Communities were not required to change the determination as it related to the 'effects of other factors' in this particular dispute. Moreover, we do not see why that part of the redetermination that merely incorporates elements of the original determination on 'other factors' would constitute an inseparable element of a measure taken to comply with the DSB rulings in the original dispute. Indeed, the investigating authorities of the European Communities were able to treat this element separately. Therefore, we do not agree with India that the redetermination can only be considered 'as a whole new measure'."[867]

Panel's discretion to decide on scope of the measures taken to comply

605. The Panel in *Australia – Salmon (Article 21.5 – Canada)* ruled that an Article 21.5 panel could not leave to the discretion of the parties the decision on whether a measure is a "measure taken to comply":

> "We note that an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether a measure is one 'taken to comply'. If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures 'taken to comply'."[868]

606. In *EC – Bed Linen (Article 21.5 – India)*, the Panel, in a finding upheld by the Appellate Body,[869] also concluded that it is for the panel to decide whether certain measures have been "taken to comply" with a DSB ruling:

> "Thus, it is clear that it is the Panel, and not the EC, which decides whether the measures cited by India in the request for establishment are to be considered 'measures taken to comply' and therefore fall within the purview of this dispute. That said, however, it is also not India's right to determine which measures taken by the EC are measures taken to comply. Rather, this is an issue which must be considered and decided by an Article 21.5 panel."[870]

(iii) Claims in Article 21.5 proceedings

General

607. The Appellate Body on *EC – Bed Linen (Article 21.5 – India)*, stressed that "[i]f a claim challenges a measure which is not a 'measure taken to comply', that claim cannot properly be raised in Article 21.5 proceedings".[871]

Claims already raised and decided during the original proceedings

608. In *US – Shrimp (Article 21.5 – Malaysia)*, Malaysia raised a claim against an aspect of the implementation

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867 Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, paras. 85–86 (original footnotes omitted).

868 Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subparagraph 22. *See also* Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, paras. 6.4–6.5.

869 "We agree with the Panel that it is, ultimately, for an Article 21.5 panel – and not for the complainant or the respondent – to determine which of the measures listed in the request for its establishment are 'measures taken to comply'." Appellate Body Report on *EC – Bed Linen (Article 21.5)*, para. 78.

870 Panel Report on *EC – Bed Linen (Article 21.5)*, para. 6.15.

871 Appellate Body Report on *EC – Bed Linen (Article 21.5)*, para. 78.

measure that was the *same* as the *original* measure, and that, at the appeal stage, the Appellate Body had found to be not *inconsistent* with WTO obligations in the original dispute. The Appellate Body upheld the panel's dismissal of Malaysia's claim on the grounds that an adopted Appellate Body Report must be treated as a final resolution to a dispute between the parties to that dispute:

> "We wish to recall that panel proceedings under Article 21.5 of the DSU are, as the title of Article 21 states, part of the process of the '*Surveillance of Implementation of Recommendations and Rulings*' of the DSB. This includes Appellate Body Reports. To be sure, the right of WTO Members to have recourse to the DSU, including under Article 21.5, must be respected. Even so, it must also be kept in mind that Article 17.14 of the DSU provides not only that Reports of the Appellate Body 'shall be' adopted by the DSB, by consensus, but also that such Reports 'shall be . . . unconditionally accepted by the parties to the dispute. . . .' Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, '. . . unconditionally accepted by the parties to the dispute', and, therefore, must be treated by the parties to a particular dispute as a final resolution to that dispute. In this regard, we recall, too, that Article 3.3 of the DSU states that the 'prompt settlement' of disputes 'is essential to the effective functioning of the WTO'."[872]

609. In *EC – Bed Linen (Article 21.5 – India)*, the Panel declined to consider India's claim on the "other factors" analysis after finding that the original panel had dismissed the claim and that India had *not* appealed it.[873] The Appellate Body explained that, based on other provisions of the *DSU*, namely Articles 16.4, 19.1, 21.1, 21.3 and 22.1, an unappealed finding in an adopted panel report must be treated as the "*final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim". The Appellate Body thus gave the same value to a panel finding in an adopted Report as to a finding included in an adopted Appellate Body Report":

> "[A]n *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim. This conclusion is supported by Articles 16.4 and 19.1, paragraphs 1 and 3 of Article 21, and Article 22.1 of the DSU. Where a panel concludes that a measure is inconsistent with a covered agreement, that panel shall *recommend*, according to Article 19.1, that the Member concerned bring that measure into conformity with that agreement. A panel report, including the *recommendations* contained therein, shall be *adopted* by the DSB within the time period specified in Article 16.4 – unless appealed. Members are to *comply* with recommendations and rulings *adopted* by the DSB promptly, or within a reasonable period of time, in accordance with paragraphs 1 and 3 of Article 21 of the DSU. A Member that does not comply with the recommendations and rulings adopted by the DSB within these time periods must face the consequences set out in Article 22.1, relating to compensation and suspension of concessions. Thus, a reading of Articles 16.4 and 19.1, paragraphs 1 and 3 of Article 21, and Article 22.1, taken together, makes it abundantly clear that a panel finding which is not appealed, and which is included in a panel report *adopted* by the DSB, must be accepted by the parties as a *final* resolution to the dispute between them, in the same way and with the same finality as a finding included in an Appellate Body Report adopted by the DSB – with respect to the particular claim and the specific component of the measure that is the subject of the claim.
>
> . . .
>
> The Panel's ruling that India's claim under Article 3.5 relating to 'other factors' was not properly before it is also consistent with the object and purpose of the DSU. Article 3.3 provides that the *prompt* settlement of disputes is 'essential to the effective functioning of the WTO'. Article 21.5 advances the purpose of achieving a prompt settlement of disputes by providing an expeditious procedure to establish whether a Member has fully complied with the recommendations and rulings of the DSB.[874] For that purpose, an Article 21.5 panel is to complete its work within 90 days, whereas a panel in an original dispute is to complete its work within 9 months of its establishment, or within 6 months of its composition. It would be incompatible with the function and purpose of the WTO dispute settlement system if a claim could be reasserted in Article 21.5 proceedings after the original panel or the Appellate Body has made a finding that the challenged aspect of the original measure is *not* inconsistent with WTO obligations, and that report has been adopted by the DSB. At some point, disputes must be viewed as definitely *settled* by the WTO dispute settlement system."[875]

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[872] Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, para. 97.

[873] The Panel ruled that:

> "When considering the status of adopted panel reports, the Appellate Body has indicated that they are binding on the parties 'with respect to that particular dispute'. In our view, the Panel's ruling in the original dispute disposed of India's claim in this regard. Thus, we consider that India is precluded from reasserting in this proceeding and presenting arguments in support of a claim challenging the EC's consideration of 'other factors' of injury." (footnotes omitted)

Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.52.

[874] (*footnote original*) *Ibid.*, para. 6.45.

[875] Appellate Body Report on *EC – Bed Linen (Article 21.5)*, paras. 93 and 98.

Claims different from or additional to those raised in the original proceedings:

610. In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body examined whether an Article 21.5 panel could consider a *new* claim that challenged an aspect of the measure taken to comply that was not part of the original measure and had not been, and could not have been, previously raised before the panel in the original proceedings. The Appellate Body explained that an Article 21.5 panel is not limited solely to examining whether the Member had complied with the DSB recommendations and rulings, but rather must examine the consistency of the new measure with the relevant provisions of, *in casu*, the *SCM Agreement*. The Appellate Body considered that the utility of Article 21.5 proceedings would be hampered if the panel could only considered the new measure from the perspective of the claims raised during the original proceedings:

> "We have already noted that these proceedings, under Article 21.5 of the DSU, concern the 'consistency' of the revised TPC programme with Article 3.1(a) of the *SCM Agreement*.[876] Therefore, we disagree with the Article 21.5 Panel that the scope of these Article 21.5 dispute settlement proceedings is limited to 'the issue of whether or not Canada *has implemented the DSB recommendation*'. The recommendation of the DSB was that the measure found to be a prohibited export subsidy must be withdrawn within 90 days of the adoption of the Appellate Body Report and the original panel report, as modified – that is, by 18 November 1999. That recommendation to 'withdraw' the prohibited export subsidy did not, of course, cover the new measure – because the new measure did not exist when the DSB made its recommendation. It follows then that the task of the Article 21.5 Panel in this case is, in fact, to determine whether the new measure – the revised TPC programme – is consistent with Article 3.1(a) of the *SCM Agreement*.
>
> Accordingly, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU."[877]

611. In *US – FSC (Article 21.5 – EC)*, the Appellate Body upheld a ruling on a *new* claim challenging an aspect of the measure taken to comply that was a revision of the original measure.[878]

612. The Panel on *EC – Bed Linen (Article 21.5 – India)* voiced due process concerns about a situation where a complainant raises in the Article 21.5 proceeding new claims regarding unchanged aspects of the measures concerned that could have been raised during the original proceedings but were not for one reason or another:

> "As an extreme example, assume a complaining Member challenges an anti-dumping duty in dispute settlement, and alleges violations only in connection with the investigating authorities' determination of injury. Assume the Panel concludes that the anti-dumping duty is inconsistent with the AD Agreement because of a violation of Article 3.4 in the determination of injury, and the DSB recommends that the defending Member 'bring the measure into conformity'. Assume the defending Member re-evaluates only the injury aspect of its original decision, makes a new determination of injury, and continues the imposition of the anti-dumping duty on the basis of the new finding of injury and the pre-existing finding of dumping and causal link. If that anti-dumping duty, and all aspects of the determinations underlying that duty, are considered the 'measure taken to comply', then the complaining Member could, in a subsequent Article 21.5 proceeding, allege a violation in connection with the dumping determination which had not been challenged in the original dispute. If the Article 21.5 panel found a violation of the AD Agreement in the determination of dumping, it would presumably conclude that the measure taken to comply is inconsistent with the AD Agreement. In this circumstance, the defending Member would have no opportunity to bring its measure into conformity with the AD Agreement with respect to the dumping calculation. Moreover, the defending Member would be subject to potential suspension of concessions as a result of a finding of violation with respect to the dumping aspect of the original determination which, because it was not the subject of any finding of violation in the original report, the Member was entitled to assume was consistent with its

[876] (*footnote original*) *Supra*, para. 37.
[877] Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 40–41.
[878] (*footnote original*) Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 222.

obligations under the relevant agreement. Such an outcome would not seem to be consistent with the overall object and purpose of the DSU to achieve satisfactory resolution of disputes, effective functioning of the WTO, to maintain a proper balance between the rights and obligations of Members, and to ensure that benefits accruing to any Member under covered agreements are not nullified or impaired.[879]"[880]

613. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body further stressed that a complainant in Article 21.5 proceedings could raise new claims, meaning claims that it did not raise in the original proceedings:

"[T]he relevant facts bearing upon the 'measure taken to comply' may be different from the facts relevant to the measure at issue in the original proceedings. It is to be expected, therefore, that the claims, arguments, and factual circumstances relating to the 'measure taken to comply' will not, necessarily, be the same as those relating to the measure in the original dispute.[881] Indeed, a complainant in Article 21.5 proceedings may well raise *new* claims, arguments, and factual circumstances different from those raised in the original proceedings, because a 'measure taken to comply' may be *inconsistent* with WTO obligations in ways different from the original measure. In our view, therefore, an Article 21.5 panel could not properly carry out its mandate to assess whether a 'measure taken to comply' is *fully consistent* with WTO obligations if it were precluded from examining claims additional to, and different from, the claims raised in the original proceedings.[882]"[883]

(c) "through recourse to these dispute settlement procedures"

(i) General

614. The parties to a dispute have often concluded ad hoc procedural agreements to solve the sequencing problem between compliance review procedures under Article 21.5 and the suspension of concessions and other obligations procedures under Article 22. These procedural agreements also tend to include procedural arrangements concerning the various stages of Article 21.5 compliance review procedures. In this regard, see Section XXI.B.4(e) below.

(ii) Timing of the establishment of Article 21.5 panels

615. Until 31 December 2004, Article 21.5 panels have been established at the first DSB meeting at which the request for establishment was submitted; with the sole exception of the Panel on *Brazil – Aircraft (Article 21.5 – Canada II)*, which was established at the second DSB meeting.[884] In most of the cases, the establishment at the first DSB meeting was a procedural requirement agreed by the parties in an ad hoc agreement regarding procedures under Articles 21 and 22 of the DSU applicable to the given dispute. For information relating to these procedural arrangements, see Section XXI.B.4(e) below.

(iii) Parties' submissions

616. In *US – FSC (Article 21.5 – EC)*, the respondent, the United States, requested on 12 February 2001 that the Article 21.5 compliance panel deviate from the provision in Article 12.6 DSU which provides that the sequential first written submissions are to be followed by simultaneous written rebuttals. The United States argued that the European Communities had had new material from the submission of the United States to rebut in its rebuttal submission while the United States had not. The Panel denied the request on the following grounds:

"We recall that we adopted our working procedures after having heard the views of the parties, including their views on the issue of the timing of the filing of their rebuttal submissions. We do not believe that any development or consideration has since arisen that would require us to reconsider this aspect of our working procedures, particularly given the current advanced stage of the proceedings and the difficulties inherent in adjusting

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[879] See Articles 3.2–3.3 of the DSU.

[880] Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.40.

[881] (*footnote original*) *Ibid.*

[882] (*footnote original*) As we put it in *Canada – Aircraft (Article 21.5 – Brazil)*:

> Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the DSU.

(Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.) We defined the function of Article 21.5 proceedings in the same vein in our Report in *US – Shrimp (Article 21.5 – Malaysia)* (para. 87).

[883] Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 79.

[884] Compliance panels established during first DSB meeting: *EC – Bananas III (Article 21.5 – European Communities and Ecuador)* (WT/DSB/M/53); *Canada – Aircraft (Article 21.5 – Brazil)* (WT/DSB/M/72); *US – DRAMS (Article 21.5 – Korea)* (WT/DSB/M/79); *Mexico – Corn Syrup (Article 21.5 – United States)* (WT/DSB/M/91); *US – Countervailing Measures on Certain EC Products (Article 21.5 – European Communities)* (WT/DSB/M/176); Compliance Panels with Establishment at First Meeting Pursuant to an Understanding Between the Parties Regarding Procedures under Articles 21 and 22 of the DSU: *Australia – Salmon (Article 21.5 – Canada)* (WT/DSB/M/66); *Brazil – Aircraft (Article 21.5 – Canada)* (WT/DSB/M/72); *US – Shrimp (Article 21.5 – Malaysia)* (WT/DSB/M/91 and WT/DS58/16); *Canada – Dairy (Article 21.5 – United States and New Zealand)* (WT/DSB/M/100, WT/DS103/14 and WT/DS113/14); *Canada – Dairy (Article 21.5 II – United States and New Zealand)* (WT/DSB/M/116, WT/DS103/24 and WT/DS113/24); *US – FSC (Article 21.5 – European Communities)* (WT/DSB/M/95 and WT/DS108/12); *Australia – Automotive Leather II (Article 21.5 – US)* (WT/DSB/M/69); *EC – Bed Linen (Article 21.5 – India)* (WT/DSB/M/124 and WT/DS141/11); *Japan – Apples (Article 21.5 – United States)* (WT/DSB/M/174 and WT/DS245/10); Compliance Panel established during second DSB meeting: *Brazil – Aircraft (Article 21. 5 II – Canada)* (WT/DSB/M/98 and WT/DSB/M/99).

other aspects of the Panel's schedule that such a change would necessitate.

We therefore deny this request by the United States to change the Panel's schedule with respect to the timing for filing the parties' second written submissions. We note that the United States, as well as the European Communities, if they wish, would be able to respond to, or comment on, the other party's rebuttals in their oral statements at the substantive meeting."[885]

(iv) Third-party rights: access to second written submissions by third parties

617. In *Australia – Automotive Leather II (Article 21.5 – US)*, the working procedures adopted by the Panel provided, *inter alia*, for only one meeting with the parties, to be held in conjunction with the third party session. The procedures also provided for third parties to receive only the first submissions, and not the rebuttal submissions, of the parties. The European Communities objected and argued that since in this case there was to be only one meeting of the Panel, at which the Panel would be considering both submissions of each party, the third parties, in accordance with Article 10.3 of the DSU, should receive all of the parties' submissions. The Panel, in a preliminary ruling,[886] rejected the European Communities' request as follows:

"[T]he Panel indicated that it had decided not to change the existing working procedures which provide for third parties to receive the first written submissions of the parties, but not the rebuttals. The Panel stated that if it had decided to hold two meetings with the parties, as is the normal situation envisioned in Appendix 3 of the DSU, third parties would have received only the written submissions made prior to the first meeting, but not rebuttals or other submissions made subsequently. Thus, in the more usual case, third parties would be in the same position as they were in this case with respect to their ability to present views to the panel. In the view of the Panel, the procedure it had established conformed more closely with the usual practice than would be the case if third parties received the rebuttals, and was in keeping with Article 10.3 of the DSU in a case where the Panel holds only one meeting."[887]

618. In *Australia – Salmon (Article 21.5 – Canada)*, the Panel also followed the approach above and denied the European Communities' request to allow the third parties access to second written submissions.[888]

619. In *Canada – Dairy (Article 21.5 – New Zealand and US)*, however, the Panel decided, in a preliminary ruling,[889] to allow third parties access to the second written submissions of the parties on the following grounds:

"In the Panel's view, the object and purpose of Article 10.3 of the DSU is to allow third parties to participate in an informed and, hence, meaningful, manner in a session of the meeting with the parties specifically set aside for that purpose. Third parties can only do so if they have received all the information exchanged between the parties before that session. Otherwise, third parties might find themselves in a situation where their oral statements at the meeting become partially or totally irrelevant or moot in the light of second submissions by the parties to which third parties did not have access. Without access to all the submissions by the parties to the dispute to the first meeting of the panel, uninformed third party submissions could unduly delay panel proceedings and, as rightly emphasised by the EC and supported by Mexico, could prevent the Panel from receiving 'the benefit of a useful contribution by third parties which could help the Panel to make the objective assessment that it is required to make under Article 11 of the DSU'."[890]

620. In *US – FSC (Article 21.5 – EC)*, the Panel, in a preliminary ruling,[891] did not follow the position of the Panel in *Canada – Dairy (Article 21.5 – New Zealand and US)* and denied access to second written submissions to third parties on the grounds that it was not permitted by Article 10.3 of the *DSU*. However, the Appellate Body disagreed with the Panel on the grounds that Article 10.3 requires that third parties be provided with all of the submissions made by the parties up to the time of the first panel meeting "whether that meeting is the first of two panel meetings, or the first and only panel meeting":

"Article 10.3 of the DSU is couched in mandatory language. By its terms, third parties 'shall' receive 'the submissions of the parties to the *first* meeting of the panels'. (emphasis added) Article 10.3 does *not* say that third parties shall receive 'the *first* submissions' of the parties, but rather that they shall receive '*the* submissions' of the parties. (emphasis added) The number of submissions that third parties are entitled to receive is *not* stated. Rather, Article 10.3 defines the submissions that third parties are entitled to receive by reference to a specific step in the proceedings – the first meeting of the panel.[892] It follows, in our view, that, under this provision, third parties must

[885] Panel Report on *US – FSC (Article 21.5 – EC)*, para. 6.6.
[886] For more information on preliminary rulings, see Section XXXVI.C.
[887] Panel Report on *Australia – Automotive Leather II (Article 21.5 – United States)*, para. 3.9.
[888] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.5–7.6.
[889] For more information on preliminary rulings, see Section XXXVI.C.
[890] Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 2.34.
[891] For more information on preliminary rulings, see Section XXXVI.C.
[892] (*footnote original*) We note, in this regard, that paragraph 6 of Appendix 3 to the DSU also links the participatory rights of third parties to this step in the proceeding. It states that third parties "*shall be invited in writing to present their views during a session of the first substantive meeting of the panel*". (emphasis added)

be given all of the submissions that have been made by the parties to the panel up to the first meeting of the panel, irrespective of the number of such submissions which are made, including any rebuttal submissions filed in advance of the first meeting.[893]"[894]

621. As regards third-party rights in general, see Section X.B above.

(d) Burden of proof

622. The Appellate Body on *Canada – Aircraft (Article 21.5 – Brazil)* ruled that the examination of "measures taken to comply" is based on the relevant facts proved, by the complainant, to the Article 21.5 panel, during the panel proceedings:

"We add also that the examination of 'measures taken to comply' is based on the relevant facts proved, by the complainant, to the Article 21.5 panel, during the panel proceedings. Therefore, the 'minimum implementation standard' that the Article 21.5 Panel expressed and which, it said, was 'effectively' agreed between the parties, should be viewed with caution. The Article 21.5 Panel said that Canada's implementation should '"*ensure*" that *future* TPC assistance to the Canadian regional aircraft industry will not be *de facto* contingent on export performance.' (emphasis added) The use in this standard of the words 'ensure' and 'future', if taken too literally, might be read to mean that the Panel was seeking a strict guarantee or absolute assurance as to the *future* application of the revised TPC programme. A standard which, if so read, would, however, be very difficult, if not impossible, to satisfy since no one can predict how unknown administrators would apply, in the unknowable future, even the most conscientiously crafted compliance measure."[895]

623. In *Brazil – Aircraft (Article 21.5 – Canada)*, Brazil argued that the Article 21.5 Panel erred in placing upon Brazil the burden of proving that its implementation measure complied with the recommendations and rulings of the DSB. Brazil claimed that Canada must bear the burden of proving that Brazil's measure does not implement the DSB recommendations and rulings. The Appellate Body stated that the fact that the measure at issue was "taken to comply" with the "recommendations and rulings" of the DSB does not alter the allocation of the burden of proving a defence:

"[T]he fact that the measure at issue was 'taken to comply' with the 'recommendations and rulings' of the DSB does not alter the allocation of the burden of proving Brazil's 'defence' under item (k). In this respect, we note that Brazil concedes that the revised PROEX measure is, in principle, prohibited under Article 3.1(a) of the *SCM Agreement*; yet Brazil asserts nonetheless that the PROEX measure is justified, under the first paragraph of item (k). Thus, in our view, Brazil is, clearly, using item (k) to make an affirmative claim in its defence. In *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, we said: 'It is only reasonable that the burden of establishing [an affirmative] defence should rest on the party asserting it.' As it is Brazil that is asserting this 'defence' using item (k) in these proceedings, we agree with the Article 21.5 Panel that Brazil has the burden of proving that the revised PROEX is justified under the first paragraph of item (k), including the burden of proving that payments under the revised PROEX are *not* 'used to secure a material advantage in the field of export credit terms.'"[896]

(e) List of disputes under Article 21.5

624. The following table lists the disputes where an Article 21.5 panel and/or Appellate Body report has been circulated as of 31 December 2004:

	WT/DS No.	Case Name	Date circulated	Date adopted
1	WT/DS18	*Australia – Salmon (Article 21.5 – Canada)*	18 February 2000	20 March 2000
2	WT/DS27	*EC – Bananas III (Article 21.5 – EC)*	12 April 1999	–
3	WT/DS27	*EC – Bananas III (Article 21.5 – Ecuador)*	12 April 1999	6 May 1999
4	WT/DS46	*Brazil – Aircraft (Article 21.5 – Canada)*	9 May 2000	4 August 2000
5	WT/DS46	*Brazil – Aircraft (Article 21.5 – Canada II)*	26 July 2001	23 August 2001
6	WT/DS58	*US – Shrimp (Article 21.5 – Malaysia)*	15 June 2001	21 November 2001
7	WT/DS70	*Canada – Aircraft (Article 21.5 – Brazil)*	9 May 2000	4 August 2000

[893] (*footnote original*) We note, in that respect, that the DSU does not place any limits on the number of submissions which panels can request of the parties in advance of the first meeting.

[894] Appellate Body Report on *US – FSC (Article 21.5 – European Communities)*, para. 245.

[895] Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 38.

[896] Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 66.

Table (*cont.*)

	WT/DS No.	Case Name	Date circulated	Date adopted
8	WT/DS99	*US – DRAMS (Article 21.5 – Korea)*	7 November 2000	Mutually Agreed Solution
9	WT/DS103, WT/DS113	*Canada – Dairy (Article 21.5 – New Zealand and US)*	11 July 2001	18 December 2001
10	WT/DS103, WT/DS113	*Canada – Dairy (Article 21.5 – New Zealand and US II)*	26 July 2002	17 January 2003
11	WT/DS108	*US – FSC (Article 21.5 – EC)*	20 August 2001	29 January 2002
12	WT/DS126	*Australia – Automotive Leather II (Article 21.5 – US)*	21 January 2000	11 February 2000
13	WT/DS132	*Mexico – Corn Syrup (Article 21.5 – US)*	22 June 2001	21 November 2001
14	WT/DS141	*EC – Bed Linen (Article 21.5 – India)*	29 November 2002	24 April 2003

5. Ad hoc agreements on procedures under Articles 21 and 22 concluded by parties

(a) The sequencing issue

625. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators indicated that they were "aware of the question of 'sequencing' recourses to Article 21.5 and Article 22.6 of the DSU". The Arbitrators noted that one of the effects of the bilateral agreement concluded by the parties (see paragraph 637 below) "was to establish such a 'sequencing'". The Arbitrators thus considered that by issuing their report after the Appellate Body Article 21.5 report, they had respected the intention of the parties. The Arbitrators concluded that "the question of whether such a sequencing is actually required under the DSU is not part of the mandate of the Arbitrators".[897]

(b) Sequencing solutions in ad hoc procedural agreements

(i) Recourse to Article 21.5 before initiating Article 22 proceedings

626. In *Australia – Automotive Leather II*, the United States and Australia agreed on a procedural understanding on 4 October 1999, whereby the complainant, the United States, would not initiate Article 22 proceedings until the circulation of the compliance panel's report pursuant to Article 21.5. The relevant part of the procedural agreement provides that "the United States will not request authorization to suspend concessions until after the review panel has circulated its report".[898]

627. In *US – Shrimp,* the disputing parties, Malaysia and the United States, agreed on a procedural agreement on 22 December 1999, which included a similar provision to that in *Australia – Automotive Leather II* (see paragraph 626 above). However, in this case Malaysia undertook not to initiate Article 22 proceedings until the *adoption* of the 21.5 panel report. The relevant part of the procedural agreement reads as follows:

> "If Malaysia at some future date decides that it may wish to initiate proceedings under Articles 21.5 and Article 22 of the DSU, Malaysia will initiate proceedings under Article 21.5 prior to any proceedings under Article 22. Malaysia will provide the United States advance notice of any proposal to initiate proceedings under Article 21.5 and will consult with the United States before requesting the establishment of a panel under Article 21.5. Malaysia will not request authorization to suspend concessions or other obligations under Article 22 until the adoption of the Article 21.5 panel report."[899]

628. Similarly, in *Argentina – Hides and Leather*, the disputing parties, the European Communities and Argentina, agreed on a procedural agreement on 26 February 2002. According to this agreement, the complainant, the European Communities, would only have recourse to Article 22 proceedings after the completion of the Article 21.5 proceedings. The relevant part of the procedural agreement provides that:

> "However, the EC's resort to the DSU for the purposes of suspension of concessions or other obligations may take place only after completion of proceedings under Article 21.5 of the DSU."[900]

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[897] Decision by the Arbitrators in *Brazil – Aircraft (Article 22.6 – Brazil)*, footnote 7.

[898] WT/DS126/8. For similar provisions see also *Brazil – Aircraft*, WT/DS46/13; *Canada – Aircraft*, WT/DS70/9; *EC – Bed Linen*, WT/DS141/11.

[899] WT/DS58/16, para. 1. For a similar provision see also *Thailand – H-Beams*, WT/DS122/10.

[900] WT/DS155/12, para. 2. For similar provisions, see also *US – Steel Plate*, WT/DS206/9; *Chile – Price Band System*, WT/DS207/16.

(ii) Simultaneous Articles 21.5 and 22 proceedings

629. In *Canada – Dairy*, the disputing parties, New Zealand and Canada, agreed on 23 November 1999 on a procedural agreement whereby the complainant, New Zealand, could request authorization to suspend concessions under Article 22 either simultaneously or after an Article 21.5 proceeding. In the event that the Articles 21.5 and 22 proceedings were simultaneously initiated, and the matter referred to arbitration pursuant to Article 22.6, the parties would request the arbitrator to suspend its work until the adoption of the compliance panel [and Appellate Body] report[s]. The relevant part of the procedural agreement reads as follows:

> "After the end of the period available to Canada to implement the DSB recommendations and rulings . . ., should New Zealand consider that the situation described in Article 21.5 of the DSU exists, New Zealand will request consultations which the parties agree to hold within 10 days from the date of the request. Canada and New Zealand agree that at the end of such consultations, should either party so state, the parties will jointly consider that the consultations have failed to settle the dispute. Thenceforward New Zealand will be entitled to request the establishment of a panel pursuant to Article 21.5 of the DSU (the 'Article 21.5 compliance panel').
>
> . . .
>
> New Zealand may request authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU simultaneously with or after any New Zealand request for the establishment of a panel pursuant to paragraph 1.
>
> . . .
>
> Where the matter has been referred to arbitration, the parties agree to request the Article 22.6 arbitrator, at the earliest possible moment, to suspend its work until either (a) the adoption of the Article 21.5 compliance panel report; or (b) if there is an appeal, the adoption of the Appellate Body report."[901]

(iii) Agreement not to appeal the compliance report

630. In *Australia – Automotive Leather II* (see paragraph 626 above), the disputing parties agreed to refrain from appealing the panel report under Article 21.5 in the event the compliance panel found that the measures taken by Australia were inconsistent with the recommendations and rulings of the DSB. The relevant part of the procedural agreement reads as follows:

> "Both Australia and the United States will unconditionally accept the review panel report and there will be no appeal of that report."[902]

(iv) Withdrawal of Article 22 arbitration request

631. In *US – FSC*, the disputing parties, the European Communities and the United States, concluded a procedural agreement on 29 September 2000. Pursuant to this agreement, in the event that the DSB found that the measures taken to comply by the United States were not inconsistent with WTO law, the European Communities undertook to withdraw its request for authorization to suspend concessions under Article 22. The relevant part of the procedural agreement provides that:

> "In the event that the DSB finds that measures taken by the US to comply with the recommendations and rulings of the DSB are inconsistent with the covered agreements referred to in the Article 21.5 compliance panel request, the arbitrator will automatically resume its work. In the event that the DSB finds that the measures taken by the US to comply with the recommendations and rulings of the DSB are not inconsistent with the covered agreements referred to in the Article 21.5 compliance panel request, the EC will withdraw its request under Article 22.2 of the DSU, thereby terminating the arbitration procedure."[903]

(v) Direct recourse to Article 22

632. In *US – FSC*, the disputing parties agreed that in the absence of measures taken to comply by the United States, the European Communities could proceed directly to request authorization to suspend concessions under Article 22.2, without having recourse to Article 21.5 proceedings. The relevant part of the procedural agreement reads as follows:

> "Where there exist no measures taken to comply with the DSB recommendations and rulings by the end of the implementation period, the EC may request authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU and to adopt countermeasures pursuant to Article 4.10 of the SCM Agreement, without having recourse to Article 21.5 of the DSU."[904]

(vi) Agreement not to object to arbitration under Article 22.6

633. In *Japan – Apples*, the disputing parties, Japan and the United States, agreed, in a procedural agreement concluded on 30 June 2004, that in the event the complainant, the United States, requested the authorization to suspend concessions, the respondent, Japan, would object to the proposed level of suspension and request arbitration under Article 22.6. In that case, the

[901] WT/DS113/14. For similar provisions, see also *Japan – Apples*, WT/DS245/10; *US – FSC*, WT/DS108/12.
[902] WT/DS126/8, para. 4.
[903] WT/DS108/12, para. 12. For similar provisions, see also *Canada – Dairy*, WT/DS113/14; *Japan – Apples*, WT/DS245/10.
[904] WT/DS108/12, para. 9.

United States undertook not to object to the referral of the dispute to arbitration under Article 22.6. The relevant part of the procedural agreement provides that:

> "Under DSU Article 22.6, Japan will object to the level of suspension of concessions or other obligations and/or make a claim under DSU Article 22.3 before the date of the DSB meeting considering the United States' request and the matter will be referred to arbitration pursuant to DSU Article 22.6. The United States will not pose any objection to the referral of the matter to such arbitration."[905]

(vii) Non-application of the 30-day deadline in first sentence in Article 22.6

634. In *EC – Bed Linen*, the disputing parties, the European Communities and India, agreed in a procedural agreement concluded on 13 September 2001, that the European Communities would not invoke the 30-day deadline in the first sentence in Article 22.6 in order to block India's request for arbitration under Article 22.6. The relevant part of the procedural agreement reads as follows:

> "If on the basis of the results of proceedings under Article 21.5 of the DSU that might be initiated by India no later than 31 March 2002, India decides to initiate proceedings under Article 22 of the DSU, the EC will not assert that India is precluded from obtaining DSB authorization because India's request was made outside the 30 day time-period specified in the first sentence of Article 22.6 of the DSU."[906]

635. In *Australia – Automotive Leather II* (see paragraph 626 above), the disputing parties, the United States and Australia, agreed to extend the 30-day time period in the first sentence of Article 22.6 to 60 days. In addition, the 60-day deadline would start from the date of circulation of the compliance panel report. By common consent, the 60-day period for completing the arbitration under Article 22.6 was reduced by agreement to 45 days. The relevant part of the procedural agreement provides:

> "Pursuant to footnote 6 to Article 4 of the SCM Agreement, Australia and the United States agree that the deadline for DSB action under the first sentence of Article 22.6 of the DSU shall be 60 days after the circulation of the review panel report under Article 21.5 of the DSU, and that the deadline specified in the third sentence of Article 22.6 of the DSU for completion of arbitration shall be 45 days after the matter is referred to arbitration."[907]

(c) Consultations

636. In *US – Steel Plate*, the disputing parties, the United States and India, agreed in a procedural agreement concluded on 14 February 2003, that should the complainant consider that the situation described in Article 21.5 exists, it would request consultations with the respondent prior to requesting the establishment of a compliance panel. The relevant part of the procedural agreement reads:

> "Should India consider that the situation described in Article 21.5 of the DSU exists, India will request consultations which the parties agree to hold within 12 days from the date of circulation of the request. India and the United States agree that at the end of such consultations, should either party so state, the parties will jointly consider that the consultations have failed to settle the dispute."[908]

(d) Establishment of the panel

637. In *Brazil – Aircraft* and *Canada – Aircraft*, and the two proceedings under Article 21.5 brought by Canada and Brazil against each other, the disputing parties agreed, in two identical procedural agreements concluded on 23 November 1999, to include a provision whereby the parties would agree to establish the 21.5 panels at the first DSB meeting. The relevant part of the procedural agreement reads as follows:

> "On 23 November 1999, Canada will request that this matter be referred to the original panel pursuant to Article 21.5 of the DSU. Canada will also request the convening of a DSB meeting on 3 December 1999 and Brazil will not object to the holding of such a meeting.
>
> At the DSB meeting convened in response to the request by Canada, Brazil will accept the establishment of a review panel under Article 21.5 of the DSU and will not pose any procedural objection to the establishment of such a panel."[909]

(e) Appointment of panellists

638. In *Japan – Apples*, the disputing parties agreed that if the original panellists were not available for the compliance panel or the Article 22.6 arbitration (or both) proceedings, they would request the Director-General of the WTO to appoint a replacement for the proceeding or proceedings in which this was required.

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[905] *Japan – Apples*, WT/DS245/10, para. 5. For similar provisions see also *US – FSC*, WT/DS108/12; *Canada Dairy*, WT/DS113/14.

[906] WT/DS141/11, para. 5. For similar provisions see also *US – Shrimp*, WT/DS58/16; *Thailand – H-Beams*, WT/DS122/10; *Argentina – Hides and Leather*, WT/DS155/12; *US – Steel Plate*, WT/DS206/9; *Chile – Price Band System*, WT/DS207/16; *Japan – Apples*, WT/DS245/10.

[907] WT/DS126/8, para. 6. For similar provisions, see also *Brazil – Aircraft*, WT/DS46/13 and *Canada – Aircraft*, WT/DS70/9.

[908] WT/DS206/9, para. 1. For similar provisions, see also *US – FSC*, WT/DS108/12; *Canada – Dairy*, WT/DS103/14; *Thailand – H-Beams*, WT/DS122/10; *US – Steel Plate*, WT/DS206/9 and *Chile – Price Band System*, WT/DS207/16.

[909] WT/DS46/13, paras. 1–2. For similar provisions, see also *US – FSC*, WT/DS108/12; *Canada – Dairy*, WT/DS103/14; *US – Steel Plate*, WT/DS206/9; *Chile – Price Band System*, WT/DS207/16 and *Japan – Apples*, WT/DS245/10.

The relevant part of the procedural agreement provides:

> "If any of the original panellists are not available for either the Article 21.5 compliance panel or the Article 22.6 arbitration, or both, the parties will request the Director-General of the WTO to appoint, as soon as possible, a replacement for the proceeding or proceedings in which such a replacement is required. If an original panellist is unavailable to serve in either proceeding, the parties will further request that in making this appointment, the Director-General seek a person who will also be available to act in both proceedings."[910]

(f) Participation of experts

639. In *Japan – Apples*, the disputing parties agreed that if the participation of experts was deemed necessary, the parties would not object to the participation of the original experts. The relevant part of the procedural agreement provides:

> "Should the Article 21.5 compliance panel determine that the participation of experts is necessary, and should the panel consider the participation of the original experts appropriate, the parties will not object to the participation of the original experts."[911]

(g) Cooperation to ensure time-limits for the work of the compliance panel and Appellate Body are respected

640. In *Canada – Dairy*, the disputing parties agreed to include a provision in the procedural agreement whereby they would agree to cooperate to ensure that the 90-day deadlines for both the compliance panel and the Appellate Body work were respected. The relevant part of the procedural agreement reads as follows:

> "New Zealand and Canada will cooperate to enable the Article 21.5 panel to circulate its report within 90 days of the panel's composition, excluding such time as the panel's work may be suspended pursuant to Article 12.12 of the DSU.
>
> . . .
>
> In case of an appeal of the Article 21.5 compliance panel report, the parties will cooperate to enable the Appellate Body to circulate its report within no more than 90 days from the date of notification of the appeal to the DSB."[912]

(h) Non-prejudice of the parties' other rights

641. In *US – Steel Plate*, the disputing parties included a clause whereby they agreed that the provisions in the procedural agreement did not prejudice their rights or interests. The relevant part of the agreement provides that:

> "These agreed procedures do not prejudice the rights of India or the United States to take any action or procedural step to protect their rights or interests, including the activation of any aspect of the provisions of the DSU."[913]

(i) List of ad hoc agreements

642. The following table shows in which proceedings these procedural agreements were concluded up to 31 December 2004:

WT/DS Complainant	Short Title	Referral to original panel	Agreement on procedures under Articles 21 and 22
DS18 – Canada	*Australia – Salmon*	28.7.1999	Yes WT/DS18/RW, para. 1.3
DS27 – Ecuador	*EC – Bananas III (Article 21.5 – Ecuador)*	12.1.1999	No
DS27 – EC	*EC – Bananas III (Article 21.5 – EC)*	9.12.1999	No
DS46 – Canada	*Brazil – Aircraft (Article 21.5 – Canada)*	9.12.1999	Yes WT/DS46/13
DS46 – Canada	*Brazil – Aircraft (Article 21.5 – Canada II)*	16.2.2001	No
DS58 – Malaysia	*US – Shrimp (Article 21.5 – Malaysia)*	23.10.2000	Yes WT/DS58/16
DS70 – Brazil	*Canada – Aircraft (Article 21.5 – Brazil)*	9.12.1999	Yes WT/DS70/9

[910] WT/DS245/10, para. 10. For similar provisions, see also *US – FSC*, WT/DS108/12; *Canada – Dairy*, WT/DS113/14 and *Chile – Price Band System*, WT/DS207/16.

[911] WT/DS245/10, para. 11.

[912] WT/DS113/14, paras. 3 and 5. For similar provisions see also *Australia – Automotive Leather II*, WT/DS126/8; *Brazil – Aircraft*, WT/DS46/13; *Canada – Aircraft*, WT/DS70/9; *US – FSC*, 108/12; *US – Steel Plate*, WT/DS206/9; *Chile – Price Band System*, WT/DS207/16.

[913] WT/DS206/9, para. 10. For a similar provision, see *Japan – Apples*, WT/DS245/10.

Table (*cont.*)

WT/DS Complainant	Short Title	Referral to original panel	Agreement on procedures under Articles 21 and 22
DS99 – Korea	*US – DRAMS (Article 21.5 – Korea)*	25.4.2000	No
DS103 – US DS113 – New Zealand	*Canada – Dairy (Article 21.5 – New Zealand and US)*	1.3.2001	Yes WT/DS103/14 and 24 WT/DS113/14 and 24
DS103 – US DS113 – New Zealand	*Canada – Dairy (Article 21.5 – New Zealand and US II)*	18.12.2001	Yes WT/DS103/14 and 24 WT/DS113/14 and 24
DS108 – EC	*US – FSC (Article 21.5 – EC)*	20.12.2000	Yes WT/DS108/12
DS122 – Poland	*Thailand – H-Beams (Article 21.5 – Poland)*	Not yet	Yes WT/DS122/10
DS126 – US	*Australia – Automotive Leather II (Article 21.5 – US)*	14.10.1999	Yes WT/DS126/8
DS132 – US	*Mexico – Corn Syrup (Article 21.5 – US)*	23.10.2000	No
DS141 – India	*EC – Bed Linen (Article 21.5 – India)*	22.5.2002	Yes WT/DS141/11
DS155 – EC	*Argentina – Hides and Leather (Article 21.5 – EC)*	Not yet	Yes WT/DS155/12
DS206 – India	*US – Steel Plate (Article 21.5 – India)*	Not yet	Yes WT/DS206/9
DS207 – Argentina	*Chile – Price Band System (Article 21.5 – Argentina)*	Not yet	Yes WT/DS207/16
DS212 – EC	*US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*	27.9.2004	No
DS245 – US	*Japan – Apples (Article 21.5 – US)*	30.7.2004	Yes WT/DS245/10

(j) Panel's scope of review of procedural agreements

643. In *Brazil – Aircraft* and *Canada – Aircraft*, with regard to the two proceedings under Article 21.5 brought by Canada and Brazil against each other in relation to their respective aircraft export subsidies, Canada and Brazil reached two identical agreements (though the names of the parties were swapped) on the conduct of proceedings (see paragraph 637 above). Brazil, however, stated at a hearing during the Article 22.6 Arbitration proceedings that the recourse by Canada to Article 22.2 of the DSU before the completion of the Article 21.5 proceedings was a material breach of the bilateral agreement. Referring to Article 60 of the *Vienna Convention*, Brazil declared that it was terminating the bilateral agreement. Brazil thus stated that, pursuant to Article 22.7 of the DSU, the Arbitrators should determine that the proposed countermeasures are not allowed under the *SCM Agreement* on the grounds that the time within which they may be authorized has expired. Canada considered that the Arbitrators did not have authority to interpret the bilateral agreement.[914] The Arbitrators considered that they did not need to discuss the question of whether they could interpret the bilateral agreement or whether it ceased to apply to the Arbitrators' tasks after Brazil's alleged application of Article 60 of the *Vienna Convention*.[915]

6. Relationship with other Articles

(a) Article 6.2

644. The Appellate Body on *Mexico – Corn Syrup* assumed that "the same procedures apply in Article 21.5 proceedings as in original panel proceedings"[916] when considering the alleged failure of the United States to comply with Article 6.2 of the *DSU* because the United States' communication seeking recourse to Article 21.5

[914] Decision by the Arbitrators in *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.6.
[915] Decision by the Arbitrators in *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.7–3.8.
[916] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 67.

of the *DSU* did not indicate whether consultations had been held. The Appellate Body considered that the requirement under Article 6.2 of the *DSU* "to indicate whether consultations were held" is satisfied by the inclusion in the Panel request of a statement as to whether or not consultations occurred:

> "In assessing the importance of the obligation 'to indicate whether consultations were held', we observe that the requirement will be satisfied by the inclusion, in the request for establishment of a panel, of a statement as to whether consultations occurred *or not*. The purpose of the requirement seems to be primarily informational – to inform the DSB and Members as to whether consultations took place. We also recall that the DSU expressly contemplates that, in certain circumstances, a panel can deal with and dispose of the matter referred to it even if no consultations took place. Similarly, the authority of the panel cannot be invalidated by the absence, in the request for establishment of the panel, of an indication 'whether consultations were held'. Indeed, it would be curious if the requirement in Article 6.2 to inform the DSB whether consultations were held was accorded more importance in the dispute settlement process than the requirement actually to hold those consultations."[917]

(b) Article 12.7

645. As regards the panels' duty to provide a basic rationale behind their findings and conclusions in Article 21.5 proceedings, see Section XII.B.4(a) above.

XXII. ARTICLE 22

A. TEXT OF ARTICLE 22

Article 22
Compensation and the Suspension of Concessions

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(d) in applying the above principles, that party shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;

(f) for purposes of this paragraph, "sector" means:

[917] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 70.

(i) with respect to goods, all goods;

(ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;[14]

(*footnote original*) [14] The list in document MTN.GNS/W/120 identifies eleven sectors.

(iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;

(g) for purposes of this paragraph, "agreement" means:

(i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;

(ii) with respect to services, the GATS;

(iii) with respect to intellectual property rights, the Agreement on TRIPS.

4. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

5. The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator[15] appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

(*footnote original*) [15] The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

7. The arbitrator[16] acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall, upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

(*footnote original*) [16] The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.[17]

(*footnote original*) [17] Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

B. INTERPRETATION AND APPLICATION OF ARTICLE 22

1. General

(i) Nature and purpose of countermeasures

646. In *EC – Bananas III (US) (Article 22.6 – EC)*, the Arbitrators confirmed that the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned. They further agreed with the United States "that this *temporary* nature indicates that it is the purpose of countermeasures to *induce compliance*". However, the Arbitrators considered that "this purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is *equivalent* to the level of nullification or impairment. In our view, there is nothing in Article 22.1 of the *DSU*, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for countermeasures of a *punitive* nature."[918]

647. Similarly, the Arbitrators in *EC – Bananas III (Ecuador) (Article 22.6 – EC)* observed that "the object and purpose of Article 22 ... is to induce compliance".[919]

648. In *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)* the Arbitrator considered that "Article 22.1 of the DSU is particularly clear as to the temporary nature of suspensions of concessions or other obligations, pending compliance." The Arbitrator further stated that "[u]nder Article 22.1 of the DSU and Article 4.10 of the SCM Agreement, non-compliance is the very event justifying the adoption of countermeasures." Moreover, the Arbitrator noted that ". . .the *EC – Bananas* Arbitrators, referring to [DSU Article 22.1], expressed the view that suspension of concessions or other obligations was intended to induce compliance because it was temporary".[920]

649. In *US – 1916 Act (Article 22.6 – US)*, the Arbitrators clarified that they were "not called upon to 'provide a comprehensive list of the purposes' of the suspension of concessions or other obligations, or to 'rank these purposes in some sort of order of priority'".[921] Further to quoting the above awards, the Arbitrators agreed that "a fundamental objective of the suspension of obligations is to induce compliance". It emphasized that "[t]he fact that such suspension is meant to be temporary – as indicated in Article 22.1 – is further evidence of this purpose".[922] The Arbitrators further indicated that:

> "We also agree with the critically important point that the concept of 'equivalence', as embodied in Article 22.4, means that obligations cannot be suspended in a punitive manner. This means that in suspending certain obligations owed to the United States under the GATT and the Anti-Dumping Agreement, the European Communities cannot exceed the level of nullification or impairment sustained by the European Communities as a result of the 1916 Act. We consider this further below."[923]

650. In *US – Offset Act (Byrd Amendment) (Article 22.6)*, the Arbitrator questioned the nature of the countermeasures, in particular whether "inducing compliance", as set out in *EC – Bananas III (US) (Article 22.6 – EC)*, was the only objective pursued by the DSU when allowing a WTO Member to suspend concessions or other obligations. In that regard, the Arbitrator noted that:

> "The concept of 'inducing compliance' was first raised in the *EC – Bananas III (US) (Article 22.6 – EC)*[924] arbitration and has been referred to since in other arbitrations. However, it is not expressly referred to in any part of the DSU and we are not persuaded that the object and purpose of the DSU – or of the WTO Agreement – would support an approach where the purpose of suspension of concessions or other obligations pursuant to Article 22 would be exclusively to induce compliance. Having regard to Articles 3.7 and 22.1 and 22.2 of the DSU as part of the context of Articles 22.4 and 22.7, we cannot exclude that inducing compliance is part of the objectives behind suspension of concessions or other obligations, but at most it can be only one of a number of purposes in authorizing the suspension of concessions or other obligations. By relying on 'inducing compliance' as the benchmark for the selection of the most appropriate approach we also run the risk of losing sight of the requirement of Article 22.4 that the level of suspension be *equivalent* to the level of nullification or impairment."[925]

651. In *US – Offset Act (Byrd Amendment) (Article 22.6)*, the Arbitrator further remarked that the reason

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[918] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3. See also Decision by the Arbitrators in *EC – Hormones (Article 22.6 – Canada)*, para. 39.

[919] Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 76.

[920] Decision by the Arbitrators on *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.105.

[921] Decision by the Arbitrators on *US – 1916 Act (Article 22.6 – US)*, para. 5.4.

[922] Decision by the Arbitrators on *US – 1916 Act (Article 22.6 – US)*, para. 5.7.

[923] Decision by the Arbitrators on *US – 1916 Act (Article 22.6 – US)*, para. 5.8.

[924] (*footnote original*) *EC – Bananas III (US) (Article 22.6 – US)*, para. 6.3.

[925] Decision by the Arbitrator on *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil)*, *US – Offset Act (Byrd Amendment) (Article 22.6 – EC)*, *US – Offset Act (Byrd Amendment) (Article 22.6 – India)*, *US – Offset Act (Byrd Amendment) (Article 22.6 – Japan)*, *US – Offset Act (Byrd Amendment) (Article 22.6 – Korea)*, *US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, para. 3.74, *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, para. 3.72, *US – Offset Act (Byrd Amendment) (Article 22.6 – Chile)*, para. 3.69.

for suspending concessions is not explicit in the *DSU*, and that the means for "inducing compliance" are likely to vary in each case:

> "[T]he DSU does not expressly explain the purpose behind the authorization of the suspension of concessions or other obligations. On the one hand, the general obligation to comply with DSB recommendations and rulings seems to imply that suspension of concessions or other obligations is intended to induce compliance, as has been acknowledged by previous arbitrators.[926] However, exactly what may induce compliance is likely to vary in each case, in the light of a number of factors including, but not limited to, the level of suspension of obligations authorized.[927]"[928]

652. As regards the standard of "equivalence" and its assessment by the arbitrators, see Section XXII.B.9(b)(iii) below.

653. As regards the concept of "appropriate countermeasures" in arbitrations initiated pursuant to Article 4.10 of the *SCM Agreement*, see Section XXII.B.10(a) below.

(ii) Bilateral procedural agreements

654. In respect of the ad hoc bilateral agreements concluded by parties to a dispute in order to establish the order and timing of Articles 21 and 22 proceedings, see Section XXI.B.4(e) above.

(iii) Confidential information

655. Concerning the special procedures adopted to safeguard confidential information in Article 22.6 arbitrations, see paragraphs 488–489 above.

2. Article 22.1

656. Regarding compensation and suspension of concessions or other obligations, in the event that the DSB recommendations and rulings are not implemented within a reasonable period of time, see also paragraphs 568–646 above.

657. With respect to the temporary nature of the suspension of concessions, see Section XXII.B.1(i) above.

658. With respect to the relationship of Article 22.1 with Article 21.3, see paragraph 595 above.

3. Article 22.2

(a) Specificity in the request for suspension of concessions or other obligations

(i) Application of Article 6.2 specificity requirement

659. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the Arbitrators held that the requests for suspension of concessions under Article 22.2, as well as the requests for a referral to arbitration under Article 22.6, serve similar due process objectives to requests under Article 6.2 and thus concluded that the specificity standards are relevant for Article 22 requests:

> "The DSU does not explicitly provide that the specificity requirements, which are stipulated in Article 6.2 for panel requests, apply *mutatis mutandis* to arbitration proceedings under Article 22. However, we believe that requests for suspension under Article 22.2, as well as requests for a referral to arbitration under Article 22.6, serve similar due process objectives as requests under Article 6.2. First, they give notice to the other party and enable it to respond to the request for suspension or the request for arbitration, respectively. Second, a request under Article 22.2 by a complaining party defines the jurisdiction of the DSB in authorizing suspension by the complaining party. Likewise, a request for arbitration under Article 22.6 defines the terms of reference of the Arbitrators. Accordingly, we consider that the specificity standards, which are well-established in WTO jurisprudence under Article 6.2, are relevant for requests for authorization of suspension under Article 22.2, and for requests for referral of such matter to arbitration under Article 22.6, as the case may be. They do, however, not apply to the document submitted during an arbitration proceeding, setting out the methodology used for the calculation of the level of nullification or impairment."[929]

(ii) Minimum specificity requirements

660. In *EC – Hormones (US) (Article 22.6 – EC)*, the Arbitrators stated that the minimum requirements attached to a request to suspend concessions or other obligations are:

> "(1) the request must set out a specific level of suspension, i.e. a level equivalent to the nullification and impairment caused by the WTO inconsistent measure, pursuant to Article 22.4; and (2) the request must specify the agreement and sector(s) under which concessions

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[926] (*footnote original*) *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3.

[927] (*footnote original*) While the value of the suspension or concessions or other obligations easily comes to mind as a relevant factor in inducing compliance, it must also be acknowledged that the actual role of the value of such suspension in securing compliance or not may vary from one case to the next. In some cases, even a very high amount of countermeasures may not achieve compliance, whereas in some others a limited amount may.

[928] Decision by the Arbitrator on *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil)*, *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, *US – Offset Act (Byrd Amendment) (Article 22.6 – Chile)*, *US – Offset Act (Byrd Amendment) (Article 22.6 – EC)*, *US – Offset Act (Byrd Amendment) (Article 22.6 – India)*, *US – Offset Act (Byrd Amendment) (Article 22.6 – Japan)*, *US – Offset Act (Byrd Amendment) (Article 22.6 – Korea)*, *US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, para. 6.2.

[929] Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 20.

or other obligations would be suspended, pursuant to Article 22.3.[930]"[931]

661. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, in connection with the first minimum requirement for making a request for the suspension of concessions or other obligations, Ecuador requested suspension under Article 22.2 of the *DSU* in the amount of US$ 450 million. Ecuador's methodology paper and submissions indicated that the direct and indirect harm and macroeconomic repercussions of its entire economy amount to US$ 1 billion. Ecuador argued that, pursuant to Article 21.8 of the *DSU*, the total economic impact of the European Communities banana regime should be considered by the Arbitrators by applying a multiplier when calculating the level of nullification and impairment suffered by Ecuador. The Arbitrators stated:

> "[T]he level of suspension specified in Ecuador's request under Article 22.2 is the relevant one and defines the amount of requested suspension for purposes of this arbitration proceeding. Additional estimates advanced by Ecuador in its methodology document and submissions were not addressed to the DSB and thus cannot form part of the DSB's referral of the matter to arbitration. Belated supplementary requests and arguments concerning additional amounts of alleged nullification or impairment are, in our view, not compatible with the minimum specificity requirements for such a request because they were not included in Ecuador's request for suspension under Article 22.2 of the DSB."[932]

662. With respect to the second minimum requirement for making a request for the suspension of concessions or other obligations, the Arbitrators in *EC – Bananas III (Ecuador) (Article 22.6 – EC)* noted that Ecuador listed the service subsector of "wholesale trade services (CPC 622)" under the *GATS*; "Protection of performers, producers of phonograms (sound recordings) and broadcasting organizations" in Section 1 (Copyright and related rights), Section 3 (Geographical indications) and Section 4 (Industrial designs) under the *TRIPS Agreement*. The Arbitrators determined that these requests by Ecuador under the *GATS* and *TRIPS Agreement* fulfilled the minimum requirement to specify the agreements and sectors with respect to which it requests authorization to suspend concessions or other obligations. However, the Arbitrators held with respect to Ecuador's statement that it "reserve[d] the right" to suspend concessions under the *GATT*:

> "[T]he terms of reference of arbitrators, acting pursuant to Article 22.6, are limited to those sector(s) and/or agreement(s) with respect to which suspension is specifically being requested from the DSB. We thus consider Ecuador's statement that it 'reserves the right' to suspend concessions under the GATT as not compatible with the minimum requirements for requests under Article 22.2. Therefore, we conclude that our terms of reference in this arbitration proceeding include only Ecuador's requests for authorization of suspension of concessions or other obligations with respect to those specific sectors under the GATS and the *TRIPS Agreement* that were unconditionally listed in its request under Article 22.2."[933]

(b) "concessions or other obligations under the covered agreements"

(i) Tariff "concessions"

List of products

663. In *EC – Hormones (US) (Article 22.6 – EC)* and in *EC – Hormones (Canada) (Article 22.6 – EC)*, the United States and Canada had not attached a list of products to their request for suspension of concessions (as the United States had done in *EC – Bananas III (US) (Article 22.6 – EC)*). The European Communities had requested the Arbitrators to first decide on the amount of trade impairment, to then request a specific product list from the United States and Canada and to finally determine whether both were "equivalent". The Arbitrators in both cases declared themselves "unable to follow the EC request" since "[n]o support for this request can be found in the DSU"[934] and thus they "d[id] not have jurisdiction to set a definite list of products that can be subject to suspension".[935] The Panel considered that the "*qualitative* aspects of the . . . suspension touching upon the 'nature' of concessions . . . fall outside the arbitrators' jurisdiction":

> "The authorization given by the DSB under Article 22.6 of the DSU is an authorization 'to suspend [the application to the Member concerned of] concessions or other obligations [under the covered agreements]'.[936] In our view, the limitations linked to this DSB authorisation are those set out in the proposal made by the requesting Member on the basis of which the authorisation is

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[930] (*footnote original*) The more precise a request for suspension is in terms of product coverage, type and degree of suspension, etc. . ., the better. Such precision can only be encouraged in pursuit of the DSU objectives of "providing security and predictability to the multilateral trading system" (Article 3.2) and seeking prompt and positive solutions to disputes (Articles 3.3 and 3.7). It would also be welcome in light of the statement in Article 3.10 that "all Members will engage in [DSU] procedures in good faith in an effort to resolve the dispute".

[931] Decision by the Arbitrators on *EC – Hormones (US) (Article 22.6 – EC)*, para. 16.

[932] Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 24.

[933] Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 29.

[934] Decisions by the Arbitrators on *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 14.

[935] Decision by the Arbitrator on *EC – Hormones (US) (Article 22.6 – EC)*, para. 23.

[936] (*footnote original*) Article 22.6 of the DSU. Bracketed text added is from Article 22.2 of the DSU.

> granted. In the event tariff concessions are to be suspended, only products that appear on the product list attached to the request for suspension can be subject to suspension. This follows from the minimum requirements attached to a request to suspend concessions or other obligations. They are, in our view: (1) the request must set out a specific level of suspension, i.e. a level equivalent to the nullification and impairment caused by the WTO inconsistent measure, pursuant to Article 22.4;[937] and (2) the request must specify the agreement and sector(s) under which concessions or other obligations would be suspended, pursuant to Article 22.3.[938]
>
> Neither can support for the EC request be found in other provisions of Article 22 . . .
>
> In our view, the determination of other aspects related to the suspension remain the prerogative of the Member requesting the suspension. We note, in particular, that the Member in respect of whom concessions or other obligations would be suspended, can object to '*the level* of suspension proposed'[939] and that an arbitrator has to 'determine whether *the level* of such suspension is equivalent to *the level* of nullification or impairment'.[940] Arbitrators are explicitly prohibited from 'examin[ing] *the nature* of the concessions or other obligations to be suspended'[941] (other than under Articles 22.3 and 22.5).
>
> On these grounds, we cannot require that the US further specify the nature of the proposed suspension. As agreed by all parties involved in this dispute, in case a proposal for suspension were to target, for example, only biscuits with a 100 per cent tariff *ad valorem*, it would not be for the arbitrators to decide that, for example, cheese and not biscuits should be targeted; that a 150 per cent tariff should be imposed instead of a 100 per cent tariff; or that tariff increases should be levied on a product weight basis, not *ad valorem*. All of these are *qualitative* aspects of the proposed suspension touching upon the 'nature' of concessions to be withdrawn. They fall outside the arbitrators' jurisdiction."[942]

664. In *US – Offset Act (Byrd Amendment) (Article 22.6)*, the requesting parties (all but Mexico, i.e. Brazil, Canada, Chile, European Communities, India, Japan and Korea) requested authorization to suspend tariff concessions and to be allowed to impose additional import duties on a list of products originating in the United States. Since, in the case of the European Communities' request, the list of products was not "final", the Arbitrator noted that the European Communities "will notify the DSB every year, prior to the entry into force of a new level of suspension of concessions or other obligations [. . .] the list of products that will be subject to this measure."[943, 944]

"Carousel" type suspension

665. In *EC – Hormones (US) (Article 22.6 – EC)*, the European Communities referred to statements made by the United States Trade Representative and submitted that the United States claimed to be free to resort to a "carousel" type of suspension whereby the concessions and other obligations subject to suspension would change every now and then, in particular in terms of product coverage. The European Communities claimed that in so doing the United States would decide not only which concessions or other obligations would be suspended, but also unilaterally would decide whether the level of such suspension of concessions or other obligations was equivalent to the level of nullification and impairment determined by arbitration. Replying to the questions by the Arbitrators, the United States submitted that although nothing in the *DSU* prevented future changes to the list of products subject to suspension, the United States had no intention of making such changes. The Arbitrators decided to "assume that the US – in good faith and based upon this unilateral promise – will not implement the suspension of concessions in a 'carousel' manner" and that "therefore [they] d[id] not need to consider whether such an approach would require an adjustment in the way in which the effect of an authorized suspension is calculated".[945] The Arbitrators further considered:

> "As explained above,[946] we do not have jurisdiction to set a definite list of products that can be subject to suspension. It is for the US to draw up that list. In our view,

[937] (*footnote original*) In respect of the first requirement see further paragraph 21.

[938] (*footnote original*) The more precise a request for suspension is in terms of product coverage, type and degree of suspension, etc. . ., the better. Such precision can only be encouraged in pursuit of the DSU objectives of "providing security and predictability to the multilateral trading system" (Article 3.2) and seeking prompt and positive solutions to disputes (Articles 3.3 and 3.7). It would also be welcome in light of the statement in Article 3.10 that "all Members will engage in [DSU] procedures in good faith in an effort to resolve the dispute".

[939] (*footnote original*) Article 22.6, emphasis added.

[940] (*footnote original*) Article 22.7, emphasis added.

[941] (*footnote original*) Ibid.

[942] Decisions by the Arbitrators on *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, paras. 16–19.

[943] Decision by the Arbitrator on *US – Offset Act (Byrd Amendment) (Article 22.6 – EC)*, para. 5.3.

[944] The authorization to suspend concessions of Brazil, India, Japan and Korea expressly indicated that the additional import duties were to be applied on a"final list of products". The authorization to the European Communities did not mention the term "final", and hence the remark made by the Arbitrator. The European Communities had committed itself, however (as had the four Members mentioned above) not to change the list of products (see para. 1.6 of the decisions concerning these Members). A similar situation concerned Chile's request, who would notify each year the products where the suspension of concessions was to be applied; the decision concerning Chile did not indicate whether or not the Member had committed itself not to change the products. Finally, in Canada's request there is no reference to "final" list, nor is there a remark regarding the possibility of altering the products on a yearly basis.

[945] Decision by the Arbitrator on *EC – Hormones (US) (Article 22.6 – EC)*, para. 22.

[946] (*footnote original*) See paragraphs 18–19.

> it has to do so within the bounds of the product list put before the DSB. We also agree with the EC that once this list is made or once the US has defined a method of suspension, that list or method necessarily needs to cover trade in an amount not exceeding (i.e. equivalent to or less than) the nullification and impairment we find. This matter of equivalence is not one to be determined exclusively by the US.[947] The US has an obligation to ensure equivalence pursuant to Article 22.4 of the DSU.[948] In its reply to our questions, the US submitted that it 'will scrupulously comply with the requirement that the level of suspension of concessions not exceed the level of nullification or impairment to be found by the Arbitrator'.[949]"[950]

(ii) "Obligations"

Cases where the suspension of obligations was requested

666. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the Arbitrators indicated that the complainant could obtain authorization from the DSB to suspend unspecified obligations "under the TRIPS Agreement" with respect to certain sectors.[951]

667. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators authorized both the suspension of tariff concessions and the suspension of "obligations" – including obligations under the *Agreement on Textiles and Clothing* and the *Agreement on Import Licensing Procedures*.[952]

668. In *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, the Arbitrator accepted the suspension by Brazil, *inter alia*, of the application of obligations under the *Agreement on Import Licensing Procedures* relative to licensing requirements on imports from Canada.[953]

669. In *US – 1916 Act (Article 22.6 – US)*, the Arbitrators accepted the suspension by the European Communities of "obligations" under the *GATT 1994* and the *Anti-Dumping Agreement* in order to adopt an equivalent regulation to the 1916 Act against imports from the United States.

670. In *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, Canada requested, and was granted, the authorization to: (i) impose additional import duties above bound custom duties on products originating in the United States, and (ii) suspend the application of the obligations under Article VI of *GATT 1994*, Articles 3, 5, 7, 8, 9, 10, 11 and 12 of the *Anti-Dumping Agreement* and Articles 11, 12, 15, 17, 18, 19, 20, 21 and 22 of the *SCM Agreement* to determine that the effect of dumping or subsidization of products from the United States is to cause or threaten material injury to an established domestic injury, or is to retard materially the establishment of a domestic industry.[954]

671. In *US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, Mexico requested authorization to suspend the application to the United States "of obligations in the goods sector".[955] The Arbitrator granted Mexico the possibility to suspend "concessions or other obligation on products originating in the United States".[956]

Whether the "obligations" to be suspended need to be specified

672. In *US – 1916 Act (EC) (Article 22.6 – US)*, the European Communities had requested to suspend "obligations" under the *GATT 1994* and the *Anti-Dumping Agreement* in order to adopt an equivalent regulation to the 1916 Act against imports from the United States, instead of tariff concessions. The Arbitrators confirmed that the decision by the European Communities to seek the suspension of "obligations" rather than tariff "concessions" was not subject to their review.[957] The Arbitrators however examined the question whether the European Communities was nevertheless obligated under Article 22 of the *DSU* to specify precisely which "obligations" in those two Agreements it sought to suspend. In doing so, the Arbitrator reviewed previous arbitrations and concluded that a party seeking to suspend obligations is not required, under Article 22 of the *DSU*, to indicate precisely which "obligations" it seeks authorization to suspend:

> "In our view, a party seeking to suspend obligations is not required, under Article 22 of the DSU, to indicate precisely which 'obligations' it seeks authorization to suspend. Article 22.2 of the DSU states simply that a party may request authorization from the DSB 'to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.' There is no requirement that the requesting party identify exactly which obligations it wishes to suspend.

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947 (*footnote original*) See paragraphs 20–21.
948 (*footnote original*) See Section IV below.
949 (*footnote original*) US answers to arbitrators' Questions 1, 2, 4, 9, 10 and 11, *Introduction*, p. 1.
950 Decision by the Arbitrator on *EC – Hormones (US) (Article 22.6 – EC)*, para. 23.
951 Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 173.
952 Decision by the Arbitrator on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 4.1.
953 Decision by the Arbitrator on *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 4.1.
954 Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, para. 5.2.
955 Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, para. 1.4.
956 Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, para. 5.2.
957 Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, para. 3.7.

> Moreover, we note that in previous cases, neither the arbitrators nor the DSB have required requesting parties to enumerate which concessions or other obligations such Members were seeking to suspend. For example, in *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, the arbitrator accepted, and the DSB authorized, the suspension by Brazil, *inter alia*, of 'the application of obligations under the Agreement on Import Licensing Procedures relative to licensing requirements on imports from Canada.' The Brazilian request did not indicate which 'obligations' under the Agreement on Import Licensing it wished to suspend, nor did the arbitrators require such specificity.[958] In *Brazil – Aircraft (Article 22.6 – Brazil)*, the arbitrators similarly did not object to the suspension by Canada of obligations under 'the Agreement on Textiles and Clothing and the Agreement on Import Licensing Procedures.'[959] In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the arbitrators indicated that the complainant could obtain authorization from the DSB to suspend unspecified obligations 'under the TRIPS Agreement' with respect to certain sectors.[960]
>
> Moreover, even for requests seeking the suspension of tariff concessions 'and related obligations under the GATT 1994' the arbitrators did not require specificity as to what these 'related obligations' were.[961]
>
> Thus, past practice indicates that arbitrators have accepted requests to suspend unspecified 'obligations'. The DSB has granted authorization to suspend obligations, while allowing the requesting Member to decide which particular obligations it would select to implement the authorization. We would emphasize, however, that whatever discretion is granted to such a Member is subject to the requirement that the level of suspension of obligations cannot exceed the level of nullification or impairment. We return to this point below.
>
> Therefore, we do not consider that the European Communities' request to 'suspend the application of the obligations under GATT 1994 and the Anti-Dumping Agreement in order to adopt an equivalent regulation to the 1916 Act against imports from the United States' can be considered as deficient under Article 22 of the DSU for failing to specify which 'obligations' it seeks to suspend."[962]

673. In *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, the Arbitrator found that Canada's request for suspension of obligations under a number of articles of the *GATT 1994*, the *Anti-Dumping Agreement*, and the *SCM Agreement*, "to determine that the effect of dumping or subsidization of products from the United states is to cause or threaten material injury to an established domestic industry or is to retard the establishment of a domestic industry",[963] "while it could have certainly been more informative, is acceptable in terms of the minimum specificity requirement applicable to Article 22.2 requests". In that respect, the Arbitrator "consider[ed] that the United States did not demonstrate that either its ability to reach an informed decision to request arbitration, or its ability to defend itself in these proceedings had been prejudiced as a result of the way Canada's request was formulated".[964]

4. Article 22.3

(a) Scope of review by arbitrators under Article 22.3

674. In *EC – Bananas III (US) (Article 22.6 – EC)*, the United States argued that the Arbitrators could not examine the principles and procedures set forth in Article 22.3 in that particular arbitration proceeding because the United States had requested authorization to suspend concessions only pursuant to subparagraph (a) of Article 22.3 of the *DSU*. In the view of the United States, the Arbitrators could only do so if the United States had requested authorization to suspend concessions pursuant to subparagraphs (b) or (c) of Article 22.3 of the *DSU*. The Arbitrators disagreed:

> "We believe that the basic rationale of these disciplines is to ensure that the suspension of concessions or other obligations across sectors or across agreements (beyond those sectors or agreements under which a panel or the Appellate Body has found violations) remains the exception and does not become the rule. In our view, if Article 22.3 of the DSU is to be given full effect, the authority of Arbitrators to review upon request whether the principles and procedures of subparagraphs (b) or (c) of that Article have been followed must imply the Arbitrators' competence to examine whether a request made under subparagraph (a) should have been made – in full or in part – under subparagraphs (b) or (c). If the Arbitrators were deprived of such an implied authority, the principles and procedures of Article 22.3 of the DSU could easily be circumvented. If there were no review whatsoever with respect to requests for authorization to suspend concessions made under subparagraph (a), Members might be tempted to always invoke that sub-

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[958] (*footnote original*) *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paragraph 4.1.

[959] (*footnote original*) *Brazil – Aircraft (Article 22.6 – Brazil)*, paragraph 4.1. Although both *Canada – Aircraft Credits and Guarantees* and *Brazil – Aircraft* primarily involved requests for "appropriate countermeasures" under the SCM Agreement, in both disputes the requests for countermeasures also cited DSU Article 22.2.

[960] (*footnote original*) *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paragraph 173.

[961] (*footnote original*) *EC – Bananas III (US) (Article 22.6 – EC)*, paragraph 8.1; *EC – Hormones (US) (Article 22.6 – EC)*, paragraph 84; *EC – Hormones (Canada) (Article 22.6 – EC)*, paragraph 73.

[962] Decision by the Arbitrators in *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 3.10–3.14.

[963] Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, para. 1.7.

[964] Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, para. 5.2. See also para. 736 below.

paragraph in order to escape multilateral surveillance of cross-sectoral suspension of concessions or other obligations, and the disciplines of the other subparagraphs of Article 22.3 of the DSU might fall into disuse altogether."[965]

(b) "the complaining party shall apply the following principles and procedures"

675. With respect to the principles and procedures to be applied under Article 22.3, see paragraphs 679–680 below.

5. Article 22.3(a)

(a) "general principle . . . complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s)"

(i) General

676. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the Arbitrators examined Ecuador's request for suspension of concessions or other obligations in the area of the *GATS* and the *TRIPS Agreement*. The Arbitrators stated:

"[W]e further recall the general principle set forth in Article 22.3(a) that suspension of concessions or other obligations should be sought first with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment. Given this principle, it remains the preferred option under Article 22.3 for Ecuador to request suspension of concessions under the GATT as one of the same agreements where a violation was found, if it considers that such suspension could be applied in a practicable and effective manner."[966]

(ii) Parallelism between violations and requests for suspension of concessions

677. In *EC – Bananas III (US) (Article 22.6 – EC)*, the European Communities alleged that in cases where findings of violation or nullification have been made in more than one sector, or under more than one Agreement, requests for the suspension of concessions had to be made commensurate with the number or the degree of violation. The Arbitrators disagreed:

"We recall that subparagraph (a) of Article 22.3 of the DSU refers to the suspension of 'concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment.' We note that the words 'same sector(s)' include both the singular and the plural. The concept of 'sector(s)' is defined in subparagraph (f)(i) with respect to goods as *all goods*, and in subparagraph (f)(ii) with respect to services as a *principal sector* identified in the 'Services Sectoral Classification List'. We, therefore, conclude that the United States has the right to request the suspension of concessions in either of these two sectors, or in both, up to the overall level of nullification or impairment suffered, if the inconsistencies with the EC's obligations under the GATT and the GATS found in the original dispute have not been removed fully in the EC's revision of its regime. In this case the 'same sector(s)' would be 'all goods' and the sector of 'distribution services', respectively. Our conclusion, based on the ordinary meaning of Article 22.3(a), is also consistent with the fact that the findings of violations under the GATT and the GATS in the original dispute were closely related and all concerned a single import regime in respect of one product, i.e. bananas."[967]

(b) Scope of review of arbitrators under Article 22.5(a)

678. As regards the scope of review of the arbitrators when the party has requested authorization to suspend concessions only pursuant to paragraph (a) of Article 22.3, see paragraph 674 above.

6. Article 22.3(b) and (c)

(a) "if that party considers that it is not practical or effective"

679. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the European Communities argued that Ecuador had not demonstrated why it was not practicable or effective for it to suspend concessions under the *GATT* or commitments under the *GATS* in service sectors other than distribution services. Ecuador claimed that "it did not request suspension entirely under the GATT and/or in service sectors under the GATS other than distribution services because it considered that it would not be practicable or effective in the meaning of Article 22.3(b) and (c) of the DSU, that circumstances in Ecuador's bananas trade sector and the economy on the whole are serious enough to justify suspension under another agreement, and that the parameters in Article 22.3(d)(i)–(ii) corroborate this conclusion".[968] The Arbitrators held that the term "practicable" connoted "availability" and "suitability"; with respect to the term "effective", the Arbitrators held that "the thrust of this criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time".

[965] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 3.7.
[966] Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 33.
[967] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 3.10.
[968] Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 68.

"[A]n examination of the 'practicability' of an alternative suspension concerns the question whether such an alternative is available for application in practice as well as suited for being used in a particular case.

To give an obvious example, suspension of commitments in service sub-sectors or in respect of modes of service supply which a particular complaining party has not bound in its GATS Schedule is not available for application in practice and thus cannot be considered as practicable. But also other case-specific and country-specific situations may exist where suspension of concessions or other obligations in a particular trade sector or area of WTO law may not be 'practicable'.

In contrast, the term 'effective' connotes 'powerful in effect', 'making a strong impression', 'having an effect or result'. Therefore, the thrust of this criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time.

One may ask whether this objective may ever be achieved in a situation where a great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party which has failed to bring WTO-inconsistent measures into compliance with WTO law. In such a case, and in situations where the complaining party is highly dependent on imports from the other party, it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension than for the other party. In these circumstances, a consideration by the complaining party in which sector or under which agreement suspension may be expected to be least harmful to itself would seem sufficient for us to find a consideration by the complaining party of the effectiveness criterion to be consistent with the requirement to follow the principles and procedures set forth in Article 22.3.

. . .

Our interpretation of the 'practicability' and 'effectiveness' criteria is consistent with the object and purpose of Article 22 which is to induce compliance. If a complaining party seeking the DSB's authorization to suspend certain concessions or certain other obligations were required to select the concessions or other obligations to be suspended in sectors or under agreements where such suspension would be either not available in practice or would not be powerful in effect, the objective of inducing compliance could not be accomplished and the enforcement mechanism of the WTO dispute settlement system could not function properly."[969]

680. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, Ecuador argued that it was the prerogative of the Member suffering nullification or impairment to decide whether it is "practicable or effective" to choose the same sector, another sector or another agreement for the purposes of suspending concessions or other obligations. The Arbitrators held that the term "consider" in subparagraphs (b) and (c) granted a certain margin of appreciation, but that a decision by a Member was nevertheless subject to review by the Arbitrators regarding whether the Member had considered "the necessary facts objectively":

"It follows from the choice of the words 'if that party *considers*' in subparagraphs (b) and (c) that these subparagraphs leave a certain margin of appreciation to the complaining party concerned in arriving at its conclusions in respect of an evaluation of certain factual elements, i.e. of the practicability and effectiveness of suspension within the same sector or under the same agreement and of the seriousness of circumstances. However, it equally follows from the choice of the words 'in considering what concessions or other obligations to suspend, the complaining party *shall* apply the following principles and procedures' in the chapeau of Article 22.3 that such margin of appreciation by the complaining party concerned is subject to review by the Arbitrators. In our view, the margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question has considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same agreements, or only under another agreement provided that the circumstances were serious enough."[970]

(b) Relationship between Article 22.3(a) and 22.3(c)

681. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the Arbitrators noted that Ecuador argued that, in addition to suspending concessions or other obligations under the *GATS* and *TRIPS Agreement*, it "reserves the right to suspend tariff concessions or other tariff obligations granted in the framework of the GATT 1994 in the event that these may be applied in a practicable and effective manner".[971] With respect to the criterion of specificity relating to this request, see paragraph 662 above. The Arbitrators noted an "inconsistency" between making simultaneously a request under Articles 22.3(a) and Article 22.3(c):

"Even if Ecuador's 'reservation' of a request for suspension under the GATT were permissible, there would be a

[969] Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 70–73 and 76.
[970] Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 52.
[971] Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 27.

certain degree of inconsistency between making a request under Article 22.3(c) – implying that suspension is not practicable or effective within the same sector under the same agreement or under another agreement – and simultaneously making a request under Article 22.3(a) – which implies that suspension is practicable and effective under the same sector. In this respect, we note that, although Ecuador did not in fact make both requests at the very same point in time, if it were likely that the suspension of concessions under the GATT could be applied in a practicable and effective manner, doubt would be cast on Ecuador's assertion that at present only suspension of obligations under other sectors and/or other agreements within the meaning of Article 22.3(b-c) is practicable or effective in the case before us.

. . . we fail to see how it could be possible to suspend concessions or other obligations for a particular amount of nullification or impairment under the same sector as that where a violation was found (which implies that this *is* practicable and effective) and simultaneously for the same amount in another sector or under a different agreement (which implies that suspension under the same sector[972] – or under a different sector under the same agreement – is *not* practicable or effective). But we do not exclude the possibility that, once a certain amount of nullification or impairment has been determined by the Arbitrators, suspension may be practicable and effective under the same sector(s) where a violation has been found only for part of that amount and that for the rest of this amount of suspension is practicable or effective only in (an)other sector(s) under the same agreement or even only under another agreement."[973]

7. Article 22.4

(a) "*The level of the suspension of concessions or other obligations . . . shall be equivalent to the level of the nullification or impairment*"

682. In *US – Offset Act (Byrd Amendment) (Article 22.6)*, the Arbitrator examined the possibility of setting for the "level of suspension", rather than setting a fixed value, an economic formula that, when completed with the values of annual disbursements made by the respondent under the WTO-inconsistent measure, would give the parties the level of suspension authorized for that year. The Arbitrator concluded that nothing in Article 22 of the *DSU* prevented the adoption of a variable level of suspension if the circumstances of the case required it. In particular, the Arbitrator considered:

"While we note that Article 22.4 refers to 'the level' (singular) of nullification or impairment and to 'the level' (singular) of suspension of concessions or other obligations, we are not persuaded that these terms impose an obligation to identify a single and enduring level of nullification or impairment. The requirement of Article 22.4 is simply that the two levels be equivalent. As long as the two levels are equivalent, we do not see any reason why these levels may not be adjusted from time to time, provided such adjustments are justified and unpredictability is not increased as a result. In fact, we see no limitation in the DSU to the possibility of providing for a variable level of suspension if the level of nullification or impairment also varies.

Most previous arbitrators have established one single level of nullification or impairment at the level that existed at the end of the reasonable period of time granted to the responding party to bring its legislation into conformity.[974] We do not disagree that this approach is, in the large majority of cases, the most appropriate. However, we do not read anything in Article 22 of the DSU that would preclude us from following a different path if the circumstances of this case clearly required it."[975]

683. In adopting such a decision, the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6)* gave particular relevance to the circumstances of that case, by considering that, under a variable level of suspension system, the respondent party "would control the levers to make the actual level of suspension of concessions or other obligations go down". The Arbitrator remarked that while "in other arbitrations where the level of nullification or impairment was set once and for all, the responding party could not influence the level of countermeasures applied to its trade, unless the requesting party agreed to modify it, [i]n this case, the level of suspension of concessions will automatically depend on the amount of disbursements made under the [WTO-inconsistent measure] in a given year. If this amount decreases, so will the level of suspension of concessions or other obligations that the Requesting Parties will be entitled to impose. If no disbursements are made, the level of suspension will have to be 'zero'."[976]

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[972] (*footnote original*) We note that within a sector, suspension may be possible with respect to certain types of products, while it is not practicable or effective with respect to other categories of products.

[973] Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 30–31.

[974] (*footnote original*) See, e.g., *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 37; *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.63–3.65; *US – FSC (Article 22.6 – US)*, paras. 2.12–2.15; *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paras. 3.67–3.73.

[975] Decision by the Arbitrators in *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil), US – Offset Act (Byrd Amendment) (Article 22.6 – Canada), US – Offset Act (Byrd Amendment) (Article 22.6 – Chile), US – Offset Act (Byrd Amendment) (Article 22.6 – EC), US – Offset Act (Byrd Amendment) (Article 22.6 – India), US – Offset Act (Byrd Amendment) (Article 22.6 – Japan), US – Offset Act (Byrd Amendment) (Article 22.6 – Korea), US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, paras. 4.20–4.21.

[976] Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil), US – Offset Act (Byrd Amendment) (Article 22.6 – Canada), US – Offset Act (Byrd Amendment) (Article 22.6 – Chile), US – Offset Act (Byrd Amendment) (Article 22.6 – EC), US – Offset Act (Byrd Amendment) (Article 22.6 – India), US – Offset Act (Byrd Amendment) (Article 22.6 – Japan), US – Offset Act (Byrd Amendment) (Article 22.6 – Korea), US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, para. 4.24.

684. As regards the standard of "equivalence" and its assessment by the Arbitrators, see Section XXII.B.9(b)(iii) below.

685. With respect to the relationship between the "equivalence" standard and the "appropriate countermeasures" standard in arbitrations pursuant to Article 4.10 of the *SCM Agreement*, see Section XXII.B.9(c) below.

8. Article 22.6

(a) Specificity in the request for a referral to arbitration under Article 22.6

686. In *EC – Hormones (US) (Article 22.6 – EC)*, the Arbitrators considered that it was better to be as precise as possible in the request for suspension of concessions:

> "The more precise a request for suspension is in terms of product coverage, type and degree of suspension, etc. . . ., the better. Such precision can only be encouraged in pursuit of the DSU objectives of 'providing security and predictability to the multilateral trading system' (Article 3.2) and seeking prompt and positive solutions to disputes (Articles 3.3 and 3.7). It would also be welcome in light of the statement in Article 3.10 that 'all Members will engage in [DSU] procedures in good faith in an effort to resolve the dispute'."[977]

687. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the Arbitrators held that the requests for a referral to arbitration under Article 22.6 serve similar due process objectives to requests under Article 6.2 and thus concluded that the specificity standards are relevant for Article 22 requests. See paragraph 659 above.

(b) "by the original panel, if members are available, or by an arbitrator appointed by the Director-General"

688. As of 31 December 2004, all arbitrations under Article 22.6 of the *DSU* have been referred to the original panel with the exception of *US – 1916 Act (EC) (Article 22.6 – US)*. In this case, the Chairman of the original panel was no longer available. However, the other two arbitrators were members of the original Panel.[978]

(c) Burden of proof

(i) General

689. In *EC – Hormones (US) (Article 22.6 – EC)* and in *EC – Hormones (Canada) (Article 22.6 – EC)*, the Arbitrators addressed the issue of the burden of proof and concluded that, as the European Communities was challenging the conformity of the United States' proposal with Article 22.4, it was for the European Communities to prove that the United States' proposal was inconsistent with Article 22.4:

> "WTO Members, as sovereign entities, can be *presumed* to act in conformity with their WTO obligations. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency. The act at issue here is the US proposal to suspend concessions. The WTO rule in question is Article 22.4 prescribing that the level of suspension be equivalent to the level of nullification and impairment. The EC challenges the conformity of the US proposal with the said WTO rule. It is thus for the EC to prove that the US proposal is inconsistent with Article 22.4. Following well-established WTO jurisprudence, this means that it is for the EC to submit arguments and evidence sufficient to establish a *prima facie* case or presumption that the level of suspension proposed by the US is *not* equivalent to the level of nullification and impairment caused by the EC hormone ban. Once the EC has done so, however, it is for the US to submit arguments and evidence sufficient to rebut that presumption. Should all arguments and evidence remain in equipoise, the EC, as the party bearing the original burden of proof, would lose.
>
> The same rules apply where the existence of a specific *fact* is alleged; in this case, for example, where a party relies on a decrease of beef consumption in the EC or the use of edible beef offal as pet food. It is for the party alleging the fact to prove its existence.
>
> The duty that rests on *all* parties to produce evidence and to collaborate in presenting evidence to the arbitrators – an issue to be distinguished from the question of who bears the burden of proof – is crucial in Article 22 arbitration proceedings. The EC is required to submit evidence showing that the proposal is *not* equivalent. However, at the same time and as soon as it can, the US is required to come forward with evidence explaining how it arrived at its proposal and showing why its proposal *is* equivalent to the trade impairment it has suffered. Some of the evidence – such as data on trade with third countries, export capabilities and affected exporters – may, indeed, be in the sole possession of the US, being the party that suffered the trade impairment."[979]

690. In *US – 1916 Act (Article 22.6 – US)*, the Arbitrators, after referring to the above quote from *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, confirmed their agreement that that quote was an accurate presentation of the

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[977] *EC – Hormones (US) (Article 22.6 – EC)*, footnote 16. We note that the arbitrators in *EC – Bananas III (Ecuador) (Article 22.6 – EC)* also quoted this statement. *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, footnote 12.

[978] WT/DS136/17.

[979] Decisions by the Arbitrators on *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, paras. 9–11. See also Decision by the Arbitrators, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 37–38; Decision by the Arbitrators, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 2.8 and footnote 12; Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, paras. 2.10 and footnote 18; Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, para. 3.2 and 3.5.

burden of proof applicable in Article 22.6 proceedings. The Arbitrators clarified that "the fact that this case relates to the suspension of 'obligations', as opposed to the suspension of tariff concessions, in no way alters the applicable burden of proof".[980]

(ii) Burden of proof in subsidy arbitrations under Article 4.11 of the SCM Agreement

691. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators considered that the general principles of the burden of proof also apply to arbitrations under Article 4.11 of the *SCM Agreement*:

> "In application of the well-established WTO practice on the burden of proof in dispute resolution, it is for the Member claiming that another has acted inconsistently with the WTO rules to prove that inconsistency.[981]. . . . Brazil challenges the conformity of this proposal [from Canada] with Article 22 of the DSU and Article 4.10 of the SCM Agreement. It is therefore up to Brazil to submit evidence sufficient to establish a *prima facie* case or 'presumption' that the countermeasures that Canada proposes to take are not 'appropriate'. Once Brazil has done so, it is for Canada to submit evidence sufficient to rebut that 'presumption'. Should the evidence remain in equipoise on a particular claim, the Arbitrators would conclude that the claim has not been established. Should all evidence remain in equipoise, Brazil, as the party bearing the original burden of proof, would lose the case."[982]

692. In *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, the Arbitrator summarized the burden of proof rules applicable in the case of arbitration proceedings under Article 4.11 of the *SCM Agreement* as follows:

> "We recall that the general principles applicable to burden of proof, as stated by the Appellate Body, require that a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim.[983] We find these principles to be also of relevance to arbitration proceedings under Article 4.11 of the SCM Agreement.[984] In this procedure, we thus agree that it is for Canada, which has challenged the consistency of Brazil's proposed level of countermeasures under Articles 4.10 of the SCM Agreement, to bear the burden of proving that the proposed amount is not consistent with that provision. It is therefore up to Canada to submit evidence sufficient to establish a prima facie case or 'presumption' that the countermeasures that Brazil proposes taking are not 'appropriate'. Once Canada has done so, it is for Brazil to submit evidence sufficient to rebut that 'presumption'. Should the evidence remain in equipoise on a particular claim, the Arbitrator would conclude that the claim has not been established.
>
> We note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.[985] In this respect, therefore, it is also for Brazil to provide evidence for the facts which it asserts.
>
> Finally, both parties have claimed that, in respect of certain issues, the other party is in sole possession of the information necessary to establish the appropriateness of the proposed level of suspension of concessions or other obligations. In this regard, we recall that both parties generally have a duty to cooperate in these arbitral proceedings in order to assist us in fulfilling our mandate, through the provision of relevant information.[986] This is why, even though Canada bears the original burden of proof, we also requested Brazil to submit a 'methodology paper' describing how it arrived at the level of countermeasures it proposes.[987] Later, we asked it to come forward with evidence supporting various factual assertions made in its 'methodology paper'."[988]

(d) Preliminary rulings

693. In *US – Offset Act (Byrd Amendment) (Article 22.6)*, the respondent party filed a request for a preliminary ruling. The Arbitrators decided not to issue a preliminary ruling because some of the issues they were asked to rule upon were intimately linked to questions central to the substance of the arbitration. The Arbitrators also considered that nothing in Article 22 of the *DSU* foresaw the possibility of issuing preliminary rulings in arbitration proceedings. The Arbitrators remarked, however, that this fact did not preclude them from ruling on procedural issues in their Decision. In particular, the Arbitrators stated that:

> "[W]e note that neither paragraph 6 nor paragraph 7 of Article 22 of the DSU provide for the possibility of a preliminary ruling and there is, strictly speaking, no practice

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[980] Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, para. 3.3.

[981] (*footnote original*) See also how this issue is addressed in the Decisions by the Arbitrators in *EC – Hormones, Op. Cit.*, paras. 8 to 11.

[982] Decision by the Arbitrator on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 2.8. See also Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 2.10.

[983] (*footnote original*) Report of the Appellate Body, *US – Wool Shirts and Blouses* DSR 1997:I, 323, at 337.

[984] (*footnote original*) For previous application of these rules in arbitration proceedings under Article 22.6 of the DSU, see Decision by the Arbitrators, *EC – Hormones (Canada) (Article 22.6 – EC)*, paras. 8 ff. For an application in the context of Article 4.11 of the SCM Agreement, see Decision by the Arbitrators, *Brazil – Aircraft*, (*Article 22.6 – Brazil)*, paras. 2.8 ff; Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, paras. 2.8–2.11.

[985] (*footnote original*) Report of the Appellate Body, *US – Wool Shirts and Blouses*, p. 335.

[986] (*footnote original*) Report of the Appellate Body, *Canada – Aircraft*, para. 190.

[987] (*footnote original*) This approach is similar to those followed in all other arbitrations under Article 22.6 of the DSU and under Article 4.11 of the SCM Agreement.

[988] Decision by the Arbitrator in *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paras. 2.6–2.8.

of a preliminary ruling at the request of a party in past arbitrations."[989]

694. As regards preliminary rulings in Panel and Appellate Body proceedings, see Section XXXVI.C below.

(e) Third-party rights

695. In *EC – Bananas III (US) (Article 22.6 – EC)*, Ecuador requested the Arbitrators to accord it third-party status in light of its special interest in the proceedings. The Arbitrators, however, in light of the absence of provisions for third-party status under Article 22 of the *DSU* and given that they did not believe that Ecuador's rights would be affected by this proceeding, declined Ecuador's request.[990]

696. In *EC – Hormones (US) (Article 22.6 – EC)* and in *EC – Hormones (Canada) (Article 22.6 – EC)*, the United States and Canada respectively had requested the Arbitrators to accord them third-party rights in each other's arbitration procedures. On this occasion, the Arbitrators, recalling their discretion to decide on procedural matters under Article 12.1 of the *DSU* and the absence of a reference to third-party participation in Article 22, did grant the authorization on the grounds that the rights of the United States and Canada might be affected in both arbitration proceedings:

"The US and Canada are allowed to attend both arbitration hearings, to make a statement at the end of each hearing and to receive a copy of the written submissions made in both proceedings.

The above ruling was made on the following grounds.

- DSU provisions on panel proceedings, referred to by analogy in the arbitrators' working procedures, give the arbitrators discretion to decide on procedural matters not regulated in the DSU (Article 12.1 of the DSU) in accordance with due process.[991] The DSU does not address the issue of third-party participation in Article 22 arbitration proceedings.

- US and Canadian rights may be affected in both arbitration proceedings:

  First, the estimates for high quality beef ('HQB') exports, foregone because of the hormone ban, are to be based on a tariff quota that allegedly needs to be shared between Canada and the US. A determination in one proceeding may thus be decisive for the determination in the other.

  Second, several methodologies are proposed to calculate lost export opportunities. Given the fact that the product scope (HQB and edible bovine offal ('EBO')) and relevant trade barriers (hormone ban and HQB tariff quota) are the same in both proceedings, both arbitration panels (composed of the same three individuals) may consider it necessary to adopt the same or very similar methodologies. This is all the more necessary because the arbitrators are called upon to arrive at a specific determination on the amount of nullification and impairment caused by the ban.[992] They are therefore not limited, as in most panel proceedings, to ruling only on the consistency of the amounts proposed by the US and Canada with DSU provisions. Due process thus requires that all three parties receive the opportunity to comment on the methodologies proposed by each of the parties.

- In contrast, the EC has not shown how third-party participation would prejudice its rights. No specific arguments were made demonstrating that third party participation would substantially impair the EC's interests or due process rights."[993]

697. In *Brazil – Aircraft (Article 22.6 – Brazil)*, Australia requested that it be granted the authorization to participate as a third party in the Article 22.6 arbitration in light of its participation in that capacity in the Article 21.5 Panel. The Arbitrator declined this request and noted the absence of a specific provision, in Article 22, on third-party rights:

"[W]e informed Australia that we declined its request. Our decision took into account the views expressed by the parties, the fact that there is no provision in the DSU as regards third party status under Article 22, and the fact that we do not believe that Australia's rights would be affected by this proceeding.

We note in this respect that third party rights were granted in the Article 22.6 arbitrations concerning *European Communities – Measures Concerning Meat and Meat Products (Hormones)* and rejected in the *EC – Bananas (1999)* Article 22.6 arbitration. We do not consider that Australia in this case is in the same situation as Canada and the United States in the *EC – Hormones*

[989] Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil), US – Offset Act (Byrd Amendment) (Article 22.6 – Canada), US – Offset Act (Byrd Amendment) (Article 22.6 – Chile), US – Offset Act (Byrd Amendment) (Article 22.6 – EC), US – Offset Act (Byrd Amendment) (Article 22.6 – India), US – Offset Act (Byrd Amendment) (Article 22.6 – Japan), US – Offset Act (Byrd Amendment) (Article 22.6 – Korea), US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, para. 2.4.

[990] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 2.8.

[991] (*footnote original*) In this respect see footnote 138 in the Appellate Body Report on *EC – Measures Concerning Meat and Meat Products (Hormones)*, adopted on 13 February 1998, WT/DS26/15, WT/DS48/13: "[T]he DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling."

[992] (*footnote original*) See paragraph 12.

[993] Decisions by the Arbitrators on *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 7.

arbitrations, nor even in the same situation as Ecuador in the *EC – Bananas (1999)* arbitration. Indeed, Australia never initiated dispute settlement proceedings against Brazil with respect to the export financing programme at issue. Moreover, Australia did not draw the attention of the Arbitrators to any benefits accruing to it or any rights under the WTO Agreement which might be affected by their decision.[994]"[995]

(f) Working procedures in Article 22.6 arbitrations

699. In this respect, see Section XXXIII below.

(g) List of Article 22.6 arbitration proceedings

	WT/DS No.	Case Name	Date award circulated	DSB authorization
1	DS26	*EC – Hormones (US) (Article 22.6 – EC)*	12 July 1999	26 July 1999
2	DS27	*EC – Bananas III (US) (Article 22.6 – EC)*	9 April 1999	19 April 1999
3	DS27	*EC – Bananas III (Ecuador) (Article 22.6 – EC)*	24 March 2000	18 May 2000
4	DS46	*Brazil – Aircraft (Article 22.6 – Brazil)*	28 August 2000	12 December 2000
5	DS48	*EC – Hormones (Canada) (Article 22.6 – EC)*	12 July 1999	26 July 1999
6	DS108	*US – FSC (Article 22.6 – US)*	30 August 2002	7 May 2003
7	DS136	*US – 1916 Act (Article 22.6 – EC)*	24 February 2004	–
8	DS217	*US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)*	31 August 2004	16 November 2004
9	DS217	*US – Offset Act (Byrd Amendment) (Chile) (Article 22.6 – US)*	31 August 2004	17 December 2004
10	DS217	*US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*	31 August 2004	16 November 2004
11	DS217	*US – Offset Act (Byrd Amendment) (India) (Article 22.6 – US)*	31 August 2004	16 November 2004
12	DS217	*US – Offset Act (Byrd Amendment) (Japan) (Article 22.6 – US)*	31 August 2004	16 November 2004
13	DS217	*US – Offset Act (Byrd Amendment) (Korea) (Article 22.6 – US)*	31 August 2004	16 November 2004
14	DS222	*Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*	17 February 2003	18 March 2003
15	DS234	*US – Offset Act (Byrd Amendment) (Canada) (Article 22.6 – US)*	31 August 2004	16 November 2004
16	DS234	*US – Offset Act (Byrd Amendment) (Mexico) (Article 22.6 – US)*	31 August 2004	16 November 2004

9. Article 22.7

(a) The mandate of the Arbitrators

701. In *EC – Bananas III (US) (Article 22.6 – EC)*, the Arbitrators examined the extent of the arbitrators' mandate to review the choice made by a complaining Member pursuant to Article 22.3 (see paragraph 674 above). In order to do so, they looked at the mandate of arbitrators in paragraphs 6 and 7 of Article 22 and found that there was no contradiction:

> "Article 22.7 of the DSU empowers the Arbitrators to examine claims concerning the principles and procedures set forth in Article 22.3 of the DSU in its entirety, whereas Article 22.6 of the DSU seems to limit the competence of Arbitrators to such examination to cases where a request for authorization to suspend concessions is made under subparagraphs (b) or (c) of Article 22.3 of the DSU. However, we believe that there is no contradiction between paragraphs 6 and 7 of Article 22 of the DSU, and that these provisions can be read together in a harmonious way.
>
> If a panel or Appellate Body report contains findings of WTO-inconsistencies only with respect to one and the same sector in the meaning of Article 22.3(f) of the DSU, there is little need for a multilateral review of the choice with respect to goods or services or intellectual property rights, as the case may be, which a Member has selected for the suspension of concessions subject to the DSB's authorization. However, if a Member decides to seek authorization to suspend concessions under another sector, or under another agreement, outside of the scope of the sectors or agreements to which a Panel's findings relate, paragraphs (b)–(d) of Article 22.3 of the DSU provide for a certain degree of discipline such as the requirement to state reasons why that Member considered the suspension of concessions within the same sector(s) as that where violations of WTO law were found as not practicable or effective."[996]

702. The Arbitrators in *EC – Bananas III (Ecuador) (Article 22.6 – EC)* held with respect to their authority under Article 22.7:

[994] (*footnote original*) Our decision may have been different if Australia had demonstrated that the countermeasures which Canada plans to adopt may affect Australia's rights or benefits under the WTO Agreement.

[995] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 2.5–2.6.

[996] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 3.5–3.6.

"[T]he jurisdiction of the Arbitrators includes the power to determine (i) whether the level of suspension of concessions or other obligations requested is *equivalent* to the level of nullification or impairment; and (ii) whether the principles or procedures concerning the suspension of concessions or other obligations across sectors and/or agreements pursuant to Article 22.3 of the DSU have been followed."[997]

703. In *Brazil – Aircraft (Article 22.6 – Brazil)*, Brazil had claimed that, as a result of the termination of the bilateral agreement (see paragraph 643 above), the Arbitrators should, pursuant to Article 22.7 of the *DSU*, determine that the proposed countermeasures are not allowed under the *SCM Agreement* on the grounds that the time within which they may be authorized has expired. The Arbitrators disregarded Brazil's claim as follows:

"We note that Article 60 of the Vienna Convention provides for the 'termination' of a treaty by one party in response to a 'material breach' by the other party. Article 70 of the Vienna Convention nevertheless provides that the termination of a treaty does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. We conclude that, even assuming that the Bilateral Agreement has been terminated by Brazil on 14 July 2000, the request by Canada under Article 4.10 of the SCM Agreement, to the extent it was made in accordance with the terms of the Bilateral Agreement, remains unaffected by the termination.[998] We therefore do not find it necessary to address further this question."[999]

704. In *US – 1916 Act (Article 22.6 – US)*, the European Communities had requested to suspend obligations instead of tariff concessions. On that occasion, the Arbitrators considered that "the decision by the European Communities to seek the suspension of 'obligations' rather than tariff 'concessions' is not subject to review by the Arbitrators".[1000]

705. In *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, the Arbitrator stated that it did not "fall within [his] mandate to recommend the suspension of specific obligations or the adoption of specific measures by 'the requesting party'".[1001]

706. Also in *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, the Arbitrator examined Canada's request for suspension of obligations under a number of provisions of the *GATT 1994*, the *Anti-Dumping Agreement*, and the *SCM Agreement*. The Arbitrator found that he did not "have authority under our mandate to *require* Canada to be more specific as to the *measures* it intends to apply to suspend its obligations" under those provisions.[1002] In that regard, the Arbitrator stated that:

"[I]t is necessary to differentiate between the *WTO obligation* to be suspended and the specific *measures* taken to implement such suspensions. We note that our mandate is to determine whether the level of suspension of WTO *obligations* is equivalent with the level of nullification or impairment. Article 22.7 of the DSU does not imply a review of the actual *measures*, which will implement a suspension, to determine if they will exceed the level of nullification or impairment, and in our view, the Arbitrator's mandate does not extend to addressing or approving the proposed implementation of the suspension of the obligations."[1003]

707. In *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, the Arbitrator left the final decision regarding the legitimacy of the request to the DSB, by noting that:

"[I]f the DSB considers that Canada's request is not acceptable in this respect, it may reject Canada's request, pursuant to the last sentence of Article 22.7 of the DSU. Similarly, if the United States were to consider that the actual suspension of obligations by Canada exceeded the level of nullification or impairment determined pursuant to this decision, it may have recourse to the dispute settlement mechanism.[1004]"[1005]

708. As regards the task of the arbitrators under Article 4.11 of the *SCM Agreement*, see paragraph 746 below.

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[997] Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 11.

[998] (*footnote original*) Furthermore, we note that the interpretation of the first sentence of Article 22.6 of the DSU suggested by Brazil has not been followed by the DSB so far. For instance, the request by Ecuador to suspend concessions or other obligations under Article 22.6 of the DSU in the case on *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (hereinafter "*EC – Bananas*"), adopted on 25 September 1997, WT/DS27/AB/R, was made on 8 November 1999, several months after the adoption of the panel report under Article 21.5 (at the DSB meeting of 6 May 1999).

[999] Decision by the Arbitrators in *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.10.

[1000] Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, para. 3.7.

[1001] Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil)*, para. 4.11.

[1002] Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, para. 2.32.

[1003] Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, para. 2.29.

[1004] (*footnote original*) See *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 71, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 7.9.

[1005] Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, para. 2.32.

(b) "The arbitrator . . . shall determine whether the level of such suspension is equivalent to the level of nullification or impairment."

(i) Assessment of the level of nullification or impairment

Presumption of nullification or impairment not evidence of a level of nullification or impairment

709. The Arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)* established that the presumption of nullification or impairment of Article 3.8 of the *DSU* cannot be taken as evidence proving a particular level of nullification or impairment allegedly suffered by a Member

> "The *presumption* of nullification or impairment in the case of an infringement of a GATT provision as set forth by Article 3.8 of the DSU cannot in and of itself be taken simultaneously as *evidence* proving a particular level of nullification or impairment allegedly suffered by a Member requesting authorization to suspend concessions under Article 22 of the DSU at a much later stage of the WTO dispute settlement system. The review of the level of nullification or impairment by Arbitrators from the objective benchmark foreseen by Article 22 of the DSU is a separate process that is independent from the finding of infringements of WTO rules by a panel or the Appellate Body. . . .However, a Member's legal interest in compliance by other Members does not, in our view, automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU."[1006]

710. In *US – 1916 Act (Article 22.6 – US)*, the European Communities had not quantified the level of nullification or impairment but rather had requested a qualitative suspension of concessions (see paragraphs 736–738 below). The United States had claimed that the level of nullification or impairment in this case should then be "zero". The Arbitrators disagreed and indicated that although the level of nullification or impairment had not been specified in quantitative terms by the European Communities, "it clearly is not, and cannot be, 'zero'":

> "We do not accept the position of the United States that the level of nullification or impairment in this case is 'zero'. As noted by the European Communities, the original Panel in this dispute found, and the Appellate Body confirmed, that 'the 1916 Act nullifies and impairs benefits accruing to the European Communities.' Therefore, while the level of nullification or impairment has not been specified in quantitative terms in the EC request under Article 22.2, it clearly is not, and cannot be, 'zero'. In our view, this US position cannot be sustained in light of the adopted Panel and Appellate Body findings.
>
> . . .
>
> We agree with the arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)* that the *presumption* of nullification or impairment, as provided in Article 3.8 of the DSU, by no means provides evidence of the *level* of nullification or impairment sustained by the Member requesting authorization to suspend obligations. However, the fact that the presumption does not automatically translate to a given level does not mean that the level is 'zero'. The original Panel determined that the 1916 Act 'nullifies and impairs benefits accruing to the European Communities.' In light of this conclusion, the level must be something greater than 'zero', and it is a contradiction in terms to suggest otherwise."[1007]

711. In *US – Offset Act (Byrd Amendment) (Article 22.6)*, the requesting parties (Brazil, Canada, Chile, European Communities, India, Japan, Korea and Mexico) partially based their request to suspend concessions on the premise that a violation is a form of nullification or impairment. The Arbitrator distinguished the concept of violation from that of nullification or impairment by noting that, pursuant to Article 3.8 of the *DSU*, a violation generates a *presumption* of nullification or impairment, not that a violation *is a form* of nullification or impairment. The Arbitrator stated:

> "If violation was conceptually equated [. . .] to nullification or impairment, there would be no reason to provide for a possibility to rebut the presumption. The theoretical possibility to rebut the presumption established by Article 3.8 can only exist because violation and nullification or impairment are two different concepts."[1008]

Parameters for calculating the level of nullification or impairment

Trade effect

712. In *US – Offset Act (Byrd Amendment) (Article 22.6)* the Arbitrator noted that "trade effect" as a parameter to determine the level of nullification and impairment pursuant to Article 22 of the DSU "is found neither in Article XXIII of GATT 1994, nor in Article 22 of the DSU. [. . .]" However, the Arbitrator decided to follow an approach based on determining the trade effect of the inconsistent measure since "the 'trade effect' approach has been regularly applied in other

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[1006] Decision by the Arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.10.

[1007] Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, paras. 5.48–5.50.

[1008] Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil)*, para. 3.23, *US – Offset Act (Byrd Amendment) (Article 22.6 – EC)*, *US – Offset Act (Byrd Amendment) (Article 22.6 – India)*, para. 3.23, *US – Offset Act (Byrd Amendment) (Article 22.6 – Japan)*, para. 3.23, *US – Offset Act (Byrd Amendment) (Article 22.6 – Korea)*, para. 3.23, *US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, paras. 3.70–3.71, *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, paras. 3.68–3.69, *US – Offset Act (Byrd Amendment) (Article 22.6 – Chile)*, paras. 3.65–3.66.

Article 22.6 arbitrations and seems to be generally accepted by Members as *a* correct application of Article 22 of the DSU". The Arbitrator noted in that regard that "[p]revious arbitrators' decisions based on direct trade impact are not binding precedents".[1009]

Using reasoned estimates and avoiding speculation

713. The Arbitrators in *EC – Hormones (US) (Article 22.6 – EC)* stated that they were to use reasoned estimates when assessing the level of nullification or impairment. Applying this approach, the Arbitrators rejected United States claims for certain lost exports as "too remote" and "too speculative".[1010] The Arbitrators considered:

> "The question we thus have to answer here is: what would annual prospective US exports of hormone-treated beef and beef products to the EC be if the EC had withdrawn the ban on 13 May 1999? An answer to this question, like any question about future events, can only be a reasoned estimate. It is necessarily based on certain assumptions. In making those estimates and assumptions, we need to guard against claims of lost opportunities where the causal link with the inconsistent hormone ban is less than apparent, i.e. where exports are allegedly foregone not because of the ban but due to other circumstances."[1011]

714. A similar approach was taken by the Arbitrator in *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*. In that case, Canada argued that a certain airline had a "revealed margin of preference" for a Canadian regional aircraft manufacturer. The Arbitrator dismissed this argument in part because "[w]hile such a preference may have existed, Canada has not meaningfully quantified it . . . ."[1012]

715. In *US – 1916 Act (Article 22.6 – US)*, the Arbitrators referred to the above statements as support to their view that ["i]n determining the level of nullification or impairment sustained by the European Communities as a result of the 1916 Act, we need to rely, as much as possible, on credible, factual, and verifiable information".[1013] The Arbitrators further considered that "this prudent approach taken by earlier arbitrators is appropriate".[1014]

716. In *US – Offset Act (Byrd Amendment) (Article 22.6)*, the Arbitrator analysed the economic models suggested by the parties, in order to choose the appropriate model to apply in the calculation of the level of nullification or impairment. The Arbitrator "considered the approach of the Requesting Parties to be too aggregated, hence not specific enough to th[e] case. While the model specification proposed by the United States is disaggregated and well specified, [the Arbitrator] concluded that there is insufficient data to run that model with any degree of accuracy." In light of "the lack of available data to implement the United States' model", the Arbitrator decided "to reject the United States' model in favour of a modified version of the model proposed by the Requesting Parties".[1015]

Indirect benefits

717. The Arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)* considered the notion of "*direct or indirect benefits*" accruing under the WTO agreements whose nullification or impairment may give rise to an entitlement to obtain compensation or the authorization to suspend concessions or other obligations. In this case, the United States had argued that its exports to Latin America (e.g. fertilizers) used in the production of bananas that would be exported to the European Communities under a WTO-consistent regime should be counted in setting the level of suspension. The Arbitrators concluded that, "to the extent the US assessment of nullification or impairment includes *lost US exports* defined as *US content incorporated in Latin American bananas* (e.g. US fertilizer, pesticides and machinery shipped to Latin America and US capital or management services used in banana cultivation), we do not consider such lost US exports for calculating nullification or impairment in the present arbitration proceeding between the European Communities and the United States":

[1009] Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil)*, paras. 3.70–3.71.

[1010] *EC – Hormones (US) (Article 22.6 – EC)*, para. 77.

[1011] Decision by the Arbitrators in *EC – Hormones (US) (Article 22.6 – EC)*, para. 41. In support of this position, the *EC – Hormones (US) (Article 22.6 – EC)* arbitrators quoted from *EC – Bananas III (US) (Article 22.6 – EC)*:

> "We are of the view that the benchmark for the calculation of nullification or impairment of US trade flows should be losses in US exports of goods to the European Communities and losses by US service suppliers in services supply in or to the European Communities. However, we are of the opinion that losses of US exports in goods or services *between the US and third countries* do not constitute nullification or impairment of even *indirect* benefits accruing to the US under the GATT or the GATS for which the European Communities could face suspension of concessions."

Decision by the Arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.12.

[1012] Decision by the Arbitrator in *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.22.

[1013] Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, para. 5.54.

[1014] Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, para. 5.57.

[1015] Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil), US – Offset Act (Byrd Amendment) (Article 22.6 – EC), US – Offset Act (Byrd Amendment) (Article 22.6 – India), US – Offset Act (Byrd Amendment) (Article 22.6 – Japan), US – Offset Act (Byrd Amendment) (Article 22.6 – Korea), US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, paras 3.22–3.23, *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, paras 3.20–3.21, *US – Offset Act (Byrd Amendment) (Article 22.6 – Chile)*, paras 3.19–3.20,

"The *presumption* of nullification or impairment in the case of an infringement of a GATT provision as set forth by Article 3.8 of the DSU cannot in and of itself be taken simultaneously as *evidence* proving a particular level of nullification or impairment allegedly suffered by a Member requesting authorization to suspend concessions under Article 22 of the DSU at a much later stage of the WTO dispute settlement system. The review of the level of nullification or impairment by Arbitrators from the objective benchmark foreseen by Article 22 of the DSU is a separate process that is independent from the finding of infringements of WTO rules by a panel or the Appellate Body. As a result, a Member's potential interests in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreements are each sufficient to establish a right to pursue a WTO dispute settlement proceeding. However, a Member's legal interest in compliance by other Members does not, in our view, automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU.

Over the last decades of GATT dispute settlement practice, it has become a truism of GATT law that lack of *actual* trade cannot be determinative for a finding that no violation of a provision occurred because it cannot be excluded that the absence of trade is the result of an illegal measure. As discussed by the original panel reports,[1016] in past dispute settlement practice the non-discrimination provisions have been interpreted to protect 'competitive opportunities'[1017] or the 'effective equality of opportunities'[1018] for foreign products which may be undermined by 'any laws or regulations which might adversely modify the conditions of competition between domestic and imported products'.[1019] All these past panel reports concerned the alleged nullification or impairment of potential trade opportunities under the national treatment clause. Also the *US – Superfund* case,[1020] from which the wording of Article 3.8 of the DSU establishing the presumption of nullification or impairment in case of an infringement of GATT is drawn, concerned the alleged violation of Article III of GATT. Therefore, the notion underlying the protection of *potential* trade opportunities is *potential* trade between the complaining and the respondent party. Likewise, in the case of an alleged violation of the MFN treatment clause, a dispute would involve trade between the complaining party or a third country, on the one hand, and the respondent party, on the other.

We are of the view that the benchmark for the calculation of nullification or impairment of US trade flows should be losses in US exports of goods to the European Communities and losses by US service suppliers in services supply in or to the European Communities. However, we are of the opinion that losses of US exports in goods or services *between the US and third countries* do not constitute nullification or impairment of even *indirect* benefits accruing to the United States under the GATT or the GATS for which the European Communities could face suspension of concessions. To the extent the US assessment of nullification or impairment includes *lost US exports* defined as *US content incorporated in Latin American bananas* (e.g. US fertilizer, pesticides and machinery shipped to Latin America and US capital or management services used in banana cultivation), we do not consider such lost US exports for calculating nullification or impairment in the present arbitration proceeding between the European Communities and the United States."[1021]

Company-specific effects versus overall effect on the Member

718. In *EC – Bananas III (US) (Article 22.6 – EC)*, the initial United States' request for the authorization to suspend concessions or other obligations involved only losses incurred by one of its companies. The Arbitrators considered that "[i]n order to calculate the level of nullification and impairment for the United States, it is our view that it is necessary to calculate the aggregate net effects on all US suppliers of wholesale services to bananas wholesaled in the European Communities".[1022]

Court judgments

719. In *US – 1916 Act (Article 22.6 – US)*, the Arbitrators considered that any final judgments under the 1916 Act against European Communities companies "would constitute nullification or impairment of benefits accruing to the European Communities, up to the cumulative dollar or monetary value of the final judgments":

"In our view, any final judgments entered against EC companies or their subsidiaries under the 1916 Act would constitute nullification or impairment of benefits accruing to the European Communities, up to the cumulative dollar or monetary value of the final judgements. In our view, it would be appropriate to include only 'final' judgements, i.e. the amounts payable either after the appeals have been completed, or the appeal periods have expired. Moreover, all such decisions are made public, and therefore the amounts of the judgments are readily verifiable.

[1016] (*footnote original*) Panel report on *Bananas III*, paragraph 7.50.
[1017] (*footnote original*) Report of the working party on *Brazilian Internal Taxes*, adopted on 30 June 1949, BISD II/181, 185, paragraph 16.
[1018] (*footnote original*) Panel report on *United States – Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36S/345, 386–387, paragraph 5.11.
[1019] (*footnote original*) Panel report on *Italian Discrimination Against Imported Agricultural Machinery*, adopted on 23 October 1958, BISD 7S/60, 64, paragraph 12.
[1020] (*footnote original*) Panel report on *United States – Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, 158, paragraph 5.1.9.
[1021] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 6.8 and 6.10–6.12.
[1022] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.27.

> In a case involving multiple claims – i.e., a judgment award that includes both 1916 Act claims and non-1916 Act claims – the amount included by the European Communities in calculating its level of nullification or impairment would need to be limited to the 1916 Act claims alone.
>
> Judgments under the 1916 Act are awarded pursuant to WTO-inconsistent legislation, and clearly nullify or impair benefits accruing to the European Communities under the GATT 1994 and the Anti-Dumping Agreement. The cumulative dollar or monetary value of judgments under the Act therefore could, in principle, be included in any cumulative calculation by the European Communities of the overall level of the nullification or impairment that it has sustained."[1023]

Settlements

720. In *US – 1916 Act (Article 22.6 – US)*, the Arbitrators considered that any settlement awards entered into by the European Communities companies would "constitute nullification or impairment of benefits accruing to the European Communities, up to the cumulative dollar or monetary value of the settlements":

> "In our view, any settlement awards entered into by EC companies or their subsidiaries under the 1916 Act would equally constitute nullification or impairment of benefits accruing to the European Communities, up to the cumulative dollar or monetary value of the settlements. Once again, such settlements result from WTO-inconsistent legislation, and therefore nullify or impair benefits accruing to the European Communities. In our view, whether the amounts are payable by EC entities pursuant to court orders under the 1916 Act, or settlements under the Act, the legal effect is the same in terms of the nullification or impairment of benefits accruing to the European Communities.
>
> In a settlement involving multiple claims – i.e., a settlement of a lawsuit that includes both 1916 Act claims and non-1916 Act claims – the amount included by the European Communities in calculating its level of nullification or impairment would need to be limited to the 1916 Act claims alone.
>
> As noted above, in calculating the level of nullification or impairment, it is necessary to rely only on credible, verifiable information, and not on speculation. In the context of settlements under the 1916 Act, this would almost certainly necessitate the disclosure of such settlements, such that the amounts of the settlements – and the portions attributable to the 1916 Act – can be confirmed. . ."[1024]

Deterrent or "chilling" effect

721. In *US – 1916 Act (Article 22.6 – US)*, the European Communities had argued that the most damaging effect of the 1916 Act was its chilling effect on the commercial behaviour of European companies and its potential use as a means of intimidation of European companies that were either already active on the United States' market or which had considered entering the market.[1025] The Arbitrators were "of the view that any claim for a deterrent or 'chilling effect' by the European Communities in the present case would be too speculative, and too remote". They warned that they did not need to decide, for the purposes of this arbitration, whether a "chilling effect" could be considered to exist for the purposes of WTO dispute settlement. They only needed to determine whether such a chilling effect could be meaningfully quantified for the purposes of determining the level of nullification or impairment sustained by the European Communities as a result of the 1916 Act.[1026] The Arbitrators concluded that, "[o]n the basis of the information provided to the arbitrators, we agree with the parties that a quantification of the chilling effect is not possible. Accordingly, the chilling effect allegedly caused by the 1916 Act could not be included in any calculation by the European Communities of its overall level of the nullification or impairment."[1027]

Litigation costs

722. In *US – 1916 Act (Article 22.6 – US)*, the European Communities argued that legal expenses related to the pending US court cases were one of the immediate costs of the 1916 Act.[1028] The Arbitrators disagreed and considered that the litigation costs could not be included in the calculation of the level of the nullification or impairment:

> "The Arbitrators recall their position, stated above, that it is appropriate to follow the prudent approach taken by earlier arbitrators in determining the level of nullification or impairment. We are not aware of any basis in the WTO Agreements to support the view advanced by the European Communities that legal fees can be claimed as a loss of a benefit accruing to a WTO Member. Moreover, we are not aware of any prior case in which such a claim has been permitted. It is also not clear which fees, and under what circumstances, could be included in such a claim.
>
> In the circumstances of this case, it is uncontested that the European Communities has not 'meaningfully quan-

[1023] Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, paras. 5.58–5.60.
[1024] Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, paras. 5.61–5.63.
[1025] Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, para. 5.64.
[1026] Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, para. 5.69.
[1027] Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, para. 5.72.
[1028] Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, para. 5.73.

tified' the amount of legal fees paid by EC entities as a result of the 1916 Act. Indeed, the European Communities acknowledges that it has provided only examples of such costs, not an overall, verifiable tabulation. In addition, as indicated above, these examples of legal fees have been contested by the United States.

Accordingly, in our view, the litigation costs incurred by EC entities under the 1916 Act could not be included in any calculation by the European Communities of the overall level of the nullification or impairment." [1029]

Double-counting of nullification or impairment

723. In *EC – Bananas III (US) (Article 22.6 – EC)*, the United States had argued that its lost exports, including those of goods and services used in the production of Latin-American bananas for the European market, should be counted in setting the level of suspension. After rejecting the United States' argument on "indirect benefits" (see paragraph 717 above), the Arbitrators warned that if overlapping claims by different WTO Members were permissible under the *DSU* in respect of nullification or impairment suffered because of lost trade in goods, this would result in double counting of nullification and impairment:

"[I]f *overlapping* claims by different WTO Members as to nullification or impairment suffered because of the same lost trade in goods (and goods and service inputs used in their production or incorporated therein) or the same lost trade in services were permissible under the DSU, the problem of '*double-counting*' of nullification or impairment would arise. Due to the difference in origin of goods or services used as *inputs* in the banana production, on the one hand, and the origin of the bananas as *end-products*, on the other, *cumulative* requests for compensation or suspension of concessions could be made for the *same* amount of nullification or impairment caused by a Member.

If we were to allow for such '*double-counting*' of the same nullification or impairment in arbitration proceedings under Article 22.6 of the DSU with different WTO Members, incompatibilities with the standard of '*equivalence*' as embodied in paragraphs 4 and 7 of Article 22 of the DSU could arise. Given that the *same* amount of nullification or impairment inflicted on *one* Member cannot simultaneously be inflicted on *another*, the authorizations to suspend concessions granted by the DSB to different WTO Members could exceed the overall amount of nullification or impairment caused by the Member that has failed to bring a WTO-inconsistent measure into compliance with WTO law. Moreover, such *cumulative* compensation or *cumulative* suspension of concessions by different WTO Members for the *same* amount of nullification or impairment would run counter to the general international law principle of proportionality of countermeasures.[1030]" [1031]

Disbursements operating as subsidies

724. In *US – Offset Act (Byrd Amendment) (Article 22.6)* the Arbitrator utilized a formula to determine the effect that a subsidy had on the trade of the Members concerned. The Arbitrator judged that the trade effect of the subsidy could be found by multiplying the value of the subsidy by a "trade effect coefficient" composed of the values of pass-through, import penetration and elasticity of substitution. In this regard, the Arbitrator considered that:

"A basic economic model to derive a coefficient for the trade effects of disbursements operating as subsidies can be described as the product of four variables: the value of the subsidy, a measure of the *ad valorem* price reduction caused by the CDSOA disbursements (i.e., 'pass-through'), a substitution elasticity of imports, and import penetration. The basic relationship of the trade effect can be expressed as follows:

Trade effect = (value of disbursements) × [(pass-through) × (import penetration) × (elasticity of substitution)]" [1032]

Changes in the level of nullification or impairment after authorization

725. In *US – 1916 Act (Article 22.6 – US)*, the Arbitrators decided that the European Communities could suspend concessions qualitatively provided always that the level of nullification or impairment was quantified on a monetary basis. To facilitate this, the Arbitrators allowed the European Communities to take into account the cumulative monetary value of any amounts payable by EC entities pursuant to final court judgements for claims under the 1916 Act and the settlement of claims under the 1916 Act. In this context, the Arbitrators referred to the possibility that the quantified amount of nullification or impairment suffered by the European Communities could vary over time as a result

[1029] Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, paras. 5.76–5.78.

[1030] (*footnote original*) Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading, January 1997, Article 49 on Proportionality: "Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the international wrongful act and the effects thereof on the injured State." See also: I. Brownlie, *International Law and the Use of Force by States*, Oxford (1983), page 219; H. Kelsen, *Principles of International Law*, New York (1966), page 21.

[1031] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 6.15–6.16.

[1032] Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil), US – Offset Act (Byrd Amendment) (Article 22.6 – EC), US – Offset Act (Byrd Amendment) (Article 22.6 – India), US – Offset Act (Byrd Amendment) (Article 22.6 – Japan), US – Offset Act (Byrd Amendment) (Article 22.6 – Korea), US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, para. 3.117, *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, para. 3.115, *US – Offset Act (Byrd Amendment) (Article 22.6 – Chile)*, para. 3.113.

of new judgements or settlement agreements under the 1916 Act:

> "[T]he quantified amount of nullification or impairment sustained by the European Communities as a result of the 1916 Act may vary over time, if there are new judgments or settlement agreements under the 1916 Act involving EC entities. This may necessitate access by the parties to all relevant information, including settlement awards. The Arbitrators are confident that each party will abide fully by its obligation under Article 3.10 of the DSU to 'engage in dispute settlement procedures in good faith in an effort to resolve the dispute.' In our view, this obligation applies to all stages of the dispute, including during the implementation of the suspension of obligations.
>
> We also recall that the United States may have recourse to the appropriate dispute settlement procedures in the event that it considers that the application of the suspension by the European Communities exceeds the level of nullification or impairment that the European Communities has sustained as a result of the 1916 Act . . ."[1033]

726. Concerning the possibility of setting a variable level of suspension of concessions or other obligations in order to reflect possible variations in the level of nullification or impairment, see paragraphs 682–683 above.

Exception: arbitrations pursuant to Article 4.10 of the *SCM Agreement*

727. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators considered the provisions of Article 4.11 of the *SCM Agreement* as special or additional rules and recalled that the concept of nullification or impairment is absent from Articles 3 and 4 of the *SCM Agreement*. In the Arbitrators' view, there is no legal obligation in that context that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment. The Arbitrators thus concluded that, when dealing with a prohibited export subsidy, an amount of countermeasures that corresponds to the total amount of the subsidy is "appropriate". See paragraph 766 below.

728. In *US – FSC (Article 22.6 – US)*, the Arbitrators recalled that "Articles 4.10 and 4.11 of the SCM Agreement are 'special or additional rules' under Appendix 2 of the DSU, and that in accordance with Article 1.2 of the DSU, it is possible for such rules or procedures to prevail over those of the DSU. There can be no presumption, therefore, that the drafters intended the standard under Article 4.10 to be necessarily coextensive with that under Article 22.4 so that the notion of 'appropriate countermeasures' under Article 4.10 would limit such countermeasures to an amount 'equivalent to the level of nullification or impairment' suffered by the complaining Member. Rather, Articles 4.10 and 4.11 of the SCM Agreement use distinct language and that difference must be given meaning."[1034]

(ii) Assessment of the level of suspension of concessions

General

729. In *EC – Bananas III (US) (Article 22.6 – EC)*, the Arbitrators considered that "to estimate the level of nullification or impairment, the same basis needs to be used for measuring the level of suspension of concessions. Since the latter is the gross value of US imports from the European Communities, the comparable basis for estimating nullification and impairment in our view is the impact on the value of relevant EC imports from the United States (rather than US firms' costs and profits, as used in the US submission). More specifically, we compare the value of relevant EC imports from the United States under the present banana import regime (the actual situation) with their value under a WTO-consistent regime (a "counterfactual" situation)."[1035]

Methodology paper

730. In *EC – Hormones (US) (Article 22.6 – EC)*,[1036] *EC – Hormones (Canada) (Article 22.6 – EC)*[1037] and *Brazil – Aircraft (Article 22.6 – Brazil)*,[1038] the Arbitrators asked the requesting party to provide them with a methodology paper explaining the methodology they applied in calculating the proposed level of suspension.

731. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the European Communities requested that the Arbitrators disregard certain information contained in Ecuador's methodology document on the basis that such information was included in Ecuador's first submission only and not in the methodology document. The Arbitrators held that while a procedural step of submitting a methodology document had been stipulated in another arbitration proceeding for reasons of practicality, such a "methodology document" was not expressly mentioned in the *DSU*. Furthermore, the Arbitrators rejected "the idea that the specificity requirements of

[1033] Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, paras. 9.1–9.2.
[1034] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.47.
[1035] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 7.1.
[1036] Decision by the Arbitrators on *EC – Hormones (US) (Article 22.6 – EC)*, para. 5.
[1037] Decision by the Arbitrators on *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 5.
[1038] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 2.9.

Article 6.2 apply *mutatis mutandis* to the methodology document":

> "[W]e introduced the procedural step of submitting a methodology document in the US/EC *Bananas III* arbitration proceeding because we reckoned that certain information about the methodology used by the party for calculating the level of nullification or impairment would logically only be in the possession of that Member and that it would not be possible for the Member requesting arbitration pursuant to Article 22 of the DSU to challenge this information unless it was disclosed. Obviously, if such information were to be disclosed by the Member suffering impairment only in its first submission, the Member requesting arbitration could only rebut that information in its rebuttal submission, while its first submission would become necessarily less meaningful and due process concerns could arise. It was out of these concerns that the United States was requested to submit a document explaining the methodology used for calculating impairment before the filing of the first submission by both parties. Unlike in panel proceedings, where parties do not file their first submissions simultaneously, it has been the practice in past arbitration proceedings under Article 22 that both rounds of submissions take place before a single oral hearing of the parties by the Arbitrators and that in both these rounds parties file their submissions simultaneously.
>
> However, we agree with Ecuador that such a methodology document is nowhere mentioned in the DSU. Nor do we believe, as explained in detail above, that the specificity requirements of Article 6.2 relate to that methodology document rather than to requests for suspension pursuant to Article 22.2, and to requests for the referral of such matters to arbitration pursuant to Article 22.6. For these reasons, we reject the idea that the specificity requirements of Article 6.2 apply *mutatis mutandis* to the methodology document. In our view, questions concerning the amount, usefulness and relevance of information contained in a methodology document are more closely related to the questions of who is required at what point in time to present evidence and in which form, or in other words, the issue of the burden of proof in an arbitration proceeding under Article 22.6."[1039]

(iii) Standard of equivalence

Quantitative equivalence

732. In *EC – Bananas III (US) (Article 22.6 – EC)*, the Arbitrators considered the meaning of "equivalence" and noted "that the ordinary meaning of the word '*equivalence*' is 'equal in value, significance or meaning', 'having the same effect', 'having the same relative position or function', 'corresponding to', 'something equal in value or worth', also 'something tantamount or virtually identical'".[1040] The Arbitrators considered that "this meaning connotes a correspondence, identity or balance between two related levels, i.e. between the level of the concessions to be suspended, on the one hand, and the level of the nullification or impairment, on the other".[1041]

733. The Arbitrators in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)* specifically found that "equivalent" had to be determined in "quantitative" terms:

> "What we do have to determine. . .is whether the overall proposed level of suspension is *equivalent* to the level of nullification and impairment. This involves a *quantitative* – not a qualitative – assessment of the proposed suspension. As noted by the arbitrators in the *Bananas* case, '[i]t is impossible to ensure correspondence or identity between two levels if one of the two is not clearly defined'. Therefore, as a prerequisite for ensuring equivalence between the two levels, we have to be able to determine, not only the 'level of the nullification and impairment', but also the 'level of the suspension of concessions or other obligations'. To give effect to the obligation of equivalence in Article 22.4, the Member requesting suspension thus has to identify the level of suspension of concessions it proposes in a way that allows us to determine equivalence."[1042]

734. Also in *EC – Hormones (Canada) (Article 22.6 – EC)* the Arbitrators stated that the "total trade value" could not "exceed the amount of trade impairment we find".[1043]

735. Similarly, the Arbitrators in *US – FSC (Article 22.6 – US)* noted that drafters of Article 22.4 had explicitly set a "quantitative" benchmark to the level of suspension of concessions or other obligations that can be authorized:

> "The drafters [of Article 22.4] have explicitly set a quantitative benchmark to the level of suspension of concessions or other obligations that might be authorized. This is similarly reflected in Article 22.7, which defines the arbitrators' mandate in such proceedings . . . .
>
> As we have already noted in our analysis of the text of Article 4.10 of the *SCM Agreement* above, there is, by contrast, no such indication of an explicit quantitative benchmark in that provision . . . ."[1044]

[1039] Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 35–36.

[1040] (*footnote original*) The New Shorter Oxford English Dictionary on Historic Principles (1993), page 843.

[1041] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.2.

[1042] Decision by the Arbitrators on *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 20.

[1043] Decision by the Arbitrators on *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 21.

[1044] Decision by the Arbitrator on *US – FSC (Article 22.6 – US)*, paras. 5.46–5.47.

Qualitative equivalence

736. In *US – 1916 Act (Article 22.6 – US)*, the Arbitrators acknowledged that this was the first time that a complainant had requested authorization to suspend "qualitatively" equivalent (rather than "quantitatively" equivalent) obligations. The Arbitrators compared the case before them with previous cases and concluded that the fact that the requested suspension had not been stated in quantitative terms "[did] not in and of itself render the EC request inconsistent with Article 22":

> "[T]his is the first case in which a WTO Member has sought to suspend 'qualitatively equivalent' obligations. In all previous cases, parties seeking to suspend concessions or other obligations have provided a quantitative, monetary figure indicating the amount of suspension sought. Indeed, the European Communities indicated that it was 'aware that its request for suspension of "qualitatively equivalent" obligations constitutes a novelty in WTO practice.'
>
> . . .
>
> In cases such as *EC – Hormones (US) (Article 22.6 – EC)*, *EC – Hormones (Canada) (Article 22.6 – EC)* and *US – FSC (Article 22.6 – US)*, where the requested suspension was expressed in quantitative terms, the arbitrators necessarily had to assess whether there was 'quantitative equivalence' between the level of the nullification or impairment and the level of the suspension of concessions or other obligations.
>
> In the present case, by contrast, the requested suspension has not been stated in quantitative terms. However, this does not in and of itself render the EC request inconsistent with Article 22 . . ."[1045]

737. The Arbitrators on *US – 1916 Act (Article 22.6 – US)* further indicated that the question of whether it is possible to determine the WTO-consistency of a "qualitatively equivalent" Article 22.2 request cannot be considered in the abstract but has to be looked at from the point of view of its application:

> "Indeed, it is not possible to determine the WTO-consistency of a 'qualitatively equivalent' Article 22.2 request in the *abstract*. Instead, it is necessary to determine how the actual suspension resulting from such 'qualitative equivalence' would be *applied*. More specifically:
>
> - If the suspension of obligations were applied in such a manner that it were equal to or below the level of nullification or impairment sustained by the European Communities, then the suspension would, in principle, be consistent with DSU Article 22.4.[1046]
>
> - If the suspension of obligations were applied in such a manner that it exceeded the level of nullification or impairment sustained by the European Communities, then the suspension would be punitive, and would not be consistent with DSU Article 22.4.
>
> . . . .
>
> In the present case, in order to determine whether the qualitative suspension could be applied in such a manner that the level of suspension could exceed the level of nullification or impairment, it is necessary to determine the trade or economic effects on the European Communities of the 1916 Act. Once this has been determined, the European Communities could implement its suspension up to, but not beyond, this amount. This necessitates a determination of the trade or economic effects of the 1916 Act on the European Communities in numerical or monetary terms, which is the only way in which the arbitrators can determine 'equivalence' in the present context."[1047]

738. In *US – 1916 Act (Article 22.6 – US)*, the European Communities had requested the right to suspend obligations by enacting a regulation replicating the US 1916 Act which had been found inconsistent with WTO law. The Arbitrators noted that the European Communities' request had placed no quantifiable or monetary limits on how the suspension could be applied in practice. The Arbitrators were concerned that the suspension could thus apply to an unlimited amount of US exports to the European Communities. The Arbitrators then rejected the EC argument that the suspension of obligations is somehow "equivalent" because its proposed measure would replicate, or partially replicate, the 1916 Act. The Arbitrators concluded that:

> "Leaving aside for the moment the issue of whether we can examine the EC measure, we would reiterate that similar or even identical measures can have dissimilar trade effects. Stated another way, similar or identical measures may not result in the required equivalence between the level of suspension and the level of nullification or impairment.
>
> . . .
>
> Given the potentially unlimited application of the EC suspension, as described in its request, it is possible that the

[1045] Decision by the Arbitrators on *US – 1916 Act (Article 22.6 – US)*, paras. 5.17 and 5.20–5.21.

[1046] (*footnote original*) We recall that we asked the United States if "reciprocal or 'mirror' retaliation – suspension of the same obligations which have been breached by the Member which is the object of the retaliation – is in principle permissible under the DSU provided that the level of suspension is equivalent to the level of nullification or impairment." The United States indicated in its reply that it "agrees that the suspension of the same obligations is, in principle, permissible under the DSU provided that the level of suspension is equivalent to the level of nullification or impairment." *Answers of the United States to the Arbitrator's Questions to the Parties*, 20 November 2003, paragraph 38. Original emphasis.

[1047] Decision by the Arbitrators on *US – 1916 Act (Article 22.6 – US)*, paras. 5.21 and 5.23.

EC suspension could exceed the level of nullification or impairment when it is applied, and thereby become punitive. The EC request does not ensure that the suspension will be limited to the level of nullification it has sustained, as expressed in quantifiable economic or trade terms."[1048]

Assessment of "equivalence"

General

739. In *EC – Bananas III (US) (Article 22.6 – EC)*, the Arbitrators considered that they could not fulfil their task of assessing the equivalence between the two levels (i.e. level of nullification or impairment and level of suspension) before they had reached a view on whether the revised EC regime was, in the light of the Panel and the Appellate Body's findings in the original dispute, fully WTO-consistent:

"[I]t is our opinion that the concept of *equivalence* between the two levels (i.e. of the proposed suspension and the nullification or impairment) remains a concept devoid of any meaning if either of the two variables in our comparison between the proposed suspension and the nullification or impairment would remain unknown. In essence, we would be left with the option to declare the level of nullification or impairment to be tantamount to the proposed level of suspension, i.e. to equate one variable in the equation with the other. To do that would mean that any proposed level of suspension would necessarily be deemed equivalent to the level of nullification or impairment so equated. Or, we could resort to the option of measuring the level of nullification or impairment on the basis of our findings in the original dispute, as modified by the Appellate Body and adopted by the DSB. To do that would mean to ignore altogether the undisputed fact that the European Communities has taken measures to revise its banana import regime. That is certainly not the mandate that the DSB has entrusted to us.

Consequently, we cannot fulfil our task to assess the *equivalence* between the two levels before we have reached a view on whether the revised EC regime is, in light of our and the Appellate Body's findings in the original dispute, fully WTO-consistent. It would be the WTO-inconsistency of the revised EC regime that would be the root cause of any nullification or impairment suffered by the United States. Since the level of the proposed suspension of concessions is to be equivalent to the level of nullification or impairment, logic dictates that our examination as Arbitrators focuses on that latter level before we will be in a position to ascertain its equivalence to the level of the suspension of concessions proposed by the United States.[1049]

In arriving at this conclusion, we are mindful of the DSB Chairman's statement at the meeting of 29 January 1999 when the DSB decided to refer this matter to us in our capacity as Arbitrators:

'There remains the problem of how the Panel and the Arbitrators would coordinate their work, but as they will be the same individuals, the reality is that they will find a logical way forward, in consultation with the parties. In this way, the dispute settlement mechanisms of the DSU can be employed to resolve all of the remaining issues in this dispute, while recognizing the right of both parties and respecting the integrity of the DSU.'

We are convinced that our chosen 'way forward' in tackling the tasks before us is the most 'logical way forward'. It is the one that gives full weight and meaning to all of the dispute settlement mechanisms provided for under the DSU that parties to the original *Bananas III* dispute have chosen to invoke."[1050]

740. In *EC – Bananas III (US) (Article 22.6 – EC)*, the European Communities contested the Arbitrators' competence to review the WTO-consistency or otherwise of the revised European Communities' regime (see paragraph 739 above) on the grounds that such a review would deprive Article 21.5 of its *raison d'être*. The Arbitrators disagreed:

"[T]he European Communities argues that if we consider the WTO consistency of its banana regime in an arbitration proceeding under Article 22, we will deprive Article 21.5 of its *raison d'être*. We disagree. For those Members that for whatever reasons do not wish to suspend concessions, Article 21.5 will remain the prime vehicle for challenging implementation measures. However, if we accepted the EC's argument, we would in fact read the time-limit foreseen in Article 22.6 out of the DSU since an Article 21.5 proceeding, which in the EC view includes consultations and an appeal, would seldom, if ever, be completed before the end of the time-limit specified within Article 22.6 (i.e. thirty days of the expiry of the reasonable period of time).[1051] In this regard

[1048] Decision by the Arbitrators on *US – 1916 Act (Article 22.6 – US)*, paras. 5.32 and 5.34.

[1049] (*footnote original*) In this connection, we note that Article 23.2(a) of the DSU provides that Members shall make any determination to the effect that a violation has occurred or that benefits have been nullified or impaired "consistent with the findings contained in the panel or Appellate Body report adopted by the DSB *or an arbitration award* rendered under this Understanding" (emphasis added). This by implication suggests that issues of violation and nullification or impairment can be determined by arbitration.

[1050] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 4.7–4.9.

[1051] (*footnote original*) As we noted in our Initial Decision, Arbitrators pursuant to Article 22 of the DSU are neither in a position to influence the point in time when parties to the original dispute initiate such a procedure, nor when original parties initiate a procedure under Article 21.5 of the DSU, nor when the DSB is in a position to deal with such requests, nor when the DSB establishes a reconvened panel, nor when the DSB refers a matter to arbitration. We recall, on the one hand, that Article 21.5 of the DSU requires reconvened panels to complete their work in principle within 90 days as of the referral of the matter to them, but without specifying when such a proceeding should be initiated. The express wording of Article 21.5 of the

it is useful to recall the arbitration award in the *Hormones* case, in which it is stated 'Read in context, it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the *shortest* period possible within the legal system of the Member to implement the recommendations and rulings of the DSB.'[1052] We note that in the US view, if it cannot make a request for authorization to suspend concessions within the Article 22.6 time-period, it loses its right to do so, at least under circumstances where the negative-consensus rule of Article 22.6 applies."[1053]

741. In *EC – Bananas III (US) (Article 22.6 – EC)*, the Arbitrators considered that the benchmark of *equivalence* reflects a stricter standard of review for Arbitrators acting pursuant to Article 22.7 of the *DSU* than the degree of scrutiny that the standard of *appropriateness*, as applied under the *GATT 1947*, would have suggested. In arriving at this conclusion, the Arbitrators examined the working party on *Netherlands Action under Article XXIII:2 to Suspend Obligations to the United States*:

"We are mindful of the fact that the working party on *Netherlands Action under Article XXIII:2 to Suspend Obligations to the United States*[1054] considered whether the proposed action was '*appropriate*' and that the Working Party only had '*regard*' to the *equivalence* of the impairment suffered:

> '2. The Working Party was instructed by the CONTRACTING PARTIES to investigate the *appropriateness of the measure* which the Netherlands Government proposed to take, having regard to the *equivalence to the impairment* suffered by the Netherlands as a result of the United States restrictions.
>
> 3. The Working Party felt that the appropriateness of the measure envisaged by the Netherlands Government should be considered from two points of view: in the first place, whether in the circumstances, the measure proposed was *appropriate* in character, and secondly, whether the extent of the quantitative restriction proposed by the Netherlands Government was *reasonable*, having regard to the impairment suffered.' (emphasis added).

In our view, in light of the explicit reference in paragraphs 4 and 7 of Article 22 of the DSU to the need to ensure the *equivalence* between the level of proposed suspension and the level of the nullification or impairment suffered, the standard of *appropriateness* applied by the 1952 working party has lost its significance as a benchmark for the authorization of the suspension of concessions under the DSU.

However, we note that the ordinary meaning of '*appropriate*', connoting 'specially suitable, proper, fitting, attached or belonging to',[1055] suggests a certain degree of relation between the level of the proposed suspension and the level of nullification or impairment, where as we stated above, the ordinary meaning of '*equivalent*' implies a higher degree of correspondence, identity or stricter balance between the level of the proposed suspension and the level of nullification or impairment. Therefore, we conclude that the benchmark of *equivalence* reflects a stricter standard of review for Arbitrators acting pursuant to Article 22.7 of the WTO's DSU than the degree of scrutiny that the standard of *appropriateness*, as applied under the GATT of 1947 would have suggested."[1056]

742. In *EC – Hormones (US) (Article 22.6 – EC)* and in *EC – Hormones (Canada) (Article 22.6 – EC)*, the Arbitrators considered that "an arbitrator has to 'determine whether the level of such suspension is equivalent to the level of nullification or impairment'" but that "[a]rbitrators are explicitly prohibited from 'examin[ing] the nature of the concessions or other obligations to be suspended' (other than under Articles 22.3 and 22.5)".[1057] The Arbitrators further indicated that the determination of whether the overall proposed level of suspension is equivalent to the level of nullification and impairment involves a *quantitative* – not a qualitative – assessment of the proposed suspension:

"What we do have to determine, however, is whether the overall proposed level of suspension is *equivalent* to the level of nullification and impairment. This involves a *quantitative* – not a qualitative – assessment of the proposed suspension. As noted by the arbitrators in the

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Footnote 1051 (*cont.*)
DSU does not exclude the possibility of initiating such a proceeding *before* or *after* the expiry of the reasonable period of time for implementation of panel and/or Appellate Body reports adopted by the DSB. On the other hand, we recall that, pursuant to Article 22.6 of the DSU, Arbitrators shall complete their work within 60 days as of the expiry of the reasonable period of time. If a proceeding under Article 21.5 of the DSU is initiated close to the end of the reasonable period, or after it has expired, the 90 day period of Article 21.5 and the 60 day period of Article 22.6 become irreconcilable. In any event, our terms of reference as Arbitrators are limited to those foreseen in paragraphs 6 and 7 of Article 22 of the DSU. We note that the relationship of Articles 21.5 and 22 is now under discussion in the ongoing review of the DSU.

[1052] (*footnote original*) Arbitration Award under Article 21.3(c) in *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15 & WT/DS48/13, paragraph 26 (29 May 1998) (emphasis added).

[1053] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.11.

[1054] (*footnote original*) Report of the working party on Netherlands Action under Article XXIII:2 to Suspend Obligations to the United States, adopted on 8 November 1952, BISD 1S/62.

[1055] (*footnote original*) The New Shorter Oxford English Dictionary on Historic Principles (1993), page 103.

[1056] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 6.4–6.5. In *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, the Arbitrators followed this approach and considered that they "would have to estimate the level of suspension we consider to be *equivalent* to the impairment suffered" (emphasis added), para. 12.

[1057] Decisions by the Arbitrators on *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 18.

Bananas case, '[i]t is impossible to ensure correspondence or identity between two levels if one of the two is not clearly defined'.[1058] Therefore, as a prerequisite for ensuring equivalence between the two levels, we have to be able to determine, not only the 'level of the nullification and impairment', but also the 'level of the suspension of concessions or other obligations'. To give effect to the obligation of equivalence in Article 22.4, the Member requesting suspension thus has to identify the level of suspension of concessions it proposes in a way that allows us to determine equivalence."[1059]

Extent of the Arbitrators' mandate when they reject the proposed level of suspension

743. The Arbitrators on *EC – Hormones (US) (Article 22.6 – EC)* considered that when the Arbitrators determine that the level of suspension of concessions or other obligations sought by the complaining party is not equivalent to the actual level of nullification or impairment suffered, they are obliged to determine what level of suspension would be equivalent:

"There is . . . a difference between our task here and the task given to a panel. In the event we decide that the US proposal is *not* WTO consistent, i.e. that the suggested amount is too high, we should not end our examination the way panels do, namely by requesting the DSB to recommend that the measure be brought into conformity with WTO obligations. Following the approach of the arbitrators in the *Bananas* case – where the proposed amount of US$ 520 million was reduced to US$ 191.4 million – we would be called upon to go further. In pursuit of the basic DSU objectives of prompt and positive settlement of disputes, we would have to estimate the level of suspension we consider to be equivalent to the impairment suffered. This is the essential task and responsibility conferred on the arbitrators in order to settle the dispute. In our view, such approach is implicitly called for in Article 22.7. . . "[1060]

744. Similarly, in *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the Arbitrators stated:

"[W]e note that, if we were to find the proposed amount . . . not to be equivalent, we would have to estimate the level of suspension we consider to be equivalent to the nullification or impairment suffered by Ecuador. This approach is consistent with Article 22.7 of the DSU which emphasizes the finality of the arbitrators' decision. . . .

We recall that this approach was followed in the US/EC arbitration proceeding in *EC – Bananas III* and the arbitration proceedings in *EC – Hormones*, where the arbitrators did not consider the proposed amount of suspension as equivalent to the nullification or impairment suffered and recalculated that amount in order to be able to render a final decision."[1061]

745. In *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, the Arbitrators confirmed that "prior Arbitrators that have rejected proposed levels of countermeasures (or suspensions of concessions) have always proceeded to set levels consistent with the relevant agreements".[1062]

(c) Exception: standard of appropriateness in subsidy arbitrations

746. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators, although indicating that they were following the approach adopted by previous arbitrators, used the standard of appropriateness, that had been rejected in *EC – Bananas III (US) (Article 22.6 – EC)* (see paragraph 741 above). This was because Article 4.11 of the *SCM Agreement* calls for the Arbitrators to determine the "*appropriate countermeasures*". The Arbitrators indicated that "[a]s to our task, we follow the approach adopted by previous arbitrators under Article 22.6 of the DSU.[1063] We will have not only to determine whether Canada's proposal constitutes '*appropriate countermeasures*', but also to determine the level of countermeasures we consider to be *appropriate* in case we find that Canada's level of countermeasures is not appropriate, if necessary by applying our own methodology." (emphasis added)[1064]

747. With respect to the relationship between the "equivalence" and "appropriateness" standards, see paragraphs 727–728 above. As regards the particularities of arbitrations pursuant to Article 4.11 of the *SCM Agreement*, see paragraphs 763–777 below and Section IV.B.8 of the Chapter on the *SCM Agreement*.

(d) Separate opinions

748. In *US – FSC (Article 22.6 – EC)*, the Arbitrators expressed separate opinions in two footnotes regarding the extent of the possible interpretations of the Arbitrators' conclusions.[1065]

749. As regards dissenting/separate opinions in panel reports, see Section XI.B.7 above. For concurrent

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[1058] (*footnote original*) WT/DS/ARB, para. 4.2.

[1059] Decisions by the Arbitrators on *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 20.

[1060] Decision by the Arbitrators on *EC – Hormones (US) (Article 22.6 – EC)*, para. 12 (footnotes omitted). See also Decision by the Arbitrators on *US – 1916 Act (Article 22.6 – US)*, para. 4.6.

[1061] Decision by the Arbitrators on *EC – Bananas (Ecuador) (Article 22.6 – EC)*, paras. 12–13. See also Decision by the Arbitrators on *US – 1916 Act (Article 22.6 – US)*, para. 4.7.

[1062] Decision by the Arbitrator, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.51 (footnote omitted). See also Decision by the Arbitrators on *US – 1916 Act (Article 22.6 – US)*, paras. 4.8 and 4.9.

[1063] (*footnote original*) See Article 22.6 arbitrations in *EC – Hormones, op. cit.*, para. 12.

[1064] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.18.

[1065] Decision by the Arbitrators on *US – FSC (Article 22.6 – EC)*, footnotes 74 and 82.

statements in Appellate Body reports, see Section XVII.B.7 above.

(e) Suspension of concessions awarded under arbitration

750. In *EC – Bananas III (US) (Article 22.6 – EC)*, the Arbitrators decided that the suspension by the United States of the application to the European Communities and its member States of tariff concessions and related obligations under *GATT 1994* covering trade in a maximum amount of US$191.4 million per year would be consistent with Article 22.4 of the *DSU*.[1066] Further to the request by the United States,[1067] the DSB, at its meeting on 19 April 1999, authorized the suspension of concessions.[1068]

751. In *EC – Hormones (US) (Article 22.6 – EC)*, the Arbitrators decided that the suspension by the United States of the application to the European Communities and its member States of tariff concessions and related obligations under *GATT 1994* covering trade in a maximum amount of US$116.8 million per year would be consistent with Article 22.4 of the *DSU*.[1069] Further to the request by the United States,[1070] the DSB, at its meeting on 26 July 1999, authorized the suspension of concessions.[1071]

752. In *EC – Hormones (Canada) (Article 22.6 – EC)*, the Arbitrators decided that the suspension by Canada of the application to the European Communities and its member States of tariff concessions and related obligations under *GATT 1994* covering trade in a maximum amount of Can$11.3 million per year would be consistent with Article 22.4 of the *DSU*.[1072] Further to the request by Canada,[1073] the DSB, at its meeting on 26 July 1999, authorized the suspension of concessions.[1074]

753. In *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, the Arbitrators decided that the suspension by Ecuador to the European Communities of concessions or other obligations at a level not exceeding US$201.6 million per year would be consistent within the meaning of Article 22.4. The Arbitrators further decided that

> "(b) Ecuador may request, pursuant to subparagraph (a) of Article 22.3, and obtain authorization by the DSB to suspend concessions or other obligations under the GATT concerning certain categories of goods in respect of which we have been persuaded that suspension of concessions is effective and practicable. Notwithstanding the requirement set forth in Article 22.7 that arbitrators 'shall not examine the nature of the concessions or other obligations to be suspended', we note that in our view these categories of goods do not include investment goods or primary goods used as inputs in Ecuadorian manufacturing and processing industries, whereas these categories of goods do include goods destined for final consumption by end-consumers in Ecuador.[1075] In making its request for suspension of concessions with respect to certain product categories, we note that, consistent with past practice in arbitration proceedings under Article 22,[1076] Ecuador should submit to the DSB a list identifying the products with respect to which it intends to implement such suspension once it is authorized.
>
> (c) Ecuador may request, pursuant to subparagraph (a) of Article 22.3, and obtain authorization by the DSB to suspend commitments under the GATS with respect to 'wholesale trade services' (CPC 622) in the principal sector of distribution services.
>
> (d) To the extent that suspension requested under the GATT and the GATS, in accordance with subparagraphs (b) and (c) above, is insufficient to reach the level of nullification and impairment indicated in subparagraph (a) of this paragraph, Ecuador may request, pursuant to subparagraph (c) of Article 22.3, and obtain authorization by the DSB to suspend its obligations under the TRIPS Agreement with respect to the following sectors of that Agreement:
>
> Section 1: Copyright and related rights, Article 14 on 'Protection of performers, producers of phonograms (sound recordings) and broadcasting organisations';
>
> Section 3: Geographical indications;
>
> Section 4: Industrial designs."[1077]

754. Further to the request by Ecuador,[1078] the DSB, at its meeting on 28 May 2000, authorized the suspension of concessions.[1079]

[1066] Decision by the Arbitrators on *EC – Bananas III (US) (Article 22.6 – EC)*, para. 7.8.
[1067] WT/DS27/49.
[1068] WT/DSB/M/59.
[1069] Decision by the Arbitrators on *EC – Hormones (US) (Article 22.6 – EC)*, para. 84.
[1070] WT/DS26/21.
[1071] WT/DSB/M/65.
[1072] Decision by the Arbitrators on *EC – Hormones (US) (Article 22.6 – EC)*, para. 84.
[1073] WT/DS48/19.
[1074] WT/DSB/M/65.
[1075] (*footnote original*) We would expect that a request by Ecuador under subparagraph (a) of Article 22.3 for suspension of concessions under the GATT with respect to the product categories just mentioned would be at least of the amount identified in paragraph 99 above.
[1076] (*footnote original*) Decision by the Arbitrators in *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* (WT/DS26/ARB, dated 12 July 1999), paras. 18–23. Decision by the Arbitrators in *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* (WT/DS48/ARB, dated 12 July 1999), paras. 18–21.
[1077] Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 173.
[1078] WT/DS27/54.
[1079] WT/DSB/M/80.

755. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators decided that the suspension by Canada of the application to Brazil of tariff concessions or other obligations under *GATT 1994*, the *Agreement on Textiles and Clothing* and the *Agreement on Import Licensing Procedures* covering trade in a maximum amount of Can$344.2 million per year would constitute appropriate countermeasures within the meaning of Article 4.10 of the *SCM Agreement*.[1080] Further to the request by Canada,[1081] the DSB, meeting on 12 December 2000, authorized the suspension of concessions.[1082]

756. In *US – FSC (Article 22.6 – US)*, the Arbitrators decided that the suspension by the European Communities of concessions under the *GATT 1994* in the form of the imposition of a 100 per cent *ad valorem* charge on imports of certain goods from the United States in a maximum amount of US$4,043 million per year would constitute appropriate countermeasures within the meaning of Article 4.10 of the *SCM Agreement*.[1083] Further to the request by the European Communities,[1084] the DSB, at its meeting on 7 May 2003, authorized the suspension of concessions.[1085]

757. In *US – 1916 Act (Article 22.6 – US)*, the Arbitrators awarded the European Communities the possibility of suspending concessions "qualitatively" (see paragraphs 736–738 above) instead of quantitatively as in all the previous cases above, provided that it ensured that "the application of such a suspension is quantified, and does not exceed the quantified level of nullification or impairment it has sustained as a result of the 1916 Act". As parameters for quantifying the monetary level of its nullification or impairment, the Arbitrators allowed the European Communities to include (i) "the cumulative monetary value of any amounts payable by EC entities pursuant to final court judgments for claims under the 1916 Act"; and (ii) "the cumulative monetary value of any amounts payable by EC entities pursuant to the settlement of claims under the 1916 Act".[1086] As of 31 December 2004, the European Communities had not requested the DSB for authorization to suspend concessions after the issuance of the Decision by the Arbitrator, pursuant to Article 22.7 of the *DSU*, last sentence.

758. In *Canada – Aircraft Credits and Guarantees (Article 22.6 Canada)* the Arbitrator decided that the suspension by Brazil: (a) of the application of the obligation under paragraph 6(a) of Article VI of the *GATT 1994* to determine that the effect of subsidization under EDC Canada Account and EDC Corporate Account programmes was to cause or threaten material injury to an established domestic industry, or was to retard materially the establishment of a domestic industry; (b) of the application of obligations under the *Agreement on Import Licensing Procedures* relative to licensing requirements on imports from Canada; and (c) of tariff concessions and related obligations under the *GATT 1994* concerning a list of products to be drawn from the list attached to its request, covering trade in a total amount of US$247,797,000, would constitute appropriate countermeasures within the meaning of Article 4.10 of the SCM Agreement.[1087] Further to the request by Brazil,[1088] the DSB, at its meeting on 18 March 2003, authorized the suspension of concessions.[1089]

759. In *US – Offset Act (Byrd Amendment) (Article 22.6)*, the Arbitrator awarded the requesting parties (Brazil, Chile, European Communities, India, Japan, Korea and Mexico) the possibility of suspending concessions or other obligations in the form of the imposition of an additional import duty above bound custom duties on a final list of products originating in the United States covering, on a yearly basis, a total value of trade not exceeding, in US dollars, the amount resulting from the following equation:

> "Amount of disbursements under CDSOA for the most recent year for which data are available relating to anti-dumping or countervailing duties paid on imports from [the requesting party] at that time, as published by the United States' authorities.
>
> *multiplied by:*
>
> 0.72"[1090]

760. Following Canada's request to suspend concessions and other obligations, the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, allowed Canada, in addition to imposing additional import duties, to suspend "the application of the obligations under Article VI of *GATT 1994*, Articles 3, 5, 7, 8, 9, 10, 11 and 12 of the *Anti-Dumping Agreement*, and Articles 11, 12, 15, 17, 18, 19, 20, 21 and 22 of the *SCM Agreement*

[1080] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 4.1.

[1081] WT/DS46/25.

[1082] WT/DSB/M/94.

[1083] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 8.1.

[1084] WT/DS108/26.

[1085] WT/DSB/M/149.

[1086] Decision by the Arbitrators in *US – 1916 Act (Article 22.6 – US)*, paras. 8.1–8.2.

[1087] Decision by the Arbitrator in *Canada – Aircraft Credits and Guarantees (Article 22.6)*, para. 4.1.

[1088] WT/DS222/10.

[1089] WT/DSB/M/145.

[1090] Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – India)*, para. 5.2. Similar decisions were taken in regard to the requests of Brazil, Canada, Chile, EC, Japan, Korea and Mexico, with some textual variations in some cases. See decision by the Abitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Brazil), US – Offset Act (Byrd Amendment) (Article 22.6 – Canada), US – Offset Act (Byrd Amendment) (Article 22.6 – Chile), US – Offset Act (Byrd Amendment) (Article 22.6 – EC), US – Offset Act (Byrd Amendment) (Article 22.6 – Japan), US – Offset Act (Byrd Amendment) (Article 22.6 – Korea), US – Offset Act (Byrd Amendment) (Article 22.6 – Mexico)*, para. 5.2.

to determine that the effect of dumping or subsidization of products from the United States is to cause or threaten material injury to an established domestic injury, or is to retard materially the establishment of a domestic industry", converting a value of trade not exceeding the amount resulting from the same formula.[1091]

761. In *US – Offset Act (Byrd Amendment) (Article 22.6)*, further to the request by all the requesting parties except Chile,[1092] the DSB, at its meeting on 24 and 26 November 2004, authorized the suspension of concessions.[1093] Pursuant to a request by Chile,[1094] authorization to suspend concessions was granted at the DSB meeting on 17 December 2004.[1095]

762. The table below illustrates the authorizations granted by the DSB to suspend concessions as of 31 December 2004:

Dispute	Parties	Date of the award	Level of suspension
US – Offset Act (Byrd Amendment) (DS217, DS234)	Brazil, Canada, Chile, EC, India, Japan, Korea, Mexico,	31 August 2004	Amount of annual disbursements multiplied by a United States trade effect coefficient
US – 1916 Act (EC) (DS136)	EC / United States	24 February 2004	Amount of the final decisions and awards under 1916 Act
Canada – Aircraft (DS222)	Brazil / Canada	17 February 2003	US$247,797,000
US – FSC (DS108)	EC / United States	30 August 2002	US$4,043 millions per year
Brazil – Aircraft (DS46)	Canada / Brazil	28 August 2000	CAN$344.2 millions per year
EC – Bananas III (Ecuador) (DS27)	Ecuador / EC	24 March 2000	US$201.6 millions per year
EC – Hormones (Canada, DS26) (United States, DS48)	Canada / EC United States / EC	12 July 1999	CAN$11.3 millions per year (Canada) US$116.8 millions per year (United States)
EC – Bananas III (United States) (DS27)	United States / EC	9 April 1999	US$191.4 millions per year

10. Relationship with other WTO Agreements

(a) Arbitrations pursuant to Article 4.10 and 4.11 of the SCM Agreement

(i) Special or additional rules

763. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators indicated that they read the provisions of Article 4.11 of the *SCM Agreement* as special or additional rules:

> "We read the provisions of Article 4.11 of the SCM Agreement as special or additional rules. In accordance with the reasoning of the Appellate Body in *Guatemala – Cement*,[1096] we must read the provisions of the DSU and the special or additional rules in the SCM Agreement so as to give meaning to all of them, except if there is a conflict or a difference. . ."[1097]

764. In *US – FSC (Article 22.6 – US)*, the Arbitrators recalled Article 30 of the *SCM Agreement* and concluded that Article 22.6 of the *DSU* applies to arbitrations pursuant to Article 4.11 of the *SCM Agreement* although this latter provision would prevail in case of conflict:

> "We also recall the terms of Article 30 of the *SCM Agreement*, which clarifies that the provisions of the *DSU* are applicable to proceedings concerning measures covered by the *SCM Agreement*. Article 22.6 of the *DSU* therefore remains relevant to arbitral proceedings under Article 4.11 of the *SCM Agreement*, as illustrated by the textual reference made to Article 22.6 of the *DSU* in that provision. However, the special or additional rules and procedures of the *SCM Agreement*, including Articles 4.10 and 4.11, would prevail to the extent of any difference between them.[1098]"[1099]

[1091] Decision by the Arbitrator in *US – Offset Act (Byrd Amendment) (Article 22.6 – Canada)*, para. 5.2.
[1092] WT/DS217/38; WT/DS217/39; WT/DS217/40; WT/DS217/41; WT/DS217/42; WT/DS234/31 and WT/DS234/32.
[1093] WT/DSB/M/178.
[1094] WT/DS217/43.
[1095] WT/DSB/M/180.
[1096] (*footnote original*) *op. cit.*, para. 65.
[1097] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.57.
[1098] (*footnote original*) On the notion of "difference", see Report of the Appellate Body on *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico ("Guatemala – Cement I")*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, paras. 65 and 66.
[1099] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 2.6.

(ii) Exception to the requirement of equivalence to the level of nullification or impairment

765. The Arbitrators in *Brazil – Aircraft (Article 22.6 – Brazil)* rejected Brazil's argument that the countermeasures must be equivalent to the level of nullification or impairment pursuant to Article 22.4 of the *DSU*, noting that the concept of nullification or impairment is not found in Articles 3 and 4 of the *SCM Agreement*. The Arbitrators explained:

> "A first approach would be to consider that the concept of nullification or impairment does not apply to Article 4 of the SCM Agreement. We note in this respect that, in relation to actionable subsidies, Article 5 refers to nullification or impairment as only one of the three categories of adverse effects. This could mean that another test than nullification or impairment could also apply in the context of Article 4 of the SCM Agreement.
>
> That said, we note that the Original Panel concluded that, since a violation had been found, a *prima facie* case of nullification or impairment had been made within the meaning of Article 3.8 of the DSU, which Brazil had not rebutted. In that context, we are more inclined to consider that no reference was expressly made to nullification or impairment in Article 4 of the SCM Agreement for the following reasons:
>
> (a) a violation of Article 3 of the SCM Agreement entails an irrebuttable presumption of nullification or impairment. It is therefore not necessary to refer to it;
>
> (b) the purpose of Article 4 is to achieve the *withdrawal* of the prohibited subsidy. In this respect, we consider that the requirement to withdraw a prohibited subsidy is of a different nature than removal of the specific nullification or impairment caused to a Member by the measure.[1100] The former aims at removing a measure which is presumed under the WTO Agreement to cause negative trade effects, irrespective of who suffers those trade effects and to what extent. The latter aims at eliminating the effects of a measure on the trade of a given Member;
>
> (c) the fact that nullification or impairment is established with respect to a measure does not necessarily mean that, in the presence of an obligation to withdraw that measure, the level of appropriate countermeasures should be based only on the level of nullification or impairment suffered by the Member requesting the authorisation to take countermeasures."[1101]

766. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators further indicated that they read the provisions of Article 4.11 of the *SCM Agreement* as special or additional rules and recalled that the concept of nullification or impairment is absent from Articles 3 and 4 of the *SCM Agreement*. The Arbitrators considered that, accordingly, in that context there was no legal obligation that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment. The Arbitrators thus concluded that, when dealing with a prohibited export subsidy, an amount of countermeasures that corresponds to the total amount of the subsidy is "appropriate":

> "We read the provisions of Article 4.11 of the SCM Agreement as special or additional rules. In accordance with the reasoning of the Appellate Body in *Guatemala – Cement*,[1102] we must read the provisions of the DSU and the special or additional rules in the SCM Agreement so as to give meaning to all of them, except if there is a conflict or a difference. While we agree that in practice there may be situations where countermeasures equivalent to the level of nullification of impairment will be appropriate, we recall that the concept of nullification or impairment is absent from Articles 3 and 4 of the SCM Agreement. In that framework, there is no legal obligation that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment.
>
> On the contrary, requiring that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment would be contrary to the principle of effectiveness by significantly limiting the efficacy of countermeasures in the case of prohibited subsidies. Indeed, as shown in the present case,[1103] other countermeasures than suspension of concessions or obligations may not always be feasible because of their potential effects on other Members. This would be the case of a counter-subsidy granted in a sector where other Members than the parties compete with the products of the parties. In such a case, the Member taking the countermeasure may not be in a position to induce compliance.
>
> We are mindful that our interpretation may, at a first glance, seem to cause some risk of disproportionality in case of multiple complainants. However, in such a case, the arbitrator could allocate the amount of appropriate countermeasures among the complainants in proportion to their trade in the product concerned. The "inducing" effect would most probably be very similar.

[1100] (*footnote original*) We note that Article 3.7 of the DSU refers to the "withdrawal of the measures concerned" as a first objective. However, we also note that, contrary to Article 3.7 of the DSU, Article 4.7 of the SCM Agreement does not provide for any alternative than the withdrawal of the measure once it has been found to be a prohibited subsidy.

[1101] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.47–3.48.

[1102] (*footnote original*) *op. cit.*, para. 65.

[1103] (*footnote original*) Canada mentioned that it could have applied a counter-subsidy but refrained from doing so for a number of reasons.

> For the reasons set out above, we conclude that, when dealing with a prohibited export subsidy, an amount of countermeasures which corresponds to the total amount of the subsidy is 'appropriate'.[1104]"[1105]

767. In *US – FSC (Article 22.6 – US)*, the Arbitrator considered that, since Articles 4.10 and 4.11 of the *SCM Agreement* may prevail over those of the *DSU*, there can be no presumption that the drafters intended the standard under Article 4.10 of the *SCM Agreement* to be "necessarily coextensive" with that under Article 22.4 of the *DSU*:

> "It should be recalled here that Articles 4.10 and 4.11 of the *SCM Agreement* are 'special or additional rules' under Appendix 2 of the *DSU*, and that in accordance with Article 1.2 of the *DSU*, it is possible for such rules or procedures to prevail over those of the *DSU*. There can be no presumption, therefore, that the drafters intended the standard under Article 4.10 to be necessarily coextensive with that under Article 22.4 so that the notion of 'appropriate countermeasures' under Article 4.10 would limit such countermeasures to an amount 'equivalent to the level of nullification or impairment' suffered by the complaining Member. Rather, Articles 4.10 and 4.11 of the *SCM Agreement* use distinct language and that difference must be given meaning.
>
> Indeed, reading the text of Article 4.10 in its context, one might reasonably observe that if the drafters had intended the provision to be construed in this way, they could certainly have made it clear. Indeed, relevant provisions both elsewhere in the *SCM Agreement* and in the *DSU* use distinct terms to convey precisely such a standard as described by the United States, in so many words. Yet the drafters chose terms for this provision in the *SCM Agreement* different from those found in Article 22.4 of the DSU. It would not be consistent with effective treaty interpretation to simply read away such differences in terminology.
>
> We therefore find no basis in the language itself or in the context of Article 4.10 of the *SCM Agreement* to conclude that it can or should be read as amounting to a 'trade effect-oriented' provision where explicitly alternative language is to be read away in order to conform it to a different wording to be found in Article 22.4 of the *DSU*.
>
> We would simply add that, while we consider that the precise difference in language must be given proper meaning, this goes no further than that. Our interpretation of Article 4.10 of the *SCM Agreement* as embodying a different rule from Article 22.4 of the *DSU* does not make the *DSU* otherwise inapplicable or redundant."[1106]

768. As regards the subsidy-specific aspects of the determination of "appropriate countermeasures", see Section IV.B.7(a) of the Chapter on the *SCM Agreement*.

769. With respect to the standard of "*appropriateness*" as opposed to the standard of "*equivalence*", see paragraphs 741–746 above.

(iii) Concept of "appropriate countermeasures"

"countermeasure"

770. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators looked at the word 'countermeasure' as context for finding a meaning to the word "appropriate". The Arbitrators disregarded the dictionary meaning of the word and preferred to refer to its general meaning in international law and to the work of the International Law Commission on state responsibility:

> "While the parties have referred to dictionary definitions for the term 'countermeasures', we find it more appropriate to refer to its meaning in general international law[1107] and to the work of the International Law Commission (ILC) on state responsibility, which addresses the notion of countermeasures.[1108] We note that the ILC work is based on relevant state practice as well as on judicial decisions and doctrinal writings, which constitute recognized sources of international law.[1109] When considering the definition of 'countermeasures' in Article 47 of the Draft Articles,[1110] we note that counter-

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[1104] (*footnote original*) The Arbitrators also reviewed the arguments and evidence submitted by the parties concerning the approach based on the level of nullification or impairment suffered by Canada. They note that this approach implied – as any counterfactual – many more assumptions than the approach based on the amount of the subsidy. The Arbitrators were of the view that, if the calculation of appropriate countermeasures based on the amount of the subsidy were compatible with Article 4.10 of the SCM Agreement, it would be preferable to follow this approach since it could lead to a more objective result.

[1105] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.57–3.60.

[1106] Decision by the Arbitrator on *US – FSC (Article 22.6 – US)*, paras. 5.47–5.50.

[1107] (*footnote original*) See, e.g., the *Naulilaa* arbitral award (1928), UN Reports of International Arbitral Awards, Vol. II, p. 1028 and *Case Concerning the Air Services Agreement of 27 March 1946 (France v. United States of America)* (1978) International Law Reports, Vol. 54 (1979), p. 338. See also, *inter alia*, the *Draft Articles on State Responsibility With Commentaries Thereto Adopted by the International Law Commission on First Reading* (January 1997), hereinafter the "Draft Articles" and the draft Articles provisionally adopted by the Drafting Committee on second reading, A/CN.4/L 600, 11 August 2000. Even though the latter modify a number of provisions of the Draft Articles, they do not affect the terms to which we refer in this report.

[1108] (*footnote original*) We also note that, on the basis of the definition of "countermeasures" in the Draft Articles, the notion of "appropriate countermeasures" would be more general than the term "equivalent to the level of nullification or impairment". It would basically include it. Limiting its meaning to that given to the term "equivalent to the level of nullification or impairment" would be contrary to the principle of effectiveness in interpretation of treaties.

[1109] (*footnote original*) See Article 38 of the Statute of the ICJ.

[1110] (*footnote original*) We note that Canada objects to us using the Draft Articles in this interpretation process. Canada argues that the Draft Articles are not "relevant rules of international law applicable to the relations between the parties" within the meaning of Article 31.3(c) of the Vienna Convention. As already

measures are meant to 'induce [the State which has committed an internationally wrongful act] to comply with its obligations under articles 41 to 46'. We note in this respect that the Article 22.6 arbitrators in the *EC – Bananas* (1999) arbitration made a similar statement.[1111] We conclude that a countermeasure is 'appropriate' *inter alia* if it effectively induces compliance."[1112]

771. In *US – FSC (Article 22.6 – US)*, the Arbitrator looked into the ordinary meaning of the word "countermeasure":

"Dictionary definitions of 'countermeasure' suggest that a countermeasure is essentially defined by reference to the wrongful action to which it is intended to respond. The New Oxford Dictionary defines 'countermeasure' as 'an action taken to counteract a danger, threat, etc'.[1113] The meaning of 'counteract' is to 'hinder or defeat by contrary action; neutralize the action or effect of'.[1114] Likewise, the term 'counter' used as a prefix is defined *inter alia* as: 'opposing, retaliatory'.[1115] The ordinary meaning of the term thus suggests that a countermeasure bears a relationship with the action to be counteracted, or with its effects (cf. 'hinder or defeat by contrary action; neutralize the action or effect of').[1116]

In the context of Article 4 of the *SCM Agreement*, the term 'countermeasures' is used to define temporary measures which a prevailing Member may be authorized to take in response to a persisting violation of Article 3 of the *SCM Agreement*, pending full compliance with the DSB's recommendations. This use of the term is in line with its ordinary dictionary meaning as described above: these measures are authorized to counteract, in this context, a wrongful action in the form of an export subsidy that is prohibited *per se,* or the effects thereof.

It would be consistent with a reading of the plain meaning of the concept of countermeasure to say that it can be directed either at countering the measure at issue (in this case, at effectively neutralizing the export subsidy) or at counteracting its effects on the affected party, or both.

We need, however, to broaden our textual analysis in order to see whether we can find more precision in how countermeasures are to be construed in this context. We thus turn to an examination of the expression '*appropriate*' countermeasures with a view to clarifying what level of countermeasures may be legitimately authorized."[1117]

"appropriate countermeasure"

772. In *Brazil – Aircraft (Article 22.6 – Brazil)*, Canada had proposed adopting countermeasures based on the amount of subsidy per aircraft granted by Brazil instead of basing them on the level of nullification or impairment. The Arbitrators examined the meaning of the term appropriate and concluded that "a countermeasure is 'appropriate' *inter alia* if it *effectively* induces compliance":

"In accordance with Article 3.2 of the DSU, we proceed with an analysis of the meaning of the term 'appropriate' based on Article 31 of the Vienna Convention.

Examining only the ordinary meaning of the term 'appropriate' does not allow us to reply to the question before us, since dictionary definitions are insufficiently specific. Indeed, the relevant dictionary definitions of the word 'appropriate' are 'specially suitable; proper'.[1118] However, they point in the direction of meeting a particular objective.

The first context of the term 'appropriate' is the word 'countermeasures', of which it is an adjective. While the parties have referred to dictionary definitions for the term 'countermeasures', we find it more appropriate to refer to its meaning in general international law[1119] and to the work of the International Law Commission (ILC) on state responsibility, which addresses the notion of countermeasures.[1120] We note that the ILC work is based

mentioned, we use the Draft Articles as an indication of the agreed meaning of certain terms in general international law.

[1111] (*footnote original*) *Op. cit.*, para. 6.3. In that case, the arbitrators had to determine the level of nullification or impairment. Since the Article 22.6 arbitrators in the *EC – Bananas* case considered that measures equivalent to the level of nullification or impairment can induce compliance, it could be argued that in the present case too, countermeasures equivalent to the level of nullification or impairment should be sufficient to induce compliance. However, the arbitrators in *EC – Bananas* were instructed by Article 22.7 to determine whether the proposed measures were equivalent to the level of nullification or impairment.

[1112] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.44.

[1113] (*footnote original*) The New Shorter Oxford English Dictionary (1993).

[1114] (*footnote original*) Ibid.

[1115] (*footnote original*) Webster's New Encyclopedic Dictionary (1994).

[1116] (*footnote original*) The New Shorter Oxford English Dictionary (1993).

[1117] Decision by the Arbitrator on *US – FSC (Article 22.6 – US)*, paras. 5.4–5.7.

[1118] (*footnote original*) The New Shorter Oxford English Dictionary (1993), p. 103; Webster's New Encyclopedic Dictionary (1994), p. 48.

[1119] (*footnote original*) See, e.g., the *Naulilaa* arbitral award (1928), UN Reports of International Arbitral Awards, Vol. II, p. 1028 and *Case Concerning the Air Services Agreement of 27 March 1946 (France v. United States of America)* (1978) International Law Reports, Vol. 54 (1979), p. 338. See also, *inter alia*, the *Draft Articles on State Responsibility With Commentaries Thereto Adopted by the International Law Commission on First Reading* (January 1997), hereinafter the "Draft Articles" and the draft Articles provisionally adopted by the Drafting Committee on second reading, A/CN.4/L 600, 11 August 2000. Even though the latter modify a number of provisions of the Draft Articles, they do not affect the terms to which we refer in this report.

[1120] (*footnote original*) We also note that, on the basis of the definition of "countermeasures" in the Draft Articles, the notion of "appropriate countermeasures" would be more general than the term "equivalent to the level of nullification or impairment". It would basically include it. Limiting its meaning to that given to the term "equivalent to the level of nullification or impairment" would be contrary to the principle of effectiveness in interpretation of treaties.

on relevant state practice as well as on judicial decisions and doctrinal writings, which constitute recognized sources of international law.[1121] When considering the definition of 'countermeasures' in Article 47 of the Draft Articles,[1122] we note that countermeasures are meant to 'induce [the State which has committed an internationally wrongful act] to comply with its obligations under articles 41 to 46'. We note in this respect that the Article 22.6 arbitrators in the *EC – Bananas (1999)* arbitration made a similar statement.[1123] We conclude that a countermeasure is 'appropriate' *inter alia* if it *effectively* induces compliance."[1124]

773. The Arbitrators, in *US – FSC (Article 22.6 – US)*, considered the dictionary meaning of the word "appropriate" and concluded that, as far as the amount or level of countermeasures is concerned, the expression "appropriate" does not in and of itself predefine the precise and exhaustive conditions for the application of countermeasures.[1125] According to them, Articles 4.10 and 4.11 are not designed to lay down a precise formula or otherwise quantified benchmark or amount of countermeasures which might be legitimately authorized in each and every instance.[1126] The Arbitrators indicated:

"Based on the plain meaning of the word, this means that countermeasures should be adapted to the particular case at hand. The term is consistent with an intent not to prejudge what the circumstances might be in the specific context of dispute settlement in a given case. To that extent, there is an element of flexibility, in the sense that there is thereby an eschewal of any rigid *a priori* quantitative formula. But it is also clear that there is, nevertheless, an objective relationship which must be absolutely respected: the countermeasures must be suitable or fitting by way of response to the case at hand."[1127]

Footnote 9 of the SCM Agreement

774. In *US – FSC (Article 22.6 – US)*, the Arbitrators considered that the term "appropriate" countermeasures in Article 4.10 is informed by footnote 9, which provides guidance as to what the expression "appropriate" should be understood to mean. In the Arbitrators' view, "these two elements are part of a single assessment and that the meaning of the expression 'appropriate countermeasures' should result from a combined examination of these terms of the text in light of its footnote".[1128] The Arbitrators thus concluded that "[t]his footnote effectively clarifies further how the term 'appropriate' is to be interpreted. We understand it to mean that countermeasures that would be 'disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited' could not be considered 'appropriate' within the meaning of Article 4.10 of the SCM Agreement".[1129] Further to analysing the dictionary meaning of the word "disproportionate" in footnote 9, the Arbitrators considered that footnote 9 "confirms that, while the notion of 'appropriate countermeasures' is intended to ensure sufficient flexibility of response to a particular case, it is a flexibility that is distinctly bounded" and that "[t]hose bounds are set by the relationship of appropriateness". In his view, "[t]hat appropriateness, in turn, entails an avoidance of disproportion between the proposed countermeasures and, as our analysis to this point has brought us, either the actual violating measure itself, the effects thereof on the affected Member, or both".[1130]

775. In *US – FSC (Article 22.6 – US)*, the Arbitrators further looked at the text of the final part of footnote 9 and considered that this text directed him "to consider the 'appropriateness' of countermeasures under Article 4.10 from this perspective of countering a wrongful act and taking into account its essential nature as an upsetting of the rights and obligations as between Members".[1131] The Arbitrators further noted that "the negative formulation of the requirement under footnote 9 is consistent with a greater degree of latitude than a positive requirement may have entailed: footnote 9 clarifies that Article 4.10 is not intended to allow countermeasures that would be 'dis-

[1121] (*footnote original*) See Article 38 of the Statute of the ICJ.

[1122] (*footnote original*) We note that Canada objects to us using the Draft Articles in this interpretation process. Canada argues that the Draft Articles are not "relevant rules of international law applicable to the relations between the parties" within the meaning of Article 31.3(c) of the Vienna Convention. As already mentioned, we use the Draft Articles as an indication of the agreed meaning of certain terms in general international law.

[1123] (*footnote original*) *Op. cit.*, para. 6.3. In that case, the arbitrators had to determine the level of nullification or impairment. Since the Article 22.6 arbitrators in the *EC – Bananas* case considered that measures equivalent to the level of nullification or impairment can induce compliance, it could be argued that in the present case too, countermeasures equivalent to the level of nullification or impairment should be sufficient to induce compliance. However, the arbitrators in *EC – Bananas* were instructed by Article 22.7 to determine whether the proposed measures were equivalent to the level of nullification or impairment.

[1124] Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.42–3.44.

[1125] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.10.

[1126] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.11.

[1127] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.12.

[1128] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.8.

[1129] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.16.

[1130] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.19.

[1131] Decision by the Arbitrators on *US – FSC (Article 22.6 – US)*, para. 5.23.

proportionate'. It does not require strict proportionality.[1132]"[1133]

(iv) Arbitrators' mandate pursuant to Article 4.11

776. In *Brazil – Aircraft (Article 22.6 – Brazil)*, a case that dealt with Canada's request for authorization to take "appropriate countermeasures" under Article 4.10 of the *SCM Agreement*, the Arbitrators described their task under Article 4.11 of the *SCM Agreement*. See paragraph 746 above.

777. In *US – FSC (Article 22.6 – US)*, the Arbitrators considered that their mandate required them to review whether the prevailing Member, in proposing certain measures to take in application of Article 4 of the *SCM Agreement*, had respected the parameters of what is permissible under that provision:

> "[Articles 4.10 and 4.11 of the *SCM Agreement*] complement each other: the arbitrator's mandate in relation to countermeasures concerning prohibited subsidies under Article 4 of the *SCM Agreement* is defined, quite logically, with reference to the notion embodied in the underlying provision in Article 4.10. The expression 'appropriate countermeasures' defines what measures can be authorized in case of non-compliance, and our mandate requires us to review whether, in proposing certain measures to take in application of that provision, the prevailing Member has respected the parameters of what is permissible under that provision.
>
> In doing this, we must aim at determining whether, in this particular case, the countermeasures proposed by the European Communities are 'appropriate'."[1134]

XXIII. ARTICLE 23

A. TEXT OF ARTICLE 23

Article 23
Strengthening of the Multilateral System

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

   (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

   (b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

   (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

[1132] (*footnote original*) We note in this regard the view of the commentator, Sir James Crawford, on the relevant Article of the ILC text on State Responsibility, reflected in a resolution adopted on 12 December 2001 by the UN General Assembly (A/RES/56/83), which expresses – but only in positive terms – a requirement of proportionality for countermeasures:

> "the positive formulation of the proportionality requirement is adopted in Article 51. A negative formulation might allow too much latitude." (J. Crawford, *The ILC's Articles on State Responsibility, Introduction, Text and Commentaries* 2002, CUP, para. 5 on Article 51).

Article 51 of the ILC Articles on State Responsibility (entitled "*Proportionality*") reads as follows:

> "Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question." (emphasis added)

We also note in this respect that, while that provision expressly refers – contrary to footnote 9 of the *SCM Agreement* – to the injury suffered, it also requires the gravity of the wrongful act and the right in question to be taken into account. This has been understood to entail a qualitative element to the assessment, even where commensurateness with the injury suffered is at stake. We note the view of Sir James Crawford on this point in his Commentaries to the ILC Articles:

> "Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely 'quantitative' element of the injury suffered, but also 'qualitative' factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but 'taking into account' two further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to 'the rights in question' has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration." (*Op. cit.*, para. 6 of the commentaries on Article 51.)

[1133] Decision by the Arbitrator on *US – FSC (Article 22.6 – US)*, para. 5.27.

[1134] Decision by the Arbitrator on *US – FSC (Article 22.6 – US)*, paras. 4.3–4.4.

B. INTERPRETATION AND APPLICATION OF ARTICLE 23

1. General

778. In *US – Section 301 Trade Act*, the Panel stated that Article 23 has to be construed in light of the object and purpose of the WTO. The Panel opined that State responsibility was not only triggered when an actual violation takes place:

> "In treaties which concern only the relations between States, State responsibility is incurred only when an actual violation takes place. By contrast, in a treaty the benefits of which depend in part on the activity of individual operators the legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable 'chilling effect' on the economic activities of individuals."[1135]

779. In *US – Certain EC Products*, the Panel considered the European Communities argument that the United States unilaterally imposed trade sanctions and thereby violated Article 23 of the *DSU*. The Panel, in a finding not directly reviewed by the Appellate Body, held that both paragraphs of Article 23 provide a prohibition on "unilateral redress", but that this prohibition is more directly provided for under the second paragraph of Article 23:

> "The structure of Article 23 is that the first paragraph states the general prohibition or general obligation, i.e. when Members seek the redress of a WTO violation,[1136] they shall do so only through the DSU. This is a general obligation. Any attempt to seek 'redress' can take place only in the institutional framework of the WTO and pursuant to the rules and procedures of the DSU.
>
> The prohibition against unilateral redress in the WTO sectors is more directly provided for in the second paragraph of Article 23. From the ordinary meaning of the terms used in the chapeau of Article 23.2 ('in such cases, Members shall'), it is also clear that the second paragraph of Article 23 is 'explicitly linked to, and has to be read together with and subject to, Article 23.1'.[1137] That is to say, the specific prohibitions of paragraph 2 of Article 23 have to be understood in the context of the first paragraph, i.e. when such action is performed by a WTO Member with a view to redressing a WTO violation."[1138]

780. The Panel on *US – Certain EC Products* also agreed with the European Communities that Article 23.2 contains specific examples of conduct inconsistent with the rules of the *DSU*, but held that the first analytical step necessarily was to determine – before turning to Article 23.2 – whether the measure at issue falls under the scope of Article 23.1:

> "We also agree with the *US – Section 301 Trade Act* Panel Report that Article 23.2 contains 'egregious examples of conduct that contradict the rules of the DSU'[1139] and which constitute more specific forms of unilateral actions, otherwise generally prohibited by Article 23.1 of the DSU.
>
> > '[t]hese rules and procedures [Article 23.1] clearly cover much more than the ones specifically mentioned in Article 23.2. There is a great deal more State conduct which can violate the general obligation in Article 23.1 to have recourse to, and abide by, the rules and procedures of the DSU than the instances especially singled out in Article 23.2.'(Footnotes omitted)[1140]
>
> The same Panel identified a few examples of such instances where the DSU could be violated[1141] contrary to the provisions of Article 23. Each time a Member seeking the redress of a WTO violation is not abiding by a rule of the DSU, it thus violates Article 23.1 of the DSU.
>
> In order to verify whether individual provisions of Article 23.2 have been infringed (keeping in mind that the obligation to also observe other DSU provisions can be brought under the umbrella of Article 23.1), we must first determine whether the measure at issue comes under the coverage of Article 23.1. In other words, we need to determine whether Article 23 is applicable to the dispute before addressing the specific violations envisaged in the second paragraph of Article 23 of the DSU or elsewhere in the DSU."[1142]

2. Article 23.1

(a) "seek[ing] the redress of a WTO violation"

781. In *US – Certain EC Products*, the Panel, in a finding not reviewed by the Appellate Body, considered whether the United States was "seeking to redress" what it perceived to be a WTO violation when it decided to withhold liquidation on imports from the European Communities of a list of products and impose a contingent liability for 100 per cent duties on each individual importation of affected products ("3 March Measure").

[1135] Panel Report on *US – Section 301 Trade Act*, para. 7.81.

[1136] (*footnote original*) Article 23.1 of the *DSU* refers more accurately to "seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements", i.e. the three causes of actions under WTO. In this Panel Report, the expression "WTO violation(s)" refers to all three causes of actions mentioned in Article 23.1 of the *DSU*.

[1137] (*footnote original*) Panel Report on *US – Section 301 Trade Act*, para. 7.44.

[1138] Panel Report on *US – Certain EC Products*, paras 6.19–6.20. This was upheld by the Appellate Body at para. 111.

[1139] (*footnote original*) Panel Report on *US – Section 301 Trade Act*, para. 7.45.

[1140] (*footnote original*) Panel Report on *US – Section 301 Trade Act*, para. 7.45.

[1141] (*footnote original*) See Panel Report on *US – Section 301 Trade Act*, fns. 655 and 656.

[1142] Panel Report on *US – Certain EC Products*, paras. 6.17–6.20.

"The term 'seeking' or 'to seek' is defined in the Webster New Encyclopaedic Dictionary as: 'to resort to, . . . to make an attempt, try'. . . . The term 'to redress' is defined in the New Shorter Oxford English Dictionary as 'repair (an action); atone for (a misdeed); remedy or remove; to set right or rectify (injury, a wrong, a grievance etc.); obtaining reparation or compensation'. . . . . The term 'redress' implies, therefore, a reaction by a Member against another Member, because of a perceived (or WTO determined) WTO violation, with a view to remedying the situation.

. . .

On its face, this description of the 3 March Measure shows that, because of the US perceived WTO inconsistency of the 1998 Bananas regime put in place by the European Communities as a measure taken to implement the Panel and Appellate Body recommendations (the 'EC implementing measure'), the United States imposed an increased contingent liability on EC listed imports only. This 3 March Measure was, therefore, discriminatory and aimed at the European Communities exclusively. The unilateral imposition of a liability for 100 per cent duty as of 3 March (well above the bound rates of tariffs) constitutes the imposition of a debt on such imports, and adds further obligations on such imports, even if the full effect of such liability is suspended until a future liquidation date. This debt, this liability, this additional obligation imposed on listed EC imports, is evidence that the United States wanted to remedy, was 'seeking to redress', what it perceived to be a WTO violation."[1143]

(b) "recourse to, and abide by"

782. In *US – Section 301 Trade Act*, the Panel held that Article 23.1 of the *DSU* prescribes "a general duty of a dual nature":

"Article 23.1 is not concerned only with specific instances of violation. It prescribes a general duty of a dual nature. First, it imposes on all Members to 'have recourse to' the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call 'exclusive dispute resolution clause', is an important new element of Members' rights and obligations under the DSU."[1144]

3. Article 23.2(a)

783. The Panel on *US – Section 301 Trade Act* held that a statute "which . . . reserves the right for the Member concerned to do something which it has promised *not* to do under Article 23.2(a)" is a violation of Article 23.2(a) read together with Article 23.1:

"The text of Article 23.1 is simple enough: Members are obligated generally to (a) have recourse to and (b) abide by DSU rules and procedures. These rules and procedures include most specifically in Article 23.2(a) a prohibition on making a unilateral determination of inconsistency prior to exhaustion of DSU proceedings.

. . .

[T]he very discretion granted under Section 304, which under the US argument absolves the legislation, is what, in our eyes, creates the presumptive violation. The statutory language which gives the USTR this discretion on its face precludes the US from abiding by its obligations under the WTO. In each and every case when a determination is made whilst DSU proceedings are not yet exhausted, Members locked in a dispute with the US will be subject to a mandatory determination by the USTR under a statute which explicitly puts them in that very danger which Article 23 was intended to remove.

. . .

Trade legislation, important or positive as it may be, which statutorily reserves the right for the Member concerned to do something which it has promised *not* to do under Article 23.2(a), goes, in our view, against the ordinary meaning of Article 23.2(a) read together with Article 23.1."[1145]

4. Article 23.2(c)

(a) General

784. After determining that the so-called 3 March Measure, which imposed an increased bonding requirement upon goods from the European Communities, constituted a measure taken to redress a WTO violation (see the excerpt referenced in paragraph 781 above), the Panel in *US – Certain Measures* examined whether the 3 March Measure violated Article 23.2(c) of the DSU. The Panel, in a finding not reviewed by the Appellate Body, held that "any WTO suspension of concessions or other obligations without prior DSB authorization is explicitly prohibited":

"Article 23.2(c) prohibits any suspensions of concessions or other obligations (taken as measures seeking to redress a WTO violation), prior to a relevant DSB authorization. Article 3.7 provides that suspension of concessions or other obligations should be used as a last resort, and subject to a DSB authorization. In Article 22.6, the suspension of concessions or other obligations is prohibited during the arbitration process which can only take place before the DSB authorization.

. . .

In the context of these provisions, any WTO suspension of concessions or other obligations without prior DSB

[1143] Panel Report on *US – Certain EC Products*, paras. 6.22 and 6.26.
[1144] Panel Report on *US – Section 301 Trade Act*, para. 7.43.
[1145] Panel Report on *US – Section 301 Trade Act*, paras. 7.59, 7.61 and 7.63.

authorization is explicitly prohibited. On 3 March there was no relevant DSB authorization of any sort."[1146]

(b) Relationship with other provisions of the DSU

(i) Article 3.7

785. In *US – Certain EC Products*, the Appellate Body clarified that "[t]he *obligation* of WTO Members not to suspend concessions or other obligations *without* prior DSB authorization is explicitly set out in Articles 22.6 and 23.2(c), not in Article 3.7 of the DSU". It "consider[ed], however, that if a Member has acted in breach of Articles 22.6 and 23.2(c) of the DSU, that Member has also, in view of the nature and content of Article 3.7, last sentence, necessarily acted contrary to the latter provision."[1147]

5. Relationship with other WTO Agreements

(a) SCM Agreement

786. In *Canada – Aircraft Credits and Guarantees*, the Panel recalled the prospective nature of WTO dispute settlement remedies and that such an approach was also applicable to the *SCM Agreement*:

> "In any event, even if the WTO dispute settlement mechanism does only provide for prospective remedies, we note that it does so in respect of all cases, and not only those involving prohibited export subsidies. Article 23.1 of the DSU provides that Members shall resolve all disputes through the multilateral dispute system, to the exclusion of unilateral self-help. Thus, to the extent that the WTO dispute settlement system only provides for prospective remedies, that is clearly the result of a policy choice by the WTO Membership. Given this policy choice, and given the fact that Article 23.1 of the DSU applies to all disputes, including those involving (alleged) prohibited export subsidies, we see no reason why the (allegedly) prospective nature of WTO dispute settlement remedies should impact on our interpretation of the second paragraph of item (k)."[1148]

XXIV. ARTICLE 24

A. TEXT OF ARTICLE 24

Article 24
Special Procedures Involving Least-Developed Country Members

1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member, offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

B. INTERPRETATION AND APPLICATION OF ARTICLE 24

No jurisprudence or decision of a competent WTO body.

XXV. ARTICLE 25

A. TEXT OF ARTICLE 25

Article 25
Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.

4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

[1146] Panel Report on *US – Certain EC Products*, paras. 6.37–6.38.
[1147] Appellate Body Report on *US – Certain EC Products*, para. 120.
[1148] Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 7.170.

B. INTERPRETATION AND APPLICATION OF ARTICLE 25

1. General

(a) Scope of the Arbitrators' mandate under Article 25

787. In *US – Section 110(5) Copyright Act (Article 25.3)*, the first time since the inception of the WTO that Members have had recourse to arbitration pursuant to Article 25 of the *DSU*, the Arbitrators observed that such recourse is not subject to multilateral control and that, accordingly, "it is incumbent on the Arbitrators themselves to ensure that it is applied in accordance with the rules and principles governing the WTO system":

> "The Arbitrators note that this is the first time since the establishment of the WTO that Members have had recourse to arbitration pursuant to Article 25 of the DSU.[1149] Whereas the DSB establishes panels or refers matters to other arbitration bodies, Article 25 provides for a different procedure. The parties to this dispute only had to *notify* the DSB of their recourse to arbitration. No decision is required from the DSB for a matter to be referred to arbitration under Article 25. In the absence of a multilateral control over recourse to that provision, it is incumbent on the Arbitrators themselves to ensure that it is applied in accordance with the rules and principles governing the WTO system[1150]. . . ."[1151]

(b) Jurisdiction of the Arbitrators under Article 25

788. In *US – Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators were called upon to determine the level of nullification or impairment of benefits to the European Communities as a result of Section 110(5)B of the US Copyright Act. The Arbitrators considered that it was for them to determine whether they had jurisdiction to consider this issue; they concluded that they did have jurisdiction:

> "As recalled by the Appellate Body in *United States – Anti-Dumping Act of 1916,*[1152] it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative. The Arbitrators believe that this principle applies also to arbitration bodies.[1153]"[1154]

(c) Burden of proof in Article 25 arbitrations

789. In *US – Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators followed the rules on burden of proof applicable in Article 22.6 arbitrations as stipulated in the agreed procedures submitted by the parties. Therefore, it was for the United States, the defendant in the original panel proceedings, to provide a prima facie case that the methodology and estimates proposed by the European Communities did not accurately reflect the European Communities benefits being nullified or impaired:

> "The **Arbitrators** carefully examined the claims, arguments and evidence submitted by the parties in light of the rules on burden of proof applicable in the context of arbitrations under Article 22.6 of the DSU, as instructed by the parties. The Arbitrators were mindful of the fact that, in arbitration proceedings under Article 22.6, a party contests the level of countermeasures which the other intends to take under paragraphs 2, 3 and 4 of Article 22. It is therefore understandable that the burden be on the party that contests the level of countermeasures to make a *prima facie* demonstration that the methodology and the calculations submitted by the party intending to apply countermeasures are inconsistent with the requirements of Article 22 of the DSU. For instance, in the *European Communities – Hormones* cases, the initial burden was on the European Communities. The present case, however, was referred to the Arbitrators by both parties 'by mutual agreement'. It is arguable whether or not there is a complainant and a defendant. This said, we note that the agreed procedures submitted by the parties[1155] expressly instruct us to follow the allocation of the burden of proof applied in arbitrations under Article 22.6. We also note that the parties agreed that the European Communities would submit a methodology paper ahead of the first written submissions, as in proceedings under Article 22.6. As a result, the Arbitrators decided to allocate the burden of proof accordingly, as in an Article 22.6 case."[1156]

(d) Matters dealt under Article 25 arbitrations

(i) Nullification or impairment of benefits

General

790. In *US – Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators were called on to determine the

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[1149] (*footnote original*) The Arbitrators recall that arbitration was seldom used under GATT 1947.

[1150] (*footnote original*) In particular, the Arbitrators believe that this arbitration should not be applied so as to circumvent the provisions of Article 22.6 of the DSU (see Article 23.2(c) of the DSU).

[1151] Award of the Arbitrators on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 2.1.

[1152] (*footnote original*) See the Appellate Body Report on *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R and WT/DS162/AB/R, adopted 26 September 2000, para. 54, footnote 30.

[1153] (*footnote original*) This is evidenced by Article 21 of the Optional Rules of the Permanent Court of Arbitration for arbitrations involving international organizations and States. See Permanent Court of Arbitration: Optional Rules for Arbitration involving International Organizations and States, effective 1 July 1996, International Bureau of the Permanent Court of Arbitration, The Hague, The Netherlands.

[1154] Award of the Arbitrators on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 2.1.

[1155] (*footnote original*) See WT/DS160/15.

[1156] Award of the Arbitrators on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 4.4.

level of nullification or impairment of benefits to the European Communities as a result of Section 110(5)B of the US Copyright Act. As indicated in paragraph 788 above, the Arbitrators concluded that they did have jurisdiction. The first step in their reasoning was to compare the panel procedure under the *DSU* with the Article 25 arbitration. The Arbitrators concluded that the procedure provided for in Article 25 may be considered an alternative to a panel procedure:

> "The Arbitrators first note that, pursuant to the text of Article 25.1, arbitration under Article 25 is an '*alternative* means of dispute settlement'.[1157] The term 'dispute settlement' is generally used in the WTO Agreement to refer to the complete process of dispute[1158] resolution under the DSU, not to one aspect of it, such as the determination of the level of benefits nullified or impaired as a result of a violation. It may be argued that the procedure provided for in Article 25 is actually an alternative to a panel procedure. This would seem to be confirmed by the terms of Article 25.4, which provides that 'Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.'[1159] Article 22.2 itself, unlike Article 21.3(c), does not refer to arbitration as an alternative to the negotiation of mutually acceptable compensation. It could then be argued that arbitration under Article 25 is not intended for 'determin[ing] the level of nullification or impairment of benefits' to the European Communities as a result of Section 110(5)(B) of the US Copyright Act."[1160]

791. Despite their acknowledgement that an argument may be made whereby arbitration pursuant to Article 25 would be considered as not being intended for determining the level of nullification or impairment of benefits, the Arbitrators in *US – Section 110(5) Copyright Act (Article 25.3)* considered that the elements sustaining such an argument are outweighed by other elements of interpretation. The Arbitrators therefore concluded that, "pending further interpretation by the Members", they did have jurisdiction under Article 25 to determine the level of European Communities' benefits that were nullified or impaired in this case:

> "While being mindful of these elements of interpretation, the Arbitrators are of the view that they are outweighed by other elements, based on the fact that none of the provisions concerned expressly excludes recourse to arbitration under Article 25 in the particular context in which they apply. Article 25.2 itself provides that resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed 'except as otherwise provided in this Understanding'. Article 25 itself does not specify that recourse to Article 25 arbitration should be excluded when determining the level of nullification or impairment suffered by a Member. On the contrary, the terms of Article 25.1 referring to 'the solution of certain disputes that concern issues that are clearly defined by the parties' may support the view that Article 25 should be understood as an arbitration mechanism to which Members may have recourse whenever necessary within the WTO framework. We also note that Article 22.2 refers to 'negotiations [. . .] with a view to developing mutually acceptable compensation.' There is no language in that provision which would make it impossible to consider arbitration as a means of reaching a mutually acceptable compensation.
>
> Moreover, recourse to Article 25 arbitration in the present situation is fully consistent with the object and purpose of the DSU. Arbitration is likely to contribute to the prompt settlement of a dispute between Members, as commanded by Article 3.3 of the DSU. Indeed, it may facilitate the resolution of a divergence in the context of a negotiation of compensations, thus paving the way to implementation without suspension of concessions or other obligations.
>
> In general, recourse to arbitration under Article 25 strengthens the dispute resolution system by complementing negotiation under Article 22.2. The possibility for the parties to a dispute to seek arbitration in relation to the negotiation of compensation operates to increase the effectiveness of that option under Article 22.2. Incidentally, the Arbitrators note that compensation, in their opinion, is always to be preferred to countermeasures of any sort, since it enhances trade instead of restricting or diverting it. Finally, such an application of Article 25 does not, at least in the case at hand, affect the rights of other Members under the DSU.[1161]
>
> Having regard to the object of the arbitration requested by the parties and the fact that the rights of other Members under the DSU are not affected by the decision of the European Communities and the United States to seek arbitration under Article 25, the Arbitrators are of the view that, pending further interpretation by the

[1157] (*footnote original*) Emphasis added.

[1158] (*footnote original*) In a note by the GATT Secretariat on Concept, Forms and Effects of Arbitration (MTN.GNG/NG13/W/20, 22 February 1988), the term "dispute" is defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion by one party is met with refusal, counter-claim or denial by another.

[1159] (*footnote original*) The text of Article 25 of the DSU is essentially identical to that of paragraphs 1, 2 and 3 of Section E of the 1989 Decision on improvements to the GATT dispute settlement procedures (BISD 36S/63). It is worth noting that, in that Decision, Section E follows other sections on means of resolution of disputes, such as consultations (Section C) and good offices, conciliation and mediation (Section D). Moreover, GATT 1947 did not provide for the sophisticated means of enforcement found in the DSU. The note MTN.GNG/NG13/W/20 of 22 February 1988, referred to above, also presents arbitration "as an alternative to the normal dispute settlement process" (para. 12) or "as an alternative to panel proceedings" (para. 17).

[1160] Award of the Arbitrators on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 2.3.

[1161] (*footnote original*) As a matter of fact, it may affect them positively, given the *erga omnes* character of compensation.

Members, they should declare that they have jurisdiction under Article 25 to determine the level of EC benefits which are being nullified or impaired in this case.[1162]" [1163]

Nature of the benefits nullified or impaired

792. In *US – Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators agreed with the parties that, for the purpose of the arbitration proceeding, the relevant benefits were those which were economic in nature:

"In their submissions to the Arbitrators, the parties have focused on this type of benefit accruing to copyright holders. The Arbitrators concur with the parties that, for purposes of these arbitration proceedings, the relevant benefits are those which are economic in nature.[1164] This is consistent with previous decisions of arbitrators acting under Article 22.6 of the DSU.[1165] Moreover, like the parties to this dispute, the Arbitrators will proceed on the assumption that the licensing royalties realizable by copyright holders constitute an adequate measure of the economic benefits arising from Articles 11*bis*(1)(iii) and 11(1)(ii)." [1166]

Benefits denied to a WTO Member

793. The Arbitrators in *US – Section 110(5) Copyright Act (Article 25.3)* stated that their task was to assess the level of nullification or impairment of the benefits denied to the European Communities rather than determining the benefits denied to European Communities' right holders:

"Accordingly, the Arbitrators will, in this case, assess the level of EC benefits which Section 110(5)(B) is nullifying or impairing in terms of the royalty income foregone by EC right holders. In making this observation, the Arbitrators are aware that their task in this case is to determine the benefits which are denied to the *European Communities* rather than determining the benefits which are denied to *EC right holders*. However, there can be no question that the benefits which are denied to the European Communities include the benefits which are denied to EC right holders.[1167] What is more, the European Communities has not made out a claim to the effect that Section 110(5)(B) is nullifying or impairing benefits additional to those which EC right holders could otherwise derive from Articles 11*bis*(1)(iii) and 11(1)(ii). As a result, it is appropriate, for the purposes of these proceedings, to determine the level of EC benefits which Section 110(5)(B) is nullifying or impairing in terms of the benefits foregone by EC right holders." [1168]

Point in time to assess the level of nullification or impairment

794. In *US – Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators assumed that the parties wanted an assessment of the level of benefits nullified or impaired on the date the matter was referred to arbitration, disregarding the rules established in Article 22.6 of the *DSU*:

"The Arbitrators note that they have been appointed under Article 25 of the DSU. As a result, they do not feel

[1162] (*footnote original*) The Arbitrators' recognition of their jurisdiction in this case is not a unilateral extension of WTO jurisdiction, since it is dependent on the agreement of the parties to a dispute to have recourse to Article 25 of the DSU. This decision is without prejudice to the DSU compatibility of the decision of the parties to accept this award as the level of nullification or impairment for the purpose of any further proceedings under Article 22 of the DSU in relation to this case. It is also without prejudice to any interpretation of the provisions of Articles 22 and 25 of the DSU by the Ministerial Conference or the General Council.

[1163] Award of the Arbitrators on *US – Section 110(5) Copyright Act (Article 25.3)*, paras. 2.4–2.7.

[1164] (*footnote original*) This view is based on the object of the present proceedings, which is to quantify the economic harm suffered by the European Communities as a consequence of the continued application of Section 110(5)(B). It does not necessarily follow that Members having recourse to Article 64 of the TRIPS Agreement need to establish nullification or impairment of *economic* benefits accruing to them under the TRIPS Agreement. The Arbitrators find support for their view in the following statement by the arbitrators in *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*: "[A] Member's potential interests in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreements are each sufficient to establish a right to pursue a WTO dispute settlement proceeding. However, a Member's legal interest in compliance by other Members does not, in our view, automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU." See the Decision by the Arbitrators on *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* (hereafter "*EC – Bananas III (22.6) (US)*"), WT/DS27/ARB, 9 April 1999, para. 6.10.

[1165] (*footnote original*) See, e.g., the Decisions by the Arbitrators on *EC – Bananas III (22.6) (US)*, *supra*, para. 6.12 (benefits nullified or impaired: losses in US exports of goods and losses by US service suppliers in services supply); *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, 24 March 2000, footnote 52 (benefits nullified or impaired: losses by Ecuador of actual trade and of potential trade opportunities in bananas and the loss of actual and potential distribution service supply); *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* (hereafter "*EC – Hormones (22.6) (US)*"), WT/DS26/ARB, 12 July 1999, para. 41 (benefits nullified or impaired: foregone US exports of hormone-treated beef and beef products); *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* (hereafter "*EC – Hormones (22.6) (Canada)*"), WT/DS48/ARB, 12 July 1999, para. 40 (benefits nullified or impaired: foregone Canadian exports of hormone-treated beef and beef products).

[1166] Award of the Arbitrators on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 3.18.

[1167] (*footnote original*) Indeed, as already pointed out, the rights set forth in Articles 11*bis*(1)(iii) and 11(1)(ii) must, in conformity with the provisions of Article 1.3 of the TRIPS Agreement, be granted to EC right holders.

[1168] Award of the Arbitrators on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 3.19.

constrained by a number of obligations imposed on arbitrators in Article 22.6 proceedings. Unlike Article 22.6, which closely relates to compliance (or absence thereof) at the end of the reasonable period of time, Article 25 is silent as to the date on which a matter referred to arbitration should be assessed. However, the Arbitrators are aware that they are not called upon to consider the level of EC benefits which may still be nullified or impaired after the end of the implementation period, but to consider the level of EC benefits which are being nullified or impaired as a result of the current application of Section 110(5)(B).[1169] General practice under the DSU has been to consider the facts of a case as at the date of establishment of the panel. In the absence of any specification in our mandate, we believe that it should be assumed that the parties wanted us to assess the level of benefits nullified or impaired on the date the matter was referred to us. In other words, we must determine the level of nullification or impairment of EC benefits over a one-year period ending as closely as possible to 23 July 2001.[1170]"[1171]

(e) Right to seek and disregard information

795. In *US – Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators disregarded the information they had requested from a United States' collective management organization because certain conditions were attached to the use of such information. See paragraph 424 above.

(f) Treatment of confidential information

796. In *US – Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators decided that, in the absence of specific requests from the parties as to how confidentiality of business confidential information should be preserved, they would, in general, rely on the relevant practice of the Appellate Body:

"In the absence of specific requests from the parties as to how confidentiality of business confidential information should be preserved, the Arbitrators will rely generally on the practice of the Appellate Body on this matter.[1172] To the extent that confidential information may appear as such in the award in order to support the findings of the Arbitrators, the Arbitrators decided that two versions of the award would be prepared. One, for the parties, would contain all the information used in support of the determinations of the Arbitrators. The other, which would be circulated to all Members, would be edited so as not to include the information for which, after consultation with the parties, the Arbitrators would conclude that confidentiality for business reasons was sufficiently warranted. The information which the Arbitrators would consider to be business confidential would be replaced by 'x'.[1173]"[1174]

2. Article 25.1

(a) "expeditious arbitration . . . as an alternative means of dispute settlement"

797. In *US – Certain EC Products*, the Panel noted that Article 25 of the *DSU* provides for arbitration as a means of adjudicating WTO related disputes. The Panel stated that:

"[A]lthough the panel (and Appellate Body) process is the most commonly used WTO dispute settlement procedure, Article 25 of the DSU, for example, explicitly provides for arbitration as a means of adjudicating WTO related disputes. Article 25.4 provides for the applicability of Articles 21 and 22 of the DSU to the results of such arbitration. There is no reason why the WTO assessment of the compatibility of an implementing measure could not be determined by an Article 25 arbitration, as one of the WTO dispute settlement procedures."[1175]

798. In *US – Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators noted that an Article 25 arbitration is an alternative means of dispute settlement and considered that an Article 25 arbitration procedure arguably "is actually an alternative to a panel procedure".[1176] See paragraph 787 above.

(b) Differences compared with panel proceedings

799. Also in *US – Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators observed that whereas the DSB

[1169] (*footnote original*) This seems to imply that the level of nullification or impairment that the Arbitrators will assess in this case may be different from that which may exist after the end of the reasonable period of time. This implies further that the amount which will be determined by the Arbitrators may not dispense the parties from an Article 22.6 arbitration.

[1170] (*footnote original*) The reason for the choice of a yearly basis is essentially because compensations or suspensions of concessions or other obligations have been so far calculated on a twelve-month basis.

[1171] Award of the Arbitrators on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 4.19.

[1172] (*footnote original*) See, in particular, the Appellate Body Report on *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, paras. 141–147.

[1173] (*footnote original*) This approach was used in one Article 22.6 arbitration and does not seem to have met with objections in the DSB. See the Decision by the Arbitrators on *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement* (hereafter "*Brazil – Aircraft (22.6)*"), WT/DS46/ARB, 28 August 2000, para. 2.14.

[1174] Award of the Arbitrators on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 1.24.

[1175] Panel Report on *US – Certain EC Products*, para. 6.119. The elaboration made by the Panel in this case regarding the mandate of arbitrators appointed under Article 22.6 of the DSU based upon its interpretation of Articles 21.5 and 25 of the DSU was later dismissed by the Appellate Body on the grounds that the Panel's statements relate to a measure which was outside its terms of reference. Appellate Body Report on *US – Certain EC Products*, paras. 89–90.

[1176] Award of the Arbitrators on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 2.3.

establishes panels or refers matters to other arbitration bodies, under Article 25 proceedings, the parties only had to notify the DSB of their recourse to arbitration. See paragraph 787 above.

3. Article 25.2

(a) Arbitration under Article 25 should only be excluded when expressly provided

800. In *US – Section 110(5) Copyright Act*, the Arbitrators, when deciding whether they were competent to assess the level of nullification or impairment (see paragraphs 790–794 above), noted that "none of the provisions concerned expressly excludes recourse to arbitration under Article 25 in the particular context in which they apply. Article 25.2 itself provides that resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed 'except as otherwise provided in this Understanding'."[1177]

4. Article 25.4

(a) General

801. In *US – Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators noted that the nature of an Article 25 arbitration as an alternative to the panel procedure (see paragraph 798 above), "would seem to be confirmed by the terms of Article 25.4, which provides that 'Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards'[1178]."[1179]

(b) "Articles 21 and 22 . . . . shall apply *mutatis mutandis*"

802. In *US – Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators indicated that "they [did] not feel constrained by a number of obligations imposed on arbitrators in Article 22.6 proceedings". See paragraph 794 above.

5. Relationship with other Articles

(a) Article 3.3

803. In *US – Section 110(5) Copyright Act*, the Arbitrators considered that the recourse to Article 25 arbitration in that case was fully consistent with the object and purpose of the *DSU* since the arbitration at issue was likely to contribute to the prompt settlement of a dispute between the European Communities and the United States, as commanded by Article 3.3 of the *DSU*:

> "Moreover, recourse to Article 25 arbitration in the present situation is fully consistent with the object and purpose of the DSU. Arbitration is likely to contribute to the prompt settlement of a dispute between Members, as commanded by Article 3.3 of the DSU. Indeed, it may facilitate the resolution of a divergence in the context of a negotiation of compensations, thus paving the way to implementation without suspension of concessions or other obligations."[1180]

(b) Article 21

804. With respect to the relationship with Article 21, see paragraphs 790, 797, and 801 above.

(c) Article 22.2

805. With respect to the relationship with Article 22.2, see paragraphs 790, 791, 797, and 801 above.

(d) Article 22.6

806. With respect to the relationship between Article 25 arbitrations and Article 22.6, see paragraphs 789, 792, 794 and 802 above.

XXVI. ARTICLE 26

A. TEXT OF ARTICLE 26

Article 26

1. *Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

[1177] Award of the Arbitrators on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 2.4.

[1178] (*footnote original*) The text of Article 25 of the DSU is essentially identical to that of paragraphs 1, 2 and 3 of Section E of the 1989 Decision on improvements to the GATT dispute settlement procedures (BISD 36S/63). It is worth noting that, in that Decision, Section E follows other sections on means of resolution of disputes, such as consultations (Section C) and good offices, conciliation and mediation (Section D). Moreover, GATT 1947 did not provide for the sophisticated means of enforcement found in the DSU. The note MTN.GNG/NG13/W/20 of 22 February 1988, referred to above, also presents arbitration "as an alternative to the normal dispute settlement process" (para. 12) or "as an alternative to panel proceedings" (para. 17).

[1179] Award of the Arbitrators on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 2.3.

[1180] Award of the Arbitrators on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 2.5.

(a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;

(b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment;

(c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;

(d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

2. *Complaints of the Type Described in Paragraph 1(c) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61–67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply:

(a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph;

(b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph.

B. INTERPRETATION AND APPLICATION OF ARTICLE 26

1. Article 26.1

(a) "detailed justification in support of any complaint"

807. In *Japan – Film*, the Panel examined the issue of which party bears the burden of proof in a claim involving non-violation under Article 26.1 of the *DSU*. The Panel stated:

> "In a case of non-violation nullification or impairment pursuant to Article XXIII:1(b), Article 26.1(a) of the DSU and GATT jurisprudence confirm that this is an exceptional remedy for which the complaining party bears the burden of providing a *detailed justification* to back up its allegations.
>
> . . .
>
> Consistent with the explicit terms of the DSU and established WTO/GATT jurisprudence, and recalling the Appellate Body ruling that 'precisely how much and precisely what kind of evidence will be required to establish . . . a presumption [that what is claimed is true] will necessarily vary from . . . provision to provision', we thus consider that the United States, with respect to its claim of non-violation nullification or impairment under Article XXIII:1(b), bears the burden of providing a detailed justification for its claim in order to establish a presumption that what is claimed is true. It will be for Japan to rebut any such presumption."[1181]

808. In *EC – Asbestos*, the Panel confirmed that "[w]here the application of Article XXIII:1(b) is concerned, Article 26.1(a) of the Understanding and panel practice in the context of the WTO Agreement and the GATT 1947 confirm that this is an exceptional course of action requiring the complaining party to carry the burden of presenting a detailed justification in support of its complaint".[1182] The Panel further stated that "because of the importance conferred on them *a priori* by the GATT 1994, as compared with the rules governing international trade, situations that fall under Article XX justify a stricter burden of proof being applied in this context to the party invoking Article XXIII:1(b), particularly with regard to the existence of legitimate expectations and whether or not the initial Decree could be reasonably anticipated".[1183]

[1181] Panel Report on *Japan – Film*, paras. 10.30 and 10.32.
[1182] Panel Report on *EC – Asbestos*, para. 8.275.
[1183] Panel Report on *EC – Asbestos*, para. 8.282.

2. Jurisprudence under Article XXIII:1(b)

809. With respect to panel and Appellate Body reports on claims brought under Article XXIII:1(b), see Section XXIV.B.2 of the Chapter on the *GATT 1994*.

C. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Article XXIII:1(a) of the GATT 1994

810. With respect to the relationship between Article XXIII:1(a) and Article XXIII:1(b) of the *GATT 1994*, see Section XXIV.B.1(a) of the Chapter on the *GATT 1994*.

2. Article XXIII:1(b) of the GATT 1994

811. With respect to the issue of non-violation, see Section XXIV.B.2(a) of the Chapter on the *GATT 1994*.

XXVII. ARTICLE 27

A. TEXT OF ARTICLE 27

Article 27
Responsibilities of the Secretariat

1. The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.

2. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

3. The Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members' experts to be better informed in this regard.

B. INTERPRETATION AND APPLICATION OF ARTICLE 27

No jurisprudence or decision of a competent WTO body.

XXVIII. APPENDIX 1: AGREEMENTS COVERED BY THE DSU

A. TEXT OF APPENDIX 1

APPENDIX 1
AGREEMENTS COVERED BY THE UNDERSTANDING

(A) Agreement Establishing the World Trade Organization

(B) Multilateral Trade Agreements

Annex 1A: Multilateral Agreements on Trade in Goods

Annex 1B: General Agreement on Trade in Services

Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes

(C) Plurilateral Trade Agreements

Annex 4: Agreement on Trade in Civil Aircraft
Agreement on Government Procurement
International Dairy Agreement
International Bovine Meat Agreement

The applicability of this Understanding to the Plurilateral Trade Agreements shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB.

B. INTERPRETATION AND APPLICATION OF APPENDIX 1

812. As regards the concept of "covered agreements", see paragraphs 1–5 above.

XXIX. APPENDIX 2: SPECIAL OR ADDITIONAL DISPUTE SETTLEMENT RULES AND PROCEDURES

A. TEXT OF APPENDIX 2

APPENDIX 2
SPECIAL OR ADDITIONAL RULES AND PROCEDURES CONTAINED IN THE COVERED AGREEMENTS

Agreement	*Rules and Procedures*
Agreement on the Application of Sanitary and Phytosanitary Measures	11.2
Agreement on Textiles and Clothing	2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9, 6.10, 6.11, 8.1 through 8.12
Agreement on Technical Barriers to Trade	14.2 through 14.4, Annex 2
Agreement on Implementation of Article VI of GATT 1994	17.4 through 17.7
Agreement on Implementation of Article VII of GATT 1994	19.3 through 19.5, Annex II.2(f), 3, 9, 21
Agreement on Subsidies and Countervailing Measures	4.2 through 4.12, 6.6, 7.2 through 7.10, 8.5, footnote 35, 24.4, 27.7, Annex V
General Agreement on Trade in Services	XXII:3, XXIII:3
Annex on Financial Services	4
Annex on Air Transport Services	4
Decision on Certain Dispute Settlement Procedures for the GATS	1 through 5

The list of rules and procedures in this Appendix includes provisions where only a part of the provision may be relevant in this context.

Any special or additional rules or procedures in the Plurilateral Trade Agreements as determined by the competent bodies of each agreement and as notified to the DSB.

B. INTERPRETATION AND APPLICATION OF APPENDIX 2

813. With respect to the interpretation and application of Article 1.2 of the *DSU*, setting forth the rules applying to the "special or additional rules and procedures", see paragraphs 6–10 above.

XXX. APPENDIX 3: PANEL WORKING PROCEDURES

A. TEXT OF APPENDIX 3

APPENDIX 3
WORKING PROCEDURES

1. In its proceedings the panel shall follow the relevant provisions of this Understanding. In addition, the following working procedures shall apply.

2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.

3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.

6. All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.

8. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

9. The parties to the dispute and any third party invited to present its views in accordance with Article 10 shall make available to the panel a written version of their oral statements.

10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.

11. Any additional procedures specific to the panel.

12. Proposed timetable for panel work:

(a)	Receipt of first written submissions of the parties:		
	(1) complaining Party:	_____	3–6 weeks
	(2) Party complained against:	_____	2–3 weeks
(b)	Date, time and place of first substantive meeting with the parties; third party session:	_____	1–2 weeks
(c)	Receipt of written rebuttals of the parties:	_____	2–3 weeks
(d)	Date, time and place of second substantive meeting with the parties:	_____	1–2 weeks
(e)	Issuance of descriptive part of the report to the parties:	_____	2–4 weeks
(f)	Receipt of comments by the parties on the descriptive part of the report:	_____	2 weeks
(g)	Issuance of the interim report, including the findings and conclusions, to the parties:	_____	2–4 weeks
(h)	Deadline for party to request review of part(s) of report:	_____	1 week
(i)	Period of review by panel, including possible additional meeting with parties:	_____	2 weeks
(j)	Issuance of final report to parties to dispute:	_____	2 weeks
(k)	Circulation of the final report to the Members:	_____	3 weeks

The above calendar may be changed in the light of unforeseen developments. Additional meetings with the parties shall be scheduled if required.

B. INTERPRETATION AND APPLICATION OF APPENDIX 3

1. General

(a) Appendix 3 and the panel's margin of discretion

814. The Appellate Body on *EC – Hormones* held that panels, under the *DSU*, enjoy a margin of discretion to deal with situations that "are not explicitly regulated":

> "[T]he DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling."[1184]

815. The Appellate Body on *EC – Hormones* stated that it agreed with the Panel's exercise of its margin of discretion when it allowed the United States to participate in the second substantive meeting of the proceedings initiated by Canada in the same dispute.[1185] With respect to "enhanced" third-party rights, see paragraphs 312–317 above.

816. In *India – Patents (US)*, the Appellate Body examined the Panel's decision at the outset of the first substantive meeting – "that all legal claims would be considered if they were made prior to the end of that meeting; and this ruling was accepted by both parties". The Appellate Body, in being called upon to determine whether the Panel had exceeded its terms of reference, stated:

> "We do not find this statement . . . consistent with the letter and the spirit of the DSU. Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: 'Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute'. Yet that is *all* that it says. Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provisions of the DSU."[1186]

817. The Panel in *EC – Tariff Preferences* addressed the issue of the joint representation of India, the complaining party and Paraguay, a third party, by the same legal counsel, the Advisory Centre of WTO Law (AWCL). The Panel stated that "flowing from its terms of reference and from the requirement . . . pursuant to Article 12 of

[1184] Appellate Body Report on *EC – Hormones*, fn. 138.
[1185] Appellate Body Report on *EC – Hormones*, para. 154.
[1186] Appellate Body Report on *India – Patents (US)*, para. 92.

the DSU, to determine and administer its Working Procedures, the Panel has the inherent authority – and, indeed, the duty – to manage the proceeding in a manner guaranteeing due process to all parties involved in the proceeding and to maintain the integrity of the dispute settlement system". As regards the Panel's conclusion on conflict of interest, see Section XXXVI.E.3 below.

(b) Working procedures as a means to ensure due process

818. In this respect, see Section XXXVI.B.1 below.

2. Paragraph 3: non-confidential versions of written submissions

819. In *US – Steel Safeguards*, the Panel sent a letter to all parties including a series of preliminary rulings on organizational matters. Among other issues, the Panel dealt with the United States' request to require production of non-confidential versions of written submissions within 14 days following the filing of the written submissions. In this respect, see paragraph 484 above.

3. Paragraph 11: additional procedures

(a) Separate reports

820. As regards the issuance of separate reports in panel proceedings with two or more complainants, see Article 9.2 (Section IX.B.1 above).

(b) Composition of parties' delegations

821. In *Brazil – Aircraft (Article 21.5 – Canada II)*, the Panel's Working Procedures included a paragraph 13 providing that the parties and third parties had the right to determine the composition of their own delegations:

> "The parties and third parties to this proceeding have the right to determine the composition of their own delegations. Delegations may include, as representatives of the government concerned, private counsel and advisers. The parties and third parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations, as well as any other advisors consulted by a party or third party, act in accordance with the rules of the DSU and the working procedures of this Panel, particularly in regard to confidentiality of the proceedings. Parties shall provide a list of the participants of their delegation before or at the beginning of the meeting with the Panel."[1187]

(c) Business confidential information (BCI)

822. As regards procedures concerning BCI, see Section XVIII.B.1(c) above.

(d) Preliminary rulings

(i) General

823. It is often the case that the parties to a dispute raise preliminary objections in panel and Appellate Body proceedings. Section XXXVI.C below is concerned with the issues arising from this procedural issue.

(ii) Procedures

824. In *EC – Tube or Pipe Fittings*, the Panel's Working Procedures provided that preliminary rulings must be requested not later than the first written submission, but that exceptions could be made upon showing of "good cause". The European Communities requested the Panel to make a preliminary ruling rejecting a number of exhibits submitted by Brazil during the first substantive meeting on the grounds that they did not form part of the record of the underlying investigation. The Panel noted that, as Brazil submitted these exhibits in conjunction with its oral statement at the first meeting, which meant that the European Communities was not in a position to make a preliminary objection in its first written submission, good cause existed for enabling the Panel to consider the merits of the European Communities request for a preliminary ruling.[1188]

825. In *Canada – Wheat Exports and Grain Imports*, the Panel gave the United States an opportunity to provide preliminary written submissions in response to Canada's earlier preliminary submissions. At the request of Canada, the Panel also scheduled a preliminary hearing. The panel also decided to invite the third parties to participate in the preliminary proceedings.[1189]

(e) Participation of third parties in preliminary ruling proceedings

826. In *Canada – Wheat Exports and Grain Imports*, the Panel, in a preliminary ruling, decided to grant third parties the possibility to participate in the proceedings regarding preliminary rulings requested by Canada concerning the consistency of the United States' panel request with Article 6.2 of the DSU and Canada's request for the adoption of specific procedures for the protection of proprietary or commercially sensitive information. As regards the specific rights granted to the third parties, see paragraph 935 below. The Panel

[1187] This paragraph is quoted in paragraph 3.7 of the Panel Report on *Brazil – Aircraft (Article 21.5 – Canada II)*. With respect to the discussion on confidentiality implications of disclosing submissions to non-government members of the parties' delegations, see paras. 491–493.

[1188] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.37–7.40.

[1189] Panel Report on *Canada – Wheat Exports and Grain Imports*, para. 6.6.

thus amended paragraph 6 of its Working Procedures as follows:

> "The third parties shall be invited in writing to present their views during a session of the preliminary hearing of the Panel set aside for that purpose as well as during a session of the first substantive meeting of the Panel set aside for that purpose. The third parties may be present during the entirety of these sessions."[1190]

(f) Executive summaries

827. In *US – Line Pipe*, the Working Procedures of the Panel requested the parties to present executive summaries of the claims and arguments contained in their written submissions and oral presentations.[1191] The parties presented various arguments in connection with the issue of confidential information. Those arguments were summarized in the parties' executive summaries of their submissions and oral statements and were included in the relevant sections of the Panel's report. In its comments on the descriptive part of the report, Korea requested the Panel to include as an annex to the Panel report a copy of their non-summarized closing oral statement made at the second substantive meeting, addressing the issue of confidential information and use of judicial economy. The Panel declined Korea's request on the grounds that Korea's closing statement formed part of their oral statement at the second substantive meeting and that, accordingly, any arguments presented therein should have been included in its executive summary of that oral statement. Nevertheless, the Panel clarified that all the communications and submissions of the parties formed part of the record of this proceeding, and were duly considered by the Panel.[1192]

828. In *EC – Tube or Pipe Fittings*, the Panel's Working Procedures requested the parties to submit an executive summary of the claims and arguments contained in their written submissions and oral presentations.[1193] In its comments on the descriptive part of the Panel Report, Brazil requested that the complete text of its first and second submissions, rather than Brazil's executive summaries thereof, be included in Annexes A and C respectively of the Report. The Panel rejected this request as follows:

> "This paragraph [of the Working Procedures] makes it clear that we are to use the executive summaries only for the purpose of assisting us in drafting a concise arguments section of the Panel Report so as to facilitate timely translation and circulation of the Panel Report to the Members. The rationale of this paragraph is to facilitate our production of a concise and timely descriptive part and not to attach the entire written submissions and statements of the parties. We find no substantiation for Brazil's assertion that other panels that have adopted a similar paragraph in their working procedures have also nevertheless attached the parties' entire written submissions to their reports. Indeed, this would seem to us to defeat the purpose of adopting the 'executive summary approach' in the first place.
>
> Second, the attachment of executive summaries to our report also leaves the parties in control of the contents of the executive summaries and enables them to set forth their most important arguments as they wish to set these forth. Each party has the obligation and the discretion to ensure that its own executive summaries of its own submissions accurately reflects its claims and arguments. Neither party requested us to increase the page limits referred to in our Working Procedures.
>
> Third, we adopted these Working Procedures after hearing the views of the parties, at which time Brazil expressed no objection to the formulation in paragraph 16 of the Working Procedures. We decided at the outset to follow the 'executive summaries approach' for these Panel proceedings. Having adopted this approach at the outset, we do not consider that it would beneficial, at this rather advanced stage in the proceedings, to adopt Brazil's suggested approach of attaching its full first and second submissions. Our adoption of such an approach at this stage would result in significant further delays in issuing our Report, particularly in view of the lengthy nature of these submissions (totalling over 370 pages). This would impose a considerable translation burden, adding to the burden already being borne due to the operation of the WTO dispute settlement system generally. There would also be an incongruity if the full EC submissions were not also attached, which, if we were to address by taking the requisite procedural steps and

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[1190] Panel Report on *Canada – Wheat Exports and Grain Imports*, para. 6.6.

[1191] Paragraph 16 of the Panel's Working procedures provided:

> "The parties shall provide the Panel with an executive summary of the claims and arguments contained in their written submissions and oral presentations. These executive summaries will be used by the Panel only for the purpose of assisting the Panel in drafting a concise arguments section of the Panel report so as to facilitate timely translation and circulation of the Panel report to the Members. They shall not serve in any way as a substitute for the submissions of the parties."

Panel Report on *US – Line Pipe*, footnote 25.

[1192] Panel Report on *US – Line Pipe*, footnote 25.

[1193] Paragraph 16 of the Panel's Working procedures provided:

> "The parties shall provide the Panel with an executive summary of the claims and arguments contained in their written submissions and oral presentations. These executive summaries will be used by the Panel only for the purpose of assisting the Panel in drafting a concise arguments section of the Panel report so as to facilitate timely translation and circulation of the Panel report to the Members. They shall not serve in any way as a substitute for the submissions of the parties. The summaries of the first written submission and rebuttal written submission shall be limited to 10 pages and the summaries of the oral statements at the meeting will be limited to 5 pages. Summaries shall be submitted to the Secretariat within seven days of the original submission concerned."

Panel Report on *EC – Tube or Pipe Fittings*, para. 7.50.

then by annexing the EC submissions, would augment the translation burden. We find particularly salient, in this respect, Article 12.2 of the *DSU*, which provides:

> "Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, *while not unduly delaying the panel process*." (emphasis added)

Fourth, as our Working Procedures also make clear, in no way are the executive summaries to substitute for the parties' submissions. In the course of our examination of the parties' claims and arguments in these proceedings, we have read and analysed with great care the full written and oral submissions of the parties and the exchanges of questions and answers relating thereto. Our findings and conclusions in this Panel Report are based upon these full written and oral submissions and questions and answers. They form an integral part of the record before the Panel in this case. We therefore believe that we have adhered to both the letter and spirit of our Working Procedures and do not believe that any prejudice has arisen to Brazil in the course of these proceedings from annexing executive summaries of its first and second written submissions.

Fifth, we recall that Article 18.2 of the *DSU*, as also reflected in paragraph 3 of our Working Procedures, states that nothing in the *DSU* shall preclude a party to a dispute from disclosing statements of its own positions to the public. There is therefore nothing precluding Brazil from making its full first and second submissions generally and publicly available (subject, of course, to the requirements of maintaining the confidentiality of the EC's submissions in Article 18.2 of the *DSU* and paragraph 3 of our Working Procedures).[1194]" [1195]

829. In *US – Steel Safeguards*, the Panel sent a letter to all parties including a series of preliminary rulings[1196] on organizational matters. Among the issues considered, the Panel referred to the executive summaries requested in paragraph 5 of the Panel's Working Procedures, as follows:

> "In relation to the requirement contained in paragraph 5 of the Working Procedures to submit executive summaries, on the basis of discussions with the parties, the Panel has decided to allow the United States to submit executive summaries that should not exceed 30 pages. The first 15 pages should deal with the common claims raised by the complainants. The additional 15 pages would allow the United States to deal with specific claims made individually by one or more of the complainants but which are not common to all the complainants." [1197]

4. Timetable

(a) General

830. In *US – Steel Safeguards*, the Panel sent a letter to all parties including a series of preliminary rulings[1198] on organizational matters. Among other issues, the Panel referred to the timetable for its proceedings as follows:

> "The Panel notes at the outset that this case is likely to impose a heavy burden on parties in terms of their obligations to make submissions as set out in the timetable for the proceedings, a copy of which is attached. As is noted at the end of the timetable, the Panel would like to emphasize that the calendar may be changed during the panel process. The Panel would also like to assure parties that it will do its utmost, within reason, to accommodate the parties' concerns and requests in relation to the deadlines set out in the timetable." [1199]

(b) Deadline for affirmative defence

831. In *Canada – Aircraft*, Brazil argued that a good faith interpretation of the *DSU* requires a party making an affirmative defence to set forth the grounds for that affirmative defence in its first written submission to the panel. The Panel disagreed:

> "As noted above, there is nothing in the DSU, or in the Appendix 3 Working Procedures, to prevent a party submitting new evidence or allegations after the first substantive meeting. We can see no basis in the DSU to treat the submission of affirmative defences after the first sub-

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[1194] (*footnote original*) Our Working Procedures state, in relevant part: "Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential and shall not disclose such information to individuals not involved in the dispute. Where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public, within ten days of its submission to the Panel."

[1195] Panel Report on *EC – Tube or Pipe Fittings*, paras. 7.51–7.55.

[1196] For "preliminary rulings", see Section XXXVI.C.

[1197] Appellate Body Report on *US – Steel Safeguards*, para. 5.3. The final text of paragraph 5 of the Panel's Working Procedure thus read as follows:

> "Within seven days following the date for filing a submission, each of the parties and third parties is invited to provide the Panel with an executive summary of their submissions. The executive summaries will be used only for the purpose of assisting the Panel in drafting a concise factual and arguments section of the Panel report to the Members. They shall not in any way serve as a substitute for the submissions of the parties in the Panel's examination of the case. The executive summary to be provided by each party should not exceed 15 pages in length and shall summarize the content of the written submissions. In relation to the executive summaries to be provided by the United States, it is allowed an additional 15 pages to address issues that have been raised in the submissions of one or more of the other parties that are specific to those parties and which are not common to the other parties. The summary to be provided by each third party shall summarize their written submissions, as applicable, and should not exceed 5 pages in length."

[1198] For "preliminary rulings", see Section XXXVI.C.

[1199] Appellate Body Report on *US – Steel Safeguards*, para. 5.3.

stantive meeting any differently. Thus, although it is desirable that affirmative defences, as with any claim, should be submitted as early as possible, there is no requirement that affirmative defences should be submitted before the end of the first substantive meeting with the parties. Provided that due process is respected, we see nothing to prohibit the submission of affirmative defences after the first substantive meeting with the parties."[1200]

(c) Timing of the submission of evidence

832. As regards the timing for the submission of evidence by the parties in panel proceedings, see Section XI.B.3(b) above.

(d) Timing for raising objections to panels' jurisdiction

833. In this regard, see Section VII.B.1(c)(ii) above.

(e) Timing for the filing of submissions with the WTO Dispute Settlement Registrar

834. In *US – Steel Safeguards*, the Panel sent a letter to all parties including a series of preliminary rulings[1201] on organizational matters. Among the issues, the Panel referred to the timing for the filing of the parties' written submissions with the WTO Dispute Settlement Registrar. The Panel decided to require parties to file their written submissions with the Registrar by 5:30 p.m. on the deadlines established by the Panel, except for those deadlines falling on a Friday in which case the submissions should be filed by 5:00 p.m. The Panel considered that, in exceptional circumstances, when it was not possible to comply with these time deadlines, the parties could agree upon an alternative arrangement with the Secretary to the Panel.[1202]

XXXI. APPENDIX 4: EXPERT REVIEW GROUPS

A. TEXT OF APPENDIX 4

APPENDIX 4
EXPERT REVIEW GROUPS

The following rules and procedures shall apply to expert review groups established in accordance with the provisions of paragraph 2 of Article 13.

1. Expert review groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.

2. Participation in expert review groups shall be restricted to persons of professional standing and experience in the field in question.

3. Citizens of parties to the dispute shall not serve on an expert review group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on an expert review group. Members of expert review groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before an expert review group.

4. Expert review groups may consult and seek information and technical advice from any source they deem appropriate. Before an expert review group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by an expert review group for such information as the expert review group considers necessary and appropriate.

5. The parties to a dispute shall have access to all relevant information provided to an expert review group, unless it is of a confidential nature. Confidential information provided to the expert review group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the expert review group but release of such information by the expert review group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.

6. The expert review group shall submit a draft report to the parties to the dispute with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be issued to the parties to the dispute when it is submitted to the panel. The final report of the expert review group shall be advisory only.

[1200] Panel Report on *Canada – Aircraft*, para. 9.77.

[1201] For "preliminary rulings", see Section XXXVI.C.

[1202] Appellate Body Report on *US – Steel Safeguards*, paras. 5.3. Paragraph 17(b) of the Panel's Working Procedures read as follows:

> "The parties and the third parties shall provide their written submissions to the Dispute Settlement Registrar by 5:30 p.m. on the deadlines established by the Panel and by 5:00 p.m. if the deadline falls on a Friday. If, due to exceptional circumstances, it is not possible for submissions to be provided to the Registrar by the times stipulated, parties should agree otherwise with the Secretary to the Panel, ... The parties and the third parties shall provide the Panel with 10 paper copies of their written submissions. All these copies must be filed with the Dispute Settlement Registrar, . . ."

B. INTERPRETATION AND APPLICATION OF APPENDIX 4

No jurisprudence or decision of a competent WTO body.

XXXII. WORKING PROCEDURES FOR APPELLATE REVIEW

A. TEXT OF THE WORKING PROCEDURES FOR APPELLATE REVIEW[1203]

"Definitions

1. In these Working Procedures for Appellate Review,

"appellant"
means any party to the dispute that has filed a Notice of Appeal pursuant to Rule 20;

"appellate report"
means an Appellate Body report as described in Article 17 of the DSU;

"appellee"
means any party to the dispute that has filed a submission pursuant to Rule 22 or paragraph 4 of Rule 23;

"consensus"
a decision is deemed to be made by consensus if no Member formally objects to it;

"covered agreements"
has the same meaning as "covered agreements" in paragraph 1 of Article 1 of the DSU;

"division"
means the three Members who are selected to serve on any one appeal in accordance with paragraph 1 of Article 17 of the DSU and paragraph 2 of Rule 6;

"documents"
means the Notice of Appeal, any Notice of Other Appeal and the submissions and other written statements presented by the participants or third participants;

"DSB"
means the Dispute Settlement Body established under Article 2 of the DSU;

"DSU"
means the Understanding on Rules and Procedures Governing the Settlement of Disputes which is Annex 2 to the WTO Agreement;

"Member"
means a Member of the Appellate Body who has been appointed by the DSB in accordance with Article 17 of the DSU;

"other appellant"
means any party to the dispute that has filed a Notice of Other Appeal pursuant to paragraph 1 of Rule 23;

"participant"
means any party to the dispute that has filed a Notice of Appeal pursuant to Rule 20, a Notice of Other Appeal pursuant to Rule 23 or a submission pursuant to Rule 22 or paragraph 4 of Rule 23;

"party to the dispute"
means any WTO Member who was a complaining or defending party in the panel dispute, but does not include a third party;

"proof of service"
means a letter or other written acknowledgement that a document has been delivered, as required, to the parties to the dispute, participants, third parties or third participants, as the case may be;

"Rules"
means these Working Procedures for Appellate Review;

"Rules of Conduct"
means the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes as attached in Annex II to these Rules;

"SCM Agreement"
means the Agreement on Subsidies and Countervailing Measures which is in Annex 1A to the WTO Agreement;

"Secretariat"
means the Appellate Body Secretariat;

"service address"
means the address of the party to the dispute, participant, third party or third participant as generally used in WTO dispute settlement proceedings, unless the party to the dispute, participant, third party or third participant has clearly indicated another address;

"third participant"
means any third party that has filed a written submission pursuant to Rule 24(1); or any third party that appears at the oral hearing, whether or not it makes an oral statement at that hearing;

"third party"
means any WTO Member who has notified the DSB of its substantial interest in the matter before the panel pursuant to paragraph 2 of Article 10 of the DSU;

"WTO"
means the World Trade Organization;

[1203] WT/AB/WP/5. Note from the authors: This consolidated version of the Appellate Body Working Procedures entered into force on 1 January 2005 and was circulated on 4 January 2005. Although the current version of the Analytical Index only covers developments in dispute settlement until 31 December 2004, the authors have considered that the readers would find it useful to have the most current version of the Appellate Body Working Procedures.

"WTO Agreement"
means the Marrakesh Agreement Establishing the World Trade Organization, done at Marrakesh, Morocco on 15 April 1994;

"WTO Member"
means any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations that has accepted or acceded to the WTO in accordance with Articles XI, XII or XIV of the WTO Agreement; and

"WTO Secretariat"
means the Secretariat of the World Trade Organization.

PART I
MEMBERS

Duties and Responsibilities

2. (1) A Member shall abide by the terms and conditions of the DSU, these Rules and any decisions of the DSB affecting the Appellate Body.

(2) During his/her term, a Member shall not accept any employment nor pursue any professional activity that is inconsistent with his/her duties and responsibilities.

(3) A Member shall exercise his/her office without accepting or seeking instructions from any international, governmental, or non-governmental organization or any private source.

(4) A Member shall be available at all times and on short notice and, to this end, shall keep the Secretariat informed of his/her whereabouts at all times.

Decision-Making

3. (1) In accordance with paragraph 1 of Article 17 of the DSU, decisions relating to an appeal shall be taken solely by the division assigned to that appeal. Other decisions shall be taken by the Appellate Body as a whole.

(2) The Appellate Body and its divisions shall make every effort to take their decisions by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, the matter at issue shall be decided by a majority vote.

Collegiality

4. (1) To ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members, the Members shall convene on a regular basis to discuss matters of policy, practice and procedure.

(2) The Members shall stay abreast of dispute settlement activities and other relevant activities of the WTO and, in particular, each Member shall receive all documents filed in an appeal.

(3) In accordance with the objectives set out in paragraph 1, the division responsible for deciding each appeal shall exchange views with the other Members before the division finalizes the appellate report for circulation to the WTO Members. This paragraph is subject to paragraphs 2 and 3 of Rule 11.

(4) Nothing in these Rules shall be interpreted as interfering with a division's full authority and freedom to hear and decide an appeal assigned to it in accordance with paragraph 1 of Article 17 of the DSU.

Chairman

5. (1) There shall be a Chairman of the Appellate Body who shall be elected by the Members.

(2) The term of office of the Chairman of the Appellate Body shall be one year. The Appellate Body Members may decide to extend the term of office for an additional period of up to one year. However, in order to ensure rotation of the Chairmanship, no Member shall serve as Chairman for more than two consecutive terms.

(3) The Chairman shall be responsible for the overall direction of the Appellate Body business, and in particular, his/her responsibilities shall include:

(a) the supervision of the internal functioning of the Appellate Body; and
(b) any such other duties as the Members may agree to entrust to him/her.

(4) Where the office of the Chairman becomes vacant due to permanent incapacity as a result of illness or death or by resignation or expiration of his/her term, the Members shall elect a new Chairman who shall serve a full term in accordance with paragraph 2.

(5) In the event of a temporary absence or incapacity of the Chairman, the Appellate Body shall authorize another Member to act as Chairman *ad interim*, and the Member so authorized shall temporarily exercise all the powers, duties and functions of the Chairman until the Chairman is capable of resuming his/her functions.

Divisions

6. (1) In accordance with paragraph 1 of Article 17 of the DSU, a division consisting of three Members shall be established to hear and decide an appeal.

(2) The Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin.

(3) A Member selected pursuant to paragraph 2 to serve on a division shall serve on that division, unless:

(i) he/she is excused from that division pursuant to Rules 9 or 10;
(ii) he/she has notified the Chairman and the Presiding Member that he/she is prevented from serving on the division because of illness or other serious reasons pursuant to Rule 12; or
(iii) he/she has notified his/her intentions to resign pursuant to Rule 14.

Presiding Member of the Division

7. (1) Each division shall have a Presiding Member, who shall be elected by the Members of that division.

(2) The responsibilities of the Presiding Member shall include:

(a) coordinating the overall conduct of the appeal proceeding;
(b) chairing all oral hearings and meetings related to that appeal; and
(c) coordinating the drafting of the appellate report.

(3) In the event that a Presiding Member becomes incapable of performing his/her duties, the other Members serving on that division and the Member selected as a replacement pursuant to Rule 13 shall elect one of their number to act as the Presiding Member.

Rules of Conduct

8. (1) On a provisional basis, the Appellate Body adopts those provisions of the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, attached in Annex II to these Rules, which are applicable to it, until *Rules of Conduct* are approved by the DSB.

(2) Upon approval of *Rules of Conduct* by the DSB, such *Rules of Conduct* shall be directly incorporated and become part of these Rules and shall supersede Annex II.

9. (1) Upon the filing of a Notice of Appeal, each Member shall take the steps set out in Article VI:4(b)(i) of Annex II, and a Member may consult with the other Members prior to completing the disclosure form.

(2) Upon the filing of a Notice of Appeal, the professional staff of the Secretariat assigned to that appeal shall take the steps set out in Article VI:4(b)(ii) of Annex II.

(3) Where information has been submitted pursuant to Article VI:4(b)(i) or (ii) of Annex II, the Appellate Body shall consider whether further action is necessary.

(4) As a result of the Appellate Body's consideration of the matter pursuant to paragraph 3, the Member or the professional staff member concerned may continue to be assigned to the division or may be excused from the division.

10. (1) Where evidence of a material violation is filed by a participant pursuant to Article VIII of Annex II, such evidence shall be confidential and shall be supported by affidavits made by persons having actual knowledge or a reasonable belief as to the truth of the facts stated.

(2) Any evidence filed pursuant to Article VIII:1 of Annex II shall be filed at the earliest practicable time: that is, forthwith after the participant submitting it knew or reasonably could have known of the facts supporting it. In no case shall such evidence be filed after the appellate report is circulated to the WTO Members.

(3) Where a participant fails to submit such evidence at the earliest practicable time, it shall file an explanation in writing of the reasons why it did not do so earlier, and the Appellate Body may decide to consider or not to consider such evidence, as appropriate.

(4) While taking fully into account paragraph 5 of Article 17 of the DSU, where evidence has been filed pursuant to Article VIII of Annex II, an appeal shall be suspended for fifteen days or until the procedure referred to in Article VIII:14–16 of Annex II is completed, whichever is earlier.

(5) As a result of the procedure referred to in Article VIII:14–16 of Annex II, the Appellate Body may decide to dismiss the allegation, to excuse the Member or professional staff member concerned from being assigned to the division or make such other order as it deems necessary in accordance with Article VIII of Annex II.

11. (1) A Member who has submitted a disclosure form with information attached pursuant to Article VI:4(b)(i) or is the subject of evidence of a material violation pursuant to Article VIII:1 of Annex II, shall not participate in any decision taken pursuant to paragraph 4 of Rule 9 or paragraph 5 of Rule 10.

(2) A Member who is excused from a division pursuant to paragraph 4 of Rule 9 or paragraph 5 of Rule 10 shall not take part in the exchange of views conducted in that appeal pursuant to paragraph 3 of Rule 4.

(3) A Member who, had he/she been a Member of a division, would have been excused from that division pursuant to paragraph 4 of Rule 9, shall not take part in the exchange of views conducted in that appeal pursuant to paragraph 3 of Rule 4.

Incapacity

12. (1) A Member who is prevented from serving on a division by illness or for other serious reasons shall give notice and duly explain such reasons to the Chairman and to the Presiding Member.

(2) Upon receiving such notice, the Chairman and the Presiding Member shall forthwith inform the Appellate Body.

Replacement

13. Where a Member is unable to serve on a division for a reason set out in paragraph 3 of Rule 6, another Member shall be selected forthwith pursuant to paragraph 2 of Rule 6 to replace the Member originally selected for that division.

Resignation

14. (1) A Member who intends to resign from his/her office shall notify his/her intentions in writing to the Chairman of the Appellate Body who shall immediately inform the Chairman of the DSB, the Director-General and the other Members of the Appellate Body.

(2) The resignation shall take effect 90 days after the notification has been made pursuant to paragraph 1, unless the DSB, in consultation with the Appellate Body, decides otherwise.

Transition

15. A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.

PART II
PROCESS

General Provisions

16. (1) In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the division shall immediately notify the parties to the dispute, participants, third parties and third participants as well as the other Members of the Appellate Body.

(2) In exceptional circumstances, where strict adherence to a time-period set out in these Rules would result in a manifest unfairness, a party to the dispute, a participant, a third party or a third participant may request that a division modify a time-period set out in these Rules for the filing of documents or the date set out in the working schedule for the oral hearing. Where such a request is granted by a division, any modification of time shall be notified to the parties to the dispute, participants, third parties and third participants in a revised working schedule.

17. (1) Unless the DSB decides otherwise, in computing any time-period stipulated in the DSU or in the special or additional provisions of the covered agreements, or in these Rules, within which a communication must be made or an action taken by a WTO Member to exercise or preserve its rights, the day from which the time-period begins to run shall be excluded and, subject to paragraph 2, the last day of the time-period shall be included.

(2) The DSB Decision on "Expiration of Time-Periods in the DSU", WT/DSB/M/7, shall apply to appeals heard by divisions of the Appellate Body.

Documents

18. (1) No document is considered filed with the Appellate Body unless the document is received by the Secretariat within the time-period set out for filing in accordance with these Rules.

(2) Except as otherwise provided in these Rules, every document filed by a party to the dispute, a participant, a third party or a third participant shall be served on each of the other parties to the dispute, participants, third parties and third participants in the appeal.

(3) A proof of service on the other parties to the dispute, participants, third parties and third participants shall appear on, or be affixed to, each document filed with the Secretariat under paragraph 1 above.

(4) A document shall be served by the most expeditious means of delivery or communication available, including by:

(a) delivering a copy of the document to the service address of the party to the dispute, participant, third party or third participant; or

(b) sending a copy of the document to the service address of the party to the dispute, participant, third party or third participant by facsimile transmission, expedited delivery courier or expedited mail service.

(5) Upon authorization by the division, a participant or a third participant may correct clerical errors in any of its documents (including typographical mistakes, errors of grammar, or words or numbers placed in the wrong order). The request to correct

clerical errors shall identify the specific errors to be corrected and shall be filed with the Secretariat no later than 30 days after the date of the filing of the Notice of Appeal. A copy of the request shall be served upon the other parties to the dispute, participants, third parties and third participants, each of whom shall be given an opportunity to comment in writing on the request. The division shall notify the parties to the dispute, participants, third parties and third participants of its decision.

Ex Parte Communications

19. (1) Neither a division nor any of its Members shall meet with or contact one party to the dispute, participant, third party or third participant in the absence of the other parties to the dispute, participants, third parties and third participants.

(2) No Member of the division may discuss any aspect of the subject matter of an appeal with any party to the dispute, participant, third party or third participant in the absence of the other Members of the division.

(3) A Member who is not assigned to the division hearing the appeal shall not discuss any aspect of the subject matter of the appeal with any party to the dispute, participant, third party or third participant.

Commencement of Appeal

20. (1) An appeal shall be commenced by notification in writing to the DSB in accordance with paragraph 4 of Article 16 of the DSU and simultaneous filing of a Notice of Appeal with the Secretariat.

(2) A Notice of Appeal shall include the following information:

(a) the title of the panel report under appeal;
(b) the name of the party to the dispute filing the Notice of Appeal;
(c) the service address, telephone and facsimile numbers of the party to the dispute; and
(d) a brief statement of the nature of the appeal, including:

(i) identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel;
(ii) a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying; and
(iii) without prejudice to the ability of the appellant to refer to other paragraphs of the panel report in the context of its appeal, an indicative list of the paragraphs of the panel report containing the alleged errors.

Appellant's Submission

21. (1) The appellant shall, within 7 days after the date of the filing of the Notice of Appeal, file with the Secretariat a written submission prepared in accordance with paragraph 2 and serve a copy of the submission on the other parties to the dispute and third parties.

(2) A written submission referred to in paragraph 1 shall

(a) be dated and signed by the appellant; and
(b) set out

(i) a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof;
(ii) a precise statement of the provisions of the covered agreements and other legal sources relied on; and
(iii) the nature of the decision or ruling sought.

Appellee's Submission

22. (1) Any party to the dispute that wishes to respond to allegations raised in an appellant's submission filed pursuant to Rule 21 may, within 25 days after the date of the filing of the Notice of Appeal, file with the Secretariat a written submission prepared in accordance with paragraph 2 and serve a copy of the submission on the appellant, other parties to the dispute and third parties.

(2) A written submission referred to in paragraph 1 shall

(a) be dated and signed by the appellee; and
(b) set out

(i) a precise statement of the grounds for opposing the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel raised in the appellant's submission, and the legal arguments in support thereof;
(ii) an acceptance of, or opposition to, each ground set out in the appellant's submission;
(iii) a precise statement of the provisions of the covered agreements and other legal sources relied on; and
(iv) the nature of the decision or ruling sought.

Multiple Appeals

23. (1) Within 12 days after the date of the filing of the Notice of Appeal, a party to the dispute other than the original appellant may join in that appeal or appeal on the basis of other alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel. That party shall notify the DSB in writing of its appeal and shall simultaneously file a Notice of Other Appeal with the Secretariat.

(2) A Notice of Other Appeal shall include the following information:

(a) the title of the panel report under appeal;
(b) the name of the party to the dispute filing the Notice of Other Appeal;
(c) the service address, telephone and facsimile numbers of the party to the dispute; and either

(i) a statement of the issues raised on appeal by another participant with which the party joins; or
(ii) a brief statement of the nature of the other appeal, including:

(A) identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel;
(B) a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying; and
(C) without prejudice to the ability of the other appellant to refer to other paragraphs of the panel report in the context of its appeal, an indicative list of the paragraphs of the panel report containing the alleged errors.

(3) The other appellant shall, within 15 days after the date of the filing of the Notice of Appeal, file with the Secretariat a written submission prepared in accordance with paragraph 2 of Rule 21 and serve a copy of the submission on the other parties to the dispute and third parties.

(4) The appellant, any appellee and any other party to the dispute that wishes to respond to a submission filed pursuant to paragraph 3 may file a written submission within 25 days after the date of the filing of the Notice of Appeal, and any such submission shall be in the format required by paragraph 2 of Rule 22.

(5) This Rule does not preclude a party to the dispute which has not filed a submission under Rule 21 or a Notice of Other Appeal under paragraph 1 of this Rule from exercising its right of appeal pursuant to paragraph 4 of Article 16 of the DSU.

(6) Where a party to the dispute which has not filed a submission under Rule 21 or a Notice of Other Appeal under paragraph 1 of this Rule exercises its right to appeal as set out in paragraph 5, a single division shall examine the appeals.

Amending Notices of Appeal

23*bis*. (1) The division may authorize an original appellant to amend a Notice of Appeal or an other appellant to amend a Notice of Other Appeal.

(2) A request to amend a Notice of Appeal or a Notice of Other Appeal shall be made as soon as possible in writing and shall state the reason(s) for the request and identify precisely the specific amendments that the appellant or other appellant wishes to make to the Notice. A copy of the request shall be served on the other parties to the dispute, participants, third participants and third parties, each of whom shall be given an opportunity to comment in writing on the request.

(3) In deciding whether to authorize, in full or in part, a request to amend a Notice of Appeal or Notice of Other Appeal, the division shall take into account:

(a) the requirement to circulate the appellate report within the time-period set out in Article 17.5 of the DSU or, as appropriate, Article 4.9 of the *SCM Agreement*; and,

(b) the interests of fairness and orderly procedure, including the nature and extent of the proposed amendment, the timing of the request to amend a Notice of Appeal or Notice of Other Appeal, any reasons why the proposed amended Notice of Appeal or Notice of Other Appeal was not or could not have been filed on its original date, and any other considerations that may be appropriate.

(4) The division shall notify the parties to the dispute, participants, third participants, and third parties of its decision. In the event that the division authorizes an amendment to a Notice of Appeal or a Notice of Other Appeal, it shall provide an amended copy of the Notice to the DSB.

Third Participants

24. (1) Any third party may file a written submission containing the grounds and legal arguments in support of its position. Such submission shall be filed within 25 days after the date of the filing of the Notice of Appeal.

(2) A third party not filing a written submission shall, within the same period of 25 days, notify the Secretariat in writing if it intends to appear at the oral hearing, and, if so, whether it intends to make an oral statement.

(3) Third participants are encouraged to file written submissions to facilitate their positions being taken fully into account by the division hearing the appeal and in order that participants and other third participants will have notice of positions to be taken at the oral hearing.

(4) Any third party that has neither filed a written submission pursuant to paragraph (1), nor notified the Secretariat pursuant to paragraph (2), may notify the Secretariat that it intends to appear at the oral hearing, and may request to make an oral statement at the hearing. Such notifications and requests should be notified to the Secretariat in writing at the earliest opportunity.

Transmittal of Record

25. (1) Upon the filing of a Notice of Appeal, the Director-General of the WTO shall transmit forthwith to the Appellate Body the complete record of the panel proceeding.

(2) The complete record of the panel proceeding includes, but is not limited to:

(a) written submissions, rebuttal submissions, and supporting evidence attached thereto by the parties to the dispute and the third parties;
(b) written arguments submitted at the panel meetings with the parties to the dispute and the third parties, the recordings of such panel meetings, and any written answers to questions posed at such panel meetings;
(c) the correspondence relating to the panel dispute between the panel or the WTO Secretariat and the parties to the dispute or the third parties; and
(d) any other documentation submitted to the panel.

Working Schedule

26. (1) Forthwith after the commencement of an appeal, the division shall draw up an appropriate working schedule for that appeal in accordance with the time-periods stipulated in these Rules.

(2) The working schedule shall set forth precise dates for the filing of documents and a timetable for the division's work, including, where possible, the date for the oral hearing.

(3) In accordance with paragraph 9 of Article 4 of the DSU, in appeals of urgency, including those which concern perishable goods, the Appellate Body shall make every effort to accelerate the appellate proceedings to the greatest extent possible. A division shall take this into account in drawing up its working schedule for that appeal.

(4) The Secretariat shall serve forthwith a copy of the working schedule on the appellant, the parties to the dispute and any third parties.

Oral Hearing

27. (1) A division shall hold an oral hearing, which shall be held, as a general rule, between 35 and 45 days after the date of the filing of a Notice of Appeal.

(2) Where possible in the working schedule or otherwise at the earliest possible date, the Secretariat shall notify all parties to the dispute, participants, third parties and third participants of the date for the oral hearing.

(3) (a) Any third party that has filed a submission pursuant to Rule 24(1), or has notified the Secretariat pursuant to Rule 24(2) that it intends to appear at the oral hearing, may appear at the oral hearing, make an oral statement at the hearing, and respond to questions posed by the division.
(b) Any third party that has notified the Secretariat pursuant to Rule 24(4) that it intends to appear at the oral hearing may appear at the oral hearing.
(c) Any third party that has made a request pursuant to Rule 24(4) may, at the discretion of the division hearing the appeal, taking into account the requirements of due process, make an oral statement at the hearing, and respond to questions posed by the division.

(4) The Presiding Member may set time-limits for oral arguments.

Written Responses

28. (1) At any time during the appellate proceeding, including, in particular, during the oral hearing, the division may address questions orally or in writing to, or request additional memoranda from, any participant or third participant, and specify the time-periods by which written responses or memoranda shall be received.

(2) Any such questions, responses or memoranda shall be made available to the other participants and third participants in the appeal, who shall be given an opportunity to respond.

(3) When the questions or requests for memoranda are made prior to the oral hearing, then the questions or requests, as well as the responses or memoranda, shall also be made available to the

third parties, who shall also be given an opportunity to respond.

Failure to Appear

29. Where a participant fails to file a submission within the required time-periods or fails to appear at the oral hearing, the division shall, after hearing the views of the participants, issue such order, including dismissal of the appeal, as it deems appropriate.

Withdrawal of Appeal

30. (1) At any time during an appeal, the appellant may withdraw its appeal by notifying the Appellate Body, which shall forthwith notify the DSB.

(2) Where a mutually agreed solution to a dispute which is the subject of an appeal has been notified to the DSB pursuant to paragraph 6 of Article 3 of the DSU, it shall be notified to the Appellate Body.

Prohibited Subsidies

31. (1) Subject to Article 4 of the *SCM Agreement*, the general provisions of these Rules shall apply to appeals relating to panel reports concerning prohibited subsidies under Part II of that *Agreement*.

(2) The working schedule for an appeal involving prohibited subsidies under Part II of the *SCM Agreement* shall be as set out in Annex I to these Rules.

Entry into Force and Amendment

32. (1) These Rules shall enter into force on 15 February 1996.

(2) The Appellate Body may amend these Rules in compliance with the procedures set forth in paragraph 9 of Article 17 of the DSU.

(3) Whenever there is an amendment to the DSU or to the special or additional rules and procedures of the covered agreements, the Appellate Body shall examine whether amendments to these Rules are necessary.

ANNEX I
TIMETABLE FOR APPEALS[1]

	General Appeals (Day)	Prohibited Subsidies Appeals (Day)
Notice of Appeal[2]	0	0
Appellant's Submission[3]	7	4
Notice of Other Appeal[4]	12	6
Other Appellant(s) Submission(s)[5]	15	7
Appellee(s) Submission(s)[6]	25	12
Third Participant(s) Submission(s)[7]	25	12
Third Participant(s) Notification(s)[8]	25	12
Oral Hearing[9]	35–45	17–23
Circulation of Appellate Report	60–90[10]	30–60[11]
DSB Meeting for Adoption	90–120[12]	50–80[13]

(*footnote original*) [1] Rule 17 applies to the computation of the time-periods below.
(*footnote original*) [2] Rule 20.
(*footnote original*) [3] Rule 21(1).
(*footnote original*) [4] Rule 23(1).
(*footnote original*) [5] Rule 23(3).
(*footnote original*) [6] Rules 22 and 23(4).
(*footnote original*) [7] Rule 24(1).
(*footnote original*) [8] Rule 24(2).
(*footnote original*) [9] Rule 27.
(*footnote original*) [10] Article 17:5, DSU.
(*footnote original*) [11] Article 4:9, *SCM Agreement*.
(*footnote original*) [12] Article 17:14, DSU.
(*footnote original*) [13] Article 4:9, *SCM Agreement*.

ANNEX II

[For the text of the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, please refer to Section XXXIV below.]

ANNEX III
Table of Consolidated and Revised Versions of the Working Procedures for Appellate Review

Document Number	Effective Date	Rules Amended	*Working Documents* Explanatory Texts	Principal DSB Meetings(s) at which Amendments Discussed, Minutes
WT/AB/WP/1	15 February 1996	N/A	WT/AB/WP/W/1	31 January 1996, WT/DSB/M/10 and 21 February 1996, WT/DSB/M/11
WT/AB/WP/2	28 February 1997	Rule 5(2) and Annex II	WT/AB/WP/W/2, WT/AB/WP/W/3	25 February 1997, WT/DSB/M/29
WT/AB/WP/3	24 January 2002	Rule 5(2)	WT/AB/WP/W/4, WT/AB/WP/W/5	24 July 2001, WT/DSB/M/107

Table (*cont.*)

Document Number	Effective Date	Rules Amended	*Working Documents* Explanatory Texts	Principal DSB Meetings(s) at which Amendments Discussed, Minutes
WT/AB/WP/4	1 May 2003	Rules 24 and 27(3), with consequential amendments to Rules 1, 16, 18, 19, and 28, and Annex I	WT/AB/WP/W/6, WT/AB/WP/W/7	23 October 2002, WT/DSB/M/134
WT/AB/WP/5 WT/DSB/M/169	1 January 2005	Rules 1, 18, 20, 21, 23, 23 *bis*, and 27, and Annexes I and III	WT/AB/WP/W/8, WT/AB/WP/W/9	19 May 2004

B. INTERPRETATION AND APPLICATION OF THE APPELLATE BODY WORKING PROCEDURES

1. General

835. On 15 February 1996, the Appellate Body circulated its Working Procedures as an unrestricted document.[1204] On 24 January 2002 and 1 May 2003, the Appellate Body circulated consolidated, revised versions of its Working Procedures.[1205] On 4 January 2005, the Appellate Body circulated another consolidated, revised version replacing the May 2003 version and reflecting amendments to Rules 1, 18(5), 20, 21, 23, 27 and Annex I, as well as the addition of a new Rule 23*bis* and a new Annex III, as discussed in WT/AB/WP/W/8 and WT/AB/WP/W/9. These new consolidated Working Procedures are to be applied to appeals initiated after 1 January 2005. Although the current version of the Analytical Index only covers developments in dispute settlement up until the end of December 2004, the authors have decided to include this version in Section A above since it will be the version in force when this Analytical Index is published.

2. Appellate Body's authority to adopt procedural rules

836. In *US – Lead and Bismuth II*, the Appellate Body examined whether it could admit *amicus curiae* briefs (see Section XXXVI.G.2 below; with respect to the issue of *amicus curiae* briefs in general, see Section XXXVI.G below). The Appellate Body confirmed its broad authority to adopt procedural rules:

> "[Article 17.9 of the DSU] makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements.[1206] Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal."[1207]

3. Appellate Body's authority to disregard its Working Procedures

837. In *US – Gasoline*, the United States in its appeal argued that the issues of whether clean air is an exhaustible natural resources within the meaning of Article XX(g) of the *GATT 1994* and whether the baseline establishment rules were consistent with the *TBT Agreement* were not properly brought before the Appellate Body in accordance with its Working Procedures. In that case, Venezuela and Brazil had appealed the relevant findings of the Panel, but brought up these issues in their appellee's submission, contrary to the Appellate Body's Working Procedures which stipulated that such "cross-appeal" be brought in an appellant's submission. The Appellate Body refused to "casually . . . disregard" its own Working Procedures and stated:

> "[T]o deal with those two issues, under the circumstances of this appeal, would have required the Appellate Body casually to disregard its own *Working Procedures* and to do so in the absence of a compelling reason grounded on, for instance, fundamental fairness or *force majeure*. Venezuela and Brazil could have appealed the Panel's finding and non-finding on the two matters by taking advantage of Rules 23(1) or 23(4) of the *Working Procedures* and thereby placing the Appellate Body in a position to dispose of those issues directly in one and the same appellate proceeding.
>
> . . . the route . . . Brazil and Venezuela chose for addressing the two issues in question is not contemplated by the *Working Procedures*, and therefore, these issues are not properly the subject of this appeal."[1208]

[1204] WT/AB/WP/1.
[1205] WT/AB/WP/3 and WT/AB/WP/4 respectively.
[1206] (*footnote original*) In addition, Rule 16(1) of the *Working Procedures* allows a division hearing an appeal to develop an appropriate procedure in certain specified circumstances where a procedural question arises that is not covered by the *Working Procedures*.
[1207] Appellate Body Report on *US – Lead and Bismuth II*, para. 39.
[1208] Appellate Body Report on *US – Gasoline*, p. 12.

4. Interpretation of the Working Procedures

838. In *EC – Sardines*, the Appellate Body stated that its Working Procedures cannot be interpreted in a way that could undermine the effectiveness of the dispute settlement system because they have been drawn up pursuant to the DSU:

> "[W]e emphasize that the *Working Procedures* must not be interpreted in a way that could undermine the effectiveness of the dispute settlement system, for they have been drawn up pursuant to the DSU and as a means of ensuring that the dispute settlement mechanism achieves the aim of securing a positive solution to a dispute.[1209] As we have said:
>
> > 'The procedural rules of WTO dispute settlement are designed to promote . . . the fair, prompt and effective resolution of trade disputes.'[1210]
>
> This obligation to interpret the *Working Procedures* in a way that promotes the effective resolution of disputes is complemented by the obligation of Members, set out in Article 3.10 of the DSU, to 'engage in [dispute settlement] procedures in good faith in an effort to resolve the dispute'. Hence, the right to withdraw an appeal must be exercised subject to these limitations, which are applicable generally to the dispute settlement process."[1211]

5. Rule 3.1: decision-making

839. See Section XXXII.B.9 below.

6. Rule 3.2: concurrent opinions

840. In this respect, see Section XVII.B.7 above.

7. Rule 8: rules of conduct

841. In *Brazil – Aircraft*, the Appellate Body recalled that its Members are subject to the Rules of Conduct:

> "[W]e wish to recall that Members of the Appellate Body and its staff are covered by Article VII:1 of the *Rules of Conduct*,[1212] which provides:
>
> > Each covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential. (emphasis added)"[1213]

8. Rule 13: replacement of Appellate Body member in a given appeal

842. In *US – Lead and Bismuth II*, Mr Christopher Beeby, one of the members of the Division hearing the appeal, passed away and Mr Julio Lacarte-Muró, another member of the Appellate Body, was selected to replace him.[1214]

843. In *US – Offset Act (Byrd Amendment)*, Mr Giorgio Sacerdoti replaced Mr A.V. Ganesan as Presiding Member of the Division hearing this appeal because the latter was prevented from continuing to serve on the Division for serious personal reasons.[1215]

844. In *US – Softwood Lumber IV*, Mr Giorgio Sacerdoti replaced Mr A.V. Ganesan as a Member of the Division hearing this appeal because the latter was prevented from continuing to serve on the Division for serious personal reasons.[1216]

9. Rule 16

(a) Rule 16(1): "appropriate procedure for the purposes of that appeal only"

845. In *EC – Bananas III*, the Appellate Body accepted Saint Lucia's request to be assisted by private counsel during the Appellate Body hearing on the grounds that it is for a WTO Member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body.[1217] In this regard, see paragraphs 1022–1023 below.

846. In *Guatemala – Cement I*, both parties, Guatemala and Mexico, had filed their appellee's submissions in Spanish. In order to ensure that the third participant, the United States, would have time to prepare its submission after receiving an English version of the appellant's submission, the Appellate Body granted the United States additional time to file its third participant's submission. The Appellate Body further declined Mexico's request that its appellee's submission be withheld from Guatemala and the United States until the end of the time-period allowed to the United States to file its third participant's submission.[1218]

847. In *Brazil – Aircraft*, Brazil and Canada had requested that the Appellate Body apply, *mutatis mutandis*, the Procedures Governing Business Confidential Information adopted by the Panel in this case. The Appellate Body issued a preliminary ruling[1219] in which

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[1209] (*footnote original*) DSU, Article 3.7.
[1210] (*footnote original*) Appellate Body Report, *US – FSC*, *supra*, footnote 20, para. 166.
[1211] Appellate Body Report on *EC – Sardines*, paras. 139–140.
[1212] (*footnote original*) The *Rules of Conduct* have been directly incorporated into the *Working Procedures* (see Rule 8 of those *Working Procedures*).
[1213] Appellate Body Report on *Brazil – Aircraft*, para. 124. See also Appellate Body Report on *Canada – Aircraft*, para. 146.
[1214] Appellate Body Report on *US – Lead and Bismuth II*, para. 8. See also Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 8; Appellate Body Report on *US – Softwood Lumber IV*, para. 10.
[1215] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 8.
[1216] Appellate Body Report on *US – Softwood Lumber IV*, para. 10.
[1217] Appellate Body Report on *EC – Bananas III*, para. 10.
[1218] Appellate Body Report on *Guatemala – Cement I*, para. 4.
[1219] For more information on preliminary rulings, see Section XXXVI.C.

it concluded that it was not necessary, under the circumstances of this case, to adopt *additional* procedures to protect business confidential information.[1220]

848. In *EC – Asbestos*, the Appellate Body adopted an additional procedure, for the purposes of this appeal only, pursuant to Rule 16(1) of its Working Procedures, to deal with any possible submissions received from *amici curiae*. In this regard, see Section XXXVI.G.3 below.

849. In *US – Lead and Bismuth II*, due to the passing away of Mr Christopher Beeby, the Appellate Body, pursuant to Rule 13 of the *Working Procedures*, had selected Mr Julio Lacarte-Muró to replace him (see paragraph 842 above). "In view of these extraordinary circumstances, the newly-constituted Division decided, pursuant to Rule 16(1) of the *Working Procedures*, and in the interests of fairness and orderly procedure in the conduct of this appeal, to hold another oral hearing on 4 April 2000. On that date, the participants and third participants presented oral arguments and responded to questions put to them by the Members of the newly-constituted Division. Due to these same extraordinary circumstances, the participants in this appeal, the European Communities and the United States, agreed to a two-week extension of the 90-day time limit for the consideration of this appeal, and thus agreed that the Report would be circulated no later than 10 May 2000."[1221]

850. In *US – Countervailing Measures on Certain EC Products*, the European Communities filed a request for a Preliminary Ruling, alleging that the United States' Notice of Appeal was not in conformity with Rule 20(2)(d) of the Working Procedures for Appellate Review. The European Communities asked the Appellate Body to order the United States, pursuant to Rule 16(1) of the Working Procedures, immediately to file further and better particulars to its notice of appeal identifying the precise legal findings and legal interpretations that it was challenging. The Appellate Body thus invited the United States "to identify the precise findings and interpretations of the Panel which are alleged, in the Notice of Appeal filed on 9 September 2002, to constitute errors".[1222]

(b) Rule 16(2): "exceptional circumstances"

851. In *EC – Bed Linen*, the European Communities and India requested the Appellate Body to extend the time-period for filing the appellee's and third participant's submissions. The Division hearing the appeal accepted the request pursuant to Rule 16(2) of the *Working Procedure* and in the light of the "exceptional circumstances" in that appeal.[1223]

852. In *US – FSC (Article 21.5 – EC)*, the United States requested the Appellate Body to modify its timetable on the grounds that the bioterrorists' attack amounted to "exceptional circumstances" under Rule 16(2) of the Appellate Body Working Procedures:

> "By letter of 22 October 2001, the United States requested the Appellate Body pursuant to Rule 16(2) of the *Working Procedures* to modify the timetable set out in the Working Schedule for Appeal for the filing of the appellant's submissions by the United States. The United States stated that suspected bioterrorist attacks had compromised the ability of the United States to conduct the necessary consultations with the United States Congress with regard to this appeal.[1224] According to the United States, the effect of these circumstances was such that adhering to the original timetable would result in manifest unfairness to the United States. In its letter of 23 October 2001, the European Communities did not object to the request made by the United States, but requested that, in order to preserve the balance of procedural rights afforded to the participants in this appeal, the Appellate Body extend the deadline for the filing of the European Communities' appellee's submission by 14 days. In a letter dated 23 October 2001, the Division of the Appellate Body hearing the appeal accepted that the circumstances identified by the United States constituted 'exceptional circumstances' within the meaning of Rule 16(2) of the *Working Procedures* and that maintaining the deadline for submission of the appellants' submission would result in 'manifest unfairness' to the United States. Accordingly, the Division agreed to modify the Working Schedule for this appeal to allow the United States an additional seven days for the filing of its appellant's submission. In the same letter, the Division also extended by seven days the deadlines for the filing of the other appellant's submissions, the appellee's submission, and the third participants' submissions."[1225]

(c) Rule 16(2): change of date

853. In *EC – Bananas III*, pursuant to Rule 16(2) of the Working Procedures, Jamaica asked the Appellate Body to postpone the dates of the oral hearing, set out in the working schedule. This request was not granted as the Appellate Body was not persuaded that there were exceptional circumstances resulting in manifest unfair-

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[1220] Appellate Body Report on *Brazil – Aircraft*, para. 9, 104 and 119. See also Appellate Body Report on *Canada – Aircraft*, para. 6, 126 and 141.

[1221] Appellate Body Report on *US – Lead and Bismuth* II, para. 8.

[1222] Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, paras. 52 and 55.

[1223] Appellate Body Report on *EC – Bed Linen*, footnote 12 to para. 6.

[1224] (*footnote original*) In its letter, the United States explained that, due to the delivery of the bacterium anthrax to the United States Congress, several buildings had been temporarily closed, including buildings housing the offices of United States Senate officials with jurisdiction over the issues arising in this appeal.

[1225] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 8.

ness to any participant or third participant that justified the postponement of the oral hearing in the appeal.[1226]

854. In *US – Shrimp (Article 21.5 – Malaysia)*, on 13 August 2001, the United States requested that the Division hearing this appeal change the date of the oral hearing set out in the working schedule for this appeal. After inviting the participants to make their views known with respect to this request, the Division ruled that it would not change the date of the oral hearing.[1227]

10. Rule 20: notice of appeal

(a) Purpose of the notice of appeal

855. In *US – Countervailing Measures on Certain EC Products*, the Appellate Body rejected the argument by the United States that the notice of appeal serves a limited purpose as simply a formal trigger for initiating the appeal and stressed the importance of the notice of appeal as the means to allow the appellees to exercise their right of defence:

> "[O]ur previous rulings have underscored the important balance that must be maintained between the right of Members to exercise the right of appeal meaningfully and effectively, and the right of appellees to receive notice through the Notice of Appeal of the findings under appeal, so that they may exercise their right of defence effectively. Hence, we disagree with the contention of the United States here that the Notice of Appeal 'serves a limited purpose' as 'simply a formal trigger for initiating the appeal.' Indeed, if this were the only objective of the notice, our *Working Procedures* would have included only the first paragraph of Rule 20, which refers to commencement of an appeal through written notification to the Dispute Settlement Body and Appellate Body Secretariat. However, Rule 20 also prescribes additional requirements for commencing an appeal; it provides that the Notice of Appeal must include 'a brief statement of the nature of the appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel.'[1228] The notification under Rule 20(1) serves as the 'trigger' to which the United States refers. The additional requirements under Rule 20(2) serve to ensure that the appellee also receives notice, albeit brief, of the 'nature of the appeal' and the 'allegations of errors' by the panel."[1229]

(b) Rule 20(2)(d): "brief statement of the nature of appeal, including the allegations of error"

(i) Identification standard

856. In *US – Shrimp*, the Appellate Body discussed the requirement in the *Working Procedures for Appellate Review* according to which the appellant is to be *brief* in its notice of appeal in setting out "the nature of the appeal, including the allegations of errors". The Appellate Body concluded that "the 'nature of the appeal' and 'the allegations of errors' are sufficiently set out where the notice of appeal adequately identifies the findings or legal interpretations of the Panel that are being appealed as erroneous":

> "The *Working Procedures for Appellate Review* enjoin the appellant to be *brief* in its notice of appeal in setting out 'the nature of the appeal, including the allegations of errors'. We believe that, in principle, the 'nature of the appeal' and 'the allegations of errors' are sufficiently set out where the notice of appeal adequately identifies the findings or legal interpretations of the Panel which are being appealed as erroneous. The notice of appeal is not expected to contain the reasons why the appellant regards those findings or interpretations as erroneous. The notice of appeal is not designed to be a summary or outline of the arguments to be made by the appellant. The legal arguments in support of the allegations of error are, of course, to be set out and developed in the appellant's submission."[1230]

857. The appellees in *US – Shrimp* argued that the notice of appeal of the United States was both vague and cursory and therefore not in compliance with the procedural requirements of Rule 20(2) of the *Working Procedures for Appellate Review*. The Appellate Body disagreed:

> "It is scarcely necessary to add that an appellee is, of course, always entitled to its full measure of due process. In the present appeal, perhaps the best indication that that full measure of due process was not in any degree impaired by the notice of appeal filed by the United States, is the developed and substantial nature of the appellees' submissions."[1231]

858. In *US – Countervailing Measures on Certain EC Products*, the Appellate Body emphasized that, generally, a notice of appeal that simply refers to the paragraph numbers found in the "Conclusions and Recommendations" section of a panel report, or that simply quotes them in full, is insufficient to provide adequate notice of the allegations of error on appeal. In this case, however, as the section in question was particularly detailed, the Appellate Body considered that the notice of appeal was adequate in this respect:

[1226] Appellate Body Report on *EC – Bananas III*, para. 4.
[1227] Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, para. 11.
[1228] (*footnote original*) The United States' comparison to the lack of notice provided to a cross-appellee is not appropriate because the *Working Procedures* do not impose any notification requirements under such circumstances.
[1229] Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 62. See also Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 200.
[1230] Appellate Body Report on *US – Shrimp*, para. 95.
[1231] Appellate Body Report on *US – Shrimp*, para. 97.

"We observe that, in coming to these conclusions, we have before us a rather unusual example of the 'Conclusions and Recommendations' section of a panel report. In most panel reports, the 'Conclusions and Recommendations' section is relatively brief, setting out findings in summary fashion. Detailed legal interpretations and reasoning upon which panels rely are usually found only in the 'Findings' sections of panel reports. In this case, however, the Panel's 'Conclusions and Recommendations' are more detailed than usual. Paragraphs 8.1(a)–8.1(d) of the Panel Report include, not only the Panel's findings, but also certain of the reasons leading to those findings. Hence, in this case, it is possible, by reading the 'Conclusions and Recommendations' section from the Panel Report, to discern alleged errors of law appealed by the United States. We emphasize, however, that generally, a Notice of Appeal that refers simply to the paragraph numbers found in the 'Conclusions and Recommendations' section of a panel report, or that quotes them in full, will be insufficient to provide adequate notice of the allegations of error on appeal, and, hence, will fall short of the requirements set out in Rule 20(2)(d) of the *Working Procedures*."[1232]

859. In *US – Offset Act (Byrd Amendment)*, the Appellate Body considered that generic statements in a notice of appeal do not give the appellees adequate notice of the "nature of the appeal" and the "allegations of errors" made by the panel:

"We do not agree with the United States' contention that the first numbered paragraph of the United States' Notice of Appeal, referring generally to the Panel's failure properly to interpret Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, 'plainly covers' a claim that the Panel exceeded its terms of reference. As we have said, the Notice of Appeal 'serve[s] to ensure that the appellee also receives notice, albeit brief, of the "nature of the appeal" and the "allegations of errors" by the panel.'[1233] Generic statements such as that relied upon by the United States cannot serve to give the appellees adequate notice that they will be required to defend against a claim that the Panel exceeded its terms of reference. This is particularly so for procedural errors; it can be especially difficult to discern a claim of procedural error by a panel from general references to panel findings or from extracts of a panel report, because allegations of procedural error by a panel may not necessarily be raised until the appellate stage."[1234]

(ii) Distinction between "claims of error" and "legal arguments"

860. In *Chile – Price Band System*, Chile argued that the Panel had erred in choosing to examine Argentina's claim under Article 4.2 of the *Agreement on Agriculture* before examining its claim under Article II:1(b) of the *GATT 1994*. Argentina raised a procedural objection, alleging that Chile introduced this point for the first time in its appellant's submission, when, according to Argentina, Chile should have included this "allegation of error" in its notice of appeal pursuant to Rule 20(2)(d) of the *Working Procedures for Appellate Review*. The Appellate Body referred to the distinction it made between claims and legal arguments under Article 6.2 of the *DSU* in *EC – Bananas III* (see paragraph 223 above). The Appellate Body considered that this distinction "is also relevant to the distinction between 'allegations of error' and legal arguments as contemplated by Rule 20 of the *Working Procedures*":

"In our view, this distinction between claims and legal arguments under Article 6.2 of the DSU is also relevant to the distinction between 'allegations of error' and legal arguments as contemplated by Rule 20 of the *Working Procedures*. Bearing this distinction in mind, we do *not* agree with Argentina that Chile's arguments regarding the order of analysis chosen by the Panel amount to a separate 'allegation of error' that Chile *should have* – or *could have* – included in its Notice of Appeal. In fact, we do not see, nor has Argentina explained, what *separate* 'allegation of error' could have been made, or what legal basis for such 'allegation of error' there could have been. Rather than making a separate 'allegation of error', Chile has, in our view, simply set out a *legal argument* in support of the issues it raised on appeal relating to Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994.[1235]"[1236]

(iii) Claims not included in the notice of appeal

General rule: exclusion from scope of appeal

861. In *EC – Bananas III*, the Appellate Body, having found that the European Communities had not properly indicated, in its notice of appeal, that it was appealing one particular Panel finding, decided to exclude that particular finding from the scope of the appeal:

"In our view, the claims of error by the European Communities set out in paragraphs (c) and (d) of the Notice of Appeal do not cover the Panel's finding in paragraph 7.93 of the Panel Reports. The finding in that paragraph explicitly deals with Ecuador's right to invoke Article

[1232] Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 70.

[1233] (*footnote original*) Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 62. See paragraph 855 above.

[1234] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 200.

[1235] (*footnote original*) Indeed, Chile suggests in paragraph 34 of its appellant's submission that, had the Panel begun with Article II:1(b), it would "most likely have avoided the error of inventing a new definition of 'ordinary customs duties' which has no apparent basis in the text of Article II:1(b)." Thus Chile is in fact making a legal argument in support of a substantive claim under Article II:1(b).

[1236] Appellate Body Report on *Chile – Price Band System*, para. 182.

> XIII:2 or XIII:4 of the GATT 1994, given that Ecuador acceded to the WTO *after* the *WTO Agreement* entered into force and *after* the tariff quota for the BFA countries had been negotiated and inscribed in the EC Schedule to the GATT 1994. There is no specific mention of this Panel finding in either the Notice of Appeal or in the main arguments of the appellant's submission by the European Communities. Therefore, Ecuador had no notice that the European Communities was appealing this finding. For these reasons, we conclude that the Panel's finding in paragraph 7.93 of the Panel Reports should be excluded from the scope of this appeal."[1237]

862. As regards the need to include claims on Article 11 of the DSU in the notice of appeal, see paragraphs 866–868 below.

Exception: jurisdictional issues

863. In *US – Offset Act (Byrd Amendment)*, the Appellate Body, having found that the notice of appeal did not include claims on the jurisdiction of the Panel, decided, nevertheless, that "the issue of a panel's jurisdiction is so fundamental that it is appropriate to consider claims that a panel has exceeded its jurisdiction even if such claims were not raised in the Notice of Appeal":

> "Notice of Appeal does not provide notice to the appellees that the United States intended to make claims that the Panel exceeded its terms of reference; the next question is whether we are precluded from examining these claims on appeal. As we have explained, if an appellee has not received sufficient notice in the Notice of Appeal that a particular claim will be advanced by the appellant, that claim normally will be excluded from the appeal. However, we observe that the United States has argued in this appeal that we are entitled to examine questions of jurisdiction in any event, even if not included in the Notice of Appeal.[1238]
>
> We agree with the United States' position. We have stated previously, in relation to a panel's obligation to address issues related to its jurisdiction, that:
>
> > '. . . panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regard, we have previously observed that "[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings." For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.[1239] (footnote omitted)'
>
> . . . we have said, '[a]n objection to jurisdiction should be raised as early as possible' and it would be preferable, in the interests of due process, for the appellant to raise such issues in the Notice of Appeal, so that appellees will be aware that this claim will be advanced on appeal. However, in our view, the issue of a panel's jurisdiction is so fundamental that it is appropriate to consider claims that a panel has exceeded its jurisdiction even if such claims were not raised in the Notice of Appeal."[1240]

(iv) Amendment of the notice of appeal

864. In *US – Countervailing Measures on Certain EC Products*, the European Communities had claimed that the United States' notice of appeal did not meet the requirements set out in Rule 20(2)(d). The United States then submitted a letter supplementing their notice of appeal. The Appellate Body decided to examine both the notice of appeal and its supplement with a view to giving full meaning and effect to the right of appeal:

> "In conducting our analysis, we will examine both the Notice of Appeal and the letter of 13 September 2002 supplementing the Notice of Appeal. Although the *Working Procedures* do not expressly provide for the filing of clarifications or further particulars or supplementary or amended Notices of Appeal, we consider it appropriate, in the particular circumstances of this case, to examine both documents with a view to giving 'full meaning and effect to the right of appeal.'[1241] We note in particular that the additional document was filed by the United States in response to our invitation to do so, based in part on a request for additional particulars filed by the European Communities. Moreover, the additional document was filed shortly after the filing of the Notice of Appeal (three days). Finally, we note that the European Communities referred to both the Notice of Appeal and the letter of 13 September 2002 in its arguments on this issue."[1242]

(v) Replacement of a notice of appeal

865. The Appellate Body on *EC – Sardines*, after having considered that the conditional withdrawal of its notice of appeal by the European Communities was appropriate and effective, and that, therefore, the filing of a replacement notice of appeal did not constitute a second appeal,[1243] rejected Peru's request that the replacement Notice of Appeal be declared inadmissible because neither the *DSU* nor the Working Procedures "accord[s] an appellant the right to appeal the same panel report twice on different grounds":

[1237] Appellate Body Report on *EC – Bananas III*, para. 152.
[1238] (*footnote original*) United States' response to questioning at the oral hearing.
[1239] (*footnote original*) Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.
[1240] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, paras. 206–208.
[1241] (*footnote original*) Appellate Body Report, *US – Shrimp*, para. 97.
[1242] Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 64.
[1243] Appellate Body Report on *EC – Sardines*, para. 149.

"Peru alleges that, in sanctioning the approach of the European Communities in this appeal, we would be creating a procedural right for which the DSU has not provided – a right that can only be added to the DSU through a formal amendment by the Members of the World Trade Organization (the 'WTO'). We are, however, not creating a new procedural right; we are only upholding the right to withdraw an appeal. In addition, in admitting the replacement Notice of Appeal in this dispute, we are, as we were in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ('*US – Shrimp*'), seeking to:

> '. . . give full meaning and effect to the right of appeal and to give a party which regards itself aggrieved by some legal finding or interpretation in a panel report a real and effective opportunity to demonstrate the error in such finding or interpretation.'[1244]

In that same Report, we added that 'an appellee is, of course, always entitled to its full measure of due process.'[1245] In the circumstances of this case, we believe that Peru has been accorded the full measure of its due process rights, because the withdrawal of the original Notice and the filing of a replacement Notice were carried out in response to objections raised by Peru, the replacement Notice was filed in a timely manner and early in the process, and the replacement Notice contained no new or modified grounds of appeal. Also, Peru has not demonstrated that it suffered prejudice as a result. Moreover, Peru was given an adequate opportunity to address its concerns about the European Communities' actions during the course of the appeal.

In our view, the withdrawal of the original Notice of Appeal of 25 June 2002 and its replacement with the Notice of Appeal of 28 June 2002 was not an exercise of abusive litigation techniques by the European Communities, but rather was an appropriate response under the circumstances to Peru's objections regarding the original Notice of Appeal."[1246]

(vi) Article 11 of the DSU: allegation of a panel's failure to make an objective assessment

866. In *US – Countervailing Measures on Certain EC Products*, the Appellate Body established that a claim of error by a panel under Article 11 of the *DSU* is only possible in the context of an appeal and thus it needs to be included in the notice of appeal:

"A *claim* of error by a panel under Article 11 of the DSU is possible only in the context of an appeal. By definition, this *claim* will not be found in requests for establishment of a panel, and panels therefore will not have referred to it in panel reports. Accordingly, if appellants intend to argue that issue on appeal, they must refer to it in Notices of Appeal in a way that will enable appellees to discern it and know the case they have to meet.

Accordingly, we do not believe that the European Communities can be said to have been notified that the United States intended to argue on appeal that the Panel failed to act consistently with Article 11 of the DSU, and, consequently, we consider that the issue of the Panel's compliance with Article 11 of the DSU is not properly before us in this appeal."[1247]

867. In *Japan – Apples*, the Appellate Body stressed that notice of an Article 11 claim cannot be assumed merely because there is a challenge to a panel's analysis of a substantive provision of a WTO agreement.

"By referring to the Panel's alleged failure to comply with Article 11 of the DSU only in the context of Article 2.2, Japan did not enable the United States to 'know the case [it had] to meet'[1248] as to the Article 11 claim related to Article 5.1 of the *SPS Agreement*. The Appellate Body has consistently emphasized that due process requires that a Notice of Appeal place an appellee on notice of the issues raised on appeal.[1249] It is this concern with due process, reflected in Rule 20 of the *Working Procedures*, that underlay the Appellate Body's ruling on the sufficiency of the Notice of Appeal in *US – Countervailing Measures on Certain EC Products*.

Japan acknowledged during the oral hearing that it did not give the United States notice of its Article 11 claim specifically with respect to the Panel's analysis under Article 5.1 of the *SPS Agreement*. Japan claimed, however, that 'since we raised the claim under Article 5.1 of the *SPS Agreement*, this naturally involved some factual issues and . . . we can assume that the United States was notified' as to the related Article 11 claim. We disagree. As noted above,[1250] the Appellate Body determined in *US – Countervailing Measures on Certain EC Products* that Article 11 claims are distinct from those raised under substantive provisions of other covered agreements. It follows from this distinction that notice of an Article 11 challenge cannot be 'assumed' merely because there is a challenge to a panel's analysis of a substantive provision of a WTO agreement. Rather, an Article 11 claim constitutes a 'separate "allegation of error"'[1251] that

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[1244] (*footnote original*) Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, para. 97.

[1245] (*footnote original*) Ibid.

[1246] Appellate Body Report on *EC – Sardines*, paras. 150–151.

[1247] Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 74. See also Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, footnote 60 to para. 71.

[1248] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 74.

[1249] (*footnote original*) For example, Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 195; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 62; Appellate Body Report, *EC – Bananas III*, para. 152; and Appellate Body Report, *US – Shrimp*, para. 97.

[1250] (*footnote original*) *Supra*, para. 123, quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 74.

[1251] (*footnote original*) Appellate Body Report, *Chile – Price Band System*, para. 182, quoting Rule 20(2)(d) of the *Working Procedures*. In this respect, we note the distinction between *claims* and *arguments* in the context of determining whether claims have been properly identified in the request for the

must be included in a Notice of Appeal. We therefore reject Japan's assertion that an Article 11 challenge is only a 'legal argument' underlying the issues raised on appeal.[1252]" [1253]

868. In *US – Steel Safeguards*, the Appellate Body further emphasized that a claim under Article 11 of the *DSU* must not be vague or ambiguous but stand by itself and be substantiated, as such, and not as subsidiary to another alleged violation:

"A challenge under Article 11 of the DSU must not be vague or ambiguous. On the contrary, such a challenge must be clearly articulated and substantiated with specific arguments. An Article 11 claim is not to be made lightly, or merely as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement.[1254] A claim under Article 11 of the DSU must stand by itself and be substantiated, as such, and not as subsidiary to another alleged violation.

The United States' arguments on Article 11 of the DSU are mentioned only in passing in its appellant's submission. Nowhere do we find a clearly articulated claim or specific arguments that would support such a claim. Moreover, the United States did not clarify its challenge under Article 11 of the DSU during the oral hearing. In sum, the United Stated has not substantiated its claim that the Panel acted inconsistently with Article 11 of the DSU, and this claim must therefore fail." [1255]

11. Rule 23: multiple appeals (cross appeal)

(a) Conditional appeals

869. In *US – Gasoline*, the United States argued that certain of Venezuela's and Brazil's arguments were in fact conditional appeals and requested the Appellate Body to disregard them since those two parties had not filed a notice of appeal in that regard. The Appellate Body agreed with the United States and considered that Venezuela and Brazil should have taken advantage of Rules 23(1) or 23(4) of the Working Procedures:

"The arguments raised by Venezuela and Brazil on the clean air and TBT issues may be seen to be, in effect, conditional appeals, that is, conditional on the Appellate Body's overturning the Panel's overall findings on Article XX(g) and not finding in favour of Venezuela and Brazil as to the other requirements of Article XX. This condition is not fulfilled. Even if this condition had been fulfilled, the Appellate Body would have been most reluctant to pass upon these two issues. We observe, in the first place, that the issues in fact raised by the Appellant, the United States, are not of the kind which cannot be decided without at the same time necessarily resolving the clean air issue or the applicability of the *TBT Agreement*. In the second place, to deal with those two issues [i.e. the clean air issue and the application of the TBT Agreement], under the circumstances of this appeal, would have required the Appellate Body casually to disregard its own Working Procedures and to do so in the absence of a compelling reason grounded on, for instance, fundamental fairness or force majeure. Venezuela and Brazil could have appealed the Panel's finding and non-finding on the two matters by taking advantage of Rules 23(1) or 23(4) of the Working Procedures and thereby placing the Appellate Body in a position to dispose of those issues directly in one and the same appellate proceeding.

. . . the route they chose for addressing the two issues in question is not contemplated by the Working Procedures, and therefore, these issues are not properly the subject of this appeal." [1256]

870. In *US – Steel Safeguards*, the complainants made a number of conditional appeals. These appeals were conditional upon the Appellate Body reversing some of the Panel's findings. Since the Appellate Body upheld those findings, it did not consider it necessary to examine those conditional appeals.[1257]

12. Rule 24: third participants

871. In *Argentina – Footwear (EC)*, the Appellate Body received a letter from the Government of Paraguay indicating its interest "in attending" the oral hearing in this appeal. Several days later, the Appellate Body received a second letter from Paraguay clarifying that it was not requesting an opportunity to "make oral arguments or presentations at the oral hearing" as set forth in Rule 27.3 of the Working Procedures. Rather, Paraguay maintained that, as a third party which had notified its interest to the DSB under Article 10.2 of the DSU, it had the right to "participate passively" in the oral hearing before the Appellate Body in the present dispute. No participant or third participant objected to the participation of

establishment of a panel (Appellate Body Report, *EC – Bananas III*, paras. 141–143; Appellate Body Report, *EC – Hormones*, para. 156), and we affirm the Appellate Body's observation in *Chile – Price Band System* that "this distinction between claims and legal arguments under Article 6.2 of the DSU is also relevant to the distinction between 'allegations of error' and legal arguments as contemplated by Rule 20 of the *Working Procedures*." (Appellate Body Report, para. 182)

[1252] (*footnote original*) Japan's response to questioning at the oral hearing. As discussed, *supra*, at paragraph 123, the Appellate Body rejected a similar contention by the appellant in *US – Countervailing Measures on Certain EC Products*. (Appellate Body Report, paras. 73–74) The Appellate Body made a similar observation in *US – Steel Safeguards*. (Appellate Body Report, para. 498)

[1253] Appellate Body Report on *Japan – Apples*, paras. 126–127.

[1254] (*footnote original*) The United States further clarified during the oral hearing that if we were to conclude that the Panel erred in its findings on Article 4.2(b) of the *Agreement on Safeguards*, it would not be necessary for us to reach its claim under Article 11.

[1255] Appellate Body Report on *US – Steel Safeguards*, paras. 498–499.

[1256] Appellate Body Report on *US – Gasoline*, p. 12.

[1257] Appellate Body Report on *US – Steel Safeguards*, paras. 508–512.

Paraguay on a "passive" basis. Subsequently, the Members of the Division hearing the appeal informed Paraguay, the participants and third participants that, having regard to the provisions of Articles 10.2 and 17.4 of the DSU as well as the provisions of Rules 24 and 27 of the Working Procedures, Paraguay would be allowed to attend the oral hearing as a "passive observer".[1258]

872. In *India – Autos,* the Appellate Body defined the scope of "passive observer" as attending the oral hearing and hearing the oral statements and responses to questioning by the participants and the third participant in this appeal.[1259]

13. Rule 26: working schedule

(a) Extension of deadline for participants' or third participants' submissions

873. In *EC – Bananas III*, in accordance with Rule 16(2) of the Working Procedures, and at the request of the complaining parties, the Appellate Body granted a two-day extension for the filing of the appellees' and third participants' submissions.[1260]

874. In *Guatemala – Cement I*, Guatemala filed an appellant's submission drafted in Spanish. Two weeks later, Mexico filed an appellee's submission also drafted in Spanish. In order to ensure that the third participant would have time to prepare its submission after receiving an English version of the appellant's submission, the Appellate Body granted the United States additional time to file its third participant's submission.[1261]

875. In *EC – Bed Linen*, the European Communities and India requested the Appellate Body to extend the time-period for filing the appellee's and third participant's submissions. The Division hearing the appeal accepted the request pursuant to Rule 16(2) of the *Working Procedures* and in the light of the "exceptional circumstances" in that appeal.[1262]

876. In *US – Softwood Lumber IV*, for scheduling reasons, the United States withdrew its notice of appeal pursuant to Rule 30 of the Working Procedures, conditional on its right to re-file the notice of appeal at a later date. Three weeks later, the United States re-filed a substantively identical notice of appeal pursuant to Rule 20 of the Working Procedures. On that same day, the United States filed its appellant's submission in accordance with the Working Schedule drawn up by the Division for this appeal.[1263] The European Communities, a third participant in the proceedings, requested the Appellate Body to modify the Working Schedule in light of these developments. The following day, the Appellate Body declined the European Communities' request, noting that extending the date for the filing of third participants' submissions would significantly reduce the time available for the Division to consider carefully the arguments raised therein as well as the time available to the participants to respond to those arguments. The Division also observed that the new notice of appeal filed by the United States was, in all relevant respects, identical to the one submitted previously, and that the critical time-period for third participants and appellees to prepare their responses to arguments raised by appellants and other appellants is the period between the receipt of the appellant's or other appellant's submission, which contains the appellants' arguments, and the due date for the filing of the third participants' submissions. The Division noted that the time-period between the receipt of the appellant's submission and the due date for third participants' submissions in this case was the same as it would have been had the notice of appeal been filed 10 days before the date of the appellant's submission, as normally occurs.[1264]

(b) Extension of deadline for circulation of Appellate Body Report

877. In this regard, see Section XVII.B.4 above.

14. Rule 27: oral hearing

(a) Change of date

878. For information relating to requests by parties to change the date set for an oral hearing, see paragraphs 853–854 above.

(b) Joint oral hearing

879. In *US – 1916 Act,* the United States, the European Communities and Japan appealed certain issues of law and legal interpretations developed in the Panel Reports, *US – 1916 Act,* complaint by the European Communities[1265] and *US – 1916 Act,* complaint by Japan.[1266] These Panel Reports were rendered by two Panels composed of the same three members.[1267] The

[1258] Appellate Body Report on *Argentina – Footwear, (EC),* para. 7. See also Appellate Body Report on *EC – Asbestos*, para. 7; Appellate Body Report on *US – Lamb,* paras. 8–9; Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia),* footnote 16 to para. 10; Appellate Body Report on *India – Autos,* paras. 12–13; Appellate Body Report on *Chile – Price Band System,* para. 6; Appellate Body Report on *EC – Sardines,* para. 18; Appellate Body Report on *EC – Tariff Preferences,* para. 18.
[1259] Appellate Body Report on *India – Autos,* para. 13.
[1260] Appellate Body Report on *EC – Bananas III,* para. 3.
[1261] Appellate Body Report on *Guatemala – Cement I*, para.4.
[1262] Appellate Body Report on *EC – Bed Linen*, footnote 12 to para. 6.
[1263] Appellate Body Report on *US – Soft Lumber IV,* para. 6.
[1264] Appellate Body Report on *US – Softwood Lumber IV,* para. 7.
[1265] (*footnote original*) WT/DS136/R, 31 March 2000.
[1266] (*footnote original*) WT/DS162/R, 29 May 2000.
[1267] (*footnote original*) As the composition of both Panels was identical, we will refer to the Panels as "the Panel".

two Panel Reports, while not identical, were alike in all major respects.[1268] In view of the close similarity of the issues raised in the two appeals, it was decided, after consultation with the parties, that a single Division would hear and decide both appeals.[1269]

15. Rule 28: written responses

880. In *US – Gasoline*, further to the oral hearing, the participants and third participants were invited to provide, and did provide, the Appellate Body and each other with final written statements of their respective positions.[1270]

881. In *Japan – Alcoholic Beverages II*, the parties answered most of the Appellate Body's questions orally at the hearing. They also answered a number in writing. The Division hearing the appeal gave each participant an opportunity to respond to the written post-hearing memoranda of the other participants.[1271]

882. In *US – Underwear*, the participants and third participant in the oral hearing did not take advantage of an invitation by the Division hearing the appeal to submit post-hearing memoranda. The United States later submitted a written clarification and amplification of its oral response to one of the Division's questions. The next day, Costa Rica responded in writing to the United States' clarification.[1272]

883. In *EC – Poultry*, at the request of the Division hearing the appeal, the participants and third participants submitted written post-hearing memoranda on particular issues relating to the appeal. The participants submitted their respective written replies to these post-hearing memoranda.[1273]

884. In *US – Shrimp*, at the invitation of the Appellate Body, the United States, India, Pakistan, Thailand and Malaysia filed additional submissions on certain issues arising under Article XX(b) and Article XX(g) of the *GATT 1994*.[1274]

885. In *Canada – Patent Term*, at the request of the Appellate Body Division hearing the appeal, the participants submitted additional memoranda on certain issues of legal interpretation arising under Articles 70.1 and 70.2 of the *TRIPS Agreement*. The Division afforded each participant an opportunity to respond to the additional memoranda submitted by the other participant.[1275]

886. In *US – Section 211 Appropriations Act*, the Division hearing the appeal requested that the participants submit additional written memoranda on the interpretation by domestic courts of Article 6*quinquies* of the Paris Convention (1967), or the interpretation by domestic courts of legislation incorporating Article 6*quinquies*. Both participants filed the additional written memoranda and were given an opportunity to respond to these memoranda at the oral hearing.[1276]

887. In *US – FSC (Article 21.5 – EC)*, at the oral hearing, the Division requested the United States to submit in writing certain of its responses to questioning. The Division also authorized the European Communities and the third participants, if they wished, to respond in writing by 30 November 2001.[1277]

16. Rule 30(1): withdrawal of appeal

(a) General

888. As of 31 December 2004, appellants have withdrawn their notices of appeal on five occasions. On four of these occasions (*US – FSC*;[1278] *US – Line Pipe*;[1279] *EC – Sardines*;[1280] *US – Softwood Lumber IV*)[1281] the withdrawals were "conditional" upon the filing of a new notice of appeal. In *India – Autos*, India withdrew its appeal and did not file a new one.[1282]

(b) Nature of the right to withdraw an appeal

889. The Appellate Body on *EC – Sardines* considered that Rule 30(1) grants the appellant the right to withdraw an appeal which on its face appears to be "unfettered". The Appellate Body however warned that, in spite of the permissive language of Rule 30(1), the Working Procedures must not be interpreted in a way that could undermine the effectiveness of the dispute settlement system:

> "This rule accords to the appellant a broad right to withdraw an appeal at any time. This right appears, on its face, to be unfettered: an appellant is not subject to any deadline by which to withdraw its appeal; an appellant need not provide any reason for the withdrawal; and an appellant need not provide any notice thereof to other participants in an appeal. More significantly for this appeal, there is nothing in the Rule prohibiting the attachment of conditions to a withdrawal. Indeed, in two previous cases, notices of appeal were withdrawn subject to the condition that new notices would be

[1268] Appellate Body Report on *US – 1916 Act*, para. 1.
[1269] Appellate Body Report on *US – 1916 Act*, para. 7.
[1270] Appellate Body Report on *US – Gasoline*, p. 3.
[1271] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 2.
[1272] Appellate Body Report on *US – Underwear*, p. 5.
[1273] Appellate Body Report on *EC – Poultry*, para. 6.
[1274] Appellate Body Report on *US – Shrimp*, para. 8.
[1275] Appellate Body Report on *Canada – Patent Term*, para. 8.
[1276] Appellate Body Report on *US – Section 211 Appropriations Act*, para. 13.
[1277] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 11.
[1278] Appellate Body Report on *US – FSC*, para. 4.
[1279] Appellate Body Report on *US – Softwood Lumber IV*, para. 13.
[1280] Appellate Body Report on *EC – Sardines*, paras. 137–138, 140–141, 145–147 and 149–150.
[1281] Appellate Body Report on *US – Softwood Lumber IV*, para. 6.
[1282] Appellate Body Report on *India – Autos*, para. 15.

filed.[1283] Nor is the right to withdraw an appeal expressly subject to the condition that no new notice be filed on the same matter after the withdrawal.

However, despite this permissive language, we emphasize that the *Working Procedures* must not be interpreted in a way that could undermine the effectiveness of the dispute settlement system, for they have been drawn up pursuant to the DSU and as a means of ensuring that the dispute settlement mechanism achieves the aim of securing a positive solution to a dispute.[1284]"[1285]

(c) Legality of a conditional withdrawal of an appeal

890. In *EC – Sardines*, Peru claimed that Rule 30 did not permit conditions to be attached to a withdrawal of an appeal. The Appellate Body disagreed:

"Peru submits that nothing in Rule 30 of the *Working Procedures* permits the attachment of conditions to the withdrawal of a notice of appeal, and that, therefore, this appeal must be deemed to have been withdrawn irrespective of whether the conditions are met. We find no support in Rule 30 for Peru's position. While it is true that nothing in the text of Rule 30(1) explicitly permits an appellant to exercise its right subject to conditions, it is also true that nothing in the same text prohibits an appellant from doing so. As we have just explained, in our view, the right to withdraw a notice of appeal under Rule 30(1) is broad, subject only to the limitations we have described. Therefore, we see no reason to interpret Rule 30 as granting a right to withdraw an appeal only if that withdrawal is unconditional. Rather, the correct interpretation, in our view, is that Rule 30(1) permits conditional withdrawals, unless the condition imposed undermines the 'fair, prompt and effective resolution of trade disputes', or unless the Member attaching the condition is not 'engag[ing] in [dispute settlement] procedures in good faith in an effort to resolve the dispute.' Therefore, it is necessary to examine any such conditions attached to withdrawals on a case-by-case basis to determine whether, in fact, the particular condition in a particular case in any way obstructs the dispute settlement process, or in some way diminishes the rights of the appellee or other participants in the appeal."[1286]

891. In *EC – Sardines*, the Appellate Body considered whether, by withdrawing its notice of appeal subject to the condition of filing a replacement notice of appeal, the European Communities had effectively undermined the "fair, prompt and effective resolution of trade disputes" or has not "engage[d] in [dispute settlement] procedures in good faith in an effort to resolve the dispute".[1287] The Appellate Body considered that attaching a condition to the withdrawal was not unreasonable under the circumstances of the case[1288] and addressed examples of situations where the attachment of conditions to a withdrawal of appeal could be abusive or contrary to the DSU:

"We agree with Peru that there may be situations where the withdrawal of an appeal on condition of refiling a new notice, and the filing thereafter of a new notice, could be abusive and disruptive. However, in such cases, we would have the right to reject the condition, and also to reject any filing of a new notice of appeal, on the grounds either that the Member seeking to file such a new notice would not be engaging in dispute settlement proceedings in good faith, or that Rule 30(1) of the *Working Procedures* must not be used to undermine the fair, prompt, and effective resolution of trade disputes. We agree with Peru that the rules must be interpreted so as to 'ensure that appellate review proceedings do not become an arena for unfortunate litigation techniques that frustrate the objectives of the DSU, and that developing countries do not have the resources to deal with'.[1289] The case before us, however, presents none of these circumstances.

In addition, we believe there are circumstances that, although not constituting 'abusive practices', would be in violation of the DSU, and would, thus, compel us to disallow the conditional withdrawal of a notice of appeal as well as the filing of a replacement notice. For example, if the conditional withdrawal or the filing of a new notice were to take place after the 60-day deadline in Article 16.4 of the DSU for adoption of panel reports, this would effectively circumvent the requirement to file appeals within 60 days of circulation of panel reports. In such circumstances, we would reject the conditional withdrawal and the new notice of appeal.

. . .

Peru alleges that, in sanctioning the approach of the European Communities in this appeal, we would be creating a procedural right for which the DSU has not provided – a right that can only be added to the DSU through a formal amendment by the Members of the World Trade Organization (the 'WTO'). We are, however, not creating a new procedural right; we are only upholding the right to withdraw an appeal. In addition, in admitting the replacement Notice of Appeal in this dispute, we are, as we were in *United States – Import*

[1283] (*footnote original*) We note that, in both previous cases, unlike in this case, the Divisions hearing those appeals and the appellees had prior knowledge of, and agreed with, the process. (Appellate Body Report, *US – FSC*, *supra*, footnote 20, para. 4; Appellate Body Report, *US – Line Pipe*, *supra*, footnote 19, para. 13) Peru distinguishes this case on that basis; however, the mere fact that there was both notice and agreement in those cases does not, on its own, mean that such notice and agreement are required.
[1284] (*footnote original*) DSU, Article 3.7.
[1285] Appellate Body Report on *EC – Sardines*, paras. 138–139.
[1286] Appellate Body Report on *EC – Sardines*, para. 141.
[1287] Appellate Body Report on *EC – Sardines*, para. 142.
[1288] Appellate Body Report on *EC – Sardines*, paras. 143–145.
[1289] (*footnote original*) *Ibid.*, para. 51.

Prohibition of Certain Shrimp and Shrimp Products ('*US – Shrimp*'), seeking to:

> '. . . give full meaning and effect to the right of appeal and to give a party which regards itself aggrieved by some legal finding or interpretation in a panel report a real and effective opportunity to demonstrate the error in such finding or interpretation.'[1290]

In that same Report, we added that 'an appellee is, of course, always entitled to its full measure of due process.'[1291] In the circumstances of this case, we believe that Peru has been accorded the full measure of its due process rights, because the withdrawal of the original Notice and the filing of a replacement Notice were carried out in response to objections raised by Peru, the replacement Notice was filed in a timely manner and early in the process, and the replacement Notice contained no new or modified grounds of appeal. Also, Peru has not demonstrated that it suffered prejudice as a result. Moreover, Peru was given an adequate opportunity to address its concerns about the European Communities' actions during the course of the appeal."[1292]

(d) Replacement of a notice of appeal

892. The Appellate Body on *EC – Sardines*, having agreed to the European Communities' conditional withdrawal of an appeal, rejected Peru's argument that to permit this would be to create a new procedural right not foreseen under the *DSU*. Rather, the Appellate Body held that they were merely upholding the right to withdraw an appeal. See also paragraph 865 above.

> "Peru alleges that, in sanctioning the approach of the European Communities in this appeal, we would be creating a procedural right for which the DSU has not provided – a right that can only be added to the DSU through a formal amendment by the Members of the World Trade Organization (the 'WTO'). We are, however, not creating a new procedural right; we are only upholding the right to withdraw an appeal."[1293]

XXXIII. WORKING PROCEDURES FOR ARTICLE 22.6 ARBITRATIONS

A. TEXT OF THE WORKING PROCEDURES FOR ARTICLE 22.6 ARBITRATIONS

893. In both *Canada – Aircraft Credits and Guarantees (Article 22.6–Canada)* and *US – Offset Act (Byrd Amendment)*, the Arbitrator(s) attached their working procedures to their Decisions. The following is a reproduction of the working procedures in *US – Offset Act (Byrd Amendment)*:[1294]

> "The Arbitrator will follow the normal working procedures of the DSU where relevant and as adapted to the circumstances of the present proceedings, in accordance with the timetable it has adopted. In this regard, –
>
> (a) the Arbitrator will meet in closed session;
>
> (b) the deliberations of the Arbitrator and the documents submitted to it shall be kept confidential. However, this is without prejudice to the parties' disclosure of statements of their own positions to the public, in accordance with Article 18.2 of the DSU;
>
> (c) at any substantive meeting with the parties, the Arbitrator will ask the United States to present orally its views first, followed by the party(ies) having requested authorization to suspend concessions or other obligations;
>
> (d) each party shall submit all factual evidence to the Arbitrator no later than in its written submission to the Arbitrator, except with respect to evidence necessary during the hearing or for answers to questions. Derogations to this procedure will be granted upon a showing of good cause, in which case the other party(ies) shall be accorded a period of time for comments, as appropriate;
>
> (e) the parties shall provide an electronic copy (on a computer format compatible with the Secretariat's programmes) together with the printed version (6 copies) of their submissions, including the methodology paper, on the due date. All these copies must be filed with the Dispute Settlement Registrar, [. . .]. Electronic copies may be sent by e-mail to [. . .]. Parties shall provide 6 copies and an electronic version of their oral statements during any meeting with the Arbitrator or no later than noon on the day following any such meeting.
>
> (f) except as otherwise indicated in the timetable, submissions should be provided at the latest by 5.00 p.m. on the due date so that there is a possibility to send them to the Arbitrator on that date. As is customary, distribution of submissions to the other party(ies) shall be made by the parties themselves;
>
> (g) if necessary, and at any time during the proceedings, the Arbitrator may put questions to any party to clarify any point that is unclear. Whenever appropriate, a right to comment on the responses will be granted to the other party(ies);

[1290] (*footnote original*) Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, para. 97.

[1291] (*footnote original*) *Ibid.*

[1292] Appellate Body Report on *EC – Sardines*, paras. 146–147 and 150.

[1293] Appellate Body Report on *EC – Sardines*, para. 150.

[1294] The text of these working procedures is similar to that of the earlier working procedures in *Canada – Aircraft Credits and Guarantees* (Article 22.6–Canada), although further developed.

(h) any material submitted shall be concise and limited to questions of relevance in this particular procedure.

(i) Parties have the right to determine the composition of their own delegations. Delegations may include, as representatives of the government concerned, private counsel and advisers. Parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations act in accordance with the rules of the DSU and these Working Procedures, particularly in regard to confidentiality of the proceedings. Parties shall provide a list of the participants of their delegation prior to, or at the beginning of, any meeting with the Arbitrator.

(j) to facilitate the maintenance of the record of the arbitration, and to maximize the clarity of submissions and other documents, in particular the references to exhibits submitted by parties, parties shall sequentially number their exhibits throughout the course of the arbitration."

B. INTERPRETATION AND APPLICATION OF THE WORKING PROCEDURES

1. Admissibility of new evidence

894. In *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, Canada requested the Arbitrator to reject certain evidence presented by Brazil on the grounds of its late submission (at the end of the substantive meeting). The Arbitrator, after referring to the working procedures and the existing jurisprudence in this area, accepted Canada's objection and rejected Brazil's new evidence:

> "We recall that paragraph (d) of our Working Procedures provides that:
>
> '(d) the parties shall submit all factual evidence to the Arbitrators no later than the first written submissions to the Arbitrators, except with respect to evidence necessary for purposes of rebuttals or answers to questions. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment, as appropriate;'
>
> The purpose of paragraph (d), which is also found, *mutatis mutandis*, in most panel and Article 21.5 DSU compliance panel working procedures, is to ensure that parties are given sufficient opportunities to comment on any piece of evidence submitted in the course of the proceedings. Paragraph (d) clearly states the circumstances in which evidence may be submitted after the first written submission. First, additional evidence may be submitted for the purpose of rebuttals or answers to questions. Second, the Arbitrator may allow new evidence to be submitted at a later time, upon a showing of good cause. In all events, paragraph (d) requires that the other party shall be accorded a period of time for comment, as appropriate.
>
> We recall that in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items,*[1295] the Panel was confronted with a situation of evidence submitted late in the proceedings.[1296] The Panel considered that due process required that it accept the evidence submitted by the United States on the understanding that Argentina would have a period of time to provide further comments on the additional pieces of evidence. The Appellate Body upheld the Panel's reasoning, confirming that the Panel enjoyed a certain amount of discretion in its dealing with evidence and stating that Argentina had not requested more time to comment.[1297]
>
> . . . In this case, Canada requests that the Arbitrator reject the evidence, since Brazil showed no good cause for submitting late a piece of information that had been available to it for some time.[1298] Brazil responds that Exhibits BRA-76 and 77 were submitted as part of its reply to question No. 2 of the Arbitrator to both parties. However, nowhere do we find any reference to these exhibits in Brazil's reply of 1 November 2002. Assuming the evidence was for purposes of rebuttal, we see no particular reason why it could not have been submitted together with Brazil's oral statement at our meeting rather than with its closing statement. By delaying the presentation of this evidence until its closing statement, Brazil's position as respondent gave it a procedural advantage since it spoke last, and it was not foreseen in the Working Procedures that Canada could reply at that point. This makes such a late submission of evidence even less acceptable. Intentionally submitting evidence at a time where the other party is normally no longer in a position to comment – as in this case – not only adversely affects the interests of that party, it also affects due process in general and can generate delays in the work of panels and Arbitrators, thus making it more difficult for them to meet the deadlines contained in the WTO Agreement. Hence, we felt it more appropriate to exclude such evidence rather than to allow Canada to respond, the more so as Canada had expressly requested the Arbitrator to reject such evidence. As a result, we decided not to take into account the evidence submitted by Brazil in Exhibits BRA-76 and 77."[1299]

[1295] (*footnote original*) Panel Report, *Argentina – Textiles and Apparel*, para. 6.55.

[1296] (*footnote original*) In that case, evidence had been submitted by the United States a few days before the second hearing of the panel.

[1297] (*footnote original*) Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 80–81.

[1298] (*footnote original*) Exhibits BRA-76 and 77 are respectively dated 10 July 2001 and 19 October 2002.

[1299] Decision by the Arbitrator in *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paras. 2.11–2.14.

2. Admissibility of new arguments

895. In *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, Brazil had advanced new arguments in its concluding remarks at the first substantive meeting. Canada thus presented an additional submission to the Arbitrator to respond to those arguments. The Arbitrator decided to accept this additional submission on the following grounds:

> "[Canada's additional] submission should not be treated as a reply to new evidence, but as a new submission of arguments which is not foreseen in the Working Procedures. A strict interpretation of our Working Procedures should lead us to disregard Canada's additional submission. However, we note that Brazil developed a rather new line of argumentation in its concluding remarks. It was in the interest of due process and of the information of the Arbitrator to hear what Canada had to say about it, if it wished to do so. We also note that, even if Canada decided to reply to Brazil's arguments, Brazil's right – as respondent – to speak last was preserved by the opportunity given to parties to comment on each other's replies to the questions of the Arbitrator. We saw no reason to formally intervene in that process as long as due process was ultimately respected. We also do not believe that our passivity in this respect could lead to an endless exchange of arguments since the comments on the replies to the questions were the last opportunity for parties to express their views, as provided by the Arbitrator at its hearing with the parties.
>
> For these reasons we decide to accept Canada's comments on Brazil's concluding statement and Brazil's remarks on those comments."[1300]

3. Confidential/non-confidential versions of the Arbitrators' decision

896. In *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, both parties insisted on the confidentiality of certain documents. The Arbitrator decided to prepare two versions of its decision: (i) a confidential version, including the details of its calculations and all the information relied upon, issued exclusively to the parties on a confidential basis; and (ii) a non-confidential version circulated to all WTO Members. In order to decide which information should be excluded from this non-confidential version, the Arbitrator requested the parties to identify the commercially sensitive information which they considered should be removed.[1301]

XXXIV. RULES OF CONDUCT FOR THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

A. TEXT OF THE RULES OF CONDUCT[1302]

Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes

I. Preamble

Members,

Recalling that on 15 April 1994 in Marrakesh, Ministers welcomed the stronger and clearer legal framework they had adopted for the conduct of international trade, including a more effective and reliable dispute settlement mechanism;

Recognizing the importance of full adherence to the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and the principles for the management of disputes applied under Articles XXII and XXIII of GATT 1947, as further elaborated and modified by the DSU;

Affirming that the operation of the DSU would be strengthened by rules of conduct designed to maintain the integrity, impartiality and confidentiality of proceedings conducted under the DSU thereby enhancing confidence in the new dispute settlement mechanism;

Hereby establish the following Rules of Conduct.

II. Governing Principle

1. Each person covered by these Rules (as defined in paragraph 1 of Section IV below and hereinafter called "covered person") shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved. These Rules shall in no way modify the rights and obligations of Members under the DSU nor the rules and procedures therein.

III. Observance of the Governing Principle

1. To ensure the observance of the Governing Principle of these Rules, each covered person is expected (1) to adhere strictly to the provisions of the DSU; (2) to disclose the existence or development of any interest, relationship or matter that that person could reasonably be expected to know and that is likely to affect, or give rise

[1300] Decision by the Arbitrator in *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paras. 2.16–2.17.
[1301] Decision by the Arbitrator on *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paras. 2.18–2.19.
[1302] WT/DSB/RC/W/1, subsequently circulated as document WT/DSB/RC/1.

to justifiable doubts as to, that person's independence or impartiality; and (3) to take due care in the performance of their duties to fulfil these expectations, including through avoidance of any direct or indirect conflicts of interest in respect of the subject matter of the proceedings.

2. Pursuant to the Governing Principle, each covered person shall be independent and impartial, and shall maintain confidentiality. Moreover, such persons shall consider only issues raised in, and necessary to fulfil their responsibilities within, the dispute settlement proceeding and shall not delegate this responsibility to any other person. Such person shall not incur any obligation or accept any benefit that would in any way interfere with, or which could give rise to, justifiable doubts as to the proper performance of that person's dispute settlement duties.

IV. Scope

1. These Rules shall apply, as specified in the text, to each person serving: (a) on a panel; (b) on the Standing Appellate Body; (c) as an arbitrator pursuant to the provisions mentioned in Annex "1a"; or (d) as an expert participating in the dispute settlement mechanism pursuant to the provisions mentioned in Annex "1b". These Rules shall also apply, as specified in this text and the relevant provisions of the Staff Regulations, to those members of the Secretariat called upon to assist the panel in accordance with Article 27.1 of the DSU or to assist in formal arbitration proceedings pursuant to Annex "1a"; to the Chairman of the Textiles Monitoring Body (hereinafter called "TMB") and other members of the TMB Secretariat called upon to assist the TMB in formulating recommendations, findings or observations pursuant to the WTO Agreement on Textiles and Clothing; and to Standing Appellate Body support staff called upon to provide the Standing Appellate Body with administrative or legal support in accordance with Article 17.7 of the DSU (hereinafter "Member of the Secretariat or Standing Appellate Body support staff"), reflecting their acceptance of established norms regulating the conduct of such persons as international civil servants and the Governing Principle of these Rules.

2. The application of these Rules shall not in any way impede the Secretariat's discharge of its responsibility to continue to respond to Members' requests for assistance and information.

3. These Rules shall apply to the members of the TMB to the extent prescribed in Section V.

V. Textiles Monitoring Body

1. Members of the TMB shall discharge their functions on an *ad personam* basis, in accordance with the requirement of Article 8.1 of the Agreement on Textiles and Clothing, as further elaborated in the working procedures of the TMB, so as to preserve the integrity and impartiality of its proceedings.[1]

(*footnote original*) [1] These working procedures, as adopted by the TMB on 26 July 1995 (G/TMB/R/1), currently include, *inter alia*, the following language in paragraph 1.4: "In discharging their functions in accordance with paragraph 1.1 above, the TMB members and alternates shall undertake not to solicit, accept or act upon instructions from governments, nor to be influenced by any other organisations or undue extraneous factors. They shall disclose to the Chairman any information that they may consider likely to impede their capacity to discharge their functions on an *ad personam* basis. Should serious doubts arise during the deliberations of the TMB regarding the ability of a TMB member to act on an *ad personam* basis, they shall be communicated to the Chairman. The Chairman shall deal with the particular matter as necessary."

VI. Self-Disclosure Requirements by Covered Persons

1. (a) Each person requested to serve on a panel, on the Standing Appellate Body, as an arbitrator, or as an expert shall, at the time of the request, receive from the Secretariat these Rules, which include an Illustrative List (Annex 2) of examples of the matters subject to disclosure.

(b) Any member of the Secretariat described in paragraph IV:1, who may expect to be called upon to assist in a dispute, and Standing Appellate Body support staff, shall be familiar with these Rules.

2. As set out in paragraph VI:4 below, all covered persons described in paragraph VI.1(a) and VI.1(b) shall disclose any information that could reasonably be expected to be known to them at the time which, coming within the scope of the Governing Principle of these Rules, is likely to affect or give rise to justifiable doubts as to their independence or impartiality. These disclosures include the type of information described in the Illustrative List, if relevant.

3. These disclosure requirements shall not extend to the identification of matters whose relevance to the issues to be considered in the proceedings would be insignificant. They shall take into account the need to respect the personal privacy of those to whom these Rules apply and shall not be so administratively burdensome as to make it impracticable for otherwise qualified persons to serve on panels, the Standing Appellate Body, or in other dispute settlement roles.

4. (a) All panellists, arbitrators and experts, prior to confirmation of their appointment, shall complete the form at Annex 3 of these Rules. Such information would be disclosed to the Chair of the Dispute Settlement Body ("DSB") for consideration by the parties to the dispute.

(b) (i) Persons serving on the Standing Appellate Body who, through rotation, are selected to hear the appeal of a particular panel case, shall review the factual portion of the Panel report and complete the form at Annex 3. Such information would be disclosed to the Standing Appellate Body for its consideration whether

the member concerned should hear a particular appeal.

(ii) Standing Appellate Body support staff shall disclose any relevant matter to the Standing Appellate Body, for its consideration in deciding on the assignment of staff to assist in a particular appeal.

(c) When considered to assist in a dispute, members of the Secretariat shall disclose to the Director-General of the WTO the information required under paragraph VI:2 of these Rules and any other relevant information required under the Staff Regulations, including the information described in the footnote.**

(*footnote original*) ** Pending adoption of the Staff Regulations, members of the Secretariat shall make disclosures to the Director-General in accordance with the following draft provision to be included in the Staff Regulations:

"When paragraph VI:4(c) of the Rules of Conduct for the DSU is applicable, members of the Secretariat would disclose to the Director-General of the WTO the information required in paragraph VI:2 of those Rules, as well as any information regarding their participation in earlier formal consideration of the specific measure at issue in a dispute under any provisions of the WTO Agreement, including through formal legal advice under Article 27.2 of the DSU, as well as any involvement with the dispute as an official of a WTO Member government or otherwise professionally, before having joined the Secretariat.

The Director-General shall consider any such disclosures in deciding on the assignment of members of the Secretariat to assist in a dispute.

When the Director-General, in the light of his consideration, including of available Secretariat resources, decides that a potential conflict of interest is not sufficiently material to warrant non-assignment of a particular member of the Secretariat to assist in a dispute, the Director-General shall inform the panel of his decision and of the relevant supporting information."

5. During a dispute, each covered person shall also disclose any new information relevant to paragraph VI:2 above at the earliest time they become aware of it.

6. The Chair of the DSB, the Secretariat, parties to the dispute, and other individuals involved in the dispute settlement mechanism shall maintain the confidentiality of any information revealed through this disclosure process, even after the panel process and its enforcement procedures, if any, are completed.

VII. Confidentiality

1. Each covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential. No covered person shall at any time use such information acquired during such deliberations and proceedings to gain personal advantage or advantage for others.

2. During the proceedings, no covered person shall engage in ex parte contacts concerning matters under consideration. Subject to paragraph VII:1, no covered person shall make any statements on such proceedings or the issues in dispute in which that person is participating, until the report of the panel or the Standing Appellate Body has been derestricted.

VIII. Procedures Concerning Subsequent Disclosure and Possible Material Violations

1. Any party to a dispute, conducted pursuant to the WTO Agreement, who possesses or comes into possession of evidence of a material violation of the obligations of independence, impartiality or confidentiality or the avoidance of direct or indirect conflicts of interest by covered persons which may impair the integrity, impartiality or confidentiality of the dispute settlement mechanism, shall at the earliest possible time and on a confidential basis, submit such evidence to the Chair of the DSB, the Director-General or the Standing Appellate Body, as appropriate according to the respective procedures detailed in paragraphs VIII:5 to VIII:17 below, in a written statement specifying the relevant facts and circumstances. Other Members who possess or come into possession of such evidence may provide such evidence to the parties to the dispute in the interest of maintaining the integrity and impartiality of the dispute settlement mechanism.

2. When evidence as described in paragraph VIII:1 is based on an alleged failure of a covered person to disclose a relevant interest, relationship or matter, that failure to disclose, as such, shall not be a sufficient ground for disqualification unless there is also evidence of a material violation of the obligations of independence, impartiality, confidentiality or the avoidance of direct or indirect conflicts of interests and that the integrity, impartiality or confidentiality of the dispute settlement mechanism would be impaired thereby.

3. When such evidence is not provided at the earliest practicable time, the party submitting the evidence shall explain why it did not do so earlier and this explanation shall be taken into account in the procedures initiated in paragraph VIII:1.

4. Following the submission of such evidence to the Chair of the DSB, the Director-General of the WTO or the Standing Appellate Body, as specified below, the procedures outlined in paragraphs VIII:5 to VIII:17 below shall be completed within fifteen working days.

Panellists, Arbitrators, Experts

5. If the covered person who is the subject of the evidence is a panellist, an arbitrator or an expert, the party shall provide such evidence to the Chair of the DSB.

6. Upon receipt of the evidence referred to in paragraphs VIII:1 and VIII:2, the Chair of the DSB shall forthwith provide the evidence to the person who is the subject of such evidence, for consideration by the latter.

7. If, after having consulted with the person concerned, the matter is not resolved, the Chair of the DSB shall

forthwith provide all the evidence, and any additional information from the person concerned, to the parties to the dispute. If the person concerned resigns, the Chair of the DSB shall inform the parties to the dispute and, as the case may be, the panellists, the arbitrator(s) or experts.

8. In all cases, the Chair of the DSB, in consultation with the Director-General and a sufficient number of Chairs of the relevant Council or Councils to provide an odd number, and after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard, would decide whether a material violation of these Rules as referred to in paragraphs VIII:1 and VIII:2 above has occurred. Where the parties agree that a material violation of these Rules has occurred, it would be expected that, consistent with maintaining the integrity of the dispute settlement mechanism, the disqualification of the person concerned would be confirmed.

9. The person who is the subject of the evidence shall continue to participate in the consideration of the dispute unless it is decided that a material violation of these Rules has occurred.

10. The Chair of the DSB shall thereafter take the necessary steps for the appointment of the person who is the subject of the evidence to be formally revoked, or excused from the dispute as the case may be, as of that time.

Secretariat

11. If the covered person who is the subject of the evidence is a member of the Secretariat, the party shall only provide the evidence to the Director-General of the WTO, who shall forthwith provide the evidence to the person who is the subject of such evidence and shall further inform the other party or parties to the dispute and the panel.

12. It shall be for the Director-General to take any appropriate action in accordance with the Staff Regulations.***

(*footnote original*) *** Pending adoption of the Staff Regulations, the Director-General would act in accordance with the following draft provision for the Staff Regulations: "If paragraph VIII:11 of the Rules of Conduct for the DSU governing the settlement of disputes is invoked, the Director-General shall consult with the person who is the subject of the evidence and the panel and shall, if necessary, take appropriate disciplinary action."

13. The Director-General shall inform the parties to the dispute, the panel and the Chair of the DSB of his decision, together with relevant supporting information.

Standing Appellate Body

14. If the covered person who is the subject of the evidence is a member of the Standing Appellate Body or of the Standing Appellate Body support staff, the party shall provide the evidence to the other party to the dispute and the evidence shall thereafter be provided to the Standing Appellate Body.

15. Upon receipt of the evidence referred to in paragraphs VIII:1 and VIII:2 above, the Standing Appellate Body shall forthwith provide it to the person who is the subject of such evidence, for consideration by the latter.

16. It shall be for the Standing Appellate Body to take any appropriate action after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard.

17. The Standing Appellate Body shall inform the parties to the dispute and the Chair of the DSB of its decision, together with relevant supporting information.

***

18. Following completion of the procedures in paragraphs VIII:5 to VIII:17, if the appointment of a covered person, other than a member of the Standing Appellate Body, is revoked or that person is excused or resigns, the procedures specified in the DSU for initial appointment shall be followed for appointment of a replacement, but the time-periods shall be half those specified in the DSU.**** The member of the Standing Appellate Body who, under that Body's rules, would next be selected through rotation to consider the dispute, would automatically be assigned to the appeal. The panel, members of the Standing Appellate Body hearing the appeal, or the arbitrator, as the case may be, may then decide, after consulting with the parties to the dispute, on any necessary modifications to their working procedures or proposed timetable.

(*footnote original*) **** Appropriate adjustments would be made in the case of appointments pursuant to the Agreement on Subsidies and Countervailing Measures.

19. All covered persons and Members concerned shall resolve matters involving possible material violations of these Rules as expeditiously as possible so as not to delay the completion of proceedings, as provided in the DSU.

20. Except to the extent strictly necessary to carry out this decision, all information concerning possible or actual material violations of these Rules shall be kept confidential.

IX. Review

1. These Rules of Conduct shall be reviewed within two years of their adoption and a decision shall be taken by the DSB as to whether to continue, modify or terminate these Rules.

ANNEX 1a

Arbitrators acting pursuant to the following provisions:

- Articles 21.3(c); 22.6 and 22.7; 26.1(c) and 25 of the DSU;
- Article 8.5 of the Agreement on Subsidies and Countervailing Measures;
- Articles XXI.3 and XXII.3 of the General Agreement on Trade in Services.

ANNEX 1b

Experts advising or providing information pursuant to the following provisions:

- Article 13.1; 13.2 of the DSU;
- Article 4.5 of the Agreement on Subsidies and Countervailing Measures;
- Article 11.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures;
- Article 14.2; 14.3 of the Agreement on Technical Barriers to Trade.

ANNEX 2

ILLUSTRATIVE LIST OF INFORMATION TO BE DISCLOSED

This list contains examples of information of the type that a person called upon to serve in a dispute should disclose pursuant to the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes.

Each covered person, as defined in Section IV:1 of these Rules of Conduct, has a continuing duty to disclose the information described in Section VI:2 of these Rules which may include the following:

(a) financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;

(b) professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);

(c) other active interests (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question);

(d) considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);

(e) employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members).

ANNEX 3

Dispute Number: _____

WORLD TRADE ORGANIZATION DISCLOSURE FORM

I have read the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and the Rules of Conduct for the DSU. I understand my continuing duty, while participating in the dispute settlement mechanism, and until such time as the Dispute Settlement Body (DSB) makes a decision on adoption of a report relating to the proceeding or notes its settlement, to disclose herewith and in future any information likely to affect my independence or impartiality, or which could give rise to justifiable doubts as to the integrity and impartiality of the dispute settlement mechanism; and to respect my obligations regarding the confidentiality of dispute settlement proceedings.

Signed: Dated:

B. INTERPRETATION AND APPLICATION OF THE RULES OF CONDUCT

897. At its meeting on 3 December 1996,[1303] the DSB adopted the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes.[1304]

898. With a communication, dated 20 January 1997, from the Chairman of the Appellate Body addressed to the Chairman of the Dispute Settlement Body, and circulated to Members for information, "the Appellate Body confirms that the Rules of Conduct have been directly incorporated into the Working Procedures for Appellate Review. Accordingly, the Rules of Conduct, as adopted by the Dispute Settlement Body, are made a part of, and supersede Annex II of, the Working Procedures for Appellate Review."[1305]

899. At its meeting on 25, 28 and 29 January and 1 February 1999,[1306] and in accordance with Section IX of the Rules of Conduct, which provides for a periodic review of the rules, the DSB agreed to continue to apply the current Rules of Conduct.[1307]

XXXV. RULES OF PROCEDURE FOR MEETINGS OF THE DISPUTE SETTLEMENT BODY

A. TEXT OF THE RULES OF PROCEDURE

Rules of Procedure for Meetings of the Dispute Settlement Body[1308]

1. When the General Council convenes as the Dispute Settlement Body (DSB), it shall follow the rules of procedure for meetings of the General Council, except as provided otherwise in the Dispute Settlement Understanding (DSU) or below.

[1303] WT/DSB/M/27, section 1.
[1304] WT/DSB/RC/W/1, subsequently circulated as document WT/DSB/RC/1.
[1305] WT/DSB/RC/2.
[1306] WT/DSB/M/54, section 9.
[1307] WT/DSB/RC/1.
[1308] WT/DSB/9.

Chapter IV – Observers

2. Observership at meetings of the DSB shall be governed by paragraphs 9 to 11 of Annex 2 and paragraph 3, including footnote 5 of Annex 3 to these Rules.[1]

(*footnote original*) [1] WT/L/161.

Chapter V – Officers

3. The DSB shall elect its own Chairperson* from among the representatives of Members. The election shall take place at the first meeting of the year and shall take effect at the end of the meeting. The Chairperson shall hold office until the end of the first meeting of the following year.

(*footnote original*) * The Dispute Settlement Body shall apply the relevant guidelines contained in the "Guidelines for Appointment of Officers to WTO Bodies" (WT/L/31).

4. If the Chairperson is absent from any meeting or part thereof, the Chairperson of the General Council or in the latter's absence, the Chairperson of the Trade Policy Review Body, shall perform the functions of the Chairperson. If the Chairpersons of the General Council and of the Trade Policy Review Body are also not present, the DSB shall elect an interim Chairperson for that meeting or that part of the meeting.

5. If the Chairperson can no longer perform the functions of the office, the DSB shall designate a Chairperson in accordance with paragraph 4 to perform those functions pending the election of a new Chairperson.

B. INTERPRETATION AND APPLICATION OF THE RULES OF PROCEDURE

1. Adoption

900. At its meeting of 10 February 1995, the DSB, in accordance with Article IV:3 of the WTO Agreement, adopted the Rules of Procedure contained in PC/IPL/9 with the exception of the rules concerning officers and the participation of international organizations as observers in the WTO, which were at the time open issues. Once agreement was reached on those pending issues, the rules of procedure were circulated in document WT/DSB/9.

2. Reference to General Council procedures

901. Further to its own rules of procedures, the DSB follows the rules of procedure for meetings of the General Council,[1309] except as otherwise provided in the DSU or in document WT/DSB/9.

XXXVI. OTHER ISSUES IN WTO DISPUTE SETTLEMENT PROCEEDINGS

A. ORDER OF ANALYSIS

1. Provisions of different WTO Agreements

(a) Test: Agreement that deals specifically and in detail with the measure at issue

902. In *EC – Bananas III*, the Appellate Body enunciated the test that should be applied in order to decide the order of analysis where two or more provisions from different covered Agreements appear *a priori* to apply to the measure in question. According to the Appellate Body, the provision from the Agreement that "deals specifically, and in detail" with the measures at issue should be analysed first. See paragraph 903 below.[1310]

(i) GATT 1994 versus Licensing Agreement

903. In *EC – Bananas III*, the Appellate Body, disagreeing with the Panel's choice, considered that the Panel should have applied the *Licensing Agreement* first (instead of the GATT 1994), "since this agreement deals specifically, and in detail, with the administration of import licensing procedures":

> "Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994."[1311]

(ii) GATT 1994 versus SPS Agreement

904. In *EC – Hormones*, the Panel, in a finding not reviewed by the Appellate Body, considered which Agreement, the *SPS Agreement* or the *GATT 1994*,[1312] should be examined first in this particular dispute. The Panel considered that the *SPS Agreement* was to be addressed first because it "specifically addresses the type of measure in dispute":

> "[I]n accordance with the ordinary meaning to be given to the terms of the SPS Agreement in their context and in the light of its object and purpose (in conformity with Article 31 of the Vienna Convention), there is no requirement, in any of the provisions of the SPS Agreement,

[1309] WT/L/161.
[1310] Appellate Body Report on *EC – Bananas III*, para. 204.
[1311] Appellate Body Report on *EC – Bananas III*, para. 204.
[1312] As regards the relationship between the *Agreement on Sanitary and Phytosanitary Measures* and *GATT 1994*, see Section XV of the Chapter on the *Agreement on Sanitary and Phytosanitary Measures*.

that a prior violation of a GATT provision need be established before the SPS Agreement applies.

Having reached the conclusion that we are not *per se* required to address GATT claims prior to those raised under the SPS Agreement, we must then decide which of the two agreements we should examine first in this particular dispute. The SPS Agreement specifically addresses the type of measure in dispute. If we were to examine GATT first, we would in any event need to revert to the SPS Agreement: if a violation of GATT were found, we would need to consider whether Article XX(b) could be invoked and would then necessarily need to examine the SPS Agreement; if, on the other hand, no GATT violation were found, we would still need to examine the consistency of the measure with the SPS Agreement since nowhere is consistency with GATT presumed to be consistency with the SPS Agreement. For these reasons, and in order to conduct our consideration of this dispute in the most efficient manner, we shall first examine the claims raised under the SPS Agreement."[1313]

905. The Panel on *Australia – Salmon* also dealt with the question whether to address first the provisions of the *GATT 1994* or those of the *SPS Agreement*:

"Canada recognizes that the SPS Agreement provides for obligations additional to those contained in GATT 1994, but, nevertheless, first addresses its claim under Article XI of GATT 1994. Australia invokes Article 2.4 of the SPS Agreement, which presumes GATT consistency for measures found to be in conformity with the SPS Agreement, to first address the SPS Agreement. We note, moreover, that (1) the SPS Agreement specifically addresses the type of measure in dispute, and (2) we will in any case need to examine the SPS Agreement, whether or not we find a GATT violation (since GATT consistency is nowhere presumed to constitute consistency with the SPS Agreement). In order to conduct our consideration of this dispute in the most efficient manner, we shall, therefore, first address the claims made by Canada under the SPS Agreement before addressing those put forward under GATT 1994."[1314]

(iii) GATT 1994 versus TBT Agreement

906. In *EC – Asbestos*, the Panel was faced with the difficulty of applying the above test set out by the Appellate Body in *EC – Bananas III* because the parties did not agree on the legal nature of the measure itself (technical regulation covered by the *TBT Agreement* or a general ban coming under the scope of the *GATT 1994* alone) (see paragraphs 902–903 above). The Panel decided to start by examining the ways in which the Decree at issue violated the *TBT Agreement* since "if the Decree is a 'technical regulation' within the meaning of the *TBT Agreement*, then the latter would deal with the measure in the most specific and most detailed manner":

"According to the Appellate Body in *European Communities – Regime for the Importation, Sale and Distribution of Bananas,*[1315] when the GATT 1994 and another Agreement in Annex 1A appear *a priori* to apply to the measure in question, the latter should be examined on the basis of the Agreement that deals 'specifically, and in detail,' with such measures. In this particular case, as the parties do not agree on the legal nature of the measure itself (technical regulation covered by the TBT Agreement or general ban coming under the scope of the GATT 1994 alone), it is difficult at this stage to determine which Agreement, either the GATT 1994 or the TBT Agreement, deals with the measure in question most specifically and in the most detailed manner without undertaking an in-depth examination of the measure in the light of each Agreement.

In order to decide upon the order in which our consideration should proceed, in the way suggested by the Appellate Body, the hypothesis should be that, if the Decree is a 'technical regulation' within the meaning of the TBT Agreement, then the latter would deal with the measure in the most specific and most detailed manner. Consequently, in our view it must first be determined whether the Decree is a technical regulation within the meaning of the TBT Agreement. If this is the case, we shall start considering this case by examining the ways in which the Decree violates the TBT Agreement. If we find that the Decree is not a 'technical regulation', we shall then immediately start to consider it in the context of the GATT 1994."[1316]

907. In *EC – Sardines*, the Panel considered whether to examine the claims in the order requested by Peru. Peru had requested the Panel to first examine its claim under Article 2.4 of the *TBT Agreement* and then examine its claims under Articles 2.2 and 2.1 of the *TBT Agreement* only if the EC Regulation was not considered inconsistent with Article 2.4. Peru further requested the Panel to examine its claims in respect of Article III:4 of the *GATT 1994* only if the EC Regulation was not considered inconsistent with the provisions of the *TBT Agreement* invoked by Peru. The Panel recalled the Appellate Body's statement in *EC – Bananas III* stating that where two agreements apply simultaneously, a panel should normally consider the more specific agreement before the more general agreement. Furthermore, the Panel recalled the Appellate Body's statement in *US – FSC* in relation to the sequencing of claims:

"These requests by Peru on sequencing of claims thereby oblige us to consider whether there is an interpretative methodology that compels panels to adopt a particular

[1313] Panel Report on *EC – Hormones*, paras. 8.41–8.42.
[1314] Panel Report on *Australia – Salmon*, para. 8.39.
[1315] (*footnote original*) Adopted on 25 September 1997, WT/DS27/AB/R, hereinafter "*European Communities – Bananas*", para. 204.
[1316] Panel Report on *EC – Asbestos*, paras. 8.16–8.17.

order which, if not followed, would constitute an error of law.[1317] We recall the Appellate Body's statement in *US – FSC* in relation to the US argument that the panel erred by commencing its analysis with Article 3.1(a) rather than footnote 59 of the Subsidies and Countervailing Measures Agreement. The Appellate Body stated:

> 'In our view, it was not a legal error for the Panel to begin its examination of whether the FSC measure involves export *subsidies* by examining the general definition of a "*subsidy*" that is applicable to export *subsidies* in Article 3.1(a). In any event, whether the examination begins with the general definition of a "subsidy" in Article 1.1 or with footnote 59, we believe that the outcome of the European Communities' claim under Article 3.1(a) would be the same. The appropriate meaning of both provisions can be established and can be given effect, irrespective of whether the examination of the claim of the European Communities under Article 3.1(a) begins with Article 1.1 or with footnote 59.'[1318]

In our view, if the EC Regulation is a technical regulation, it would not constitute an error of law to start the examination of the consistency of the EC Regulation with Article 2.4 followed by Articles 2.2 and 2.1 of the TBT Agreement as necessary since such sequential examination would not affect the interpretation of the other provisions."[1319]

(iv) GATT 1994 versus Agreement on Agriculture

908. In *EC – Bananas III*, the Appellate Body considered that "the provisions of the GATT 1994, including Article XIII, apply to market access commitments concerning agricultural products, except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter".[1320]

909. In *Chile – Price Band System*, the Appellate Body considered whether the Panel had erred in choosing to examine Argentina's claim under Article 4.2 of the *Agreement on Agriculture* before examining its claim under Article II:1(b) of the *GATT 1994*. The Appellate Body upheld the Panel's order of analysis and found that Article 4.2 of the *Agreement on Agriculture* "applies *specifically* to agricultural products," whereas Article II:1(b) of the *GATT 1994* "applies *generally* to trade in *all* goods".[1321]

(v) GATT 1994 versus SCM Agreement

910. In *Indonesia – Autos*, the Panel, in a finding not reviewed by the Appellate Body, considered whether there is a conflict between the *SCM Agreement* and Article III of the *GATT 1994*. The Panel recalled that for a conflict to exist between two agreements, they must cover the same substantive matter. The Panel found that there was no conflict since the two provisions have different purposes.[1322]

(vi) GATT 1994 versus TRIMs Agreement

911. In *Indonesia – Autos*, the Panel considered that it should first examine the claims under the *TRIMs Agreement* since the *TRIMs Agreement* is more specific than Article III:4 of the *GATT 1994*:

> "As to which claims, those under Article III:4 of GATT or Article 2 of the TRIMs Agreement, to examine first, we consider that we should first examine the claims under the TRIMs Agreement since the TRIMs Agreement is more specific than Article III:4 as far as the claims under consideration are concerned. A similar issue was presented in *Bananas III*, where the Appellate Body discussed the relationship between Article X of GATT and Article 1.3 of the Licensing Agreement and concluded that the Licensing Agreement being more specific it should have been applied first.[1323] This is also in line with the approach of the panel and the Appellate Body in the *Hormones*[1324] dispute, where the measure at issue was examined first under the SPS Agreement since the measure was alleged to be an SPS measure."[1325]

2. Provisions within the same Agreement

(a) GATT 1994

(i) Articles III and XI

912. In *India – Autos*, the Panel recalled the GATT Panel Report on *Canada – FIRA* when it stated that Articles III and XI of the *GATT 1994* have distinct scopes of application. It quoted from that Panel that

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[1317] (*footnote original*) In *US – Shrimp*, for example, the Appellate Body considered the sequence of analysis important in examining whether the U.S. measure protecting sea turtles was justifiable under Article XX of the GATT 1994. It held that the panel erred by looking at the chapeau of Article XX and then subsequently examining whether the U.S. measure was covered by the terms of Article XX(b) or (g) because "[t]he task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter . . . has not first identified and examined the specific exception threatened with abuse". Appellate Body Report, *US – Shrimp*, para. 120.

[1318] (*footnote original*) Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("*US – FSC*"), WT/DS108/AB/R, adopted 20 March 2000, para. 89.

[1319] Panel Report on *EC – Sardines*, paras. 7.17–7.18.

[1320] Appellate Body Report on *EC – Bananas III*, para. 155.

[1321] Appellate Body Report on *Chile – Price Band System*, para. 187.

[1322] Panel Report on *Indonesia – Autos*, para. 14.29.

[1323] (*footnote original*) The Appellate Body in *Bananas III* stated in paragraph 204:"Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994."

[1324] (*footnote original*) Panel and Appellate Body reports on *EC – Measures Concerning Meat and Meat Products (Hormones) Complaints by the United States and Canada*, WT/DS26 and DS48, adopted on 13 February 1998, hereafter called *Hormones*.

[1325] Panel Report on *Indonesia – Autos*, para. 14.62.

"the General Agreement distinguishes between measures affecting the 'importation' of products, which are regulated in Article XI:1, and those affecting 'imported products', which are dealt with in Article III. If Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous.[1326]"[1327]

913. In *India – Autos*, the Panel did, however, consider that under certain circumstances, specific measures may have an impact upon both the importation of products (Article XI) and the competitive conditions of imported products on the internal market (Article III):

> "[I]t therefore cannot be excluded *a priori* that different aspects of a measure may affect the competitive opportunities of imports in different ways, making them fall within the scope either of Article III (where competitive opportunities on the domestic market are affected) or of Article XI (where the opportunities for importation itself, i.e. entering the market, are affected), or even that there may be, in perhaps exceptional circumstances, a potential for overlap between the two provisions, as was suggested in the case of state trading. . .
>
> . . .

The Panel went on to note: . . .

> there may be circumstances in which specific measures may have a range of effects. In appropriate circumstances they may have an impact both in relation to the conditions of importation of a product and in respect of the competitive conditions of imported products on the internal market within the meaning of Article III:4.[1328] This is also in keeping with the well established notion that different aspects of the same measure may be covered by different provisions of the covered Agreements."[1329]

(b) GATS

(i) Annex on Telecommunication and Member's Reference Paper on Commitments

915. In *Mexico – Telecoms*, the United States presented two claims concerning Mexico's Reference Paper commitments first, followed by its claim concerning Section 5 of the Annex on Telecommunications. The Panel decided to examine these claims in the order presented by the United States on the grounds that such an "order will allow us to analyse the issues in the most efficient manner".[1330]

(c) SCM Agreement

(i) Articles 1.1 and 3.1(a)

916. In *US – FSC*, the Appellate Body examined the United States' argument that the Panel had erred by failing to begin its examination of the European Communities' claim under Articles 1.1 and 3.1(a) of the *SCM Agreement*, rather than with footnote 59 of that Agreement. The Appellate Body considered that "whether the examination begins with the general definition of a 'subsidy' in Article 1.1 or with footnote 59, we believe that the outcome of the European Communities' claim under Article 3.1(a) would be the same":

> "Instead, the Panel began its examination with the general definition of a 'subsidy' that is set forth in Article 1.1 of the *SCM Agreement*. This definition applies throughout the *SCM Agreement*, to all the different types of 'subsidy' covered by that Agreement. In our view, it was not a legal error for the Panel to begin its examination of whether the FSC measure involves export *subsidies* by examining the general definition of a '*subsidy*' that is applicable to export *subsidies* in Article 3.1(a). In any event, whether the examination begins with the general definition of a 'subsidy' in Article 1.1 or with footnote 59, we believe that the outcome of the European Communities' claim under Article 3.1(a) would be the same. The appropriate meaning of both provisions can be established and can be given effect, irrespective of whether the examination of the claim of the European Communities under Article 3.1(a) begins with Article 1.1 or with footnote 59."[1331]

(ii) Articles 3.1(a) and 27.4

917. In *Brazil – Aircraft*, the Appellate Body examined the order of the legal reasoning of the Panel. The Appellate Body criticized the fact that the Panel had examined whether Brazil, the defending party, had met the requirements of a particular provision (*in casu* Article 3.1(a) of the *SCM Agreement*) and had only subsequently considered whether this particular provision applied to Brazil in its capacity as a developing country, in light of another provision (*in casu* Article 27.4 of the *SCM Agreement*). The Appellate Body found that the reverse order of analysis would have been appropriate. The Appellate Body also found that the Panel should not have considered Brazil's 'affirmative defence' based on item (k) of the Illustrative List before determining whether Article 3.1(a) applied to Brazil:

[1326] (*footnote original*) Panel Report, L/5504, adopted on 7 February 1987, para. 5.14.

[1327] Panel Report on *India – Autos*, para. 7.220.

[1328] (*footnote original*) The Panel notes that the TRIMS Agreement Illustrative List envisages measures relating to export requirements both in the context of Article XI:1, as noted above in the context of our analysis under Article XI:1, and in the context of Article III:4 of the GATT 1994, by listing as inconsistent with that provision measures which require "that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports": TRIMS Illustrative List, Item 1 (b).

[1329] Panel Report on *India – Autos*, paras. 7.224 and 7.296.

[1330] Panel Report on *Mexico – Telecoms*, para. 7.17.

[1331] Appellate Body Report on *US – FSC*, para. 89.

"Our interpretation of the relationship between Article 27 and Article 3.1(a) of the *SCM Agreement*[1332] leads us, in this appeal, to examine, first, the issues appealed relating to whether Brazil has increased the level of its export subsidies contrary to the provisions of Article 27.4. Only if we determine that Brazil has not complied with the conditions of Article 27.4, and thereby find that the provisions of Article 3.1(a) do in fact *apply* to Brazil, will we need to examine Brazil's appeal of the Panel's findings relating to its alleged 'affirmative defence' under item (k) of the Illustrative List."[1333]

(d) TRIPS Agreement

(i) Articles 33 and 70

918. In *Canada – Patent Term*, the Appellate Body considered what the order of its analysis should be regarding Articles 33 and 70 of the *TRIPS Agreement* and decided to start with the examination of the latter:

"As in every appeal, a threshold question is whether the measure before us falls within the scope of one of the covered agreements, in this case the *TRIPS Agreement*. For this reason, we begin our analysis of the legal issues raised in this appeal by considering Article 70, because this Article determines the overall applicability of the obligations of the *TRIPS Agreement*, including the obligation found in Article 33, to the measure in dispute. Only if we conclude from addressing Article 70 that the measure before us does fall within the scope of the *TRIPS Agreement* will it become necessary for us to examine the consistency of Section 45 of Canada's *Patent Act* with Article 33 of that Agreement."[1334]

B. DUE PROCESS IN WTO DISPUTE SETTLEMENT PROCEEDINGS

1. Standard panel working procedures as a tool to ensure due process

919. In *EC – Bananas III*, the Appellate Body indicated that issues including whether or not a claim had been specified in the request for establishment of a panel "could be decided early in panel proceedings, without causing prejudice or unfairness to any party or third party, if panels had detailed, standard working procedures that allowed, *inter alia*, for preliminary rulings".[1335]

920. The Appellate Body on *India – Patents (US)* also pointed to the relevance of having standard panel working procedures that provide for appropriate factual discovery at an early stage in order to assist the requirements of due process:

"It is worth noting that, with respect to fact-finding, the dictates of due process could better be served if panels had standard working procedures that provided for appropriate factual discovery at an early stage in panel proceedings."[1336]

921. Similarly, the Appellate Body in *Argentina – Textiles and Apparel* observed that "standard working procedures for panels would help to ensure due process and fairness in panel proceedings":

"As we have observed in two previous Appellate Body Reports, we believe that detailed, standard working procedures for panels would help to ensure due process and fairness in panel proceedings. See *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted 25 September 1997, WT/DS27/AB/R, para. 144; *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted 16 January 1998, WT/DS50/AB/R, para. 95."[1337]

2. Due process demands when identifying the measures and claims at issue

922. In *India – Patents (US)*, the Appellate Body noted that "the demands of due process that are implicit in the *DSU* make [the clear statement of the claims and the free disclosure of facts] especially necessary during consultations". See paragraph 118 above.

923. The European Communities argued in *EC – Computer Equipment* that its right to due process during the course of the proceedings was violated because the term "LAN equipment" lacked precision in the request for establishment of a panel. The Appellate Body stated:

"We do not see how the alleged lack of precision of the terms, LAN equipment and PCs with multimedia capability, in the request for the establishment of a panel affected the rights of defence of the European Communities *in the course* of the panel proceedings. As the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the Panel."[1338]

924. The Appellate Body on *Korea – Dairy*, when considering if the mere listing in the request for establish-

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[1332] (*footnote original*) The Appellate Body considered that: "[w]ith respect to the *application* of the prohibition of export subsidies in Article 3.1(a) of the *SCM Agreement*, paragraphs 2 and 4 of Article 27 contain a carefully negotiated balance of rights and obligations for developing country Members. During the transitional period . . . certain developing country Members are *entitled* to the *non-application* of Article 3.1(a), *provided* that they comply with the specific obligation set forth in Article 27.4. Put another way, when a developing country Member complies with the conditions in Article 27.4, a claim of violation of Article 3.1(a) cannot be entertained during the transitional period, because the export subsidy prohibition in Article 3 simply *does not apply* to that developing country Member." Appellate Body Report on *Brazil – Aircraft*, para. 139.

[1333] Appellate Body Report on *Brazil – Aircraft*, para. 144.

[1334] Appellate Body Report on *Canada – Patent Term*, para. 49.

[1335] Appellate Body Report on *EC – Bananas III*, para. 144.

[1336] Appellate Body Report on *India – Patents (US)*, para. 95.

[1337] Appellate Body Report on *Argentina – Textiles and Apparel*, fn. 68.

[1338] Appellate Body Report on *EC – Computer Equipment*, para. 70.

ment of the Articles claimed to have been violated meets the standard of Article 6.2, took into account whether the ability of the respondent to defend itself had been prejudiced by that fact. See paragraph 220 above.

925. In *Chile – Price Band System*, the Appellate Body ruled that "[t]he requirements of due process and orderly procedure dictate that claims must be made explicitly in WTO dispute settlement". See paragraph 233 above.

926. Also in *Chile – Price Band System*, the Appellate Body, in the context of its analysis of whether an amendment to a measure after the request for establishment of a panel was part of the measure at issue, considered the importance for the "demands of due process" "that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'".[1339] See paragraph 272 above.

3. Identification of appealed measures

927. In this regard, see paragraphs 855–861 above.

4. Right of response

928. In *Australia – Salmon*, the Appellate Body warned panels to be careful to observe due process, when complying with the Article 12.2 requirement of flexibility in panel procedures, by providing parties with adequate opportunity to respond to evidence submitted:

> "We note that Article 12.2 of the DSU provides that '[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.' However, a panel must also be careful to observe due process, which entails providing the parties adequate opportunity to respond to the evidence submitted."[1340]

929. In *Australia – Salmon*, the Appellate Body further indicated that "[a] fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it". In this case, Australia had claimed that the Panel erred in failing to accord it an opportunity to submit a formal written rebuttal submission to respond to the oral statement made by Canada at the second meeting. The Appellate Body, noting that Australia had requested one week to respond to Canada's oral statement and that the Panel had granted Australia's request, dismissed the claim as follows:

> "A fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it. In this case, we believe that the Panel *did* accord Australia a proper opportunity to respond by allowing Australia to submit a third written submission. We cannot see how the Panel failed to accord due process to Australia by granting the extra time it had requested."[1341]

930. In *Chile – Price Band System*, the Appellate Body concluded that the Panel had made a finding on a claim not made by Argentina.[1342] Chile had claimed that, by making a finding on that claim, the Panel had deprived Chile of a fair right to response. The Appellate Body agreed with Chile and ruled that the Panel had acted inconsistently with Article 11 of the *DSU* by denying Chile the fair right of response and thus had denied it the due process rights to which it was entitled:

> "There is, furthermore, the requirement of due process. As Argentina made no claim under the second sentence of Article II:1(b) of the GATT 1994, Chile was entitled to assume that the second sentence was not in issue in the dispute, and that there was no need to offer a defence against a claim under that sentence. We agree with Chile that, by making a finding on the second sentence – a claim that was neither made nor argued – the Panel deprived Chile of a 'fair right of response'.[1343]
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> As we said in *India – Patents*, '. . . the demands of due process . . . are implicit in the DSU'.[1344] And, as we said in *Australia – Salmon* on the right of response, '[a] fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it'.[1345] Chile contends that this fundamental tenet of due process was not observed on this issue.
>
> As we said earlier, Article 11 imposes duties on panels that extend beyond the requirement to assess evidence objectively and in good faith, as suggested by Argentina. This requirement is, of course, an indispensable aspect of a panel's task. However, in making 'an objective assessment of the matter before it', a panel is also duty bound to ensure that due process is respected. Due process is an obligation inherent in the WTO dispute settlement system. A panel will fail in the duty to respect due process if it makes a finding on a matter that is not before it, because it will thereby fail to accord to a party a fair right of response. In this case, because the Panel did not give Chile a fair right of response on this issue, we find that the Panel failed to accord to Chile the due process rights to which it is entitled under the DSU."[1346]

[1339] Appellate Body Report on *Chile – Price Band System*, para. 144.
[1340] Appellate Body Report on *Australia – Salmon*, para. 272.
[1341] Appellate Body Report on *Australia – Salmon*, para. 278.
[1342] See para. 287 of this Chapter.
[1343] (*footnote original*) Chile's appellant's submission, para. 23.
[1344] (*footnote original*) Appellate Body Report [. . .] para. 94.
[1345] (*footnote original*)Appellate Body Report [. . .] para. 278.
[1346] Appellate Body Report on *Chile – Price Band System*, paras. 174–176.

C. PRELIMINARY RULINGS

1. General

(a) Lack of regulation in standard working procedures

931. In *EC – Bananas III*, the Appellate Body considered that the compliance of the Panel request with Article 6.2 could be decided early by a preliminary ruling if panels had detailed, standard working procedures that allowed it:

> "As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. . .
>
> . . .
>
> We note, in passing, that this kind of issue could be decided early in panel proceedings, without causing prejudice or unfairness to any party or third party, if panels had detailed, standard working procedures that allowed, *inter alia*, for preliminary rulings."[1347]

932. In *Canada – Aircraft*, the Panel noted that there is no requirement nor established practice that obliges the Panel to issue a preliminary ruling before the deadline for the parties' first written submission. See paragraph 933 below.

(b) Absence of a requirement to rule on a preliminary basis

933. In *Canada – Aircraft*, Canada asked the Panel to issue a preliminary ruling on its jurisdiction before the deadline for the parties' first written submission. The Panel denied the request on the grounds that there is no requirement nor established practice in that regard:

> "Canada asked the Panel to issue the requested ruling on the Panel's jurisdiction prior to the deadline for the parties' first written submissions. In our view, there is no requirement in the DSU for panels to rule on preliminary issues prior to the parties' first written submissions. Nor is there any established practice to this effect, for there are numerous panel reports where rulings on preliminary issues have been reserved until the final report.[1348] Furthermore, there may be cases where the panel wishes to seek further clarification from the parties before providing a preliminary ruling. Indeed, we considered it necessary to request such clarification in the present case. In our view, the possibility for obtaining such clarification would be lost – or at least significantly undermined – if a panel were required to rule on preliminary issues before the deadline for the parties' first written submissions. For these reasons, we rejected Canada's request for a preliminary ruling on this issue prior to the deadline for the parties' first submissions."[1349]

(c) Preliminary ruling procedures followed in certain disputes

934. In this regard, see Section XXX.B.3(d)(ii) above.

(d) Participation of third parties in preliminary ruling proceedings

935. In *Canada – Wheat Exports and Grain Imports*, the Panel, after consulting the parties to the dispute in accordance with Article 12.1 of the DSU, decided, in a preliminary ruling, that the third parties to this dispute were to be invited to participate in the proceedings up to the time the Panel issues its preliminary rulings on the requests made by Canada concerning the consistency with Article 6.2 of the DSU of the United States' request for the establishment and certain additional procedures proposed by Canada for the protection of proprietary or commercially sensitive information. As regards the extent of this participation, the Panel decided as follows:

> "(a) third parties shall receive the preliminary written submissions of the parties to the dispute;[1350]
>
> (b) third parties shall have an opportunity to make preliminary written submissions to the Panel for purposes of commenting on the parties' preliminary written submissions; and
>
> (c) third parties shall have an opportunity to be heard by the Panel on the issues raised in the parties' preliminary written submissions."[1351]

(e) Preliminary rulings in Article 22.6 Arbitrations

936. In this respect, see Section XXII.B.8(d) above.

2. Parties' objections

937. In *EC – Hormones*, the Appellate Body ruled that "a procedural objection raised by a party to a dispute should be sufficiently specific to enable the panel to address it[1352]".[1353]

[1347] Appellate Body Report on *EC – Bananas III*, paras.142 and 144.

[1348] (*footnote original*) See, for example, *European Communities – Bananas* (WT/DS27//R, adopted 25 September 1997), and *European Communities – Computer Equipment* (WT/DS62, 67/R, adopted 22 June 1998).

[1349] Panel Report on *Canada – Aircraft*, para. 9.15.

[1350] (*footnote original*) For the purposes of these proceedings, the expression "preliminary written submissions of the parties to the dispute" refers to the preliminary written submissions by Canada of 13 May 2003 and the preliminary written submissions to be filed by the United States on 27 and 28 May 2003.

[1351] Panel Report on *Canada – Wheat Exports and Grain Imports*, para. 6.6.

[1352] (*footnote original*) Furthermore, the DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling.

[1353] Appellate Body Report on *EC – Hormones*, para. 152.

938. The Appellate Body on *Mexico – Corn Syrup (Article 21.5 – US)* stated that requirements of good faith, due process and orderly procedure dictate that objections should be explicitly raised for the Panel to be required to address them:

> "[T]he 'observations' raised by Mexico were not expressed in a fashion that indicated that Mexico was raising an objection to the authority of the Panel. The requirements of good faith, due process and orderly procedure dictate that objections, especially those of such potential significance, should be explicitly raised. Only in this way will the panel, the other party to the dispute, and the third parties, understand that a specific objection has been raised, and have an adequate opportunity to address and respond to it. In our view, Mexico's objection was not explicitly raised. Thus, in making its 'observations', Mexico did not meet this standard.
>
> (. . .)
>
> However, had we been satisfied that Mexico did, in fact, explicitly raise its objections before the Panel, then the Panel may well have been required to 'address' those objections, whether by virtue of Articles 7.2 and 12.7 of the DSU, or the requirements of due process.[1354] In such circumstances, however, the Panel could have satisfied that duty simply by stating in its Report that it declined to examine or rule on Mexico's 'objections' due to the *untimely* manner in which they were raised. We note, in this regard, that Mexico was aware of all the facts on which it now relies in arguing that the Panel had no authority to deal with and dispose of the matter as soon as the United States submitted its communication seeking recourse to Article 21.5 of the DSU on 12 October 2000. Yet Mexico mentioned these alleged deficiencies, for the first time, more than four months later, at the meeting with the Panel on 20 February 2000. Mexico did not take advantage of the opportunities it had to raise the issues at the DSB meeting of 23 October 2000, or in either of its written submissions to the Panel."[1355]

939. As regards the requirement to raise objections in a timely manner, see paragraph 980 below.

3. Issues that have been the object of a preliminary objection

(a) Adequacy of consultations

940. In *Korea – Alcoholic Beverages*, Korea requested a preliminary ruling on the adequacy of the consultations on the grounds that the complainants had not engaged in consultations in good faith with a view to reaching a mutual solution as envisaged by the DSU.[1356] As regards the content of the Panel's preliminary ruling, see paragraph 120 above.

(b) Compliance of panel request with Article 6.2 requirements

941. In *EC – Bananas III*, the Appellate Body considered that "this kind of issue could be decided early in panel proceedings, without causing prejudice or unfairness to any party or third party, if panels had detailed, standard working procedures that allowed, *inter alia*, for preliminary rulings".[1357]

942. In *Korea – Alcoholic Beverages*, Korea requested the Panel to issue a preliminary ruling on the specificity of the request for establishment of the panel by both the European Communities and the United States. Korea argued that the description of the product concerned by the European Communities ("certain alcoholic beverages falling within HS heading 2208") and the United States ("other distilled spirits such as whisky, brandy, vodka, gin and ad-mixtures") were not specific enough to satisfy Article 6.2.[1358] For information on the actual preliminary ruling, see paragraph 209 above.

943. In *Thailand – H-Beams*, Thailand had asked the Panel for a preliminary ruling on the sufficiency of Poland's panel request with respect to the lack of clarity as regards Articles 5 and 6 of the *Anti-Dumping Agreement*. In assessing and identifying the claim brought under Article 6.2, the Appellate Body responded:

> "Thailand argues that it was prejudiced by the lack of clarity of Poland's panel request. The fundamental issue in assessing claims of prejudice is whether a defending party was made aware of the claims presented by the complaining party, sufficient to allow it to defend itself. In assessing Thailand's claims of prejudice, we consider it relevant that, although Thailand asked the Panel for a preliminary ruling on the sufficiency of Poland's panel request with respect to Articles 5 and 6 of the *Anti-Dumping Agreement* at the time of filing of its first written submission, it did not do so at that time with respect to Poland's claims under Articles 2 and 3 of that Agreement. We must, therefore, conclude that Thailand did not feel at that time that it required additional clarity with respect to these claims, particularly as we note that Poland had further clarified its claims in its first written submission. This is a strong indication to us that Thailand

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[1354] (*footnote original*) We recall that, in a different context involving judicial economy, we said that: ". . . for purposes of transparency and fairness to the parties, a panel should, . . .in all cases, address expressly [even] those claims which it declines to examine and rule upon . . . Silence does not suffice for these purposes."
Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 117.

[1355] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 47–49.

[1356] Panel Report on *Korea – Alcoholic Beverages*, para. 5.21.

[1357] Appellate Body Report on *EC – Bananas III*, para. 144.

[1358] Panel Report on *Korea – Alcoholic Beverages*, paras. 5.4–5.12.

did not suffer any prejudice on account of any lack of clarity in the panel request."[1359]

944. In *US – Wheat Exports and Grain Imports*, Canada raised several preliminary objections that the United States' claims under Article XVII of the *GATT 1994*, rail car allocation and Article 2 of the *TRIMS Agreement* as set out in the panel request failed to satisfy the requirements of Article 6.2 of the *DSU*. The Panel disregarded Canada's objections as regards the rail car allocation and the *TRIMS Agreement* but agreed with Canada in that the United States had failed to comply with Article 6.2 requirements as regards its claim under Article XVII of the *GATT 1994*.[1360]

945. In *US – Oil Country Tubular Goods Sunset Reviews*, the United States requested the Panel to dismiss certain claims raised by Argentina in its panel request on the grounds that, inconsistently with the requirements of Article 6.2 of the *DSU*, these claims were identified in vague terms. The Panel declined the United States' request for preliminary rulings.[1361]

(c) Panel composition

946. In *Guatemala – Cement II*, Guatemala submitted a preliminary objection to the Panel requesting it to rule that the composition of the Panel was inconsistent with WTO and international law principles because one of the members of the Panel had served on the previous *Guatemala – Cement I*. The Panel issued a preliminary ruling rejecting Guatemala's request. For the content of the Panel's ruling, see paragraph 293 above.

(d) Panel's jurisdiction

(i) Measures withdrawn before establishment of the Panel

947. In *Argentina – Textiles and Apparels*, the Panel declined to issue a preliminary ruling on the objection raised by Argentina as regards the Panel not having jurisdiction to address the specific duties on footwear that were withdrawn before the Panel was established.[1362]

(ii) Double fora

948. In *Argentina – Poultry Anti-Dumping Duties*, Argentina raised as a preliminary issue the fact that, prior to bringing WTO dispute settlement proceedings against Argentina's anti-dumping measure, Brazil had challenged that measure before a MERCOSUR Ad Hoc Arbitral Tribunal. Argentina requested that, in light of the prior MERCOSUR proceedings, the Panel refrain from ruling on the claims raised by Brazil in the present WTO dispute settlement proceedings.[1363] In order to defend this position, Argentina invoked the principle of estoppel. In this regard, see paragraph 79 above. In the alternative, Argentina asserted that the Panel should be bound by the ruling of the MERCOSUR Tribunal.[1364] In this regard, see paragraph 23 above.

(iii) Claims outside the panel's terms of reference

949. In *EC – Tube or Pipe Fittings*, the European Communities requested the Panel to make a preliminary ruling that certain of Brazil's claims were not within its terms of reference. The Panel noted that among the said claims, there were several provisions cited by Brazil in its first written submission not mentioned in its request for establishment. The Panel accordingly found that Brazil's claims under those provisions were not within its terms of reference. As regards the content of the Panel's preliminary ruling, see paragraph 221 above.

950. In *US – Softwood Lumber V*, the United States raised a preliminary objection that Canada had included in its first written submission claims with respect to a number of provisions of the *Anti-Dumping Agreement* that were not included in the Panel Request, claiming that these were therefore outside the Panel's terms of reference.[1365] The Panel, in its Report, agreed that some of the provisions mentioned by Canada in its written submissions were not part of its terms of reference since they were not included in the panel request.[1366]

951. In *Canada – Wheat Exports and Grain Imports*, the Panel, in a preliminary ruling, found that certain portions of the United States' panel request that dealt with Article XVII of the *GATT 1994* claim failed to satisfy the requirements of Article 6.2 of the *DSU* insofar as they did not identify the specific measures at issue.[1367]

952. In *US – Oil Country Tubular Goods Sunset Reviews*, the United States requested a preliminary ruling on the grounds that certain claims that appeared in Argentina's first written submission were not within the Panel's terms of reference because these claims had not been raised in Argentina's panel request. The Panel declined the request.[1368]

[1359] Appellate Body Report on *Thailand – H-Beams*, para. 95.
[1360] Panel Report on *US – Wheat Exports and Grain Imports*, para. 6.10.
[1361] Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, paras. 7.40 and 7.48.
[1362] Panel Report on *Argentina – Textiles and Apparel*, para. 6.7.
[1363] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.17.
[1364] Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.17.
[1365] Panel Report on *US – Softwood Lumber V*, para. 7.17.
[1366] Panel Report on *US – Softwood Lumber V*, para. 7.30.
[1367] Panel Report on *Canada – Wheat Exports and Grain Imports*, 6.10.
[1368] Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.70.

(e) Clarity of claims in written submissions

953. In *EC – Tube or Pipe Fittings*, the European Communities had requested the Panel to refuse to consider certain of Brazil's claims on the grounds that these claims were defective as they were only vaguely defined in Brazil's first written submission.[1369] As regards the Panel's preliminary ruling, see paragraph 235 above.

(f) Evidence

(i) Timing of the submission of evidence

954. In *Korea – Alcoholic Beverages*, Korea requested the Panel to issue a preliminary ruling rejecting certain evidence submitted by the European Communities after the second substantive meeting. Korea alleged that its rights of defence were violated by the late submission of such evidence.[1370] As regards the content of the Panel's preliminary ruling, see paragraph 368 above.

955. In *Canada – Aircraft*, Canada requested the Panel to make a preliminary ruling on the issue of whether the complaining party may adduce new evidence or allegations after the end of the first substantive meeting. Canada argued that it would suffer prejudice under the accelerated procedure under Article 4 of the *SCM Agreement* as a result of the late submission of allegations or evidence.[1371] As regards the content of the Panel's preliminary ruling, see paragraph 369 above.

956. In *US – Offset Act (Byrd Amendment)*, Canada asked the Panel to accept as evidence a letter which it submitted after the first substantive meeting. In spite of the United States' objections, the Panel issued a preliminary ruling accepting the evidence. As regards the reasoning of the Panel's ruling, see paragraph 370 above.[1372]

957. In *US – Steel Safeguards*, the Panel sent a letter to all parties including a series of preliminary rulings on organizational matters. Among the issues, the Panel referred to the timing for the submission of evidence in the context of the parties' discussion about the wording of paragraph 11 of the Panel's Working Procedures. For the content of the Panel's preliminary ruling, see paragraph 373 above.

(ii) Information not made available to the investigating authorities

958. In *EC – Tube or Pipe Fittings*, the European Communities requested the Panel to make a preliminary ruling rejecting a number of exhibits submitted by Brazil during the first substantive meeting on the grounds that they did not form part of the record of the underlying investigation.[1373]

959. In *US – Softwood Lumber V*, the United States raised a preliminary objection claiming that Canada had introduced certain new evidence in the context of the proceedings that had not been before the investigating authority during the course of the investigation.[1374] Since the United States had not requested the Panel to rule on a preliminary basis, the Panel preferred to rule within its report where it indicated that it would not take such evidence into consideration.[1375]

(g) Third-party rights

(i) Third-party participation in preliminary proceedings

960. In *Canada – Wheat Exports and Grain Imports*, the Panel, after consulting with the parties to the dispute in accordance with Article 12.1 of the *DSU*, decided, in a preliminary ruling, that the third parties to this dispute would be invited to participate in the proceedings up to the time the Panel issued its preliminary rulings. These rulings related to requests made by Canada concerning the consistency with Article 6.2 of the DSU of the United States' request for the establishment and certain additional procedures proposed by Canada for the protection of proprietary or commercially sensitive information. As regards the extent of this participation, see paragraph 935 above.

(ii) Access to second written submissions by third parties in Article 21.5 proceedings

961. In *Australia – Automotive Leather II (Article 21.5 – US)*, the European Communities raised a preliminary objection and argued that since in this case there was to be only one meeting of the Panel, at which the Panel would be considering both submissions of each party, the third parties, in accordance with Article 10.3 of the *DSU*, should receive all of the parties' submissions. The Panel, in a preliminary ruling, rejected the European Communities' request.[1376] For the content of the Panel's preliminary ruling, see paragraph 617 above.

962. In *Australia – Salmon (Article 21.5 – Canada)*, the Panel was also requested to rule on a preliminary basis on this issue and did so following the approach in *Australia – Automotive Leather II (Article 21.5 – US)*.[1377]

963. In *Canada – Dairy (Article 21.5 – New Zealand and US)*, also in a preliminary ruling, the Panel,

[1369] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.10.
[1370] Panel Report on *Korea – Alcoholic Beverages*, para. 5.21.
[1371] Panel Report on *Canada – Aircraft*, para. 9.73.
[1372] Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.2.
[1373] Panel Report on *EC – Tube or Pipe Fittings*, paras. 7.37–7.40.
[1374] Panel Report on *US – Softwood Lumber V*, para. 7.17.
[1375] Panel Report on *US – Softwood Lumber V*, para. 7.43.
[1376] Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, para. 3.9.
[1377] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.5–7.6.

however, decided to allow third parties access to the second written submissions of the parties.[1378] For the content of the Panel's preliminary ruling, see paragraph 619 above.

964. In *US – FSC (Article 21.5 – EC)*, the Panel, in a preliminary ruling, did not follow the position of the Panel in *Canada – Dairy (Article 21.5 – New Zealand and US)* and denied access to second written submissions to third parties on the grounds that it was not permitted by Article 10.3 of the *DSU*. However, the Appellate Body disagreed with the Panel.[1379] For the content of the Panel's preliminary ruling, see paragraph 620 above.

(h) Confidentiality

(i) Breach of confidentiality of the consultation process

965. In *Korea – Alcoholic Beverages*, Korea requested a preliminary ruling on whether both complainants, the European Communities and the United States, had breached the confidentiality requirement of Article 4.6 by making reference, in their submissions, to information supplied by Korea during consultations.[1380] As regards the Panel's preliminary ruling in this regard, see paragraph 135 above.

(ii) Disclosure of written submissions

966. In *Argentina – Poultry Anti-Dumping Duties*, Brazil informed the Panel of its intention to make its first written submission (except the exhibits) available to the public, after providing Argentina with an opportunity to indicate whether the submission should be revised to exclude any information deemed to be confidential. Argentina objected and submitted that a Member is only entitled by virtue of Article 18.2 of the *DSU* to disclose written statements of its positions. See paragraphs 482–483 above.

(iii) Non-confidential versions of written submissions

967. In *US – Steel Safeguards,* the Panel sent a letter to all parties including a series of preliminary rulings on organizational matters. Among the issues, the Panel dealt with the United States' request to require production of non-confidential versions of written submissions within 14 days following the filing of the written submissions. In this respect, see paragraph 484 above.

(iv) Business confidential information

968. In *Canada – Aircraft* and *Brazil – Aircraft*, the Appellate Body issued a preliminary ruling on 11 June 1999 that it was not necessary to adopt additional procedures to protect business confidential information in the appellate proceeding. The Appellate Body held that the existing provisions concerning confidentiality of dispute settlement proceedings were sufficient for the purposes at issue. In this regard, see paragraph 486 above.

969. In *Canada – Wheat Exports and Grain Imports*, the Panel, in a preliminary ruling, having rejected the parties' specific proposals for the protection of confidential information, adopted its own procedures for the protection of such information.[1381]

(v) Confidentiality concerns when private counsel intervene

970. In *Thailand – H-Beams*, an industry association submitted an *amicus* brief which cited Thailand's confidential submission. Thailand then claimed that Poland's private counsel might have violated WTO rules of confidentiality by providing Thailand's submission to the said association. Although Poland and the lawyer concerned denied the alleged breach of confidentiality, the Appellate Body issued a preliminary ruling rejecting the *amicus* brief. See paragraphs 491–493 above.

(i) Private counsel

971. In *EC – Bananas III*, St Lucia submitted to the Appellate Body a letter explaining its reasons for including two private lawyers in its delegation for the oral hearing. The Appellate Body issued a preliminary ruling indicating that nothing in the *WTO Agreement*, the *DSU* or its Working Procedures prevented a Member from admitting whomever it deems fit to become part of its delegation to Appellate Body proceedings. See paragraph 1022 below.

972. In *Indonesia – Autos*, Indonesia had announced that two private lawyers were members of its delegation for the first substantive meeting of the Panel with the parties. Following a request by the United States to exclude those lawyers from the meeting, the Chairman issued a preliminary ruling on behalf of the Panel following the line in *EC – Bananas III*: see paragraph 1024 below.

973. In *Korea – Alcoholic Beverages*, Korea requested the Panel to issue a preliminary ruling with respect to permission to have private counsel attend the Panel meetings and address the Panel. The Panel accepted the presence of private counsel. As regards the content of the Panel's preliminary ruling in this regard, see paragraph 1025 below.

[1378] Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 2.34.
[1379] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 245.
[1380] Panel Report on *Korea – Alcoholic Beverages*, para. 5.31.
[1381] Panel Report on *Canada – Wheat Exports and Grain Imports*, para. 6.8.

974. As regards confidentiality concerns when private lawyers are concerned, see paragraphs 491–493 and 970 above.

(j) Panel's timetable

975. In *US – Steel Safeguards*, the Panel sent a letter to all parties including a series of preliminary rulings on organizational matters. Among the issues dealt with, the Panel referred to the timetable for its proceedings. In this regard, see paragraph 830 above.

(k) Executive summaries

976. In *US – Steel Safeguards*, the Panel sent a letter to all parties including a series of preliminary rulings on organizational matters. Among the issues, the Panel referred to executive summaries. For the content of the Panel's preliminary ruling, see paragraph 829 above.

(l) Meaning of the term "second written submissions"

977. In *US – Steel Safeguards*, the Panel sent a letter to all parties including a series of preliminary rulings on organizational matters. Among the issues, the Panel dealt with a request by the United States to change the reference in its Working Procedures from "rebuttal submission" to "rebuttal". In this respect, see paragraph 403 above.

(m) Timing for the filing of submissions in panel proceedings

978. In *US – Steel Safeguards*, the Panel sent a letter to all parties including a series of preliminary rulings[1382] on organizational matters. Among the issues, the Panel referred to the timing for the filing of the parties' written submissions with the WTO Dispute Settlement Registrar. As regards the content of this preliminary ruling, see paragraph 834 above.

(n) Amicus curiae

979. In *EC – Asbestos*, the Panel received several written submissions from non-governmental organizations. The Panel issued a preliminary ruling informing the parties that, in the light of the European Communities' decision to incorporate into its own submissions the *amicus* briefs submitted by two organizations, the Panel would consider these two documents on the same basis as the other documents furnished by the European Communities in this dispute. At the second substantive meeting of the Panel with the parties, the Panel gave Canada the opportunity to reply, in writing or orally, to the arguments set forth in these two *amicus* briefs. At that same meeting, the Panel also informed the parties that it had decided not to take into consideration the other *amicus* briefs submitted.[1383] At the appeal stage, the Appellate Body adopted an additional procedure, for the purposes of this appeal only, pursuant to Rule 16(1) of its Working Procedures, to deal with any possible submissions received from *amici curiae*. With respect to the additional procedures, see Section XXXII.B.9 above. Pursuant to the additional procedure, the Appellate Body received 17 applications requesting leave to file a written brief in this appeal. Six of these 17 applications were received after the deadline specified in the additional procedure and, for this reason, leave to file a written brief was denied to these six applicants. The other 11 applications were considered by the Appellate Body but finally denied for failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure.[1384]

3. Timing

(a) Promptness of objections

980. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body ruled that parties must raise objections in a timely manner:

> "When a Member wishes to raise an objection in dispute settlement proceedings, it is always incumbent on that Member to do so promptly. A Member that fails to raise its objections in a timely manner, notwithstanding one or more opportunities to do so, may be deemed to have waived its right to have a panel consider such objections."[1385]

981. In *US – 1916 Act*, the Appellate Body agreed with the Panel that objections on the Panel's jurisdiction should not be raised at the interim review stage for the first time although it also agreed with the Panel that certain jurisdictional issues may need to be addressed by the Panel at any time:

> "We agree with the Panel that the interim review was not an appropriate stage in the Panel's proceedings to raise objections to the Panel's jurisdiction for the first time. An objection to jurisdiction should be raised as early as possible and panels must ensure that the requirements of due process are met. However, we also agree with the Panel's consideration that 'some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time.'[1386] We do not share

[1382] For "preliminary rulings", see Section XXXVI.C.

[1383] Panel Report on *EC – Asbestos*, paras. 6.1–6.4 and 8.12–8.14.

[1384] Appellate Body Report on *EC – Asbestos*, paras. 50–57.

[1385] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50.

[1386] (*footnote original*) EC Panel Report, para. 5.17. We note that it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it. See, for example, *Case Concerning the Administration of the Prince von Pless (Preliminary Objection)* (1933) P.C.I.J. Ser. A/B, No. 52, p. 15; Individual Opinion of President Sir A. McNair, *Anglo-Iranian Oil Co. Case (Preliminary Objection)*

the European Communities' view that objections to the jurisdiction of a panel are appropriately regarded as simply 'procedural objections'. The vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings. We, therefore, see no reason to accept the European Communities' argument that we must reject the United States' appeal because the United States did not raise its jurisdictional objection before the Panel in a timely manner."[1387]

982. The Appellate Body on *Thailand – H-Beams* stressed that the importance of the request for establishment was such that the defending party was entitled to request further clarification on the claims raised in a panel request from the complaining party, even before the filing of the first written submission:[1388]

"In view of the importance of the request for the establishment of a panel, we encourage complaining parties to be precise in identifying the legal basis of the complaint. We also note that nothing in the DSU prevents a defending party from requesting further clarification on the claims raised in a panel request from the complaining party, even before the filing of the first written submission. In this regard, we point to Article 3.10 of the DSU which enjoins Members of the WTO, if a dispute arises, to engage in dispute settlement procedures 'in good faith in an effort to resolve the dispute'. As we have previously stated, the 'procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes'.[1389]"[1390]

983. In *US – Offset Act (Byrd Amendment)*, the Appellate Body recalled that "[a]n objection to jurisdiction should be raised as early as possible"[1391] and clarified that "it would be preferable, in the interests of due process, for the appellant to raise such issues in the Notice of Appeal, so that appellees will be aware that this claim will be advanced on appeal".[1392]

984. In *EC – Tube or Pipe Fittings*, the European Communities requested the Panel to make a preliminary ruling rejecting a number of exhibits submitted by Brazil during the first substantive meeting on the grounds that they did not form part of the record of the underlying investigation. In this case, the Panel's Working Procedures provided that preliminary rulings must be requested not later than the first written submission, but that exceptions could be made upon showing of "good cause". The Panel noted that, as Brazil submitted these exhibits in conjunction with its oral statement at the first meeting, which meant that the European Communities was not in a position to make a preliminary objection in its first written submission, good cause existed for it to consider the merits of the European Communities request for a preliminary ruling.[1393]

985. In *US – Wheat Exports and Grain Imports*, Canada had raised several preliminary objections regarding compliance by the United States' panel request with the requirements of Article 6.2 (see paragraph 944 above). The United States argued that Canada's request for a preliminary ruling should be denied because Canada failed to raise its procedural objection at the earliest opportunity. The Panel, referring to the Appellate Body's findings in *Thailand – H-Beams* (see paragraph 982 above), considered that "the Appellate Body notes that there is no legal bar to any Member requesting clarification of a panel request even before the filing of the first written submission". It further concluded that such a "statement does not suggest that, in *Thailand – H-Beams*, Thailand should have raised its concerns at the DSB meetings at which Poland's panel request was on the agenda". Accordingly, the Panel rejected the United States' argument.[1394] On appeal, the Appellate Body upheld the Panel and considered that a determination as to the timeliness of a preliminary objection under Article 6.2 must be examined on a case-by-case basis:

"As regards objections to the *adequacy* of panel requests, the Appellate Body has stated that compliance

Footnote 1386 (*cont.*)
(1952) I.C.J. Rep., p. 116; Separate Opinion of Judge Sir H. Lauterpacht in *Case of Certain Norwegian Loans* (1957) I.C.J. Rep., p. 43; and Dissenting Opinion of Judge Sir H. Lauterpacht in the *Interhandel Case (Preliminary Objections)* (1959) I.C.J. Rep., p. 104. See also M. O. Hudson, *The Permanent Court of International Justice 1920–1942* (Macmillan, 1943), pp. 418–419; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. 2 (Grotius Publications, 1986), pp. 530, 755–758; S. Rosenne, *The Law and Practice of the International Court* (Martinus Nijhoff, 1985), pp. 467–468; L. A. Podesta Costa and J. M. Ruda, *Derecho Internacional Público*, Vol. 2 (Tipográfica, 1985), p. 438; M. Diez de Velasco Vallejo, *Instituciones de Derecho International Público* (Tecnos, 1997), p. 759. See also the award of the Iran-United States Claims Tribunal in *Marks & Umman v. Iran*, 8 Iran-United States C.T.R., pp. 296–297 (1985) (Award No. 53–458–3); J. J. van Hof, *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-U.S. Claims Tribunal* (Kluwer, 1991), pp. 149–150; and Rule 41(2) of the rules applicable to ICSID Arbitration Tribunals: International Centre for Settlement of Investment Disputes, Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

[1387] Appellate Body Report on *US – 1916 Act*, para. 54.

[1388] The Appellate Body made this statement as part of its review of a finding by the Panel that Poland's request for the establishment was sufficient to meet the requirements of Article 6.2 of the DSU. The Panel had made such a finding in response to a request for a preliminary ruling by Thailand which had submitted its request to the Panel as part of its first written submission.

[1389] (*footnote original*) Appellate Body Report, *United States – Tax Treatment of "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.

[1390] Appellate Body Report on *Thailand – H-Beams*, para. 97

[1391] The Appellate Body referred to its Report on *US – 1916 Act*, para. 54.

[1392] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 208.

[1393] Panel Report on *EC – Tube or Pipe Fittings*, para. 7.37–7.40.

[1394] Panel Report on *US – Wheat Exports and Grain Imports*, para. 6.10.

with the requirements of Article 6.2 of the DSU must be determined on the merits of each case.[1395] Similarly, it would appear to us that a determination as to the *timeliness* of an objection raised under Article 6.2 must be examined on a case-by-case basis. This is consistent with the discretion given to panels, under the DSU, to deal with specific situations that may arise in a particular case and that are not explicitly regulated.[1396] Furthermore, under Article 12 of the DSU, it is the panel that sets the timetable for the panel proceedings and, therefore, it is the panel that is in the best position to determine whether, under the particular circumstances of each case, an objection is raised in a timely manner."[1397]

(b) Timing of the preliminary ruling

986. In *Canada – Aircraft*, Canada asked the Panel to make a ruling on the Panel's jurisdiction before the deadline set for the submission of the written submission of the parties. The Panel stated:

"In our view, there is no requirement in the DSU for panels to rule on preliminary issues prior to the parties' first written submissions. Nor is there any established practice to this effect, for there are numerous panel reports where rulings on preliminary issues have been reserved until the final report. Furthermore, there may be cases where the panel wishes to seek further clarification from the parties before providing a preliminary ruling."[1398]

987. In *US – Softwood Lumber V*, the United States raised two preliminary objections (on the Panel's terms of reference and introduction of new evidence), but did not request the Panel to rule on them on a preliminary basis.[1399]

D. BURDEN OF PROOF

1. The rule on burden of proof

988. In *US – Wool Shirts and Blouses*, the Appellate Body held that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence:

"[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof.[1400] Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[1401]

In the context of the GATT 1994 and the *WTO Agreement*, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case."[1402]

989. The Panel on *Turkey – Textiles*, in a finding not addressed by the Appellate Body, summed up the rules on burden of proof under WTO jurisprudence as follows:

"(a) it is for the complaining party to establish the violation it alleges;

(b) it is for the party invoking an exception or an affirmative defence to prove that the conditions contained therein are met; and

(c) it is for the party asserting a fact to prove it."[1403]

990. In *EC – Hormones*, the Appellate Body discussed the allocation of the burden of proof in the context of the *SPS Agreement*, but referred to its statement in *US – Wool Shirts and Blouses* and stated that this rule "embodies a rule applicable in any adversarial proceedings":

"The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a

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[1395] *Ibid.*, para. 127. See also Appellate Body Report, *Korea – Dairy*, para. 127.

[1396] Appellate Body Report, *EC – Hormones*, footnote 138 to para. 152. See also Appellate Body Report, *US – FSC (Article 21.5)*, paras. 247–248.

[1397] Appellate Body Report on *US – Wheat Exports and Grain Imports*, para. 206.

[1398] Panel Report on *Canada – Aircraft*, para. 9.15.

[1399] Panel Report on *US – Softwood Lumber V*, para. 7.17.

[1400] (*footnote original*) M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer Law International, 1996), p. 117.

[1401] (*footnote original*) See M. N. Howard, P. Crane and D. A. Hochberg, *Phipson on Evidence*, 14th ed. (Sweet & Maxwell, 1990), p. 52: "The burden of proof rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue." See also L. Rutherford and S. Bone (eds.), *Osborne's Concise Law Dictionary*, 8th ed. (Sweet & Maxwell, 1993), p. 266; Earl Jowitt and C. Walsh, *Jowitt's Dictionary of English Law*, 2nd ed. by J. Burke (Sweet & Maxwell, 1977), Vol. 1, p. 263; L. B. Curzon, *A Directory of Law*, 2nd ed. (Macdonald and Evans, 1983), p. 47; Art. 9, Nouveau Code de Procédure Civile; J. Carbonnier, *Droit Civil*, Introduction, 20th ed. (Presses Universitaires de France, 1991), p. 320; J. Chevalier and L. Bach, *Droit Civil*, 12th ed. (Sirey, 1995), Vol. 1, p. 101; R. Guillien and J. Vincent, *Termes juridiques*, 10th ed. (Dalloz, 1995), p. 384; O. Samyn, P. Simonetta and C. Sogno, *Dictionnaire des Termes Juridiques* (Editions de Vecchi, 1986), p. 250; J. González Pérez, *Manual de Derecho Procesal Administrativo*, 2nd ed. (Editorial Civitas, 1992), p. 311; C. M. Bianca, S. Patti and G. Patti, *Lessico di Diritto Civile* (Giuffré Editore, 1991), p. 550; F. Galgano, *Diritto Privato*, 8th ed. (Casa Editrice Dott. Antonio Milani, 1994), p. 873; and A. Trabucchi, *Istituzioni di Diritto Civile* (Casa Editrice Dott. Antonio Milani, 1991), p. 210.

[1402] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14.

[1403] Panel Report on *Turkey – Textiles*, para. 9.57. See also Panel Report on *Argentina – Textiles and Apparel*, paras. 6.34–6.40.

particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency. This seems straightforward enough and is in conformity with our ruling in *United States – Shirts and Blouses*,[1404] which the Panel invokes and which embodies a rule applicable in any adversarial proceedings."[1405]

991. In *Japan – Apples*, the Appellate Body emphasized the distinction between the two "distinct" principles relating to the burden of proof:

"It is important to distinguish, on the one hand, the principle that the complainant must establish a *prima facie* case of inconsistency with a provision of a covered agreement[1406] from, on the other hand, the principle that the party that asserts a fact is responsible for providing proof thereof.[1407] In fact, the principles are distinct."[1408]

2. Evidence and arguments remain in equipoise

992. In *US – Section 301 Trade Act*, the Panel clarified, in the light of the allocation of the burden of proof, which party would benefit in case of uncertainty (i.e. in case all evidence and arguments were to remain in "equipoise"):

"Since, in this case, both parties have submitted extensive facts and arguments in respect of the EC claims, our task will essentially be to balance all evidence on record and decide whether the EC, as party bearing the original burden of proof, has convinced us of the validity of its claims. In case of uncertainty, i.e. in case all the evidence and arguments remain in equipoise, we have to give the benefit of the doubt to the US as defending party."[1409]

3. Establishing a prima facie case

(a) What is a prima facie case?

993. In *EC – Hormones*, the Appellate Body specified what is meant by the term "prima facie case":

"It is also well to remember that a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."[1410]

(b) Source of evidence for a prima facie case

994. In *US – Wool Shirts and Blouses*, the Appellate Body stated that the nature and scope of evidence required to establish a prima facie case "will vary from measure to measure, provision to provision, and case to case".[1411]

995. In *Korea – Dairy*, Korea argued in its appeal that the Panel should have looked solely at the evidence submitted by the European Communities as the complaining party to determine whether the European Communities had met its burden of proof of making a prima facie case. The Appellate Body disagreed and stated, *inter alia*: "In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof":

"Korea appears to suggest that the Panel, in evaluating Korea's actions leading up to the adoption of its safeguard measure, should have looked solely to the evidence submitted by the European Communities as complaining party. We do not agree with Korea in this respect. It is, of course, true that the European Communities has the *onus* of establishing its claim that Korea's safeguard measure is inconsistent with the requirements of Article 4.2 of the *Agreement on Safeguards*. However, under Article 11 of the DSU, a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof. . . . The determination of the significance and weight properly pertaining to the evidence presented by one party is a function of a panel's appreciation of the probative value of all the evidence submitted by both parties considered together.

We note that in examining the [Report of the Korean Authority], the Panel did not do anything out of the ordinary. The European Communities' claim was that Korea had disregarded certain requirements of Article 4.2 of the *Agreement on Safeguards* in its actions preceding and accompanying the adoption of its safeguard measure. The [Report of the Korean Authority] was issued by the Korean authorities which, *inter alia*, investigated and evaluated the assertions of serious injury to the domestic industry involved. Thus, that Report was clearly relevant to the task of the Panel to determine the facts, and the Panel was within its discretionary authority in deciding whether or not, or to what extent, it should rely upon

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[1404] (*footnote original*) Adopted 23 May 1997, WT/DS33/AB/R, p. 14.
[1405] Appellate Body Report on *EC – Hormones*, para. 98.
[1406] (*footnote original*) Appellate Body Report on *EC – Hormones*, para. 98.
[1407] (*footnote original*) Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335.
[1408] Appellate Body Report on *Japan – Apples*, para. 157.
[1409] Panel Report on *US – Section 301 Trade Act*, para. 7.14.
[1410] Appellate Body Report on *EC – Hormones*, para. 104. This was confirmed by the Appellate Body in its Reports *Japan – Agricultural Products II*, paras. 98 and 136 and *Japan – Apples*, para. 159.
[1411] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14.

the Report in ascertaining the facts relating to Korea's injury determination."[1412]

(c) No need to state explicitly that a prima facie case has been made.

996. The Appellate Body has held on several occasions that a Panel was not obliged to make an explicit finding that a party has met its burden of proof of making a prima facie case: for example, see paragraph 1005 below. Further, in *Thailand – H-Beams*, the Appellate Body stated:

"In our view, a panel is not required to make a separate and specific finding, in each and every instance, that a party has met its burden of proof in respect of a particular claim, or that a party has rebutted a *prima facie* case. Thus, the Panel did not err to the extent that it made no specific findings on whether Poland had met its burden of proof."[1413]

997. In *Korea – Dairy*, Korea argued in its appeal that "'as a threshold matter', 'a panel must evaluate and make a finding on whether the complaining Member (i.e., the Member with the burden of proof) has established a *prima facie* case of a violation', before requiring the respondent to submit evidence of its own case or defence." By ignoring this step, the Panel "'did not consider and *a fortiori* did not find that the European Communities made a prima facie case that justified its proceeding to examine the evidence and arguments' of Korea".[1414] The Appellate Body stated:

"We find no provision in the DSU or in the Agreement on Safeguards that requires a panel to make an explicit ruling on whether the complainant has established a *prima facie* case of violation before a panel may proceed to examine the respondent's defence and evidence."[1415]

4. Relevance of the difficulty of collecting information to prove a case

998. In *EC – Sardines*, the Appellate Body also found that there is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that might possibly be encountered by the complainant and the respondent in collecting information to prove a case:

"The degree of difficulty in substantiating a claim or a defence may vary according to the facts of the case and the provision at issue. For example, on the one hand, it may be relatively straightforward for a complainant to show that a particular measure has a text that establishes an explicit and formal discrimination between like products and is, therefore, inconsistent with the national treatment obligation in Article III of the GATT 1994. On the other hand, it may be more difficult for a complainant to substantiate a claim of a violation of Article III of the GATT 1994 if the discrimination does not flow from the letter of the legal text of the measure, but rather is a result of the administrative practice of the domestic authorities of the respondent in applying that measure. But, in both of those situations, the complainant must prove its claim. There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case."[1416]

5. Necessary collaboration of the parties

999. In *Argentina – Textiles and Apparel*, the Panel, in a finding not addressed by the Appellate Body, made the following statement regarding burden of proof and the requirement of collaboration of the parties in presenting facts and evidence to the panel:

"Another incidental rule to the burden of proof is the requirement for collaboration of the parties in the presentation of the facts and evidence to the panel and especially the role of the respondent in that process. It is often said that the idea of peaceful settlement of disputes before international tribunals is largely based on the premise of co-operation of the litigating parties. In this context the most important result of the rule of collaboration appears to be that the adversary is obligated to provide the tribunal with relevant documents which are in its sole possession. This obligation does not arise until the claimant has done its best to secure evidence and has actually produced some *prima facie* evidence in support of its case. It should be stressed, however, that 'discovery' of documents, in its common-law system sense, is not available in international procedures.

. . . Before an international tribunal, parties do have a duty to collaborate in doing their best to submit to the adjudicatory body all the evidence in their possession."[1417]

6. Relationship between the burden of proof and a panel's fact-finding mandate

1000. In *Japan – Agricultural Products II*, the Appellate Body held that while a panel had a broad and "comprehensive authority" to engage in fact-finding under Article 13 of the *DSU*, it could not use this authority so as to effectively relieve the complaining party of making a prima facie case of inconsistency:

[1412] Appellate Body Report on *Korea – Dairy*, paras. 137–138.
[1413] Appellate Body Report on *Thailand – H-Beams*, para. 134. See also Appellate Body Report on *Canada – Aircraft*, para. 185.
[1414] Appellate Body Report on *Korea – Dairy*, para. 144.
[1415] Appellate Body Report on *Korea – Dairy*, para. 145.
[1416] Appellate Body Report on *EC – Sardines*, para. 281.
[1417] Panel Report on *Argentina – Textiles and Apparel*, paras. 6.40 and 6.58.

"Article 13 of the DSU allows a panel to seek *information* from any relevant source and to consult individual experts or expert bodies to obtain their *opinion* on certain aspects of the matter before it. In our Report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ('*United States – Shrimp*'), we noted the 'comprehensive nature' of this authority, and stated that this authority is 'indispensably necessary' to enable a panel to discharge its duty imposed by Article 11 of the DSU to 'make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements* . . . .'

Furthermore, we note that the present dispute is a dispute under the *SPS Agreement*. Article 11.2 of the *SPS Agreement* explicitly *instructs* panels in disputes under this Agreement involving scientific and technical issues to 'seek advice from experts'.

Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.

In the present case, the Panel was correct to seek information and advice from experts to help it to understand and evaluate the evidence submitted and the arguments made by the United States and Japan with regard to the alleged violation of Article 5.6. The Panel erred, however, when it used that expert information and advice as the basis for a finding of inconsistency with Article 5.6, since the United States did not establish a *prima facie* case of inconsistency with Article 5.6 based on claims relating to the 'determination of sorption levels'. The United States did not even *argue* that the 'determination of sorption levels' is an alternative measure which meets the three elements under Article 5.6."[1418]

7. Relevance of the mandatory/discretionary distinction

1001. In *US – Carbon Steel*, the Appellate Body, endorsing the approach of the Panel, considered that when there is an issue related to the mandatory/discretionary aspect of the law of a Member, the burden of proof will be on the complainant to demonstrate that the law is mandatory. The Appellate Body further noted that a responding Member's law will be treated as WTO-consistent "until proven otherwise":

"[A] responding Member's law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion . . . . The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case."[1419]

1002. As regards which party has the burden of proof in respect of whether certain legislation is mandatory or discretionary when this is invoked as an affirmative defence, see paragraph 188 above.

1003. As regards the mandatory/discretionary distinction in general, see Section VI.B.3(c)(ii) above.

8. Application of the burden of proof in the context of a given WTO Agreement

(a) Burden of proof in the GATT 1994

1004. In *India – Quantitative Restrictions*, India argued in its appeal that the Panel erred in finding that the proviso to Article XVIII:11 of *GATT 1994* was to be properly characterized as an affirmative defence and that India, therefore, bore the burden of proof in respect thereof. The Appellate Body upheld the finding of the Panel:

"Assuming that the complaining party has successfully established a *prima facie* case of inconsistency with Article XVIII:11 and the Ad Note, the responding party may, in its defence, either rebut the evidence adduced in support of the inconsistency or invoke the proviso. In the latter case, it would have to demonstrate that the complaining party violated its obligation not to require the responding party to change its development policy. This is an assertion with respect to which the responding party must bear the burden of proof. We, therefore, agree with the Panel that the burden of proof with respect to the proviso is on India."[1420]

1005. In *India – Quantitative Restrictions*, India argued on appeal that the Panel did not apply the rules on burden of proof correctly. India claimed that the Panel failed to analyse whether the United States had made a prima facie case prior to considering the answers provided by the IMF to the Panel's questions and prior to shifting the burden of proof to India. India also argued that the evidence introduced by the United States could not, as a matter of law, have constituted a prima facie case that India's balance-of-payments restrictions were not justified under the Ad Note. The Appellate

[1418] Appellate Body Report on *Japan – Agricultural Products II*, paras. 127–130.
[1419] Appellate Body Report on *US – Carbon Steel*, para. 157.
[1420] Appellate Body Report on *India – Quantitative Restrictions*, para. 136.

Body stated that a Panel was not required to make an explicit statement that a prima facie case has been made:

> "In support of its argument, India refers to the Appellate Body Report in *European Communities – Hormones,* where the Appellate Body stated:
>
> > 'In accordance with our ruling in *United States – Shirts and Blouses*, the Panel should have begun the analysis of each legal provision by examining whether the United States and Canada had presented evidence and legal instruments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities under each Article of the *SPS Agreement* addressed by the Panel. . . . Only after such a *prima facie* determination has been made by the Panel may the onus be shifted to the European Communities to bring forward evidence and arguments to disprove the complaining party's claim.'
>
> We do not interpret the above statement as requiring a panel to conclude that a *prima facie* case is made before it considers the views of the IMF or any other experts that it consults. Such consideration may be useful in order to determine whether a *prima facie* case has been made. Moreover, we do not find it objectionable that the Panel took into account, in assessing whether the United States had made a *prima facie* case, the responses of India to the arguments of the United States. This way of proceeding does not imply, in our view, that the Panel shifted the burden of proof to India. We, therefore, are not of the opinion that the Panel erred in law in proceeding as it did."[1421]

1006. The Appellate Body on *India – Quantitative Restrictions* then rejected India's appeal on the grounds "that the evidence introduced by the United States could not, as a matter of law, have constituted a *prima facie* case". The Appellate Body recalled its previous findings in this respect and held that the "weighing and assessing of the evidence" was outside the scope of review.

> "As to the second alleged mistake, namely, that the evidence introduced by the United States could not, as a matter of law, have constituted a *prima facie* case that India's balance-of-payments restrictions were not justified under the Ad Note, we recall that in *European Communities – Hormones*, the Appellate Body stated:
>
> > 'Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts . . .'
>
> Similarly, in *Korea – Taxes on Alcoholic Beverages*, the Appellate Body stated:
>
> > 'The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review. . . .'
>
> We believe that this second mistake alleged by India relates to the weighing and assessing of the evidence adduced by the United States, and is, therefore, outside the scope of appellate review."[1422]

(b) Burden of proof under the Enabling Clause

1007. The Appellate Body stated in *EC – Tariff Preferences* that as an exception provision, the ultimate burden of proof under the Enabling Clause falls on the respondent party:

> "As a general rule, the burden of proof for an 'exception' falls on the respondent, that is, as the Appellate Body stated in *US – Wool Shirts and Blouses*, on the party 'assert[ing] the affirmative of a particular . . . defence'.[1423] From this allocation of the burden of proof, it is normally for the respondent, first, to *raise* the defence and, second, to *prove* that the challenged measure meets the requirements of the defence provision.
>
> We are therefore of the view that the European Communities must *prove* that the Drug Arrangements satisfy the conditions set out in the Enabling Clause. Consistent with the principle of *jura novit curia,* it is not the responsibility of the European Communities to provide us with the legal interpretation to be given to a particular provision in the Enabling Clause; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause."[1424]

1008. However, the Appellate Body also found in *EC – Tariff Preferences* that the complainant bears the burden of raising the Enabling Clause in its panel request in order to convey the "legal basis of the complaint sufficient to present the problem clearly" as required by Article 6 of the DSU. At the same time, the Appellate Body reiterated its view that the ultimate burden of justifying the challenged measure under the Enabling Clause is with the respondent:

> "In our view, the special status of the Enabling Clause in the WTO system has particular implications for WTO dispute settlement. As we have explained, paragraph 1 of the Enabling Clause enhances market access for

[1421] Appellate Body Report on *India – Quantitative Restrictions*, paras. 141–142.

[1422] Appellate Body Report on *India – Quantitative Restrictions*, paras. 143–144.

[1423] (*footnote original*) Appellate Body Report, p. 14, DSR 1997:I, at 335. (See also Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 133; and Appellate Body Report, *India – Quantitative Restrictions*, para. 136.)

[1424] Appellate Body Report on *EC – Tariff Preferences*, paras. 104–105.

developing countries as a means of improving their economic development by authorizing preferential treatment for those countries, 'notwithstanding' the obligations of Article I. It is evident that a Member cannot implement a measure authorized by the Enabling Clause without according an 'advantage' to a developing country's products over those of a developed country. It follows, therefore, that every measure undertaken pursuant to the Enabling Clause would necessarily be inconsistent with Article I, if assessed on that basis alone, but it would be exempted from compliance with Article I because it meets the requirements of the Enabling Clause. Under these circumstances, we are of the view that a complaining party challenging a measure taken pursuant to the Enabling Clause must allege more than mere inconsistency with Article I:1 of the GATT 1994, for to do only that would not convey the 'legal basis of the complaint sufficient to present the problem clearly'. In other words, it is insufficient in WTO dispute settlement for a complainant to allege inconsistency with Article I:1 of the GATT 1994 if the complainant seeks also to argue that the measure is not justified under the Enabling Clause. This is especially so if the challenged measure, like that at issue here, is plainly taken pursuant to the Enabling Clause, as we discuss *infra*.

. . .

The responsibility of the complaining party in such an instance, however, should not be overstated. It is merely to *identify* those provisions of the Enabling Clause with which the scheme is allegedly inconsistent, without bearing the burden of *establishing* the facts necessary to support such inconsistency. That burden, as we concluded above, remains on the responding party invoking the Enabling Clause as a defence."[1425]

(c) Burden of proof in the SPS Agreement

(i) *Burden of proof in the context of Article 2.2 of the SPS Agreement*

1010. The Appellate Body explained in *Japan – Apples* that the complainant could establish a prima facie case of inconsistency with Article 2.2 of the *SPS Agreement* even though it confined its arguments to a claim asserted by it, and found that the Panel acted within the limits of its investigative authority when the Panel assessed relevant allegations of fact asserted by Japan as the respondent:

"Japan also contends that the Panel did not have the authority to make certain findings of fact . . . . We disagree with Japan. . . .The Panel acted within the limits of its investigative authority because it did nothing more than assess relevant allegations of fact asserted by Japan, in the light of the evidence submitted by the parties and the opinions of the experts.

Japan also submits that, 'in order to establish a *prima facie* case of insufficient scientific evidence under Article 2.2 of the SPS Agreement, the complaining party must establish that there is not sufficient evidence for *any* of the perceived risks underlying the measure.' . . . We find no basis for the approach advocated by Japan. As the Appellate Body stated in *EC – Hormones*, 'a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.'[1426] In *US – Wool Shirts and Blouses*, the Appellate Body stated that the nature and scope of evidence required to establish a *prima facie* case 'will vary from measure to measure, provision to provision, and case to case.'[1427] In the present case, the Panel appears to have concluded that in order to demonstrate a *prima facie* case that Japan's measure is maintained without sufficient scientific evidence, it sufficed for the United States to address only the question of whether mature, symptomless apples could serve as a pathway for fire blight.

The Panel's conclusion seems appropriate to us for the following reasons. First, the claim pursued by the United States was that Japan's measure is maintained without sufficient scientific evidence to the extent that it applies to mature, symptomless apples exported from the United States to Japan. What is required to demonstrate a *prima facie* case is necessarily influenced by the nature and the scope of the claim pursued by the complainant. A complainant should not be required to prove a claim it does not seek to make. Secondly, the Panel found that mature, symptomless apple fruit is the commodity 'normally exported' by the United States to Japan.[1428] The Panel indicated that the risk that apple fruit other than mature, symptomless apples may actually be imported into Japan would seem to arise primarily as a result of human or technical error, or illegal actions,[1429] and noted that the experts characterized errors of handling and illegal actions as 'small' or 'debatable' risks.[1430] Given the characterization of these risks, in our opinion it was legitimate for the Panel to consider that the United States could demonstrate a *prima facie* case of inconsistency with Article 2.2 of the SPS Agreement through argument based solely on mature, symptomless apples. Thirdly, the record contains no evidence to suggest that apples other than mature, symptomless ones have ever been exported to Japan from the United States as a result of errors of handling or illegal actions. . . . "[1431]

[1425] Appellate Body Report on *EC – Tariff Preferences*, paras. 110 and 115.

[1426] (*footnote original*) Appellate Body Report on *EC – Hormones*, para. 104.

[1427] (*footnote original*) Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335.

[1428] (*footnote original*) Panel Report, para. 8.141. The Panel also found that "the importation of immature, infected apples may only occur as a result of a handling error or an illegal action". (*Ibid.*, footnote 2275 to para. 8.121.)

[1429] (*footnote original*) Panel Report, para. 8.174.

[1430] (*footnote original*) Panel Report, para. 8.161.

[1431] Appellate Body Report on *Japan – Apples*, paras. 158–160.

(ii) *Burden of proof in the context of Article 3.2 of the SPS Agreement*

1012. In *EC – Hormones*, the Appellate Body examined whether the Panel correctly allocated the burden of proof under the *SPS Agreement*. The Appellate Body noted that the Panel made an interpretative ruling that "the *SPS Agreement* allocates the 'evidentiary burden' to the Members imposing an SPS measure" on the basis of, *inter alia*, Article 3.2 of the *SPS Agreement*. The Appellate Body noted that the Panel drew a reverse inference from Article 3.2 of the *SPS Agreement* to the effect that "if a measure does not conform to international standards, the Member imposing such a measure must bear the burden of proof in any complaint of inconsistency with the provisions of the *SPS Agreement*." The Appellate Body reversed the Panel's ruling and stated:

> "The presumption of consistency with relevant provisions of the *SPS Agreement* that arises under Article 3.2 in respect of measures that conform to international standards may well be an *incentive* for Members so to conform their SPS measures with such standards. It is clear, however, that a decision of a Member not to conform a particular measure with an international standard does not authorize imposition of a special or generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*.
>
> . . .
>
> The Panel relies on two interpretative points in reaching its above finding. First, the Panel posits the existence of a 'general rule – exception' relationship between Article 3.1 (the general obligation) and Article 3.3 (an exception) and applies to the *SPS Agreement* what it calls 'established practice under GATT 1947 and GATT 1994' to the effect that the burden of justifying a measure under Article XX of the GATT 1994 rests on the defending party. It appears to us that the Panel has misconceived the relationship between Articles 3.1, 3.2 and 3.3, a relationship discussed below, which is qualitatively different from the relationship between, for instance, Articles I or III and Article XX of the GATT 1994. Article 3.1 of the *SPS Agreement* simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement, that is, where a Member has projected for itself a higher level of sanitary protection than would be achieved by a measure based on an international standard. Article 3.3 recognizes the autonomous right of a Member to establish such higher level of protection, provided that that Member complies with certain requirements in promulgating SPS measures to achieve that level. The general rule in a dispute settlement proceeding, requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an 'exception'. In much the same way, merely characterizing a treaty provision as an 'exception' does not by itself justify a 'stricter' or 'narrower' interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation. It is also well to remember that a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."[1432]

(d) Burden of proof in the SCM Agreement

1013. In *Brazil – Aircraft*, Canada appealed the Panel's finding that, in a case involving a claim of violation of Article 3.1(a) of the *SCM Agreement* against a developing country Member, the complaining party has the burden of proving that the developing country Member in question has not complied with at least one of the elements set out in Article 27.4 of the *SCM Agreement*. Canada argued that since Article 27.4 of the *SCM Agreement* is in the nature of a conditional exception or an affirmative defence, the respondent developing country Member has the burden of proof whereas Brazil submitted that since Article 27 is a transitional provision that contains a set of special and differential rights and obligations for developing country Members, the complaining party, namely Canada, has the burden of proving that the developing country Member is not in compliance with Article 27.4 of the *SCM Agreement*. The Appellate Body stated:

> "On reading paragraphs 2(b) and 4 of Article 27 together, it is clear that the conditions set forth in paragraph 4 are *positive obligations* for developing country Members, *not* affirmative defences. If a developing country Member complies with the obligations in Article 27.4, the prohibition on export subsidies in Article 3.1(a) simply does not apply. However, if that developing country Member does *not* comply with those obligations, Article 3.1(a) *does* apply.
>
> For these reasons, we agree with the Panel that the burden is on the complaining party (*in casu* Canada) to demonstrate that the developing country Member (*in casu* Brazil) is not in compliance with at least one of the elements set forth in Article 27.4. If such non-compliance is demonstrated, then, and only then, does the prohibition of Article 3.1(a) *apply* to that developing country Member."[1433]

1014. In *Canada – Aircraft*, Canada justified its refusal to provide information on the disputed financing of the

[1432] Appellate Body Report on *EC – Hormones*, paras. 102 and 104. See also Panel Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 6.22.

[1433] Appellate Body Report on *Brazil – Aircraft*, paras. 140–141.

transaction at issue on the grounds that Brazil had not established a prima facie case that such financing constituted a prohibited export subsidy under Article 3.1(a) of the *SCM Agreement*. The Appellate Body stated:

> "A *prima facie* case, it is well to remember, is a case which, in the absence of effective refutation by the defending party (that is, in the present appeal, the Member requested to provide the information), requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case. There is, as noted earlier, nothing in either the DSU or the *SCM Agreement* to support Canada's assumption. To the contrary, a panel is vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a *prima facie* basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a *prima facie* case or defence. Furthermore, a refusal to provide information requested on the basis that a *prima facie* case has not been made implies that the Member concerned believes that it is able to judge for itself whether the other party has made a *prima facie* case. However, no Member is free to determine for itself whether a *prima facie* case or defence has been established by the other party. That competence is necessarily vested in the panel under the DSU, and not in the Members that are parties to the dispute."[1434]

(e) Burden of proof in the TRIPS Agreement

1015. In *India – Patents (US)*, India challenged the application of the burden of proof by the Panel, arguing that the Panel erroneously required the United States, the complaining party, merely to raise "reasonable doubts" suggesting a violation of Article 70.8 of the *TRIPS Agreement*, and subsequently placed the burden on India to dispel such doubts. The Appellate Body recalled the finding of the Panel and rejected India's claim:

> "India raises the additional argument that the Panel erred in its application of the burden of proof in assessing Indian municipal law. In particular, India alleges that the Panel, after having required the United States merely to raise 'reasonable doubts' suggesting a violation of Article 70.8, placed the burden on India to dispel such doubts.
>
> The Panel states:
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> > 'As the Appellate Body report on *Shirts and Blouses* points out, "a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim". In this case, it is the United States that claims a violation by India of Article 70.8 of the *TRIPS Agreement*. Therefore, it is up to the United States to put forward evidence and legal arguments sufficient to demonstrate that action by India is inconsistent with the obligations assumed by India under Article 70.8. In our view, the United States has successfully put forward such evidence and arguments. Then, . . . the onus shifts to India to bring forward evidence and arguments to disprove the claim. We are not convinced that India has been able to do so (footnotes deleted).'[1435]
>
> This statement of the Panel is a legally correct characterization of the approach to burden of proof that we set out in *United States – Shirts and Blouses*.[1436] However, it is not sufficient for a panel to enunciate the correct approach to burden of proof; a panel must also apply the burden of proof correctly. A careful reading of paragraphs 7.35 and 7.37 of the Panel Report reveals that the Panel has done so in this case. These paragraphs show that the United States put forward evidence and arguments that India's 'administrative instructions' pertaining to mailbox applications were legally insufficient to prevail over the application of certain mandatory provisions of the Patents Act. India put forward rebuttal evidence and arguments. India misinterprets what the Panel said about 'reasonable doubts'. The Panel did not require the United States merely to raise 'reasonable doubts' before the burden shifted to India. Rather, after properly requiring the United States to establish a *prima facie* case and after hearing India's rebuttal evidence and arguments, the Panel concluded that *it* had 'reasonable doubts' that the 'administrative instructions' would prevail over the mandatory provisions of the Patents Act if a challenge were brought in an Indian court.
>
> For these reasons, we conclude that the Panel applied the burden of proof correctly in assessing the compliance of India's domestic law with Article 70.8(a) of the *TRIPS Agreement*."[1437]

(f) Burden of proof in the TBT Agreement

1016. In *EC – Sardines*, the European Communities had asserted before the Panel that Codex Stan 94 was "ineffective or inappropriate" to fulfil the "legitimate objectives" of the European Communities Regulation at issue. The Panel was of the view that the European Communities was thus asserting the affirmative of a particular claim or defence, and, therefore, that the burden of proof was on the European Communities to demonstrate that claim.[1438] The Panel justified its position as follows: first, it reasoned that the complainant is

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[1434] Appellate Body Report on *Canada – Aircraft*, para. 192. See also Appellate Body Report on *Canada – Aircraft*, paras. 217–219.
[1435] (*footnote original*) Panel Report, para. 7.40.
[1436] (*footnote original*) Adopted 23 May 1997, WT/DS33/AB/R, p. 16.
[1437] Appellate Body Report on *India – Patents (US)*, paras. 73–75.
[1438] Panel Report on *EC – Sardines*, para. 7.50.

not in a position to "spell out" the "legitimate objectives" pursued by a Member through a technical regulation; and, second, it reasoned "that the assessment of whether a relevant international standard is 'inappropriate' ... may extend to considerations which are proper to the Member adopting or applying a technical regulation".[1439] The Panel, although it acknowledged the Appellate Body's finding in *EC – Hormones* (see paragraph 990 above), concluded that it "does not have a direct bearing" on the question of the allocation of the burden of proof under the second part of Article 2.4 of the *TBT Agreement*".[1440] The Appellate Body disagreed with the Panel's conclusion that its ruling on the issue of the burden of proof in *EC – Hormones* had no "direct bearing" on this case and reversed the Panel's finding on burden of proof.[1441] The Appellate Body thus concluded that the complaining Member seeking a ruling on the inconsistency of the measure applied by the defendant with Article 2.4 of the *TBT Agreement* was to bear the burden of proving its claim:

> "We disagree with the Panel's conclusion that our ruling on the issue of the burden of proof has no 'direct bearing' on this case. The Panel provides no explanation for this conclusion and, indeed, could not have provided any plausible explanation. For there are strong conceptual similarities between, on the one hand, Article 2.4 of the *TBT Agreement* and, on the other hand, Articles 3.1 and 3.3 of the *SPS Agreement*, and our reasoning in *EC – Hormones* is equally apposite for this case. The heart of Article 3.1 of the *SPS Agreement* is a requirement that Members base their sanitary or phytosanitary measures on international standards, guidelines, or recommendations. Likewise, the heart of Article 2.4 of the *TBT Agreement* is a requirement that Members use international standards as a basis for their technical regulations. Neither of these requirements in these two agreements is absolute. Articles 3.1 and 3.3 of the *SPS Agreement* permit a Member to depart from an international standard if the Member seeks a level of protection higher than would be achieved by the international standard, the level of protection pursued is based on a proper risk assessment, and the international standard is not sufficient to achieve the level of protection pursued. Thus, under the *SPS Agreement*, departing from an international standard is permitted in circumstances where the international standard is ineffective to achieve the objective of the measure at issue. Likewise, under Article 2.4 of the *TBT Agreement*, a Member may depart from a relevant international standard when it would be an 'ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued' by that Member through the technical regulation.
>
> Given the conceptual similarities between, on the one hand, Articles 3.1 and 3.3 of the *SPS Agreement* and, on the other hand, Article 2.4 of the *TBT Agreement*, we see no reason why the Panel should not have relied on the principle we articulated in *EC – Hormones* to determine the allocation of the burden of proof under Article 2.4 of the *TBT Agreement*. In *EC – Hormones*, we found that a 'general rule–exception' relationship between Articles 3.1 and 3.3 of the *SPS Agreement* does not exist, with the consequence that the complainant had to establish a case of inconsistency with *both* Articles 3.1 and 3.3.[1442] We reached this conclusion as a consequence of our finding there that 'Article 3.1 of the *SPS Agreement* simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement'.[1443] Similarly, the circumstances envisaged in the second part of Article 2.4 are excluded from the scope of application of the first part of Article 2.4. Accordingly, as with Articles 3.1 and 3.3 of the *SPS Agreement*, there is no 'general rule–exception' relationship between the first and the second parts of Article 2.4. Hence, in this case, it is for Peru – as the complaining Member seeking a ruling on the inconsistency with Article 2.4 of the *TBT Agreement* of the measure applied by the European Communities – to bear the burden of proving its claim. This burden includes establishing that Codex Stan 94 has not been used 'as a basis for' the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to fulfil the 'legitimate objectives' pursued by the European Communities through the EC Regulation."[1444]

1017. As regards the statements of the Appellate Body in *EC – Sardines* on the lack of relevance of the difficulty of collecting information to prove a case in the allocation of the burden of proof, see paragraph 998 above.

(g) Burden of proof in the Agreement on Agriculture

1018. With respect to the burden of proof in relation to Article 10.3 of the *Agreement on Agriculture*, see the excerpts from the reports of the panels and Appellate Body referenced in the Chapter on the *Agreement on Agriculture*, Section XI.B.3(b).

(h) Burden of proof in Article 21.3(c) arbitrations

1019. With respect to the burden of proof in Article 21.3(c) proceedings, see paragraphs 593–594 above.

(i) Burden of proof in Article 21.5 compliance panel proceedings

1020. With respect to the burden of proof in Article 21.5 proceedings, see paragraph 622 above.

[1439] Panel Report on *EC – Sardines*, para. 7.51.
[1440] Panel Report on *EC – Sardines*, footnote 70 to para. 7.50.
[1441] Appellate Body Report on *EC – Sardines*, para. 282.
[1442] (*footnote original*) Appellate Body Report, *supra*, footnote 17, para. 104.
[1443] (*footnote original*) Ibid.
[1444] Appellate Body Report on *EC – Sardines*, paras. 274–275.

(j) Burden of proof in Article 22.6 arbitrations

1021. With respect to the burden of proof under Article 22.6 proceedings, see paragraphs 689–690 above.

E. PRIVATE COUNSEL

1. Presence of private counsel in oral hearings

1022. In *EC – Bananas III*, the Panel did not allow the presence of private lawyers at the first substantive meeting.[1445] The Appellate Body, however, allowed their presence in the oral hearing and to that effect it issued a preliminary ruling indicating that nothing in the *WTO Agreement*, the *DSU* or its Working Procedures prevented a Member from admitting whomever it deems fit to become part of its delegation to Appellate Body proceedings. Accordingly, the Appellate Body held that a Member could include private counsel in its delegation to an Appellate Body hearing:

> "[W]e can find nothing in the *Marrakesh Agreement Establishing the World Trade Organization* (the '*WTO Agreement*'), the *DSU* or the *Working Procedures*, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings. Having carefully considered the request made by the government of Saint Lucia, and the responses dated 14 July 1997 received from Canada; Jamaica; Ecuador, Guatemala, Honduras, Mexico and the United States, we rule that it is for a WTO Member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body."[1446]

1023. In its Report, the Appellate Body in *EC – Bananas III* further justified its preliminary ruling (see paragraph 1022 above) as follows:

> "We note that there are no provisions in the *Marrakesh Agreement Establishing the World Trade Organization* (the '*WTO Agreement*'), in the DSU or in the *Working Procedures* that specify who can represent a government in making its representations in an oral hearing of the Appellate Body. With respect to GATT practice, we can find no previous panel report which speaks specifically to this issue in the context of panel meetings with the parties. We also note that representation by counsel of a government's own choice may well be a matter of particular significance – especially for developing-country Members – to enable them to participate fully in dispute settlement proceedings. Moreover, given the Appellate Body's mandate to review only issues of law or legal interpretation in panel reports, it is particularly important that governments be represented by qualified counsel in Appellate Body proceedings."[1447]

1024. In *Indonesia – Autos*, the Panel applied the same principle to the presence of private lawyers before panels:

> "I wish to inform the parties that having carefully reviewed the letters received in the preliminary matter before us, and having heard the arguments of the parties, the Panel does not agree with the United States' request to exclude from meetings of the Panel certain persons nominated by the Government of Indonesia as members of its delegation. We conclude that it is for the Government of Indonesia to nominate the members of its delegation to meetings of this Panel, and we find no provision in the WTO Agreement or the DSU, including the standard rules of procedure included therein, which prevents a WTO Member from determining the composition of its delegation to WTO panel meetings. Nor does past practice in GATT and WTO dispute settlement point us to a different conclusion in this case. In particular, we note that unlike in this present case, the working procedures of the *Bananas III* Panel contained a specific provision requiring the presence only of government officials.
>
> We would like to emphasize that all members of parties' delegations – whether or not they are government employees – are present as representatives of their governments, and as such are subject to the provisions of the DSU and of the standard working procedures, including Articles 18.1 and 18.2 of the DSU and paragraphs 2 and 3 of those procedures. In particular, parties are required to treat as confidential all submissions to the Panel and all information so designated by other Members; and, in addition, the Panel meets in closed session. Accordingly, we expect that all delegations will fully respect those obligations and will treat these proceedings with the utmost circumspection and discretion. I would ask the four Heads of Delegation to confirm that all members of their delegations are present as representatives of their governments, and as such will abide by all of the applicable provisions; and therefore that the governments are responsible for the actions of their representatives.[1448]"[1449]

1025. In *Korea – Alcoholic Beverages*, Korea requested the Panel to issue a preliminary ruling with respect to permission to have private counsel attend the Panel meetings and address the Panel. In Korea's view, in order to fully defend its interests and match the much greater resources of the complaining parties, it had to retain the services of expert counsel with long standing experience in matters of international economic law and international economics. The European Communities had no problem with the presence of private counsel provided that Korea assumed full responsibility for any breach of confidentiality which might result from the presence at the Panel meetings of non-governmental persons. The

[1445] Panel Report on *EC – Bananas III*, paras. 7.10–7.12.
[1446] Appellate Body Report on *EC – Bananas III*, para. 10.
[1447] Appellate Body Report on *EC – Bananas III*, para. 12.
[1448] (*footnote original*) The Panel, on referring to *Bananas III*, referred to the Appellate and Panel Reports on *EC – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27, adopted on 25 September 1997.
[1449] Panel Report on *Indonesia – Autos*, para. 14.2.

United States, however, indicated, among other things, that the established practice applied in disputes under the GATT 1947 system excluded the routine presence of private lawyers in panel proceedings and asked the Panel, in the event that it decided to accept Korea's request, to impose appropriate safeguards with respect to those persons. The Panel accepted the presence of private counsel as follows:

> "Having considered the request of Korea for the right to use private counsel at the panel meetings, and the responses of the European Communities and the United States, we decided to permit the appearance of private counsel before the Panel and to allow them to address arguments to the Panel in this case. In our view, it is appropriate to grant such a request in order to ensure that Korea has every opportunity to fully defend its interests in this case. However, such permission is granted based on the representations by Korea that the private counsel concerned are official members of the delegation of Korea, that they are retained by and responsible to the Government of Korea, and that they will fully respect the confidentiality of the proceedings and that Korea assumes full responsibility for confidentiality of the proceedings on behalf of all members of its delegation, including non-government employees.
>
> We note that written submissions of the parties which contain confidential information may, in some cases, be provided to non-government advisors who are not members of an official delegation at a panel meeting. The duty of confidentiality extends to all governments that are parties to a dispute and to all such advisors regardless of whether they are designated as members of delegations and appear at a panel meeting.
>
> The United States offered several suggestions for new rules and procedures in regard to these questions. However, in our view, the broader question of establishing further rules on confidentiality and possibly rules of conduct specifically directed at the role of non-governmental advisors generally is a matter more appropriate for consideration by the Dispute Settlement Body and is not within the terms of reference of this Panel."[1450]

2. Confidentiality concerns

1026. As regards confidentiality concerns when private lawyers are concerned, see Section XVIII.B.1(d) above.

3. Conflict of interest

1027. In *EC – Tariff Preferences*, the European Communities had raised ethical concerns arising from the joint representation of India, the complaining party and Paraguay, a third party, by the same legal counsel, the Advisory Centre of WTO Law (ACWL). The Panel considered that it had an obligation to clarify this issue:

> "The Panel nonetheless considers that, flowing from its terms of reference and from the requirement, in Article 11 of the DSU, to 'make an objective assessment of the matter before it . . . ', as well as the requirement, pursuant to Article 12 of the DSU, to determine and administer its Working Procedures, the Panel has the inherent authority – and, indeed, the duty – to manage the proceeding in a manner guaranteeing due process to all parties involved in the proceeding and to maintain the integrity of the dispute settlement system. With specific reference to issues raised in the instant case, it is incumbent on the Panel to clarify whether the ACWL's joint representation of India and Paraguay poses any ethical concerns of the kind raised by the European Communities. At the same time, and although the European Communities asks the Panel for a ruling whether, as a matter of principle, the same legal counsel can represent simultaneously a party and a third party and, if so, under what conditions, the Panel considers that it cannot rule on such issues in the abstract, but only as they relate to the specific case before it."[1451]

1028. The Panel in *EC – Tariff Preferences* then examined the issue of whether there was a conflict of interest when the complainant and a third party were represented by the same legal counsel. In this regard, the Panel found that some common ethical rules of conduct in national jurisdictions were applicable to a conflict of interest situation in WTO dispute settlement proceedings, one such applicable rule being that parties concerned could waive any conflict of interest by their express consent to their joint representation:

> "As a general matter, the Panel considers that it is the responsibility of legal counsel to ensure that it is not placing itself in a position of actual or potential conflict of interest when agreeing to represent, and thereafter representing, one or more WTO Members in a dispute under the DSU. In this regard, the Panel notes that bar associations in many jurisdictions have elaborated rules of conduct dealing explicitly with conflicts of interest through joint representation.[1452]
>
> Common to all such ethical rules of conduct is the principle that counsel shall not accept or continue representation of more than one client in a matter in which the interests of the clients actually or potentially conflict. Underlying this principle is the fundamental notion that a client must have full confidence in the objectivity and independence of the professional advice provided to it

[1450] Panel Report on *Korea – Alcoholic Beverages*, paras. 10.31–10.33.

[1451] Panel report on *EC – Tariff Preferences*, para. 7.8.

[1452] (*footnote original*) See, e.g., American Bar Association, Model Rules of Professional Conduct, Rule 1.7; State Bar of California, Rules of Conduct, Rule 3–310; New York State Bar Association, Lawyer's Code of Professional Responsibility, DR 5–105; Canadian Bar Association, Code of Professional Conduct, Chapter V; Law Society of Upper Canada, Rules of Professional Conduct, Rule 2.04; Council of the Bars and Law Societies of the European Union, Code of Conduct for Lawyers in the European Union, Rule 3.2; Barreau de Paris, Règles professionnelles, Article 155; Bar of England and Wales, Code of Conduct, Rules 603 and 608.

by counsel. A second common element to all such ethical rules, however, is the possibility for clients, when faced with counsel being subject to actual or potential conflict of interest as the result of joint representation, to consent to such joint representation, but only following full disclosure by counsel. In other words, following disclosure of the actual or potential conflict of interest, clients may waive such conflict. Yet a third common element is that counsel shall nevertheless discontinue such joint representation at such time as counsel becomes aware that the interests of the two (or more) clients are directly adverse.

The Panel considers that the above-described common elements to ethical rules of conduct in many jurisdictions are equally appropriate to dealing with issues of representational conflict of interest in the WTO dispute settlement context."[1453]

1029. In *EC – Tariff Preferences*, the Panel further found no "conflict of interest" based on the fact that the parties concerned had consented to the joint representation following a full disclosure of information by the legal counsel to them:

"The Panel agrees with India and Paraguay that the parties most likely to be concerned by any potential or actual conflict of interest are those agreeing to joint representation, here India and Paraguay. It would seem that the basis for raising concerns over such joint representation would be considerably less for other parties in the case, who would be unlikely to be prejudiced by any joint representation of India and Paraguay. While the Panel does not exclude that, in a different case, there could be concerns of a more systemic nature, that could be raised by parties other than those agreeing to joint representation, the Panel is of the view that the European Communities has not demonstrated the existence of a particular situation which gives rise to such concerns in the instant case. The Panel accordingly does not consider that it is faced with an issue of principle or one having systemic implications for the WTO dispute settlement system.

As stated in the Introduction, India and Paraguay claim to have been fully informed about their joint representation by the ACWL and have given their written consent to such joint representation. In these circumstances, the Panel considers that India and Paraguay, as well as counsel for this party and third party, have done everything necessary to allow for the continued joint representation of India and Paraguay by the ACWL."[1454]

F. JUDICIAL ECONOMY

1. Legal basis for the exercise of judicial economy

1030. The Panel on *US – Wool Shirts and Blouses* decided to exercise judicial economy with respect to some of India's claims in that dispute, stating "India is entitled to have the dispute over the contested 'measure' resolved by the Panel, and if we judge that the specific matter in dispute can be resolved by addressing only some of the arguments raised by the complaining party, we can do so. We, therefore, decide to address only the legal issues we think are needed in order to make such findings as will assist the DSB in making recommendations or in giving rulings in respect of this dispute." The Appellate Body upheld the finding of the Panel and discussed the legal basis for judicial economy. The Appellate Body began by noting the function of panels, as defined under Article 11 of the *DSU*:

"The function of panels is expressly defined in Article 11 of the *DSU*, which reads as follows:

'The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and *make such other findings as will assist the DSB* in making the recommendations or in giving the rulings provided for in the covered agreements . . . (emphasis added).'

Nothing in this provision or in previous GATT practice requires a panel to examine all legal claims made by the complaining party. Previous GATT 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues. Thus, if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated.[1455] In recent WTO practice, panels likewise

[1453] Panel Report on *EC – Tariff Preferences*, paras. 7.9–7.11.
[1454] Panel Report on *EC – Tariff Preferences*, paras. 7.12–7.13.
[1455] (*footnote original*) See, for example, *EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted 12 July 1983, BISD 30S/129, para. 33; *Canada – Administration of the Foreign Investment Review Act*, adopted 7 February 1984, BISD 30S/140, para. 5.16; *United States – Imports of Sugar from Nicaragua*, adopted 13 March 1984, BISD 31S/67, paras. 4.5–4.6; *United States – Manufacturing Clause*, adopted 15/16 May 1984, BISD 31S/74, para. 40; *Japan – Measures on Imports of Leather*, adopted 15/16 May 1984, BISD 31S/94, para. 57; *Japan – Trade in Semi-Conductors*, adopted 4 May 1988, BISD 35S/116, para. 122; *Japan – Restrictions on Imports of Certain Agricultural Products*, adopted 22 March 1988, BISD 35S/163, para. 5.4.2; *EEC – Regulations on Imports of Parts and Components*, adopted 16 May 1990, BISD 37S/132, paras. 5.10, 5.22, and 5.27; *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted 22 March 1988, BISD 35S/37, para. 5.6; and *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, adopted 19 June 1992, BISD 39S/128, para. 6.18.

have refrained from examining each and every claim made by the complaining party and have made findings only on those claims that such panels concluded were necessary to resolve the particular matter.[1456]

Although a few GATT 1947 and WTO panels did make broader rulings, by considering and deciding issues that were not absolutely necessary to dispose of the particular dispute, there is nothing anywhere in the *DSU* that requires panels to do so.[1457]"[1458]

1031. The Appellate Body on *US – Wool Shirts and Blouses* also referred to Article 3.7 of the *DSU* and emphasized that a requirement to address all legal claims raised by a party is inconsistent with the basic aim of dispute settlement, namely to settle disputes:

"Furthermore, such a requirement [to address all legal claims] is not consistent with the aim of the WTO dispute settlement system. Article 3.7 of the *DSU* explicitly states:

> 'The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.'

Thus, the basic aim of dispute settlement in the WTO is to settle disputes. This basic aim is affirmed elsewhere in the *DSU*. Article 3.4, for example, stipulates:

> 'Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.'"[1459]

1032. Finally, the Appellate Body in *US – Wool Shirts and Blouses* rejected the argument by India that, pursuant to Article 3.2, panels were obliged to address all legal claims raised by the parties:

"As India emphasizes, Article 3.2 of the *DSU* states that the Members of the WTO 'recognize' that the dispute settlement system 'serves to preserve the rights and obligations of Members under the covered agreements, and *to clarify the existing provisions of those agreements* in accordance with customary rules of interpretation of public international law' (emphasis added). Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.[1460]

We note, furthermore, that Article IX of the *WTO Agreement* provides that the Ministerial Conference and the General Council have the 'exclusive authority' to adopt interpretations of the *WTO Agreement* and the Multilateral Trade Agreements.[1461] This is explicitly recognized in Article 3.9 of the *DSU*, which provides:

> 'The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.'

In the light of the above, we believe that the Panel's finding in paragraph 7.20 of the Panel Report is consistent with the *DSU* as well as with practice under the GATT 1947 and the *WTO Agreement*."

1033. The Appellate Body confirmed its approach to judicial economy in *India – Patents (US)*:

"[A] panel has the discretion to determine the claims it must address in order to resolve the dispute between the parties – provided that those claims are within that panel's terms of reference."[1462]

2. Exercise of judicial economy with respect to arguments

1034. While the Appellate Body has, on several occasions, reiterated that panels are not obliged to address every legal claim made by a party – i.e. the ability of panels to exercise judicial economy – in *EC – Poultry* it held that a panel also had the discretion to decide which arguments made by the parties it was going to address in its analysis. See paragraph 333 above.

3. No obligation to exercise judicial economy

1035. In *US – Lead and Bismuth II*, the United States, the defending party, argued that the Panel was required to exercise judicial economy and not address issues

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[1456] (*footnote original*) See, for example, Panel Report, *Brazil – Measures Affecting Desiccated Coconut*, adopted 20 March 1997, WT/DS22/R, para. 293; and Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, as modified by the Appellate Body Report, AB-1996–1, adopted 20 May 1996, WT/DS2/9, para. 6.43.

[1457] (*footnote original*) See, for example, *EEC – Restrictions on Imports of Dessert Apples*, Complaint by Chile, adopted 22 June 1989, BISD 36S/93, para.12.20, where the panel explicitly stated that given its finding that the EEC measures were in violation of Article XI:1 of the GATT 1947 and were not justified by Article XI:2(c)(i) or (ii) of the GATT 1947, no further examination of the administration of the measures would normally be required. In that case, the panel nonetheless considered it "appropriate" to examine the administration of the EEC measures in respect of Article XIII of the GATT 1947 in view of the questions of great practical interest raised by both parties.

[1458] Appellate Body Report on *US – Wool Shirts and Blouses*, pp. 18–19.

[1459] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 19.

[1460] (*footnote original*) The "matter in issue" is the "matter referred to the DSB" pursuant to Article 7 of the *DSU*.

[1461] (*footnote original*) *Japan – Taxes on Alcoholic Beverages*, AB-1996–2, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 13.

[1462] Appellate Body Report on *India – Patents (US)*, para. 87.

which did not need to be addressed for resolving the dispute at hand. The Appellate Body rejected the argument and emphasized that the exercise of judicial economy was within the discretion of a Panel, but that a Panel was never required to exercise judicial economy:

> "The United States seems to consider that our Report in *United States – Shirts and Blouses* sets forth a general principle that panels may not address any issues that need not be addressed in order to resolve the dispute between the parties. We do not agree with this characterization of our findings. In that appeal, India had argued that it was entitled to a finding by the Panel on each of the legal claims that it had made. We, however, found that the principle of judicial economy allows a panel to decline to rule on certain claims.
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> . . .
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> In order to resolve the claim of the European Communities, the Panel deemed it necessary to address the two principal arguments made in support of this claim. In doing so, the Panel acted within the context of resolving this particular dispute and, therefore, within the scope of its mandate under the DSU."[1463]

1036. In *Argentina – Footwear (EC)*, the Appellate Body expressed its "surprise" that the Panel had made a certain finding under the *Agreement on Safeguards*:

> "We are somewhat surprised that the Panel, having determined that there were no 'increased imports', and having determined that there was no 'serious injury', for some reason went on to make an assessment of causation. It would be difficult, indeed, to demonstrate a 'causal link' between 'increased imports' that did not occur and 'serious injury' that did not exist. Nevertheless, we see no error in the Panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the *Agreement on Safeguards*."[1464]

4. Requirement for a panel to state it is exercising judicial economy

1037. In *Canada – Autos*, the Appellate Body admonished the Panel for not stating explicitly that it was exercising judicial economy, when it did not address a particular claim:

> "In our view, it was not necessary for the Panel to make a determination on the European Communities' *alternative* claim relating to the CVA requirements under Article 3.1(a) of the *SCM Agreement* in order 'to secure a positive solution' to this dispute. The Panel had already found that the CVA requirements violated both Article III:4 of the GATT 1994 and Article XVII of the GATS. Having made these findings, the Panel, in our view, exercising the discretion implicit in the principle of judicial economy, could properly decide not to examine the *alternative* claim of the European Communities that the CVA requirements are inconsistent with Article 3.1(a) of the *SCM Agreement*.
>
> We are bound to add that, for purposes of transparency and fairness to the parties, a panel should, however, in all cases, address expressly those claims which it declines to examine and rule upon for reasons of judicial economy. Silence does not suffice for these purposes."[1465]

5. "False" judicial economy

1038. In *Australia – Salmon*, the Appellate Body held that the right to exercise judicial economy could not be exercised where only a partial resolution of a dispute would result:

> "The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'"[1466]

1039. In *Japan – Agricultural Products*, the Appellate Body found an error of law in the Panel's exercise of judicial economy. As in *Australia – Salmon*, the Appellate Body found that the Panel had exercised "false" judicial economy and had provided only a partial resolution of the dispute before it:

> "We note that there is an error of logic in the Panel's finding in paragraph 8.63. The Panel stated that it had found earlier in its Report that the varietal testing requirement violates Article 2.2, and that there was, therefore, no need to examine whether the measure at issue was based on a risk assessment in accordance with Articles 5.1 and 5.2 of the *SPS Agreement*. We note, however, that the Panel's finding of inconsistency with Article 2.2 only concerned the varietal testing requirement as it applies to apples, cherries, nectarines and walnuts. With regard to the varietal testing requirement as it applies to apricots, pears, plums and quince, the Panel found that there was insufficient evidence before it to conclude that this measure was inconsistent with Article 2.2. The Panel, therefore, made an error of logic when it stated, in general terms, that there was no need to examine whether the varietal testing requirement was consistent with Article 5.1 because this requirement had

[1463] Appellate Body Report on *US – Lead and Bismuth II*, paras. 71 and 73.
[1464] Appellate Body Report on *Argentina – Footwear (EC)*, para. 145.
[1465] Appellate Body Report on *Canada – Autos*, paras. 116–117.
[1466] Appellate Body Report on *Australia – Salmon*, para. 223. See also Panel Report on *EC – Sardines*, paras. 7.148–7.152; Appellate Body Report on *US – Steel Safeguards*, para. 10.703.

already been found to be inconsistent with Article 2.2. With regard to the varietal testing requirement as it applies to apricots, pears, plums and quince, there was clearly still a need to examine whether this measure was inconsistent with Article 5.1. By not making a finding under Article 5.1 with regard to the varietal testing requirement as it applies to apricots, pears, plums and quince, the Panel improperly applied the principle of judicial economy. We believe that a finding under Article 5.1 with respect to apricots, pears, plums and quince is necessary 'in order to ensure effective resolution' of the dispute."[1467]

1040. In *Argentina – Ceramic Tiles*, the Panel declined to exercise judicial economy despite its finding under Article 6.8 of the *Anti-Dumping Agreement* that "cast doubt on the entire final determination of dumping" by the investigating authorities. The Panel indicated that "[m]indful of the Appellate Body's comments in [*Australia – Salmon*],[1468] we will continue with our analysis of the other claims made before us 'because it could prove of utility depending on any appeal'[1469] and in order 'to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance with those recommendations and rulings'.[1470]"[1471]

G. *AMICUS CURIAE* BRIEFS

1. Access to the dispute settlement process by non-WTO members

1041. In connection with the access to the WTO dispute settlement process, the Appellate Body in *US – Shrimp* emphasized that such access and the legal right to have one's submission considered by a panel existed only in respect of WTO Members:[1472]

"It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members 'having a substantial interest in a matter before a panel' may become third parties in the proceedings before that panel.[1473] Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions; they do not, however, dispose of the issue here presented by the appellant's first claim of error. We believe this interpretative issue is most appropriately addressed by examining what a panel is *authorized* to do under the DSU."[1474]

1042. In *Turkey – Textiles*, Turkey argued that India should have directed its complaint against the customs union between Turkey and the European Communities instead of directing it solely against Turkey. Turkey argued that it was not responsible for actions collectively taken by the members of the customs union through the institutions created by the agreement. The Panel did not accept this argument and ultimately held that the measures at issue had been taken by Turkey. See also paragraphs 171 and 323–325 above. The Panel also emphasized that the customs union between Turkey and the European Communities did not have standing under WTO law:

"[T]he WTO dispute settlement system is based on Members' rights; is accessible to Members only; and is enforced and monitored by Members only. The Turkey-EC customs union is not a WTO Member, and in that respect does not have any autonomous legal standing for the purpose of WTO law and therefore its dispute settlement procedures. Moreover, the European Communities' import restrictions appear *a priori* to be WTO compatible and could not be the object of any panel recommendation that the European Communities brings its measure into conformity with the WTO Agreement, as required by Article 19 of the DSU."[1475]

2. Authority to admit *amicus curiae* briefs

1043. In *US – Shrimp*, the Appellate Body found that the Panel had erred in its legal interpretation of Article 13 of the *DSU* and held that accepting non-requested information from non-governmental sources was not incompatible with the provisions of the *DSU*. The Appellate Body emphasized the "comprehensive nature" of a panel's authority to seek information in the context of a dispute:

"The comprehensive nature of the authority of a panel to 'seek' information and technical advice from 'any individual or body' it may consider appropriate, or from 'any

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[1467] Appellate Body Report on *Japan – Agricultural Products II*, para. 111.

[1468] See para. 1038 of this Chapter.

[1469] (*footnote original*) Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea* ("*United States – Korea Steel*"), WT/DS179/R, adopted 1 February 2001, para. 5.11.

[1470] (*footnote original*) Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled, or Frozen Lamb Meat from New Zealand and Australia* ("*United States – Lamb Safeguards*"), WT/DS177/AB/R and WT/DS178/AB/R, adopted 16 May 2001, para. 194.

[1471] Panel Report on *Argentina – Ceramic Tiles*, para. 6.81

[1472] For issues relating to *amicus curiae* briefs, see paras. 979–986 of this Chapter.

[1473] (*footnote original*) See Articles 4, 6, 9 and 10 of the DSU.

[1474] Appellate Body Report on *US – Shrimp*, para. 101.

[1475] Panel Report on *Turkey – Textiles*, para. 9.41.

relevant source', should be underscored. This authority embraces more than merely the choice and evaluation of the *source* of the information or advice which it may seek. A panel's authority includes the authority to decide *not to seek* such information or advice at all. We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case, to ascertain the *acceptability* and *relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received.

The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to 'make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements* . . . .' (emphasis added)"[1476]

1044. In *US – Lead and Bismuth II*, the Appellate Body considered that as long as it acts consistently with the provisions of the *DSU* and the covered agreements, the Appellate Body also has the legal authority pursuant to Article 17.9 of the *DSU* to decide whether or not to accept and consider any information that it believes is relevant and useful in an appeal:

"In considering this matter, we first note that nothing in the DSU or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. On the other hand, neither the DSU nor the *Working Procedures* explicitly prohibit[s] acceptance or consideration of such briefs. . . . [Article 17.9] makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal."[1477]

1045. In *US – Lead and Bismuth II*, the Appellate Body drew a distinction between, on the one hand, parties and third parties to a dispute, which have a legal right to participate in panel and Appellate Body proceedings, and, on the other hand, private individuals and organizations, which are not Members of the WTO, and which, therefore, do not have a legal right to participate in dispute settlement proceedings:

"We wish to emphasize that in the dispute settlement system of the WTO, the DSU envisages *participation* in panel or Appellate Body proceedings, as a matter of legal right, *only* by parties and third parties to a dispute. And, under the DSU, *only* Members of the WTO have a legal right to participate as parties or third parties in a particular dispute. . . .

Individuals and organizations, which are not Members of the WTO, have no legal *right* to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal duty to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations, not Members of the WTO. The Appellate Body has a legal duty to accept and consider only submissions from WTO Members which are parties or third parties in a particular dispute."[1478]

1046. The Appellate Body on *US – Lead and Bismuth II* further explained that participation by private individuals and organizations is dependent upon the Appellate Body permitting such participation if it finds it useful to do so:

"[W]e have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so. In this appeal, we have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering our decision."[1479]

1047. In *EC – Sardines*, the Appellate Body received for the first time an *amicus curiae* brief from a WTO Member, Morocco, that had not exercised its third-party rights at the panel stage of the proceedings. The Appellate Body found that it was entitled to accept the *amicus curiae* brief submitted by Morocco, and to consider it. However, the Appellate Body emphasized that, in accepting the brief filed by Morocco in this appeal, it was not suggesting that each time a Member files such a brief it was required to accept and consider it. The Appellate Body indicated that it could well exercise its discretion to reject an *amicus curiae* brief if, by accepting it, this would interfere with the "fair, prompt and effective resolution of trade disputes":

"As we explained in *US – Lead and Bismuth II*, the DSU gives WTO Members that are participants and third participants a legal *right* to participate in appellate pro-

[1476] Appellate Body Report on *US – Shrimp*, paras. 104 and 106.
[1477] Appellate Body Report on *US – Lead and Bismuth II*, para. 39.
[1478] Appellate Body Report on *US – Lead and Bismuth II*, paras. 40–41.
[1479] Appellate Body Report on *US – Lead and Bismuth II*, para. 42.

ceedings.[1480] In particular, WTO Members that are third participants in an appeal have the *right* to make written and oral submissions. The corollary is that we have a *duty*, by virtue of the DSU, to accept and consider these submissions from WTO Members. By contrast, participation as *amici* in WTO appellate proceedings is not a legal *right*, and we have no duty to accept any *amicus curiae* brief. We may do so, however, based on our legal authority to regulate our own procedures as stipulated in Article 17.9 of the DSU. The fact that Morocco, as a sovereign State, has chosen not to exercise its *right* to participate in this dispute by availing itself of its third-party rights at the panel stage does not, in our opinion, undermine our *legal authority* under the DSU and our *Working Procedures* to accept and consider the *amicus curiae* brief submitted by Morocco.

Therefore, we find that we are entitled to accept the *amicus curiae* brief submitted by Morocco, and to consider it. We wish to emphasize, however, that, in accepting the brief filed by Morocco in this appeal, we are not suggesting that each time a Member files such a brief we are required to accept and consider it. To the contrary, acceptance of any *amicus curiae* brief is a matter of discretion, which we must exercise on a case-by-case basis. We recall our statement that:

> The procedural rules of WTO dispute settlement are designed to promote . . . the fair, prompt and effective resolution of trade disputes.[1481]

Therefore, we could exercise our discretion to reject an *amicus curiae* brief if, by accepting it, this would interfere with the 'fair, prompt and effective resolution of trade disputes.' This could arise, for example, if a WTO Member were to seek to submit an *amicus curiae* brief at a very late stage in the appellate proceedings, with the result that accepting the brief would impose an undue burden on other participants."[1482]

3. Appellate Body additional procedure for *amicus curiae* briefs

1048. In *EC – Asbestos*, the Appellate Body adopted an additional procedure, for the purposes of this appeal only, pursuant to Rule 16(1) of its Working Procedures, to deal with any possible submissions received from *amici curiae*. The additional procedure was posted on the WTO website on 8 November 2000 and provided as follows:

> "1. In the interests of fairness and orderly procedure in the conduct of this appeal, the Division hearing this appeal has decided to adopt, pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and after consultations with the parties and third parties to this dispute, the following additional procedure for purposes of this appeal only.
>
> 2. Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body *by noon* on *Thursday, 16 November 2000*.
>
> 3. An application for leave to file such a written brief shall:
>
> (a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;
>
> (b) be in no case longer than three typed pages;
>
> (c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;
>
> (d) specify the nature of the interest the applicant has in this appeal;
>
> (e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief;
>
> (f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute; and
>
> (g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief.

[1480] (*footnote original*) Appellate Body Report, *supra*, footnote 58, para. 40. This is subject to meeting the requirements in Rule 27(3) of the *Working Procedures*, which provides that "[a]ny third participant who has filed a submission pursuant to Rule 24 may appear to make oral arguments or presentations at the oral hearing." However, we have on several occasions permitted third parties who have not filed a submission to attend the oral hearing as passive observers.

[1481] (*footnote original*) Appellate Body Report, *US – FSC*, *supra*, footnote 20, para. 166. In that appeal, we were not referring in the quoted excerpt to the issue of *amicus curiae* briefs. The issue there related to the exercise of the right of appeal. We nevertheless believe that our views on how to interpret the *Working Procedures* are of general application and are thus pertinent to the *amicus curiae* issue as it arises in this case.

[1482] Appellate Body Report on *EC – Sardines*, paras. 166–167.

5. The Appellate Body will review and consider each application for leave to file a written brief and will, without delay, render a decision whether to grant or deny such leave.

6. The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.

7. Any person, other than a party or a third party to this dispute, granted leave to file a written brief with the Appellate Body, must file its brief with the Appellate Body Secretariat *by noon* on *Monday, 27 November 2000*.

8. A written brief filed with the Appellate Body by an applicant granted leave to file such a brief shall:

(a) be dated and signed by the person filing the brief;

(b) be concise and in no case longer than 20 typed pages, including any appendices; and

(c) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.

8. An applicant granted leave shall, in addition to filing its written brief with the Appellate Body Secretariat, also serve a copy of its brief on all the parties and third parties to the dispute *by noon* on *Monday, 27 November 2000*.

9. The parties and the third parties to this dispute will be given a full and adequate opportunity by the Appellate Body to comment on and respond to any written brief filed with the Appellate Body by an applicant granted leave under this procedure." (original emphasis)[1483]

4. Admission/rejection of *amicus curiae* briefs

1049. In *US – Shrimp*, the Appellate Body admitted three *amicus curiae* briefs that were attached as exhibits to the appellant's submission in that appeal. The Appellate Body concluded that those briefs formed part of the appellant's submission, and observed that it was for a participant in an appeal to determine for itself what to include in its submission.[1484]

1050. In *EC – Asbestos*, the Panel received several written submissions from non-governmental organizations. The Panel issued a preliminary ruling informing the parties that, in the light of the European Communities' decision to incorporate into its own submissions the *amicus* briefs submitted by two organizations, the Panel would consider these two documents on the same basis as the other documents furnished by the European Communities in this dispute. At the second substantive meeting of the Panel with the parties, the Panel gave Canada the opportunity to reply, in writing or orally, to the arguments set forth in these two *amicus* briefs. At that same meeting, the Panel also informed the parties that it had decided not to take into consideration the other *amicus* briefs submitted.[1485] At the appeal stage, the Appellate Body adopted an additional procedure, for the purposes of this appeal only, pursuant to Rule 16(1) of its Working Procedures, to deal with any possible submissions received from *amici curiae*. With respect to the additional procedures, see Section XXXVI.G.3 above. Pursuant to the additional procedure, the Appellate Body received 17 applications requesting leave to file a written brief in this appeal. Six of these 17 applications were received after the deadline specified in the additional procedure and, for this reason, leave to file a written brief was denied to these six applicants. The other 11 applications were considered by the Appellate Body but finally denied for failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure.[1486]

1051. In *Thailand – H-Beams*, an industry association submitted an *amicus* brief which cited Thailand's confidential submission. Thailand then claimed that Poland's private counsel might have violated WTO rules of confidentiality by providing Thailand's submission to the said association. Although Poland and the lawyer concerned denied the alleged breach of confidentiality, the Appellate Body issued a preliminary ruling rejecting the *amicus* brief. See Section XVIII.B.1(b) above.

1052. In *EC – Sardines*, the Appellate Body received for the first time an *amicus curiae* brief from a WTO Member, Morocco, that had not exercised its third-party rights at the panel stage of the proceedings. The Appellate Body found that it was entitled to accept the *amicus curiae* brief submitted by Morocco, and to consider it. See paragraph 1047 above in this regard.[1487]

1053. In *US – Countervailing Measures on Certain EC Products*, the Appellate Body received an *amicus curiae* brief from a United States' industry association. The Appellate Body did not take it into account on the

[1483] Appellate Body Report on *EC – Asbestos*, para. 52. See also document WT/DS135/9.
[1484] Appellate Body Report on *US – Shrimp*, para. 91. See also Appellate Body Report on *Thailand – H-Beams* and Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*.
[1485] Panel Report on *EC – Asbestos*, paras. 6.1–6.4 and 8.12–8.14.
[1486] Appellate Body Report on *EC – Asbestos*, paras. 50–57.
[1487] Appellate Body Report on *EC – Sardines*, paras. 166–167.

grounds that they did not find it to be of assistance in the appeal.[1488]

1054. In *US – Steel Safeguards*, the Appellate Body received an *amicus curiae* brief from an industry association, the American Institute for International Steel. The Appellate Body did not take it into account on the grounds that it was primarily directed to a question that was not part of any of the claims and thus the Appellate Body did not find it to be of assistance in the appeal.[1489]

1055. In *US – Softwood Lumber IV*, the Appellate Body received two *amicus curiae* briefs from the Indigenous Network on Economies and Trade (Canada) and jointly from Defenders of Wildlife, Natural Resources Defense Council and Northwest Ecosystem Alliance (United States). The Appellate Body did not find it necessary to take the two *amicus curiae* briefs into account in rendering its decision on the grounds that these briefs dealt with questions not addressed in the submissions of the participants or third participants and that no participant or third participant adopted the arguments made in these briefs.[1490]

[1488] Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 76.
[1489] Appellate Body Report on *US – Steel Safeguards*, para. 268.
[1490] Appellate Body Report on *US – Softwood Lumber IV*, para. 9.

XXXVII. TIME-FRAMES IN RELATION TO PANEL AND APPELLATE BODY REPORTS

WT/DS No.	Case Name	Estblshmt to Compostn	Compostn to Last Meeting with Parties	Interim Report to Final Report to Parties	Final Report to Circulation to Members	Compostn to Final Report to Parties	Estblshmnt to Circulatn to Members	Circulation to Appeal or Adoption	Appeal to Circulation AB Report	Circulatn of AB Report to Adoption	Estblshmt to Adoption of Reports	Estblshmt to Determination of RPT
Source of Time Periods (DSU)		Article 8.7	Appendix 3	Appendix 3	Appendix 3	Article 12.8	Article 12.9	Article 16.4	Article 17.5	Article 17.14	Article 20	Article 21.4
Length of Time Periods		30 days	10–16 weeks	5 weeks	3 weeks	6 months	9 months	60 days	60–90 days	30 days	9/12 months	15/18 months
2, 4	*US – Gasoline*	16 days	20 weeks	5 weeks 2 days	1 week 5 days	8 mths 21 days	9 mths 19 days	23 days	68 days	21 days	13 mths 10 days	19 mths 22 days
8, 10, 11	*Japan – Alcoholic Beverages II*	33 days	15 weeks 6 day	4 weeks 4 days	2 weeks 6 days	7 mths 21 days	9 mths 13 days	28 days	57 days	28 days	13 mths 4 days	16 mths 17 days
18	*Australia – Salmon*	48 days	36 weeks 1 day	5 weeks 5 days	5 weeks 3 days	11 mths 6 days	14 mths 2 days	40 days	90 days	17 days	18 mths 26 days	22 mths 13 days
22	*Brazil – Desiccated Coconut*	42 days	13 weeks	1 week 6 days	3 weeks	5 mths 10 days	7 mths 12 days	60 days	67 days	27 days	12 mths 15 days	n/a
24	*US – Underwear*	30 days	16 weeks 4 days	5 weeks	2 weeks	6 mths 21 days	8 mths 3 days	3 days	91 days	15 days	11 mths 20 days	n/a
26	*EC – Hormones (US)*	43 days	18 weeks 6 day	6 weeks 5 days	7 weeks	11 mths 28 days	14 mths 29 days	37 days	114 days	28 days	20 mths 23 days	24 mths 9 days
27	*EC – Bananas III*	30 days	18 weeks 5 days	6 weeks	3 weeks 2 days	10 mths 22 days	12 mths 14 days	20 days	90 days	16 days	16 mths 17 days	19 mths 29 days
31	*Canada – Periodicals*	36 days	16 weeks 1 day	5 weeks 1 day	3 weeks	6 mths 26 days	8 mths 22 days	46 days	62 days	30 days	13 mths 11 days	14 mths 26 days
33	*US – Wool Shirts and Blouses*	68 days	14 weeks 4 days	4 weeks 6 days	3 weeks	5 mths 21 days	8 mths 19 days	49 days	60 days	28 days	13 mths 6 days	n/a
34	*Turkey – Textiles*	90 days	23 weeks 6 days	3 weeks 2 days	9 weeks 3 days	9 mths 15 days	14 mths 18 days	56 days	88 days	28 days	20 mths 6 days	17 mths 24 days
44	*Japan – Film*	62 days	24 weeks	8 weeks	8 weeks 4 days	13 mths 13 days	17 mths 15 days	22 days	n/a	n/a	18 mths 6 days	n/a
46	*Brazil – Aircraft*	91 days			4 weeks 5 days	4 mths 17 days	8 mths 21 days	19 days	91 days	18 days	12 mths 27 days	
48	*EC – Hormones (Canada)*	19 days	15 weeks 2 days	6 weeks 5 days	7 weeks	7 mths 26 days	10 mths 2 days	37 days	114 days	28 days	15 mths 27 days	19 mths 13 days
50	*India – Patents (US)*	70 days	14 weeks 6 days	4 weeks 4 days	5 weeks 3 days	6 mths	9 mths 15 days	40 days	65 days	28 days	13 mths 26 days	17 mths 1 day
54, 55, 59, 64	*Indonesia – Autos*	47 days	24 weeks 2 days	4 weeks 1 day	10 weeks 1 day	8 mths 22 days	12 mths 19 days	21 days	n/a	n/a	13 mths 11 days	17 mths 24 days
56	*Argentina – Textiles and Apparel*	38 days	15 weeks 5 days	6 weeks 3 days	1 week 4 days	7 mths 10 days	9 mths	57 days	65 days	26 days	13 mths 27 days	15 mths 11 days
58	*US – Shrimp*	49 days	40 weeks 2 days	5 weeks	5 weeks 4 days	11 mths 21 days	14 mths 19 days	59 days	91 days	25 days	20 mths 11 days	22 mths 20 days
60	*Guatemala – Cement I*	42 days	23 weeks 4 days	8 weeks	4 weeks 4 days	12 mths 17 days	14 mths 29 days	46 days	90 days	23 days	20 mths 5 days	n/a
62, 67, 68	*EC – Computer Equipment*	52 days	11 weeks 6 days	6 weeks 3 days	9 weeks	7 mths 15 days	11 mths 10 days	47 days	73 days	17 days	15 mths 27 days	n/a
69	*EC – Poultry*	12 days	14 weeks 1 day	2 weeks 6 days	4 weeks	6 mths 1 day	7 mths 11 days	48 days	75 days	10 days	11 mths 22 days	14 mths 19 days
70	*Canada – Aircraft*	91 days	7 weeks 2 days	3 weeks 2 days	4 weeks 5 days	4 mths 17 days	8 mths 21 days	19 days	91 days	18 days	12 mths 27 days	
75, 84	*Korea – Alcoholic Beverages*	50 days	19 weeks 4 days	9 weeks 3 days	5 weeks	7 mths 26 days	11 mths 1 day	33 days	90 days	30 days	16 mths 1 day	19 mths 18 days
76	*Japan – Agricultural Products II*	30 days	26 weeks 4 day	8 weeks 5 days	3 weeks	9 mths 17 days	11 mths 9 days	28 days	90 days	25 days	16 mths 1 day	18 mths 27 days
79	*India – Patents (EC)*	42 days	21 weeks 6 days	4 weeks 6 days	4 weeks 4 days	7 mths 25 days	10 mths 8 days	29 days	n/a	n/a	11 mths 6 days	13 mths 8 days
87, 110	*Chile – Alcoholic Beverages*	92 days	19 weeks	17 weeks 1 days	11 weeks 4 days		18 mths 27 days	90 days	91 days	30 days	25 mths 24 days	30 mths 5 days
90	*India – Quantitative Restrictions*	94 days	17 weeks 3 days		3 weeks 4 days	9 mths 20 days	16 mths 18 days	49 days	90 days	30 days	22 mths 4 days	25 mths 10 days
98	*Korea – Dairy*	28 days	16 weeks 6 days	5 weeks 1 day	10 weeks 4 days	7 mths 18 days	10 mths 28 days	86 days	90 days	29 days	17 mths 19 days	19 mths 26 days
99	*US – DRAMS*	62 days	17 weeks 5 days	6 weeks	8 weeks	8 mths 14 days	12 mths 13 days	49 days	n/a	n/a	13 mths 3 days	16 mths 3 days
103, 113	*Canada – Dairy*	140 days			6 weeks 5 days	7 mths 5 days	13 mths 21 days	59 days	90 days	14 days	19 mths 2 days	20 mths 17 days

108	*US – FSC*	48 days	18 weeks 1 day	8 weeks	3 weeks		12 mths 15 days	49 days	90 days	25 days	17 mths 26 days	
114	*Canada – Pharmaceutical Products*	52 days			5 weeks	13 mths 16 days	21 days	n/a	n/a	14 mths 6 days		18 mths 17 days
121	*Argentina – Footwear (EC)*	54 days	20 weeks 1 day	6 weeks 2 days	3 weeks	8 mths 19 days	11 mths 2 days	82 days	90 days	29 days	17 mths 19 days	
122	*Thailand – H-Beams*	31 days	16 weeks 2 days	3 weeks	14 weeks 1 day	10 mths 9 days	25 days	140 days	24 days	16 mths 16 days		18 mths 6 days
126	*Australia – Automotive Leather II*	133 days	10 weeks 2 days	2 weeks 1 day	9 weeks	4 mths 21 days	11 mths 3 days	22 days	n/a	n/a	11 mths 24 days	12 mths 13 days
132	*Mexico – Corn Syrup*	49 days	18 weeks 6 days	15 weeks 2 days	1 week	12 mths 8 days	14 mths 3 days	27 days	n/a	n/a	13 mths 29 days	16 mths 24 days
135	*EC – Asbestos*	124 days	42 weeks 3 days	6 weeks	7 weeks 6 days	15 mths 25 days	21 mths 23 days	35 days	140 days	24 days	28 mths 11 days	n/a
136	*US – 1916 Act (EC)*	59 days	23 weeks 5 days	8 weeks	6 weeks 4 days	10 mths 13 days	13 mths 30 days	59 days	91 days	29 days	19 mths 25 days	24 mths 27 days
138	*US – Lead and Bismuth II*	27 days	17 weeks 1 day	6 weeks 5 days	4 weeks 3 days	8 mths 6 days	10 mths 6 days	35 days	104 days	28 days	15 mths 20 days	n/a
139, 142	*Canada – Autos*	52 days	15 weeks 5 days	10 weeks	7 weeks 2 days	8 mths 26 days	12 mths 10 days	20 days	90 days	19 days	16 mths 18 days	20 mths 3 days
141	*EC – Bed Linen*	89 days	19 weeks 1 day	5 weeks	8 weeks	7 mths 10 days	12 mths 3 days	32 days	90 days	11 days	16 mths 12 days	17 mths 29 days
146, 175	*India – Autos*	120 days	24 weeks 6 days	10 weeks	1 week	12 mths 19 days	16 mths 23 days	41 days	47 days	17 days	20 mths 8 days	23 mths 20 days
152	*US – Section 301 Trade Act*	29 days	17 weeks	3 weeks 6 days	6 weeks 2 days	8 mths 20 days	9 mths 20 days	36 days	n/a	n/a	10 mths 25 days	n/a
155	*Argentina – Hides and Leather*	189 days	19 weeks 1 day	5 weeks	4 weeks 4 days	9 mths 16 days	16 mths 22 days	59 days	n/a	n/a	18 mths 20 days	25 mths 5 days
156	*Guatemala – Cement II*	41 days	23 weeks 1 day		3 weeks 1 ay	11 mths	13 mths 2 days	24 days	n/a	n/a	13 mths 25 days	n/a
160	*US – Section 110(5) Copyright Act*	72 days	17 weeks 4 days	3 weeks	5 weeks 6 days	8 mths 28 days	12 mths 19 days	42 days	n/a	n/a	14 mths 1 day	19 mths 19 days
161, 169	*Korea – Various Measures on Beef*	70 days	28 weeks	5 weeks 1 day	6 weeks 4 days	10 mths 11 days	14 mths 5 days	42 days	91 days	30 days	19 mths 14 days	22 mths 23 days
162	*US – 1916 Act (Japan)*	16 days	17 weeks	4 weeks 4 days	8 weeks 3 days	7 mths 20 days	10 mths 3 days	0	91 days	29 days	14 mths	19 mths 2 days
163	*Korea – Procurement*	75 days	10 weeks 3 days	4 weeks 6 days	3 weeks 4 days	7 mths 6 days	10 mths 14 days	49 days	n/a	n/a	12 mths 3 days	n/a
165	*US – Certain EC Products*	114 days	17 weeks 5 days	5 weeks 2 days	12 weeks 5 days	6 mths 11 days	13 mths 1 day	57 days	90 days	30 days	18 mths 24 days	n/a
166	*US – Wheat Gluten*	77 days	16 weeks 1 day	3 weeks 4 days	2 weeks 3 days	9 mths 2 days	12 mths 5 days	57 days	87 days	28 days	17 mths 23 days	20 mths 14 days
170	*Canada – Patent Term*	30 days	13 weeks 4 days	4 weeks	5 weeks	5 mths 9 days	7 mths 12 days	45 days	91 days	24 days	12 mths 19 days	17 mths 6 days
176	*US – Section 211 Appropriations Act*	30 days	18 weeks 6 days	3 weeks 1 day	4 weeks 6 days	8 mths 6 days	10 mths 10 days	59 days	90 days	30 days	16 mths 5 days	18 mths 2 days
177, 178	*US – Lamb*	123 days	18 weeks 1 day	6 weeks 1 day	2 weeks 1 day	8 mths 14 days	13 mths 2 days	41 days	90 days	15 days	17 mths 26 days	18 mths 25 days
179	*US – Stainless Steel*	126 days	15 weeks 5 days	5 weeks	1 week 1 day	8 mths 19 days	13 mths 3 days	41 days	n/a	n/a	14 mths 12 days	17 mths 7 days
184	*US – Hot-Rolled Steel*	65 days	18 weeks	2 weeks 3 days	2 weeks 6 days	8 mths 14 days	11 mths 8 days	56 days	90 days	30 days	17 mths 3 days	22 mths 29 days
189	*Argentina – Ceramic Tiles*	56 days	20 weeks	7 weeks 2 days	2 weeks	8 mths 2 days	10 mths 11 days	38 days	n/a	n/a	11 mths 18 days	13 mths 3 days
192	*US – Cotton Yarn*	72 days	15 weeks	5 weeks	4 weeks 6 days	7 mths 27 days	11 mths 12 days	39 days	91 days	28 days	16 mths 16 days	n/a
194	*US – Export Restraints*	42 days	17 weeks 2 days	3 weeks 4 days	5 weeks 3 days	6 mths 28 days	9 mths 18 days	55 days	n/a	n/a	11 mths 12 days	n/a
202	*US – Line Pipe*	91 days					12 mths 6 days	21 days	88 days	21 days	16 mths 12 days	21 mths 6 days
204	*Mexico – Telecoms*	131 days	28 weeks 2 days	16 weeks	3 weeks	18 mths 14 days	23 mths 15 days	60 days	n/a	n/a	25 mths 14 days	25 mths 26 days
206	*US – Steel Plate*	94 days	17 weeks 4 days	7 weeks	1 week	6 mths 24 days	11 mths 4 days	31 days	n/a	n/a	12 mths 5 days	14 mths 6 days
207	*Chile – Price Band System*	66 days	20 weeks 6 days	6 weeks	4 weeks 1 day	10 mths 17 days	13 mths 20 days	52 days	91 days	30 days	19 mths 11 days	24 mths 5 days
211	*Egypt – Steel Rebar*	28 days	31 weeks 5 days	5 weeks	6 weeks 2 days	11 mths 7 days	13 mths 18 days	54 days	n/a	n/a	15 mths 10 days	16 mths 24 days

Table (*cont.*)

WT/DS No.	Case Name	Estblshmt to Compostn	Compostn to Last Meeting with Parties	Interim Report to Final Report to Parties	Final Report to Circulation to Members	Compostn to Final Report to Parties	Estblshmnt to Circulatn to Members	Circulation to Appeal or Adoption	Appeal to Circulation AB Report	Circulatn of AB Report to Adoption	Estblshmt to Adoption of Reports	Estblshmt to Determination of RPT
212	*US – Countervailing Measures on Certain EC Products*	56 days	19 weeks 2 days	5 weeks 2 days	6 weeks	7 mths 14 days	10 mths 21 days	40 days	91 days	30 days	15 mths 28 days	19 mths
213	*US – Carbon Steel*	46 days	20 weeks 4 days	4 weeks 3 days	2 weeks 5 days	7 mths 18 days	9 mths 22 days	58 days	90 days	21 days	15 mths 9 days	n/a
217, 234	*US – Offset Act (Byrd Amendment)*	63 days	19 weeks 5 days	6 weeks 5 days	2 weeks	10 mths 7 days	12 mths 23 days	32 days	90 days	11 days	17 mths 4 days	21 mths 20 days
219[1]	*EC – Tube or Pipe Fittings*	43 days	39 weeks 6 days	9 weeks 1 day	12 weeks 3 days	15 mths 6 days	19 mths 10 days	47 days	90 days	27 days	24 mths 24 days	26 mths 6 days
221	*US – Section 129(c)(1) URAA*	68 days	21 weeks	3 weeks	4 weeks 5 days	7 mths 12 days	10 mths 24 days	46 days	n/a	n/a	12mths 7 days	n/a
222	*Canada – Aircraft Credits and Guarantees*	60 days	11 weeks 4 days	3 weeks	11 weeks 3 days	5 mths 28 days	10 mths 16 days	22 days	n/a	n/a	11 mths 7 days	
231[2]	*EC – Sardines*	49 days	19 weeks 1 day	7 weeks 6 days	1 week	8 mths 11 days	10 mths 5 days	30 days	90 days	27 days	14 mths 28 days	16 mths 24 days
236	*US – Softwood Lumber III*	58 days	17 weeks 4 days	5 weeks 5 days	3 weeks 2 days		9 mths 22 days	35 days	n/a	n/a	10 mths 26 days	
238	*Argentina – Preserved Peaches*	88 days	21 weeks 1 day	3 weeks 4 days	8 weeks 5 days	8 mths	12 mths 26 days	60 days	n/a	n/a	14 mths 27 days	17 mths 9 days
241	*Argentina – Poultry Anti-Dumping Duties*	71 days	21 weeks 5 days	6 weeks	2 weeks	9 mths 11 days	12 mths 5 days	27 days	n/a	n/a	13 mths 2 days	n/a
243	*US – Textiles Rules of Origin*	108 days	15 weeks	2 weeks	8 weeks	6 mths 15 days	11 mths 26 days	31 days	n/a	n/a	12 mths 26 days	n/a
244	*US – Corrosion-Resistant Steel Sunset Review*	56 days	25 weeks 1 day	7 weeks 3 days	12 weeks	10 mths 5 days	14 mths 22 days	32 days	91 days	25 days	19 mths 17 days	n/a
245	*Japan – Apples*	43 days	26 weeks 2 days	13 weeks 6 days	2 weeks 6 days	11 mths 9 days	13 mths 12 days	44 days	90 days	14 days	18 mths 15 days	20 mths 17 days
246	*EC – Tariff Preferences*	38 days	17 weeks 5 days	7 weeks 4 days	4 weeks 6 days	7 mths 22 days	10 mths 3 days	38 days	90 days	13 days	14 mths 23 days	20 mths 2 days
248, 249, 251, 252, 253, 254, 258, 259	*US – Steel Safeguards*	52 days	19 weeks 6 days	5 weeks 2 days	10 weeks	9 mths 6 days	13 mths 8 days	31 days	91 days	30 days	18 mths 17 days	n/a
257	*US – Softwood Lumber IV*	38 days	19 weeks 4 days	5 weeks 1 day	8 weeks 2 days	7 mths 23 days	10 mths 28 days	53 days	90 days	29 days	16 mths 16 days	19 mths 5 days
264	*US – Softwood Lumber V*	48 days	23 weeks 6 days	6 weeks	6 weeks 4 days	12 mths 2 days	15 mths 5 days	30 days	90 days	20 days	19 mths 23 day	22 mths 27 days
268	*US – Oil Country Tubular Goods Sunset Review*	108 days	21 weeks 5 days	5 weeks 4 days	4 weeks 3 days	9 mths 11 days	13 mths 26 days	46 days	90 days	18 days	18 mths 27 days	24 mths 18 days
276	*Canada – Wheat Exports and Grain Imports*	42 days	23 weeks 1 day	7 weeks	8 weeks	8 mths 28 days	8 mths 25 days	56 days	90 days	28 days	17 mths 26 days	19 mths 14 days
277	*US – Softwood Lumber VI*	43 days	15 weeks 5 days	7 weeks 4 days	5 weeks 6 days	7 mths 21 days	10 mths 15 days	35 days	n/a	n/a	11 mths 19 days	16 mths 23 days

Notes:
[1] Panel suspended from 15 January to 21 April 2002.
[2] Panel suspended from 3 to 21 May 2002.

Trade Policy Review Mechanism

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B. INTERPRETATION AND APPLICATION OF PARAGRAPH G 1392

I. PARAGRAPH A

A. TEXT OF PARAGRAPH A

Members hereby *agree* as follows:

A. *Objectives*

(i) The purpose of the Trade Policy Review Mechanism ("TPRM") is to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system. It is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members.

(ii) The assessment carried out under the review mechanism takes place, to the extent relevant, against the background of the wider economic and developmental needs, policies and objectives of the Member concerned, as well as of its external environment. However, the function of the review mechanism is to examine the impact of a Member's trade policies and practices on the multilateral trading system.

B. INTERPRETATION AND APPLICATION OF PARAGRAPH A

1. Mission of TPRM

1. With respect to the mission of the *TPRM*, the TPRB, in its Report to the Third Ministerial Conference, stated:

> "The TPRB reaffirmed the relevance of TPRM's mission as defined in Annex 3. The TPRM had been conceived as a policy exercise and it was therefore not intended to serve as a basis for the enforcement of specific WTO obligations or for dispute settlement procedures, or to impose new policy commitments on Members. The Mechanism should continue to focus on improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where

applicable, the Plurilateral Trade Agreements, and hence contribute to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. Accordingly, the Mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system. Reviews under the Mechanism should continue to take place, to the extent relevant, against the background of the wider economic and development needs, policies and objectives of the Members concerned, as well as of their external environment. Greater attention should be given to transparency in government decision-making on trade policy matters, in line with Paragraph B of Annex 3."[1]

2. Reference to GATT practice

2. With respect to GATT practice on this subject-matter see GATT Analytical Index, pages 305–308.

II. PARAGRAPH B

A. TEXT OF PARAGRAPH B

B. *Domestic transparency*

Members recognize the inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral trading system, and agree to encourage and promote greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Member's legal and political systems.

B. INTERPRETATION AND APPLICATION OF PARAGRAPH B

3. The TPRB, in its Report to the Third Ministerial Conference, found:

"The Mechanism had demonstrated that it had a valuable public-good aspect, particularly in its contribution to transparency. The Mechanism had also been a catalyst for Members to reconsider their policies, had served as an input into policy formulation and had helped identify technical assistance needs."[2]

4. The TPRB then concluded in the Report that "[g]reater attention should be given to transparency in government decision-making on trade policy matters, in line with Paragraph B of Annex 3".[3]

III. PARAGRAPH C

A. TEXT OF PARAGRAPH C

C. *Procedures for review*

(i) The Trade Policy Review Body (referred to herein as the "TPRB") is hereby established to carry out trade policy reviews.

(ii) The trade policies and practices of all Members shall be subject to periodic review. The impact of individual Members on the functioning of the multilateral trading system, defined in terms of their share of world trade in a recent representative period, will be the determining factor in deciding on the frequency of reviews. The first four trading entities so identified (counting the European Communities as one) shall be subject to review every two years. The next 16 shall be reviewed every four years. Other Members shall be reviewed every six years, except that a longer period may be fixed for least-developed country Members. It is understood that the review of entities having a common external policy covering more than one Member shall cover all components of policy affecting trade including relevant policies and practices of the individual Members. Exceptionally, in the event of changes in a Member's trade policies or practices that may have a significant impact on its trading partners, the Member concerned may be requested by the TPRB, after consultation, to bring forward its next review.

(iii) Discussions in the meetings of the TPRB shall be governed by the objectives set forth in paragraph A. The focus of these discussions shall be on the Member's trade policies and practices, which are the subject of the assessment under the review mechanism.

(iv) The TPRB shall establish a basic plan for the conduct of the reviews. It may also discuss and take note of update reports from Members. The TPRB shall establish a programme of reviews for each year in consultation with the Members directly concerned. In consultation with the Member or Members under review, the Chairman may choose discussants who, acting in their personal capacity, shall introduce the discussions in the TPRB.

(v) The TPRB shall base its work on the following documentation:

(a) a full report, referred to in paragraph D, supplied by the Member or Members under review;

(b) a report, to be drawn up by the Secretariat on its own responsibility, based on the information available to it and that pro-

[1] WT/MIN(99)/2, para. 3. See para. 29 of this Chapter.
[2] WT/MIN(99)/2, para. 4. See para. 29 of this Chapter.
[3] WT/MIN(99)/2, section VIII, fourth bullet point. See para. 29 of this Chapter.

vided by the Member or Members concerned. The Secretariat should seek clarification from the Member or Members concerned of their trade policies and practices.

(vi) The reports by the Member under review and by the Secretariat, together with the minutes of the respective meeting of the TPRB, shall be published promptly after the review.

(vii) These documents will be forwarded to the Ministerial Conference, which shall take note of them.

B. INTERPRETATION AND APPLICATION OF PARAGRAPH C

1. Subparagraph (i)

(a) Establishment of Trade Policy Review Body

5. With respect to the composition of the TPRB, see the Chapter on the *WTO Agreement*, Section IV.B.4.

(b) Rules of procedure

6. At its meeting of 6 June 1995, pursuant to Article IV:4 of the *WTO Agreement*, the TPRB adopted the rules of procedure for its meetings,[4] where the TPRB follows, *mutatis mutandis*, the rules of procedure for the General Council,[5] with certain exceptions.

7. The procedural improvements proposed by the TPRB to the *TPRM* and the discussion of these proposals can be found in two Notes by the Chairperson.[6]

(c) Overview of activities

(i) Reviews

8. As of 31 December 2004, the TPRB has conducted 197 reviews since its establishment in 1989.[7] The reviews have covered 114 Members, counting the European Union as one Member.[8] In its annual report for 2004, the TPRB stated:

> "By the end of 2004, the TPRM will have conducted 197 reviews since its formation (Annex I). The reviews have covered 114 of 148 Members, representing around 88% of the share of world trade. The trade policies and practices of four Members will have been reviewed for the first time during 2004.[9] The increased importance given to the reviews of least developed countries (LDCs) has led to 20 such reviews since 1998.[10]"[11]

(ii) Reporting

9. The TPRB issues annual reports covering its annual assessment of the *TPRM* and the extent to which it fulfils its objectives as set out in the *WTO Agreement*.[12]

2. Subparagraph (ii)

(a) Timing and frequency of review

10. Paragraph 2 of the rules of procedure for TPRB meetings provides as follows:

> "The cycle of reviews provided for in Paragraph C (ii) of the Agreement on the Trade Policy Review Mechanism (TPRM) shall be applied with a general flexibility of up to six months, if and as may be necessary. Schedules of subsequent reviews shall be established counting from the date of the previous review meeting. Members should adhere strictly to the timetables for the preparation of reviews, once agreed."[13]

11. The TPRB, in its Report to the Third Ministerial Conference, observed:

> "The TPRB considered that the current frequency of reviews provided a balance amongst numerous competing considerations, including TPRM objectives, particularly the smoother functioning of the multilateral trading system, the need to maintain a realistic workload, and the benefits of reviewing all Members soon."[14]

12. Also in the Report, the TPRB concluded that "[a]ll Members, including LDCs, should be reviewed at least once as soon as possible".[15]

(b) "the review of entities having a common external policy"

13. With respect to the reviews of regional entities and "grouped" reviews, the Note by the Chairperson dated 13 December 1995 states:

> "I believe it should be stressed that individual reviews must remain the basis of the TPRM. There is room for consideration of grouping of reviews, where possible;

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[4] The text of the adopted rules of procedure can be found in WT/TPR/6.
[5] WT/L/28.
[6] The text of the notes can be found in WT/TPR/13 and WT/TPR/20. The latter note was submitted to the TPRB meeting of 11 and 12 July 1996. WT/TPR/21, para. 2.
[7] WT/TPR/154, para. 4 and Annex I.
[8] WT/TPR/M/1–141.
[9] *(Footnote original)*These are Belize, Gambia, Rwanda, and Suriname.
[10] (*footnote original*) The least developed countries reviewed since the establishment of the Mechanism are: Bangladesh (twice), Benin (twice), Burkina Faso (twice), Burundi, Gambia, Guinea, Haiti, Lesotho (twice), Madagascar, Malawi, Maldives, Mali (twice), Mauritania, Mozambique, Niger, Rwanda, Senegal (twice), the Solomon Islands, Tanzania, Togo, Uganda (twice), and Zambia (twice).
[11] WT/TPR/154.
[12] The annual reports are numbered WT/TPR/27 (1996), WT/TPR/41 (1997), WT/TPR/59 (1998), WT/TPR/69 (1999) and WT/TPR/86 (2000).
[13] WT/TPR/6, para. 3.
[14] WT/MIN(96)/2, para. 9. See para. 29 of this Chapter. On this matter, see also WT/TPR/13, section (i) and WT/TPR/20, para. 10 and para. 7 of this Chapter.
[15] WT/MIN(96)/2, section VIII, second bullet point. See para. 29 of this Chapter.

however, at this stage there is no support for reviews of regional entities other than the EU."[16]

14. Also, the Note by the Chairperson submitted to the TPRB meeting of 11–12 June 1996 states:

"There is caution about the idea of 'grouping' countries for review, since criteria for such groupings would be difficult to develop and the benefits are not self-evident. However, where smaller member States might themselves volunteer to be reviewed as a group, such requests would be sympathetically considered."[17]

15. Further, the TPRB, in its Report to the Third Ministerial Conference, stated:

"Efforts to maximize efficiency might include: (i) a more considered use of grouped reviews . . . ."[18]

16. The TPRB has conducted reviews of the European Communities and its members. Also, the TPRB has conducted to date the group review of the WTO Members of (i) the South African Customs Union ("SACU")[19] and (ii) the Organisation of Eastern Caribbean States ("OECS").[20]

3. Subparagraph (iii)

17. On TPRB meetings, the TPRB, in its Report to the Third Ministerial Conference, stated:

"The TPRB judged two half-days as an appropriate timespan for a TPRB review, and a day-in-between as desirable. More interactive discussion was encouraged, as was greater participation in reviews of smaller Members, if possible at a rank reflecting the high-level representation often sent by Members under review. Reviews could highlight changes since the previous review."[21]

4. Subparagraph (v)

(a) Documentation

18. On the issue of documentation, the TPRB, in its Report to the Third Ministerial Conference, stated:

"The TPRB felt it essential to meet the agreed four weeks lead time for document distribution in all WTO official languages, as active participation in reviews depended on the timely availability of documents. The TPRB favoured flexibility on the lead time to submit written questions, as well as on the role and number of discussants. Current practice concerning minutes of meetings was seen as appropriate, as was the inclusion of written questions and answers in minutes. Members were encouraged to provide written answers whenever possible during the TPRB meetings. Questions left unanswered during the review should be answered in writing, with responses made available to the Membership; on this there should be a regular follow-up by the WTO Secretariat."[22]

(i) Government reports

19. With respect to reports by Members, see paragraphs 23–28 below.

(ii) Secretariat reports

20. On the Secretariat reports, the TPRB, in its Report to the Third Ministerial Conference, stated:

"The Secretariat should retain its capacity to prepare autonomous, in-depth reports that allowed the TPRB to arrive at an independent, fully informed evaluation of a Member's trade policies and practices. The present structure and coverage of Secretariat reports was generally satisfactory; care should continue to be taken that the reports achieve an appropriate balance between the traditional and relatively new areas of the WTO. Reports should be WTO-relevant, comprehensive and self-contained. The TPRB saw scope for making the Summary Observations of the Secretariat report more readable and for presenting in relevant parts of the report subsequent developments on issues raised at the previous review."[23]

(iii) Derestriction of reports by the Secretariat and the Member under review

21. The Reports by the Secretariat and the Member under review are subject to restricted circulation and press embargo until the end of the first session of the review meeting of the Trade Policy Review Body.

5. Subparagraph (vi)

22. On the dissemination of reviews, the TPRB, in its Report to the Third Ministerial Conference, stated:

"The TPRB considered present dissemination practices as satisfactory. Members noted the value of building awareness within the wider public of the work of the TPRB. Taking existing publication arrangements and budgetary implications into account, the fullest possible dissemination of reviews was encouraged, particularly through the Internet."[24]

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[16] WT/TPR/13, para. 11. See para. 7 of this Chapter. The Note, however, states that "[t]he general feeling was that national trade policy reviews should not be confused with analyses of regional agreements under Article XXIV of GATT 1994 and Article V of GATS". WT/TPR/13, para. 9.

[17] WT/TPR/20, para. 11. See para. 7 of this Chapter.

[18] WT/MIN(99)/2, para. 15. See para. 29 of this Chapter.

[19] WT/TPR/M/34–38. The WTO Members of the SACU are: South Africa, Botswana, Lesotho, Namibia and Swaziland.

[20] WT/TPR/M/85. The WTO Members of the OECS are: Antigua and Barbuda, Dominica, Grenada, St Kitts and Nevis, St Lucia and St Vincent and the Grenadines.

[21] WT/MIN(99)/2, para. 11. See para. 29 of this Chapter.

[22] WT/MIN(99)/2, para. 12. See para. 29 of this Chapter.

[23] WT/MIN(99)/2, para. 8. See para. 29 of this Chapter. See also WT/TPR/13, section (iii). In this regard, see para. 7 of this Chapter.

[24] WT/MIN(99)/2, para. 13. See para. 29 of this Chapter.

IV. PARAGRAPH D

A. TEXT OF PARAGRAPH D

D. *Reporting*

In order to achieve the fullest possible degree of transparency, each Member shall report regularly to the TPRB. Full reports shall describe the trade policies and practices pursued by the Member or Members concerned, based on an agreed format to be decided upon by the TPRB. This format shall initially be based on the Outline Format for Country Reports established by the Decision of 19 July 1989 (BISD 36S/406–409), amended as necessary to extend the coverage of reports to all aspects of trade policies covered by the Multilateral Trade Agreements in Annex 1 and, where applicable, the Plurilateral Trade Agreements. This format may be revised by the TPRB in the light of experience. Between reviews, Members shall provide brief reports when there are any significant changes in their trade policies; an annual update of statistical information will be provided according to the agreed format. Particular account shall be taken of difficulties presented to least-developed country Members in compiling their reports. The Secretariat shall make available technical assistance on request to developing country Members, and in particular to the least-developed country Members. Information contained in reports should to the greatest extent possible be coordinated with notifications made under provisions of the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements.

B. INTERPRETATION AND APPLICATION OF PARAGRAPH D

1. Government reports

(a) Format

23. With respect to the Decision of 19 July 1989,[25] see GATT Analytical Index, page 307.

24. On this topic, the TPRB, in its Report to the Third Ministerial Conference, stated:

> "The TPRB saw the Secretariat and Government reports as complementary. Governments were free to define the structure and coverage of their own reports, but were encouraged to keep them short, WTO-relevant and forward-looking, highlighting recent trade policy development and future policy directions and their impact on trade."[26]

25. Further, a decision of the Contracting Parties to *GATT 1947*, adopted at the Council meeting of 10 May 1994, states:

> "[I]n order to avoid duplication of the material contained in the Secretariat report, and to lighten the burden of delegations, Government reports shall be in the form of policy statements."[27]

(b) Timing

26. The rules of procedure for the TPRB meetings state:

> "Documentation relating to each review meeting shall be circulated in all working languages not less than four weeks in advance of the relevant meetings."[28]

27. Also, the TPRB, in its Report to the Third Ministerial Conference, stated:

> "The TPRB felt it essential to meet the agreed four weeks lead time for document distribution in all WTO official languages, as active participation in reviews depended on the timely availability of documents. The TPRB favoured flexibility on the lead time to submit written questions, as well as on the role and number of discussants."[29]

28. In practice, Members are accordingly requested to submit their government reports to the WTO at least eight weeks before the TPRB meeting for their review.[30]

V. PARAGRAPH E

A. TEXT OF PARAGRAPH E

E. *Relationship with the balance-of-payments provisions of GATT 1994 and GATS*

Members recognize the need to minimize the burden for governments also subject to full consultations under the balance-of-payments provisions of GATT 1994 or GATS. To this end, the Chairman of the TPRB shall, in consultation with the Member or Members concerned, and with the Chairman of the Committee on Balance-of-Payments Restrictions, devise administrative arrangements that harmonize the normal rhythm of the trade policy reviews with the timetable for balance-of-payments consultations but do not postpone the trade policy review by more than 12 months.

B. INTERPRETATION AND APPLICATION OF PARAGRAPH E

No jurisprudence or decision of a competent WTO body.

VI. PARAGRAPH F

A. TEXT OF PARAGRAPH F

F. *Appraisal of the Mechanism*

The TPRB shall undertake an appraisal of the operation of the TPRM not more than five years after the

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[25] L/6552.
[26] WT/MIN(99)/2, para. 7. See para. 29 of this Chapter.
[27] L/7458.
[28] WT/TPR/6, para. 10. See para. 6 of this Chapter.
[29] WT/MIN(99)/2, para. 12. See para. 29 of this Chapter.
[30] See also the Decision adopted by the GATT Council at its meeting 12 April 1989 to establish the Trade Policy Review Mechanism, L/6490, para. B(i).

entry into force of the Agreement Establishing the WTO. The results of the appraisal will be presented to the Ministerial Conference. It may subsequently undertake appraisals of the TPRM at intervals to be determined by it or as requested by the Ministerial Conference.

B. INTERPRETATION AND APPLICATION OF PARAGRAPH F

29. At its meeting of 27 January 1999, the TPRB agreed on a procedure to appraise the operation of the *TPRM*.[31] On 5 October 1999, the TPRB adopted a report to the Third Ministerial Conference concerning the results of its first appraisal.[32] With respect to the contents of this report, see paragraphs 1, 3, 4, 11, 12, 15, 17, 18, 20, 22, 27 and 30 in this Chapter.

30. With respect to a further appraisal of the operation of the *TPRM*, the TPRB's report to the Third Ministerial Conference states:

> "The TPRB should undertake a further appraisal of the operation of the TPRM not more than five years after the conclusion of the Third WTO Ministerial or as requested by a Ministerial Conference."[33]

VII. PARAGRAPH G

A. TEXT OF PARAGRAPH G

G. *Overview of Developments in the International Trading Environment*

An annual overview of developments in the international trading environment which are having an impact on the multilateral trading system shall also be undertaken by the TPRB. The overview is to be assisted by an annual report by the Director-General setting out major activities of the WTO and highlighting significant policy issues affecting the trading system.

B. INTERPRETATION AND APPLICATION OF PARAGRAPH G

31. Annual reports by the Director-General are submitted to the TPRB in accordance with Paragraph G.[34]

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[31] WT/TPR/69, para. 7.
[32] WT/TPR/69, para. 7. The text of the adopted report can be found in WT/MIN(99)/2.
[33] WT/MIN(99)/2, section VIII, last bullet point. See para. 29 of this Chapter.
[34] The reports are numbered WT/TPR/OV/-.

Agreement on Trade in Civil Aircraft

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A. TEXT OF THE ANNEX 1399
B. INTERPRETATION AND APPLICATION OF THE ANNEX 1399

I. PREAMBLE

A. TEXT OF THE PREAMBLE

Signatories[1] to the Agreement on Trade in Civil Aircraft, hereinafter referred to as "this Agreement";

(*footnote original*) [1] The term "Signatories" is hereinafter used to mean Parties to this Agreement.

Noting that Ministers on 12–14 September 1973 agreed the Tokyo Round of Multilateral Trade Negotiations should achieve the expansion and ever-greater liberalization of world trade through, *inter alia*, the progressive dismantling of obstacles to trade and the improvement of the international framework for the conduct of world trade;

Desiring to achieve maximum freedom of world trade in civil aircraft, parts and related equipment, including elimination of duties, and to the fullest extent possible, the reduction or elimination of trade restricting or distorting effects;

Desiring to encourage the continued technological development of the aeronautical industry on a worldwide basis;

Desiring to provide fair and equal competitive opportunities for their civil aircraft activities and for their producers to participate in the expansion of the world civil aircraft market;

Being mindful of the importance in the civil aircraft sector of their overall mutual economic and trade interests;

Recognizing that many Signatories view the aircraft sector as a particularly important component of economic and industrial policy;

Seeking to eliminate adverse effects on trade in civil aircraft resulting from governmental support in civil aircraft development, production, and marketing while recognizing that such governmental support, of itself, would not be deemed a distortion of trade;

Desiring that their civil aircraft activities operate on a commercially competitive basis, and recognizing that government–industry relationships differ widely among them;

Recognizing their obligations and rights under the General Agreement on Tariffs and Trade, hereinafter referred to as "the GATT", and under other multilateral agreements negotiated under the auspices of the GATT;

Recognizing the need to provide for international notification, consultation, surveillance and dispute settlement procedures with a view to ensuring a fair, prompt and effective enforcement of the provisions of this Agreement and to maintain the balance of rights and obligations among them;

Desiring to establish an international framework governing conduct of trade in civil aircraft;

Hereby agree as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

1. General

(a) Origins

1. The *Aircraft Agreement* was concluded on 12 April 1979 at the end of the Tokyo Round. It entered into force on 1 January 1980.[1] Signatories adopted on 8 March 1983 an "Agreed interpretation of Article 2.1.2 of the Agreement on Trade in Civil Aircraft" and "Common guidelines for binding of duties on repairs, to be inserted as a headnote in Signatories' respective GATT schedules".[2] During the Uruguay Round, the negotiators tried unsuccessfully to elaborate a new Aircraft Agreement. At the end of the negotiations, the 1979 *Aircraft Agreement* was annexed, unchanged, to the *WTO Agreement*.

(b) Status under the WTO

2. As of 31 December 2004, there were 30 Signatories to the Agreement: Bulgaria, Canada, the European Communities, Austria, Belgium, Chinese Taipei, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, the United Kingdom, Egypt, Estonia, Georgia, Japan, Latvia, Lithuania, Macau, Malta, Norway, Romania, Switzerland and the United States. Those WTO Members with observer status in the Committee are: Argentina, Australia, Bangladesh, Brazil, Cameroon, China, Colombia, the Czech Republic, Finland, Gabon, Ghana, India, Indonesia, Israel, Korea, Mauritius, Nigeria, Oman, Poland, Singapore, Slovakia, Sri Lanka, Trinidad and Tobago, Tunisia and Turkey. In addition, the Russian Federation and Saudi Arabia are also observers. The IMF and UNCTAD are also observers.[3]

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1
Product Coverage

1.1 This Agreement applies to the following products:

(*a*) all civil aircraft,

(*b*) all civil aircraft engines and their parts and components,

(*c*) all other parts, components, and sub-assemblies of civil aircraft,

(*d*) all ground flight simulators and their parts and components,

whether used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification or conversion of civil aircraft.[4]

1.2 For the purposes of this Agreement "civil aircraft" means (*a*) all aircraft other than military aircraft and (*b*) all other products set out in Article 1.1 above.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. Article 1.1

3. The Annex to the Aircraft Agreement on Product Coverage, to which there were three certifications of modifications and rectifications,[5] has been further amended by means of a Protocol in 1986.[6] At the 21 November 2001 meeting, the Chairman gave an updated report confirming the adoption by the Committee of the *Protocol (2001)*[7] and decision on interim application of duty-free treatment to aircraft ground maintenance simulators,[8] with effect from 6 June 2001. In view of the fact that the *Protocol (2001)* had not yet been accepted by all Signatories, and that the terms of the Protocol give authority to the Committee to decide on the date for acceptance, Signatories adopted a decision to extend the date of acceptance of the *Protocol (2001)* indefinitely.[9, 10] At the 13 November 2002 meet-

[1] BISD 26S/162–170.
[2] AIR/M/10, paras. 9–25 (see footnote 10 of this Chapter). For the Agreed interpretation of Article 2.1.2, see para. 6 of this Chapter.
[3] No Members have become signatories to this Agreement since 1 February 2002.
[4] With respect to the coverage of this Agreement, see the Annex in Section XI.
[5] BISD 30S/4 (1983); BISD 31S/4 (1984); BISD 31S/5 (1985).
[6] BISD 34S/22–24.
[7] TCA/4.
[8] TCA/6.
[9] TCA/7.
[10] The Protocol amending the Annex to the TCA Agreement transposes into the Annex to the Agreement the changes introduced in 1992, 1996 and 2002 versions of the Harmonized Commodity Description and Coding System, as well as extending the product coverage of the Agreement. The new product coverage annex is thus contained in Annex TCA/4.

ing, the Committee adopted ad referendum a decision on Procedures for the Circulation and Derestriction of Documents,[11] aligning the procedures concerning circulation and derestriction of Committee documents with those applicable to other WTO documents.[12]

4. At the meeting of 30 November 1998, the Aircraft Committee decided that the factual information regarding civil/military identification for domestic customs purposes contained in AIR/TSC/W/49 should be updated.[13]

5. At its meeting of 15 November 2000, the Aircraft Committee adopted the following decision:

> "The Committee decides to urge that Signatories apply immediately, on an interim basis, duty-free treatment to the goods of the proposed product coverage Annex outlined in WTO document TCA/W/5/Rev. 3, including aircraft ground maintenance simulators. Signatories shall inform the Committee on steps they have taken relating to such interim application."[14]

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2
Customs Duties and Other Charges

2.1 Signatories agree:

2.1.1 to eliminate by 1 January 1980, or by the date of entry into force of this Agreement, all customs duties and other charges[1] of any kind levied on, or in connection with, the importation of products, classified for customs purposes under their respective tariff headings listed in the Annex, if such products are for use in a civil aircraft and incorporation therein, in the course of its manufacture, repair, maintenance, rebuilding, modification or conversion;

(*footnote original*) [1] "Other charges" shall have the same meaning as in Article II of the GATT.

2.1.2 to eliminate by 1 January 1980, or by the date of entry into force of this Agreement, all customs duties and other charges[1] of any kind levied on repairs on civil aircraft;

(*footnote original*) [1] "Other charges" shall have the same meaning as in Article II of the GATT.

2.1.3 to incorporate in their respective GATT Schedules by 1 January 1980, or by the date of entry into force of this Agreement, duty-free or duty-exempt treatment for all products covered by Article 2.1.1 above and for all repairs covered by Article 2.1.2 above.

2.2 Each Signatory shall: (a) adopt or adapt an end-use system of customs administration to give effect to its obligations under Article 2.1 above; (b) ensure that its end-use system provides duty-free or duty-exempt treatment that is comparable to the treatment provided by other Signatories and is not an impediment to trade; and (c) inform other Signatories of its procedures for administering the end-use system.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

6. As mentioned in paragraph 1 above, on 8 March 1983, the signatories adopted an "Agreed Interpretation of Article 2.1.2 of the Agreement on Trade in Civil Aircraft"[15], which states that the elimination of "all customs duties and other charges of any kind levied on repairs on civil aircraft" applies only to repairs of complete civil aircraft and those civil aircraft products covered by the respective tariff headings listed in the Annex to the *Aircraft Agreement.*

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3
Technical Barriers to Trade

3.1 Signatories note that the provisions of the Agreement on Technical Barriers to Trade apply to trade in civil aircraft. In addition, Signatories agree that civil aircraft certification requirements and specifications on operating and maintenance procedures shall be governed, as between Signatories, by the Provisions of the Agreement on Technical Barriers to Trade.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

No jurisprudence or decision of a competent WTO body.

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[11] TCA/8.

[12] The Committee agreed that the Decision on Procedures for the Circulation and Derestriction of Documents would be considered as finally adopted in the absence of objections from Signatories before the agreed deadline of 30 November 2002. No objections were made by that date and the adoption of the Decision was thus confirmed. The Decision can be found in document TCA/8.

[13] WT/L/291, para. 4. As of 15 November 2000, Bulgaria, Canada, the European Communities, Japan and the United States had provided the requisite information, TCA/M/11, para. 58.

[14] TCA/M/11, para. 48. See also TCA/M/12, paras. 47–51, and TCA/W/7 concerning a communication from Japan on the non-legally binding nature of the Aircraft Committee decision on 15 November 2000.

[15] AIR/M/10, BISD 30S/24.

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4
Government-Directed Procurement, Mandatory Sub-Contracts and Inducements

4.1 Purchasers of civil aircraft should be free to select suppliers on the basis of commercial and technological factors.

4.2 Signatories shall not require airlines, aircraft manufacturers, or other entities engaged in the purchase of civil aircraft, nor exert unreasonable pressure on them, to procure civil aircraft from any particular source, which would create discrimination against suppliers from any Signatory.

4.3 Signatories agree that the purchase of products covered by this Agreement should be made only on a competitive price, quality and delivery basis. In conjunction with the approval or awarding of procurement contracts for products covered by this Agreement a Signatory may, however, require that its qualified firms be provided with access to business opportunities on a competitive basis and on terms no less favourable than those available to the qualified firms of other Signatories.[1]

(*footnote original*) [1] Use of the phrase "access to business opportunities . . . on terms no less favourable . . ." does not mean that the amount of contracts awarded to the qualified firms of one Signatory entitles the qualified firms of other Signatories to contracts of a similar amount.

4.4 Signatories agree to avoid attaching inducements of any kind to the sale or purchase of civil aircraft from any particular source which would create discrimination against suppliers from any Signatory.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

No jurisprudence or decision of a competent WTO body.

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5
Trade Restrictions

5.1 Signatories shall not apply quantitative restrictions (import quotas) or import licensing requirements to restrict imports of civil aircraft in a manner inconsistent with applicable provisions of the GATT. This does not preclude import monitoring or licensing systems consistent with the GATT.

5.2 Signatories shall not apply quantitative restrictions or export licensing or other similar requirements to restrict, for commercial or competitive reasons, exports of civil aircraft to other Signatories in a manner inconsistent with applicable provisions of the GATT.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

No jurisprudence or decision of a competent WTO body.

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6
Government Support, Export Credits, and Aircraft Marketing

6.1 Signatories note that the provisions of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Agreement on Subsidies and Countervailing Measures) apply to trade in civil aircraft. They affirm that in their participation in, or support of, civil aircraft programmes they shall seek to avoid adverse effects on trade in civil aircraft in the sense of Articles 8.3 and 8.4 of the Agreement on Subsidies and Countervailing Measures. They also shall take into account the special factors which apply in the aircraft sector, in particular the widespread governmental support in this area, their international economic interests, and the desire of producers of all Signatories to participate in the expansion of the world civil aircraft market.

6.2 Signatories agree that pricing of civil aircraft should be based on a reasonable expectation of recoupment of all costs, including non-recurring programme costs, identifiable and pro-rated costs of military research and development on aircraft, components, and systems that are subsequently applied to the production of such civil aircraft, average production costs, and financial costs.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

No jurisprudence or decision of a competent WTO body.

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7
Regional and Local Governments

7.1 In addition to their other obligations under this Agreement, Signatories agree not to require or encourage, directly or indirectly, regional and local governments and authorities, non-governmental bodies, and other bodies to take action inconsistent with provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

No jurisprudence or decision of a competent WTO body.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8
Surveillance, Review, Consultation, and Dispute Settlement

8.1 There shall be established a Committee on Trade in Civil Aircraft (hereinafter referred to as "the Committee") composed of representatives of all Signatories. The Committee shall elect its own Chairman. It shall meet as necessary, but not less than once a year, for the purpose of affording Signatories the opportunity to consult on any matters relating to the operation of this Agreement, including developments in the civil aircraft industry, to determine whether amendments are required to ensure continuance of free and undistorted trade, to examine any matter for which it has not been possible to find a satisfactory solution through bilateral consultations, and to carry out such responsibilities as are assigned to it under this Agreement, or by the Signatories.

8.2 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the Contracting Parties to the GATT of developments during the period covered by such review.

8.3 Not later than the end of the third year from the entry into force of this Agreement and periodically thereafter, Signatories shall undertake further negotiations, with a view to broadening and improving this Agreement on the basis of mutual reciprocity.

8.4 The Committee may establish such subsidiary bodies as may be appropriate to keep under regular review the application of this Agreement to ensure a continuing balance of mutual advantages. In particular, it shall establish an appropriate subsidiary body in order to ensure a continuing balance of mutual advantages, reciprocity and equivalent results with regard to the implementation of the provisions of Article 2 above related to product coverage, the end-use systems, customs duties and other charges.

8.5 Each Signatory shall afford sympathetic consideration to and adequate opportunity for prompt consultation regarding representations made by another Signatory with respect to any matter affecting the operation of this Agreement.

8.6 Signatories recognize the desirability of consultations with other Signatories in the Committee in order to seek a mutually acceptable solution prior to the initiation of an investigation to determine the existence, degree and effect of any alleged subsidy. In those exceptional circumstances in which no consultations occur before such domestic procedures are initiated, Signatories shall notify the Committee immediately of initiation of such procedures and enter into simultaneous consultations to seek a mutually agreed solution that would obviate the need for countervailing measures.

8.7 Should a Signatory consider that its trade interests in civil aircraft manufacture, repair, maintenance, rebuilding, modification or conversion have been or are likely to be adversely affected by any action by another Signatory, it may request review of the matter by the Committee. Upon such a request, the Committee shall convene within thirty days and shall review the matter as quickly as possible with a view to resolving the issues involved as promptly as possible and in particular prior to final resolution of these issues elsewhere. In this connection the Committee may issue such rulings or recommendations as may be appropriate. Such review shall be without prejudice to the rights of Signatories under the GATT or under instruments multilaterally negotiated under the auspices of the GATT, as they affect trade in civil aircraft. For the purposes of aiding consideration of the issues involved, under the GATT and such instruments, the Committee may provide such technical assistance as may be appropriate.

8.8 Signatories agree that, with respect to any dispute related to a matter covered by this Agreement, but not covered by other instruments multilaterally negotiated under the auspices of the GATT, the provisions of Articles XXII and XXIII of the General Agreement and the provisions of the Understanding related to Notification, Consultation, Dispute Settlement and Surveillance shall be applied, *mutatis mutandis*, by the Signatories and the Committee for the purposes of seeking settlement of such dispute. These procedures shall also be applied for the settlement of any dispute related to a matter covered by this Agreement and by another instrument multilaterally negotiated under the auspices of the GATT, should the parties to the dispute so agree.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

7. The Aircraft Committee reviews annually the implementation of the *Aircraft Agreement* and, pursuant to Article IV.8 of the *WTO Agreement*, submits annual reports to the General Council.[16]

[16] WT/L/107; WT/L/193; WT/L/247; WT/L/291; WT/L/340 (+Corr.1); WT/L/374. (See TCA/M/1, para. 20.)

8. At its meeting of 20 February 1980, the Aircraft Committee established a Technical Sub-Committee,[17] with the following terms of reference:

"1. Pursuant to Article 8.4, to examine the implementation of the provisions of Article 2 related to product coverage, the end-use system, customs duties and other charges, including matters relating to aircraft tariff nomenclature, and to report to the Committee.

2. In the light of the Preamble of the Agreement, to examine proposals for modifying the product coverage and to report thereon to the Committee".[18]

9. At its meeting of 16 July 1992, the Aircraft Committee also established the Sub-Committee of the Committee on Trade in Civil Aircraft in which negotiations under Article 8.3 of the Agreement would be conducted.[19] The Sub-Committee has not met since its fourteenth meeting in November 1995.[20]

X. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9
Final Provisions

9.1 *Acceptance and Accession*

9.1.1 This Agreement shall be open for acceptance by signature or otherwise by governments contracting parties to the GATT and by the European Economic Community.

9.1.2 This Agreement shall be open for acceptance by signature or otherwise by governments having provisionally acceded to the GATT, on terms related to the effective application of rights and obligations under this Agreement, which take into account rights and obligations in the instruments providing for their provisional accession.

9.1.3 This Agreement shall be open to accession by any other government on terms, related to the effective application of rights and obligations under this Agreement, to be agreed between that government and the Signatories, by the deposit with the Director-General to the CONTRACTING PARTIES to the GATT of an instrument of accession which states the terms so agreed.

9.1.4 In regard to acceptance, the provisions of Article XXVI:5 (*a*) and (*b*) of the General Agreement would be applicable.

9.2 *Reservations*

9.2.1 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Signatories.

9.3 *Entry into Force*

9.3.1 This Agreement shall enter into force on 1 January 1980 for the governments[1] which have accepted or acceded to it by that date. For each other government it shall enter into force on the thirtieth day following the date of its acceptance or accession to this Agreement.

(*footnote original*) [1] For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Economic Community.

9.4 *National Legislation*

9.4.1 Each government accepting or acceding to this Agreement shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement.

9.4.2 Each Signatory shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

9.5 *Amendments*

9.5.1 The Signatories may amend this Agreement, having regard, *inter alia*, to the experience gained in its implementation. Such an amendment, once the Signatories have concurred in accordance with the procedures established by the Committee, shall not come into force for any Signatory until it has been accepted by such Signatory.

9.6 *Withdrawal*

9.6.1 Any Signatory may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of twelve months from the day on which written notice of withdrawal is received by the Director-General to the CONTRACTING PARTIES to the GATT. Any Signatory may

[17] AIR/M/1, paras. 36–40.
[18] AIR/M/1, para. 38.
[19] AIR/M/32, para. 35. See also AIR/M/34, paras. 6–11.
[20] TCA/1. See also TCA/M/4, paras. 18–25.

upon such notification request an immediate meeting of the Committee.

9.7 *Non-Application of this Agreement Between Particular Signatories*

9.7.1 This Agreement shall not apply as between any two Signatories if either of the Signatories, at the time either accepts or accedes to this Agreement, does not consent to such application.

9.8 *Annex*

9.8.1 The Annex to this Agreement forms an integral part thereof.

9.9 *Secretariat*

9.9.1 This Agreement shall be serviced by the GATT secretariat.

9.10 *Deposit*

9.10.1 This Agreement shall be deposited with the Director-General to the CONTRACTING PARTIES to the GATT who shall promptly furnish to each Signatory and each contracting party to the GATT a certified copy thereof and of each amendment thereto pursuant to Article 9.5 and a notification of each acceptance thereof or accession thereto pursuant to Article 9.1, or each withdrawal therefrom pursuant to Article 9.6.

9.11 *Registration*

9.11.1 This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Geneva this twelfth day of April nineteen hundred and seventy-nine in a single copy, in the English and French languages, each text being authentic, except as otherwise specified with respect to the various lists in the Annex.[1]

(*footnote original*) [1] On 25 March 1987, the Committee agreed that the Spanish text of the Agreement shall also be considered authentic.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

No jurisprudence or decision of a competent WTO body.

XI. ANNEX

A. TEXT OF THE ANNEX

ANNEX

(as amended by the Protocol (1986) amending the access to the Agreement on Trade in Civil Aircraft)

PRODUCT COVERAGE

1. The product coverage is defined in Article 1 of the Agreement on Trade in Civil Aircraft.

2. Signatories agree that products covered by the descriptions listed below[1] and properly classified for customs purposes under the Customs Co-operation Council Nomenclature (Revised) headings of the Harmonized System codes shown alongside shall be accorded duty-free or duty-exempt treatment, if such products are for use in civil aircraft or ground flying trainers* and for incorporation therein, in the course of their manufacture, repair, maintenance, rebuilding, modification or conversion.

These products shall not include:

an incomplete or unfinished product, unless it has the essential character of a complete or finished part, component, sub-assembly or item of equipment of a civil aircraft or ground flying trainer*, (e.g. an article which has a civil aircraft manufacturer's number),

materials in any form (e.g. sheets, plates, profile shapes, strips, bars, pipes, tubes or other shapes) unless they have been cut to size or shape and/or shaped for incorporation in civil aircraft or a ground flying trainer* (e.g. an article which has a civil aircraft manufacturer's part number),

raw materials and consumable goods.

4. For the purpose of this Annex, «Ex» has been included to indicate that the product description referred to does not exhaust the entire range of products within the Customs Co-operation Council Nomenclature (Revised) headings or the Harmonized System codes listed below.[1]

(*footnote original*) [1] The list is not reproduced.
(*footnote original*) * For the purposes of Article 1.1 of this Agreement "ground flight simulators" are to be regarded as ground flying trainers as provided for under 8805.20 of the Harmonized System.

B. INTERPRETATION AND APPLICATION OF THE ANNEX

No jurisprudence or decision of a competent WTO body.

Agreement on Government Procurement

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Parties to this Agreement (hereinafter referred to as "Parties"),

Recognizing the need for an effective multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade;

Recognizing that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection to domestic products or services or domestic suppliers and should not discriminate among foreign products or services or among foreign suppliers;

Recognizing that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement;

Recognizing the need to establish international procedures on notification, consultation, surveillance and dispute settlement with a view to ensuring a fair, prompt and effective enforcement of the international provisions on government procurement and to maintain the balance of rights and obligations at the highest possible level;

Recognizing the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries;

Desiring, in accordance with paragraph 6(b) of Article IX of the Agreement on Government Procurement done on 12 April 1979, as amended on 2 February 1987, to broaden and improve the Agreement on the basis of mutual reciprocity and to expand the coverage of the Agreement to include service contracts;

Desiring to encourage acceptance of and accession to this Agreement by governments not party to it;

Having undertaken further negotiations in pursuance of these objectives;

Hereby *agree* as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

No jurisprudence or decision of a competent WTO body.

II. ARTICLE I

A. TEXT OF ARTICLE I

Article I
Scope and Coverage

1. This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I.[1]

(*footnote original*) [1] For each Party, Appendix I is divided into five Annexes:
- Annex 1 contains central government entities.
- Annex 2 contains sub-central government entities.
- Annex 3 contains all other entities that procure in accordance with the provisions of this Agreement.
- Annex 4 specifies services, whether listed positively or negatively, covered by this Agreement.
- Annex 5 specifies covered construction services.

Relevant thresholds are specified in each Party's Annexes.

2. This Agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.

3. Where entities, in the context of procurement covered under this Agreement, require enterprises not included in Appendix I to award contracts in accordance with particular requirements, Article III shall apply *mutatis mutandis* to such requirements.

4. This Agreement applies to any procurement contract of a value of not less than the relevant threshold specified in Appendix I.

B. INTERPRETATION AND APPLICATION OF ARTICLE I

1. Article I:1

(a) Loose-leaf system for updating appendices

1. At its meeting of 4 June 1996, the Committee on Government Procurement decided to establish a loose-leaf system with legal effect to periodically update the Appendices to the *Agreement on Government Procurement*.[1] At its meeting on 24 February 1997, the Committee on Government Procurement agreed on the procedures for subsequent modifications to the loose-leaf system.[2] In addition to being made available in hard-copy form, the loose-leaf system and future new or replacement pages are circulated to parties and other WTO Members in electronic form through the WTO Document Dissemination Facility. An up-to-date copy of the loose-leaf system is also available to the general public through the government procurement site on the WTO Home Page on the Internet.[3]

2. Appendix 1

2. With respect to the interpretation of the Korean Annex 1 in the Panel on *Korea – Procurement*, see paragraphs 27–33 below.

3. Article I:4

3. At its meeting of 27 February 1996, the Committee on Government Procurement decided on the "Modalities for Notifying Threshold Figures in National Currencies".[4]

III. ARTICLE II

A. TEXT OF ARTICLE II

Article II
Valuation of Contracts

1. The following provisions shall apply in determining the value of contracts[2] for purposes of implementing this Agreement.

(*footnote original*) [2] This Agreement shall apply to any procurement contract for which the contract value is estimated to equal or exceed the threshold at the time of publication of the notice in accordance with Article IX.

2. Valuation shall take into account all forms of remuneration, including any premiums, fees, commissions and interest receivable.

3. The selection of the valuation method by the entity shall not be used, nor shall any procurement requirement be divided, with the intention of avoiding the application of this Agreement.

4. If an individual requirement for a procurement results in the award of more than one contract, or in contracts being awarded in separate parts, the basis for valuation shall be either:

(a) the actual value of similar recurring contracts concluded over the previous fiscal year or 12 months adjusted, where possible, for anticipated changes in quantity and value over the subsequent 12 months; or

(b) the estimated value of recurring contracts in the fiscal year or 12 months subsequent to the initial contract.

5. In cases of contracts for the lease, rental or hire purchase of products or services, or in the case of contracts which do not specify a total price, the basis for valuation shall be:

(a) in the case of fixed-term contracts, where their term is 12 months or less, the total contract value for their duration, or, where their term exceeds 12 months, their total value including the estimated residual value;

(b) in the case of contracts for an indefinite period, the monthly instalment multiplied by 48.

If there is any doubt, the second basis for valuation, namely (b), is to be used.

6. In cases where an intended procurement specifies the need for option clauses, the basis for valuation shall be the total value of the maximum permissible procurement, inclusive of optional purchases.

B. INTERPRETATION AND APPLICATION OF ARTICLE II

No jurisprudence or decision of a competent WTO body.

IV. ARTICLE III

A. TEXT OF ARTICLE III

Article III
National Treatment and Non-discrimination

1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than:

(a) that accorded to domestic products, services and suppliers; and

(b) that accorded to products, services and suppliers of any other Party.

[1] GPA/M/2, Section E.
[2] GPA/M/5, Section D.
[3] GPA/19, para. 7.
[4] GPA/M/1, Section B. The text of the decision can be found in GPA/1, Annex 3.

2. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure:

(a) that its entities shall not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership; and

(b) that its entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the Agreement in accordance with the provisions of Article IV.

3. The provisions of paragraphs 1 and 2 shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices regarding government procurement covered by this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE III

No jurisprudence or decision of a competent WTO body.

V. ARTICLE IV

A. TEXT OF ARTICLE IV

Article IV
Rules of Origin

1. A Party shall not apply rules of origin to products or services imported or supplied for purposes of government procurement covered by this Agreement from other Parties, which are different from the rules of origin applied in the normal course of trade and at the time of the transaction in question to imports or supplies of the same products or services from the same Parties.

2. Following the conclusion of the work programme for the harmonization of rules of origin for goods to be undertaken under the Agreement on Rules of Origin in Annex 1A of the Agreement Establishing the World Trade Organization (hereinafter referred to as "WTO Agreement") and negotiations regarding trade in services, Parties shall take the results of that work programme and those negotiations into account in amending paragraph 1 as appropriate.

B. INTERPRETATION AND APPLICATION OF ARTICLE IV

No jurisprudence or decision of a competent WTO body.

VI. ARTICLE V

A. TEXT OF ARTICLE V

Article V
Special and Differential Treatment for Developing Countries

Objectives

1. Parties shall, in the implementation and administration of this Agreement, through the provisions set out in this Article, duly take into account the development, financial and trade needs of developing countries, in particular least-developed countries, in their need to:

(a) safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development;

(b) promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other sectors of the economy;

(c) support industrial units so long as they are wholly or substantially dependent on government procurement; and

(d) encourage their economic development through regional or global arrangements among developing countries presented to the Ministerial Conference of the World Trade Organization (hereinafter referred to as the "WTO") and not disapproved by it.

2. Consistently with the provisions of this Agreement, each Party shall, in the preparation and application of laws, regulations and procedures affecting government procurement, facilitate increased imports from developing countries, bearing in mind the special problems of least-developed countries and of those countries at low stages of economic development.

Coverage

3. With a view to ensuring that developing countries are able to adhere to this Agreement on terms consistent with their development, financial and trade needs, the objectives listed in paragraph 1 shall be duly taken into account in the course of negotiations with respect to the procurement of developing countries to be covered by the provisions of this Agreement. Developed countries, in the preparation of their coverage lists under the provisions of this Agreement, shall endeavour to include entities procuring products and services of export interest to developing countries.

Agreed Exclusions

4. A developing country may negotiate with other participants in negotiations under this Agreement mutually

acceptable exclusions from the rules on national treatment with respect to certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case. In such negotiations, the considerations mentioned in subparagraphs 1(a) through 1(c) shall be duly taken into account. A developing country participating in regional or global arrangements among developing countries referred to in subparagraph 1(d) may also negotiate exclusions to its lists, having regard to the particular circumstances of each case, taking into account, *inter alia*, the provisions on government procurement provided for in the regional or global arrangements concerned and, in particular, products or services which may be subject to common industrial development programmes.

5. After entry into force of this Agreement, a developing country Party may modify its coverage lists in accordance with the provisions for modification of such lists contained in paragraph 6 of Article XXIV, having regard to its development, financial and trade needs, or may request the Committee on Government Procurement (hereinafter referred to as "the Committee") to grant exclusions from the rules on national treatment for certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case and taking duly into account the provisions of subparagraphs 1(a) through 1(c). After entry into force of this Agreement, a developing country Party may also request the Committee to grant exclusions for certain entities, products or services that are included in its coverage lists in the light of its participation in regional or global arrangements among developing countries, having regard to the particular circumstances of each case and taking duly into account the provisions of subparagraph 1(d). Each request to the Committee by a developing country Party relating to modification of a list shall be accompanied by documentation relevant to the request or by such information as may be necessary for consideration of the matter.

6. Paragraphs 4 and 5 shall apply *mutatis mutandis* to developing countries acceding to this Agreement after its entry into force.

7. Such agreed exclusions as mentioned in paragraphs 4, 5 and 6 shall be subject to review in accordance with the provisions of paragraph 14 below.

Technical Assistance for Developing Country Parties

8. Each developed country Party shall, upon request, provide all technical assistance which it may deem appropriate to developing country Parties in resolving their problems in the field of government procurement.

9. This assistance, which shall be provided on the basis of non-discrimination among developing country Parties, shall relate, *inter alia*, to:

- the solution of particular technical problems relating to the award of a specific contract; and
- any other problem which the Party making the request and another Party agree to deal with in the context of this assistance.

10. Technical assistance referred to in paragraphs 8 and 9 would include translation of qualification documentation and tenders made by suppliers of developing country Parties into an official language of the WTO designated by the entity, unless developed country Parties deem translation to be burdensome, and in that case explanation shall be given to developing country Parties upon their request addressed either to the developed country Parties or to their entities.

Information Centres

11. Developed country Parties shall establish, individually or jointly, information centres to respond to reasonable requests from developing country Parties for information relating to, *inter alia*, laws, regulations, procedures and practices regarding government procurement, notices about intended procurements which have been published, addresses of the entities covered by this Agreement, and the nature and volume of products or services procured or to be procured, including available information about future tenders. The Committee may also set up an information centre.

Special Treatment for Least-Developed Countries

12. Having regard to paragraph 6 of the Decision of the CONTRACTING PARTIES to GATT 1947 of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (BISD 26S/203–205), special treatment shall be granted to least-developed country Parties and to the suppliers in those Parties with respect to products or services originating in those Parties, in the context of any general or specific measures in favour of developing country Parties. A Party may also grant the benefits of this Agreement to suppliers in least-developed countries which are not Parties, with respect to products or services originating in those countries.

13. Each developed country Party shall, upon request, provide assistance which it may deem appropriate to potential tenderers in least-developed countries in submitting their tenders and selecting the products or services which are likely to be of interest to its entities as well as to suppliers in least-developed countries, and likewise assist them to comply with technical regulations and standards relating to products or services which are the subject of the intended procurement.

Review

14. The Committee shall review annually the operation and effectiveness of this Article and, after each three years of its operation on the basis of reports to be submitted by Parties, shall carry out a major review in order to evaluate its effects. As part of the three-yearly reviews and with a view to achieving the maximum implemen-

tation of the provisions of this Agreement, including in particular Article III, and having regard to the development, financial and trade situation of the developing countries concerned, the Committee shall examine whether exclusions provided for in accordance with the provisions of paragraphs 4 through 6 of this Article shall be modified or extended.

15. In the course of further rounds of negotiations in accordance with the provisions of paragraph 7 of Article XXIV, each developing country Party shall give consideration to the possibility of enlarging its coverage lists, having regard to its economic, financial and trade situation.

B. INTERPRETATION AND APPLICATION OF ARTICLE V

No jurisprudence or decision of a competent WTO body.

VII. ARTICLE VI

A. TEXT OF ARTICLE VI

Article VI
Technical Specifications

1. Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

2. Technical specifications prescribed by procuring entities shall, where appropriate:

(a) be in terms of performance rather than design or descriptive characteristics; and

(b) be based on international standards, where such exist; otherwise, on national technical regulations,[3] recognized national standards,[4] or building codes.

(*footnote original*) [3] For the purpose of this Agreement, a technical regulation is a document which lays down characteristics of a product or a service or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method.
(*footnote original*) [4] For the purpose of this Agreement, a standard is a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or services or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method.

3. There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tender documentation.

4. Entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.

B. INTERPRETATION AND APPLICATION OF ARTICLE VI

No jurisprudence or decision of a competent WTO body.

VIII. ARTICLE VII

A. TEXT OF ARTICLE VII

Article VII
Tendering Procedures

1. Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles VII through XVI.

2. Entities shall not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition.

3. For the purposes of this Agreement:

(a) Open tendering procedures are those procedures under which all interested suppliers may submit a tender.

(b) Selective tendering procedures are those procedures under which, consistent with paragraph 3 of Article X and other relevant provisions of this Agreement, those suppliers invited to do so by the entity may submit a tender.

(c) Limited tendering procedures are those procedures where the entity contacts suppliers individually, only under the conditions specified in Article XV.

B. INTERPRETATION AND APPLICATION OF ARTICLE VII

No jurisprudence or decision of a competent WTO body.

IX. ARTICLE VIII

A. TEXT OF ARTICLE VIII

Article VIII
Qualification of Suppliers

In the process of qualifying suppliers, entities shall not discriminate among suppliers of other Parties or between domestic suppliers and suppliers of other Parties. Qualification procedures shall be consistent with the following:

(a) any conditions for participation in tendering procedures shall be published in adequate time to enable interested suppliers to initiate and, to the extent that it is compatible with efficient operation of the procurement process, complete the qualification procedures;

(b) any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question. Any conditions for participation required from suppliers, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifications, shall be no less favourable to suppliers of other Parties than to domestic suppliers and shall not discriminate among suppliers of other Parties. The financial, commercial and technical capacity of a supplier shall be judged on the basis both of that supplier's global business activity as well as of its activity in the territory of the procuring entity, taking due account of the legal relationship between the supply organizations;

(c) the process of, and the time required for, qualifying suppliers shall not be used in order to keep suppliers of other Parties off a suppliers' list or from being considered for a particular intended procurement. Entities shall recognize as qualified suppliers such domestic suppliers or suppliers of other Parties who meet the conditions for participation in a particular intended procurement. Suppliers requesting to participate in a particular intended procurement who may not yet be qualified shall also be considered, provided there is sufficient time to complete the qualification procedure;

(d) entities maintaining permanent lists of qualified suppliers shall ensure that suppliers may apply for qualification at any time; and that all qualified suppliers so requesting are included in the lists within a reasonably short time;

(e) if, after publication of the notice under paragraph 1 of Article IX, a supplier not yet qualified requests to participate in an intended procurement, the entity shall promptly start procedures for qualification;

(f) any supplier having requested to become a qualified supplier shall be advised by the entities concerned of the decision in this regard. Qualified suppliers included on permanent lists by entities shall also be notified of the termination of any such lists or of their removal from them;

(g) each Party shall ensure that:

(i) each entity and its constituent parts follow a single qualification procedure, except in cases of duly substantiated need for a different procedure; and

(ii) efforts be made to minimize differences in qualification procedures between entities;

(h) nothing in subparagraphs (a) through (g) shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE VIII

No jurisprudence or decision of a competent WTO body.

X. ARTICLE IX

A. TEXT OF ARTICLE IX

Article IX
Invitation to Participate Regarding Intended Procurement

1. In accordance with paragraphs 2 and 3, entities shall publish an invitation to participate for all cases of intended procurement, except as otherwise provided for in Article XV (limited tendering). The notice shall be published in the appropriate publication listed in Appendix II.

2. The invitation to participate may take the form of a notice of proposed procurement, as provided for in paragraph 6.

3. Entities in Annexes 2 and 3 may use a notice of planned procurement, as provided for in paragraph 7, or a notice regarding a qualification system, as provided for in paragraph 9, as an invitation to participate.

4. Entities which use a notice of planned procurement as an invitation to participate shall subsequently invite all suppliers who have expressed an interest to confirm their interest on the basis of information which shall include at least the information referred to in paragraph 6.

5. Entities which use a notice regarding a qualification system as an invitation to participate shall provide, subject to the considerations referred to in paragraph 4 of Article XVIII and in a timely manner, information which allows all those who have expressed an interest to have a meaningful opportunity to assess their interest in participating in the procurement. This information shall include the information contained in the notices referred

to in paragraphs 6 and 8, to the extent such information is available. Information provided to one interested supplier shall be provided in a non-discriminatory manner to the other interested suppliers.

6. Each notice of proposed procurement, referred to in paragraph 2, shall contain the following information:

(a) the nature and quantity, including any options for further procurement and, if possible, an estimate of the timing when such options may be exercised; in the case of recurring contracts the nature and quantity and, if possible, an estimate of the timing of the subsequent tender notices for the products or services to be procured;

(b) whether the procedure is open or selective or will involve negotiation;

(c) any date for starting delivery or completion of delivery of goods or services;

(d) the address and final date for submitting an application to be invited to tender or for qualifying for the suppliers' lists, or for receiving tenders, as well as the language or languages in which they must be submitted;

(e) the address of the entity awarding the contract and providing any information necessary for obtaining specifications and other documents;

(f) any economic and technical requirements, financial guarantees and information required from suppliers;

(g) the amount and terms of payment of any sum payable for the tender documentation; and

(h) whether the entity is inviting offers for purchase, lease, rental or hire purchase, or more than one of these methods.

7. Each notice of planned procurement referred to in paragraph 3 shall contain as much of the information referred to in paragraph 6 as is available. It shall in any case include the information referred to in paragraph 8 and:

(a) a statement that interested suppliers should express their interest in the procurement to the entity;

(b) a contact point with the entity from which further information may be obtained.

8. For each case of intended procurement, the entity shall publish a summary notice in one of the official languages of the WTO. The notice shall contain at least the following information:

(a) the subject matter of the contract;

(b) the time-limits set for the submission of tenders or an application to be invited to tender; and

(c) the addresses from which documents relating to the contracts may be requested.

9. In the case of selective tendering procedures, entities maintaining permanent lists of qualified suppliers shall publish annually in one of the publications listed in Appendix III a notice of the following:

(a) the enumeration of the lists maintained, including their headings, in relation to the products or services or categories of products or services to be procured through the lists;

(b) the conditions to be fulfilled by suppliers with a view to their inscription on those lists and the methods according to which each of those conditions will be verified by the entity concerned; and

(c) the period of validity of the lists, and the formalities for their renewal.

When such a notice is used as an invitation to participate in accordance with paragraph 3, the notice shall, in addition, include the following information:

(d) the nature of the products or services concerned;

(e) a statement that the notice constitutes an invitation to participate.

However, when the duration of the qualification system is three years or less, and if the duration of the system is made clear in the notice and it is also made clear that further notices will not be published, it shall be sufficient to publish the notice once only, at the beginning of the system. Such a system shall not be used in a manner which circumvents the provisions of this Agreement.

10. If, after publication of an invitation to participate in any case of intended procurement, but before the time set for opening or receipt of tenders as specified in the notices or the tender documentation, it becomes necessary to amend or re-issue the notice, the amendment or the re-issued notice shall be given the same circulation as the original documents upon which the amendment is based. Any significant information given to one supplier with respect to a particular intended procurement shall be given simultaneously to all other suppliers concerned in adequate time to permit the suppliers to consider such information and to respond to it.

11. Entities shall make clear, in the notices referred to in this Article or in the publication in which the notices appear, that the procurement is covered by the Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE IX

No jurisprudence or decision of a competent WTO body.

XI. ARTICLE X

A. TEXT OF ARTICLE X

Article X
Selection Procedures

1. To ensure optimum effective international competition under selective tendering procedures, entities shall, for each intended procurement, invite tenders from the maximum number of domestic suppliers and suppliers of other Parties, consistent with the efficient operation of the procurement system. They shall select the suppliers to participate in the procedure in a fair and non-discriminatory manner.

2. Entities maintaining permanent lists of qualified suppliers may select suppliers to be invited to tender from among those listed. Any selection shall allow for equitable opportunities for suppliers on the lists.

3. Suppliers requesting to participate in a particular intended procurement shall be permitted to submit a tender and be considered, provided, in the case of those not yet qualified, there is sufficient time to complete the qualification procedure under Articles VIII and IX. The number of additional suppliers permitted to participate shall be limited only by the efficient operation of the procurement system.

4. Requests to participate in selective tendering procedures may be submitted by telex, telegram or facsimile.

B. INTERPRETATION AND APPLICATION OF ARTICLE X

No jurisprudence or decision of a competent WTO body.

XII. ARTICLE XI

A. TEXT OF ARTICLE XI

Article XI
Time-limits for Tendering and Delivery

General

1. (a) Any prescribed time-limit shall be adequate to allow suppliers of other Parties as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures. In determining any such time-limit, entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the normal time for transmitting tenders by mail from foreign as well as domestic points.

(b) Each Party shall ensure that its entities shall take due account of publication delays when setting the final date for receipt of tenders or of applications to be invited to tender.

Deadlines

2. Except in so far as provided in paragraph 3,

(a) in open procedures, the period for the receipt of tenders shall not be less than 40 days from the date of publication referred to in paragraph 1 of Article IX;

(b) in selective procedures not involving the use of a permanent list of qualified suppliers, the period for submitting an application to be invited to tender shall not be less than 25 days from the date of publication referred to in paragraph 1 of Article IX; the period for receipt of tenders shall in no case be less than 40 days from the date of issuance of the invitation to tender;

(c) in selective procedures involving the use of a permanent list of qualified suppliers, the period for receipt of tenders shall not be less than 40 days from the date of the initial issuance of invitations to tender, whether or not the date of initial issuance of invitations to tender coincides with the date of the publication referred to in paragraph 1 of Article IX.

3. The periods referred to in paragraph 2 may be reduced in the circumstances set out below:

(a) if a separate notice has been published 40 days and not more than 12 months in advance and the notice contains at least:

(i) as much of the information referred to in paragraph 6 of Article IX as is available;

(ii) the information referred to in paragraph 8 of Article IX;

(iii) a statement that interested suppliers should express their interest in the procurement to the entity; and

(iv) a contact point with the entity from which further information may be obtained,

the 40-day limit for receipt of tenders may be replaced by a period sufficiently long to enable responsive tendering, which, as a general rule, shall not be less than 24 days, but in any case not less than 10 days;

(b) in the case of the second or subsequent publications dealing with contracts of a recurring nature within the meaning of paragraph 6 of Article IX, the 40-day limit for receipt of tenders may be reduced to not less than 24 days;

(c) where a state of urgency duly substantiated by the entity renders impracticable the periods in question, the periods specified in paragraph 2 may be reduced but shall in no case be less than 10 days from the date of the pub-

lication referred to in paragraph 1 of Article IX; or

(d) the period referred to in paragraph 2(c) may, for procurements by entities listed in Annexes 2 and 3, be fixed by mutual agreement between the entity and the selected suppliers. In the absence of agreement, the entity may fix periods which shall be sufficiently long to enable responsive tendering and shall in any case not be less than 10 days.

4. Consistent with the entity's own reasonable needs, any delivery date shall take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the realistic time required for production, de-stocking and transport of goods from the points of supply or for supply of services.

B. INTERPRETATION AND APPLICATION OF ARTICLE XI

No jurisprudence or decision of a competent WTO body.

XIII. ARTICLE XII

A. TEXT OF ARTICLE XII

Article XII
Tender Documentation

1. If, in tendering procedures, an entity allows tenders to be submitted in several languages, one of those languages shall be one of the official languages of the WTO.

2. Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders, including information required to be published in the notice of intended procurement, except for paragraph 6(g) of Article IX, and the following:

(a) the address of the entity to which tenders should be sent;

(b) the address where requests for supplementary information should be sent;

(c) the language or languages in which tenders and tendering documents must be submitted;

(d) the closing date and time for receipt of tenders and the length of time during which any tender should be open for acceptance;

(e) the persons authorized to be present at the opening of tenders and the date, time and place of this opening;

(f) any economic and technical requirement, financial guarantees and information or documents required from suppliers;

(g) a complete description of the products or services required or of any requirements including technical specifications, conformity certification to be fulfilled, necessary plans, drawings and instructional materials;

(h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transport, insurance and inspection costs, and in the case of products or services of other Parties, customs duties and other import charges, taxes and currency of payment;

(i) the terms of payment;

(j) any other terms or conditions;

(k) in accordance with Article XVII the terms and conditions, if any, under which tenders from countries not Parties to this Agreement, but which apply the procedures of that Article, will be entertained.

Forwarding of Tender Documentation by the Entities

3. (a) In open procedures, entities shall forward the tender documentation at the request of any supplier participating in the procedure, and shall reply promptly to any reasonable request for explanations relating thereto.

(b) In selective procedures, entities shall forward the tender documentation at the request of any supplier requesting to participate, and shall reply promptly to any reasonable request for explanations relating thereto.

(c) Entities shall reply promptly to any reasonable request for relevant information submitted by a supplier participating in the tendering procedure, on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract.

B. INTERPRETATION AND APPLICATION OF ARTICLE XII

No jurisprudence or decision of a competent WTO body.

XIV. ARTICLE XIII

A. TEXT OF ARTICLE XIII

Article XIII
Submission, Receipt and Opening of Tenders and Awarding of Contracts

1. The submission, receipt and opening of tenders and awarding of contracts shall be consistent with the following:

(a) tenders shall normally be submitted in writing directly or by mail. If tenders by telex, telegram

or facsimile are permitted, the tender made thereby must include all the information necessary for the evaluation of the tender, in particular the definitive price proposed by the tenderer and a statement that the tenderer agrees to all the terms, conditions and provisions of the invitation to tender. The tender must be confirmed promptly by letter or by the despatch of a signed copy of the telex, telegram or facsimile. Tenders presented by telephone shall not be permitted. The content of the telex, telegram or facsimile shall prevail where there is a difference or conflict between that content and any documentation received after the time-limit; and

(b) the opportunities that may be given to tenderers to correct unintentional errors of form between the opening of tenders and the awarding of the contract shall not be permitted to give rise to any discriminatory practice.

Receipt of Tenders

2. A supplier shall not be penalized if a tender is received in the office designated in the tender documentation after the time specified because of delay due solely to mishandling on the part of the entity. Tenders may also be considered in other exceptional circumstances if the procedures of the entity concerned so provide.

Opening of Tenders

3. All tenders solicited under open or selective procedures by entities shall be received and opened under procedures and conditions guaranteeing the regularity of the openings. The receipt and opening of tenders shall also be consistent with the national treatment and non-discrimination provisions of this Agreement. Information on the opening of tenders shall remain with the entity concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures of Articles XVIII, XIX, XX and XXII.

Award of Contracts

4. (a) To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation. If an entity has received a tender abnormally lower than other tenders submitted, it may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract.

(b) Unless in the public interest an entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic products or services, or products or services of other Parties, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.

(c) Awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.

Option Clauses

5. Option clauses shall not be used in a manner which circumvents the provisions of the Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIII

No jurisprudence or decision of a competent WTO body.

XV. ARTICLE XIV

A. TEXT OF ARTICLE XIV

Article XIV
Negotiation

1. A Party may provide for entities to conduct negotiations:

(a) in the context of procurements in which they have indicated such intent, namely in the notice referred to in paragraph 2 of Article IX (the invitation to suppliers to participate in the procedure for the proposed procurement); or

(b) when it appears from evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation.

2. Negotiations shall primarily be used to identify the strengths and weaknesses in tenders.

3. Entities shall treat tenders in confidence. In particular, they shall not provide information intended to assist particular participants to bring their tenders up to the level of other participants.

4. Entities shall not, in the course of negotiations, discriminate between different suppliers. In particular, they shall ensure that:

(a) any elimination of participants is carried out in accordance with the criteria set forth in the notices and tender documentation;

(b) all modifications to the criteria and to the technical requirements are transmitted in writing to all remaining participants in the negotiations;

(c) all remaining participants are afforded an opportunity to submit new or amended sub-

missions on the basis of the revised requirements; and

(d) when negotiations are concluded, all participants remaining in the negotiations shall be permitted to submit final tenders in accordance with a common deadline.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIV

No jurisprudence or decision of a competent WTO body.

XVI. ARTICLE XV

A. TEXT OF ARTICLE XV

Article XV
Limited Tendering

1. The provisions of Articles VII through XIV governing open and selective tendering procedures need not apply in the following conditions, provided that limited tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of other Parties or protection to domestic producers or suppliers:

(a) in the absence of tenders in response to an open or selective tender, or when the tenders submitted have been collusive, or not in conformity with the essential requirements in the tender, or from suppliers who do not comply with the conditions for participation provided for in accordance with this Agreement, on condition, however, that the requirements of the initial tender are not substantially modified in the contract as awarded;

(b) when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, or in the absence of competition for technical reasons, the products or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

(c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the products or services could not be obtained in time by means of open or selective tendering procedures;

(d) for additional deliveries by the original supplier which are intended either as parts replacement for existing supplies, or installations, or as the extension of existing supplies, services, or installations where a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services;[5]

(*footnote original*) [5] It is the understanding that "existing equipment" includes software to the extent that the initial procurement of the software was covered by the Agreement.

(e) when an entity procures prototypes or a first product or service which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. When such contracts have been fulfilled, subsequent procurements of products or services shall be subject to Articles VII through XIV;[6]

(*footnote original*) [6] Original development of a first product or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the product or service is suitable for production or supply in quantity to acceptable quality standards. It does not extend to quantity production or supply to establish commercial viability or to recover research and development costs.

(f) when additional construction services which were not included in the initial contract but which were within the objectives of the original tender documentation have, through unforeseeable circumstances, become necessary to complete the construction services described therein, and the entity needs to award contracts for the additional construction services to the contractor carrying out the construction services concerned since the separation of the additional construction services from the initial contract would be difficult for technical or economic reasons and cause significant inconvenience to the entity. However, the total value of contracts awarded for the additional construction services may not exceed 50 per cent of the amount of the main contract;

(g) for new construction services consisting of the repetition of similar construction services which conform to a basic project for which an initial contract was awarded in accordance with Articles VII through XIV and for which the entity has indicated in the notice of intended procurement concerning the initial construction service, that limited tendering procedures might be used in awarding contracts for such new construction services;

(h) for products purchased on a commodity market;

(i) for purchases made under exceptionally advantageous conditions which only arise in the very short term. This provision is intended to cover unusual disposals by firms which are not normally suppliers, or disposal of assets of businesses in liquidation or receivership. It is not intended to cover routine purchases from regular suppliers;

(j) in the case of contracts awarded to the winner of a design contest provided that the contest has been organized in a manner which is consistent with the principles of this Agreement, notably as regards the publication, in the sense of Article IX, of an invitation to suitably qualified suppliers, to participate in such a contest which shall be judged by an independent jury with a view to design contracts being awarded to the winners.

2. Entities shall prepare a report in writing on each contract awarded under the provisions of paragraph 1. Each report shall contain the name of the procuring entity, value and kind of goods or services procured, country of origin, and a statement of the conditions in this Article which prevailed. This report shall remain with the entities concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures of Articles XVIII, XIX, XX and XXII.

B. INTERPRETATION AND APPLICATION OF ARTICLE XV

No jurisprudence or decision of a competent WTO body.

XVII. ARTICLE XVI

A. TEXT OF ARTICLE XVI

Article XVI
Offsets

1. Entities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets.[7]

(*footnote original*) [7] Offsets in government procurement are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, countertrade or similar requirements.

2. Nevertheless, having regard to general policy considerations, including those relating to development, a developing country may at the time of accession negotiate conditions for the use of offsets, such as requirements for the incorporation of domestic content. Such requirements shall be used only for qualification to participate in the procurement process and not as criteria for awarding contracts. Conditions shall be objective, clearly defined and non-discriminatory. They shall be set forth in the country's Appendix I and may include precise limitations on the imposition of offsets in any contract subject to this Agreement. The existence of such conditions shall be notified to the Committee and included in the notice of intended procurement and other documentation.

B. INTERPRETATION AND APPLICATION OF ARTICLE XVI

No jurisprudence or decision of a competent WTO body.

XVIII. ARTICLE XVII

A. TEXT OF ARTICLE XVII

Article XVII
Transparency

1. Each Party shall encourage entities to indicate the terms and conditions, including any deviations from competitive tendering procedures or access to challenge procedures, under which tenders will be entertained from suppliers situated in countries not Parties to this Agreement but which, with a view to creating transparency in their own contract awards, nevertheless:

(a) specify their contracts in accordance with Article VI (technical specifications);

(b) publish the procurement notices referred to in Article IX, including, in the version of the notice referred to in paragraph 8 of Article IX (summary of the notice of intended procurement) which is published in an official language of the WTO, an indication of the terms and conditions under which tenders shall be entertained from suppliers situated in countries Parties to this Agreement;

(c) are willing to ensure that their procurement regulations shall not normally change during a procurement and, in the event that such change proves unavoidable, to ensure the availability of a satisfactory means of redress.

2. Governments not Parties to the Agreement which comply with the conditions specified in paragraphs 1(a) through 1(c), shall be entitled if they so inform the Parties to participate in the Committee as observers.

B. INTERPRETATION AND APPLICATION OF ARTICLE XVII

1. Working Group on Transparency in Government Procurement

4. The Working Group on Transparency in Government Procurement was established pursuant to the mandate provided in the Singapore Ministerial Declaration and paragraph 26 of the Doha Ministerial Declaration. Paragraph 26 reads as follows:

"Recognizing the case for a multilateral agreement on transparency in government procurement and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus,

at that Session on modalities of negotiations. These negotiations will build on the progress made in the Working Group on Transparency in Government Procurement by that time and take into account participants' development priorities, especially those of least-developed country participants. Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers. We commit ourselves to ensuring adequate technical assistance and support for capacity building both during the negotiations and after their conclusion."[5]

XIX. ARTICLE XVIII

A. TEXT OF ARTICLE XVIII

Article XVIII
Information and Review as Regards Obligations of Entities

1. Entities shall publish a notice in the appropriate publication listed in Appendix II not later than 72 days after the award of each contract under Articles XIII through XV. These notices shall contain:

(a) the nature and quantity of products or services in the contract award;

(b) the name and address of the entity awarding the contract;

(c) the date of award;

(d) the name and address of winning tenderer;

(e) the value of the winning award or the highest and lowest offer taken into account in the award of the contract;

(f) where appropriate, means of identifying the notice issued under paragraph 1 of Article IX or justification according to Article XV for the use of such procedure; and

(g) the type of procedure used.

2. Each entity shall, on request from a supplier of a Party, promptly provide:

(a) an explanation of its procurement practices and procedures;

(b) pertinent information concerning the reasons why the supplier's application to qualify was rejected, why its existing qualification was brought to an end and why it was not selected; and

(c) to an unsuccessful tenderer, pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer.

3. Entities shall promptly inform participating suppliers of decisions on contract awards and, upon request, in writing.

4. However, entities may decide that certain information on the contract award, contained in paragraphs 1 and 2(c), be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers.

B. INTERPRETATION AND APPLICATION OF ARTICLE XVIII

No jurisprudence or decision of a competent WTO body.

XX. ARTICLE XIX

A. TEXT OF ARTICLE XIX

Article XIX
Information and Review as Regards Obligations of Parties

1. Each Party shall promptly publish any law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract clauses) regarding government procurement covered by this Agreement, in the appropriate publications listed in Appendix IV and in such a manner as to enable other Parties and suppliers to become acquainted with them. Each Party shall be prepared, upon request, to explain to any other Party its government procurement procedures.

2. The government of an unsuccessful tenderer which is a Party to this Agreement may seek, without prejudice to the provisions under Article XXII, such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. To this end, the procuring government shall provide information on both the characteristics and relative advantages of the winning tender and the contract price. Normally this latter information may be disclosed by the government of the unsuccessful tenderer provided it exercises this right with discretion. In cases where release of this information would prejudice competition in future tenders, this information shall not be disclosed except after consultation with and agreement of the Party which gave the information to the government of the unsuccessful tenderer.

3. Available information concerning procurement by covered entities and their individual contract awards shall be provided, upon request, to any other Party.

4. Confidential information provided to any Party which would impede law enforcement or otherwise be

[5] WT/MIN(01)/DEC/1.

contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers shall not be revealed without formal authorization from the party providing the information.

5. Each Party shall collect and provide to the Committee on an annual basis statistics on its procurements covered by this Agreement. Such reports shall contain the following information with respect to contracts awarded by all procurement entities covered under this Agreement:

(a) for entities in Annex 1, statistics on the estimated value of contracts awarded, both above and below the threshold value, on a global basis and broken down by entities; for entities in Annexes 2 and 3, statistics on the estimated value of contracts awarded above the threshold value on a global basis and broken down by categories of entities;

(b) for entities in Annex 1, statistics on the number and total value of contracts awarded above the threshold value, broken down by entities and categories of products and services according to uniform classification systems; for entities in Annexes 2 and 3, statistics on the estimated value of contracts awarded above the threshold value broken down by categories of entities and categories of products and services;

(c) for entities in Annex 1, statistics, broken down by entity and by categories of products and services, on the number and total value of contracts awarded under each of the cases of Article XV; for categories of entities in Annexes 2 and 3, statistics on the total value of contracts awarded above the threshold value under each of the cases of Article XV; and

(d) for entities in Annex 1, statistics, broken down by entities, on the number and total value of contracts awarded under derogations to the Agreement contained in the relevant Annexes; for categories of entities in Annexes 2 and 3, statistics on the total value of contracts awarded under derogations to the Agreement contained in the relevant Annexes.

To the extent that such information is available, each Party shall provide statistics on the country of origin of products and services purchased by its entities. With a view to ensuring that such statistics are comparable, the Committee shall provide guidance on methods to be used. With a view to ensuring effective monitoring of procurement covered by this Agreement, the Committee may decide unanimously to modify the requirements of subparagraphs (a) through (d) as regards the nature and the extent of statistical information to be provided and the breakdowns and classifications to be used.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIX

1. Article XIX:5

5. At its meeting of 27 February 1996, the Committee on Government Procurement adopted the recommendation of the Statistical Working Group that the rules of origin used for the purposes of statistical reporting in Article XIX:5 of the Agreement should be the same as those applied under Article IV, which are those used in the normal course of trade.[6]

6. At its meeting of 4 June 1996, the Committee on Government Procurement adopted the product classification system of 26 product categories as proposed by the Chairman.[7] The Committee on Government Procurement also adopted the services classification system as proposed by the Chairman,[8] as amended by merging category 71 and 73 into one category named "transport services".[9]

XXI. ARTICLE XX

A. TEXT OF ARTICLE XX

Article XX
Challenge Procedures

Consultations

1. In the event of a complaint by a supplier that there has been a breach of this Agreement in the context of a procurement, each Party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system.

Challenge

2. Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest.

3. Each Party shall provide its challenge procedures in writing and make them generally available.

4. Each Party shall ensure that documentation relating to all aspects of the process concerning procurements covered by this Agreement shall be retained for three years.

5. The interested supplier may be required to initiate a challenge procedure and notify the procuring entity

[6] GPA/M/1, paras. 56–57.
[7] GPA/W/17, Annex 1.
[8] GPA/W/17, Annex 2.
[9] GPA/M/2, paras. 49–51.

within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of less than 10 days.

6. Challenges shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment. A review body which is not a court shall either be subject to judicial review or shall have procedures which provide that:

(a) participants can be heard before an opinion is given or a decision is reached;

(b) participants can be represented and accompanied;

(c) participants shall have access to all proceedings;

(d) proceedings can take place in public;

(e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;

(f) witnesses can be presented;

(g) documents are disclosed to the review body.

7. Challenge procedures shall provide for:

(a) rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing;

(b) an assessment and a possibility for a decision on the justification of the challenge;

(c) correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.

8. With a view to the preservation of the commercial and other interests involved, the challenge procedure shall normally be completed in a timely fashion.

B. INTERPRETATION AND APPLICATION OF ARTICLE XX

No jurisprudence or decision of a competent WTO body.

XXII. ARTICLE XXI

A. TEXT OF ARTICLE XXI

Article XXI
Institutions

1. A Committee on Government Procurement composed of representatives from each of the Parties shall be established. This Committee shall elect its own Chairman and Vice-Chairman and shall meet as necessary but not less than once a year for the purpose of affording Parties the opportunity to consult on any matters relating to the operation of this Agreement or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the Parties.

2. The Committee may establish working parties or other subsidiary bodies which shall carry out such functions as may be given to them by the Committee.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXI

1. Article XXI:1

7. At its meeting of 27 February 1996, the Committee on Government Procurement approved recommendations for decisions adopted by the Interim Committee[10] on Procedures on the Participation of Observers.[11]

8. At its meeting of 27 February 1996, the Committee on Government Procurement adopted interim procedures on the circulation of documents and on the derestriction of documents, pending definitive measures.[12] Subsequently, at its meeting of 24 February 1997, the Committee on Government Procurement adopted revised procedures with respect to circulation and derestriction of documents.[13] At its meeting of 8 October 2002, the Committee agreed to the revision of that Decision on Circulation and Derestriction of Documents[14] in order to reflect the WTO procedures adopted in the General Council Decision of 14 May 2002 on Procedures for the Circulation and Derestriction of WTO Documents.[15, 16]

[10] Interim Committee on Government Procurement, adopted 25 October 1995, GPA/IC/W/31.
[11] GPA/M/1, Section B. The text of the decision can be found in GPA/1, Annex 1.
[12] GPA/M/1, Section B. The text of the decision can be found in GPA/1, Annexes 4 and 5.
[13] GPA/M/5, Section G. The text of the decision can be found in GPA/1/Add.2.
[14] GPA/1/Add.2.
[15] WT/L/452.
[16] The text of the revised decision adopted by the Committee at its meeting of 8 October 2002 can be found in document GPA/72.

XXIII. ARTICLE XXII

A. TEXT OF ARTICLE XXII

Article XXII
Consultations and Dispute Settlement

1. The provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes under the WTO Agreement (hereinafter referred to as the "Dispute Settlement Understanding") shall be applicable except as otherwise specifically provided below.

2. If any Party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the attainment of any objective of this Agreement is being impeded as the result of the failure of another Party or Parties to carry out its obligations under this Agreement, or the application by another Party or Parties of any measure, whether or not it conflicts with the provisions of this Agreement, it may, with a view to reaching a mutually satisfactory resolution of the matter, make written representations or proposals to the other Party or Parties which it considers to be concerned. Such action shall be promptly notified to the Dispute Settlement Body established under the Dispute Settlement Understanding (hereinafter referred to as "DSB"), as specified below. Any Party thus approached shall give sympathetic consideration to the representations or proposals made to it.

3. The DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, make recommendations or give rulings on the matter, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under this Agreement or consultations regarding remedies when withdrawal of measures found to be in contravention of the Agreement is not possible, provided that only Members of the WTO Party to this Agreement shall participate in decisions or actions taken by the DSB with respect to disputes under this Agreement.

4. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days of the establishment of the panel:

> "To examine, in the light of the relevant provisions of this Agreement and of (name of any other covered Agreement cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in this Agreement."

In the case of a dispute in which provisions both of this Agreement and of one or more other Agreements listed in Appendix 1 of the Dispute Settlement Understanding are invoked by one of the parties to the dispute, paragraph 3 shall apply only to those parts of the panel report concerning the interpretation and application of this Agreement.

5. Panels established by the DSB to examine disputes under this Agreement shall include persons qualified in the area of government procurement.

6. Every effort shall be made to accelerate the proceedings to the greatest extent possible. Notwithstanding the provisions of paragraphs 8 and 9 of Article 12 of the Dispute Settlement Understanding, the panel shall attempt to provide its final report to the parties to the dispute not later than four months, and in case of delay not later than seven months, after the date on which the composition and terms of reference of the panel are agreed. Consequently, every effort shall be made to reduce also the periods foreseen in paragraph 1 of Article 20 and paragraph 4 of Article 21 of the Dispute Settlement Understanding by two months. Moreover, notwithstanding the provisions of paragraph 5 of Article 21 of the Dispute Settlement Understanding, the panel shall attempt to issue its decision, in case of a disagreement as to the existence or consistency with a covered Agreement of measures taken to comply with the recommendations and rulings, within 60 days.

7. Notwithstanding paragraph 2 of Article 22 of the Dispute Settlement Understanding, any dispute arising under any Agreement listed in Appendix 1 to the Dispute Settlement Understanding other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement listed in the said Appendix 1.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXII

1. Article XXII:2

(a) Non-violation claim

9. In *Korea – Procurement*, the Panel was requested to determine alternatively – if no violation of the *Agreement on Government Procurement* were found – whether the measures nevertheless nullified or impaired benefits accruing to the United States under the *Agreement on Government Procurement*, pursuant to Article XXII:2 providing for non-violation claims. The Panel began by noting the general requirements for a "non-violation claim":

> "[N]ormal non-violation cases involve an examination as to whether there is: (1) an application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit due to the application of the measure that could not have been reasonably expected by the exporting Member."[17]

[17] Panel Report on *Korea – Procurement*, para. 7.86.

10. The Panel on *Korea – Procurement* then held that the question in the case before it was "whether or not there was a reasonable expectation of an entitlement to a benefit that had accrued pursuant to the negotiation rather than pursuant to a concession":

> "In this case, the United States has asserted that measures it claimed violated the GPA (that is, the imposition of inadequate bid-deadlines; the imposition of certain qualification requirements; the imposition of certain domestic partnering requirements; and the failure to establish effective domestic challenge procedures engaged in by KAA [Korea Airports Authority] and its successors in relation to the IIA [Inchon International Airport] project) to nullify or impair benefits accruing to the United States under the GPA, pursuant to Article XXII:2 of the GPA. A key difference between a traditional non-violation case and the present one would seem to be that, normally, the question of 'reasonable expectation' is whether or not it was reasonably to be expected that the benefit under an existing concession would be impaired by the measures. However here, if there is to be a non-violation case, the question is whether or not there was a reasonable expectation of an entitlement to a benefit that had accrued pursuant to the negotiation rather than pursuant to a concession."[18]

11. Noting that non-violation is an exceptional concept within the WTO dispute settlement system, stemming from the public international law principle of *pacta sunt servanda*, the Panel however specified that it was not implying that "a complainant [must] affirmatively prove actual bad faith on the part of another Member":

> "[U]pon occasion, it may be the case that some actions, while permissible under one set of rules (e.g., the Agreement on Subsidies and Countervailing Measures is a commonly referenced example of rules in this regard), are not consistent with the spirit of other commitments such as those in negotiated Schedules. That is, such actions deny the competitive opportunities which are the reasonably expected effect of such commitments. However, we must also note that, while the overall burden of proof is on the complainant, we do not mean to introduce here a new requirement that a complainant affirmatively prove actual bad faith on the part of another Member. It is fairly clear from the history of disputes prior to the conclusion of the Uruguay Round that such a requirement was never established and there is no evidence in the current treaty text that such a requirement was newly imposed. Rather, the affirmative proof should be that measures have been taken that frustrate the object and purpose of the treaty and the reasonably expected benefits that flow therefrom."[19]

12. With reference to the case at hand, the Panel subsequently held that an error in treaty negotiation can also be addressed under Article 26 of the *DSU* and Article XXII:2 of the *Agreement on Government Procurement*:

> "One of the issues that arises in this dispute is whether the concept of non-violation can arise in contexts other than the traditional approach represented by *pacta sunt servanda*. Can, for instance the question of error in treaty negotiation be addressed under Article 26 of the DSU and Article XXII:2 of the GPA? We see no reason why it cannot. Parties have an obligation to negotiate in good faith just as they must implement the treaty in good faith. It is clear to us (as discussed in paragraphs 7.110 and 7.121 below) that it is necessary that negotiations in the Agreement before us (the GPA) be conducted on a particularly open and forthcoming basis.
>
> Thus, on the basis of the ample evidence provided by both parties to the dispute, we will review the claim of nullification or impairment raised by the United States within the framework of principles of international law which are generally applicable not only to performance of treaties but also to treaty negotiation.[20] To do otherwise potentially would leave a gap in the applicability of the law generally to WTO disputes and we see no evidence in the language of the WTO Agreements that such a gap was intended. If the non-violation remedy were deemed not to provide a relief for such problems as have arisen in the present case regarding good faith and error in the negotiation of GPA commitments (and one might add, in tariff and services commitments under other WTO Agreements), then nothing could be done about them within the framework of the WTO dispute settlement mechanism if general rules of customary international law on good faith and error in treaty negotiations were ruled not to be applicable."[21]

13. After examination of the facts of the case, the Panel on *Korea – Procurement* found that while Members had a "right to expect full and forthright answers to their questions submitted during negotiations", they had to protect their own interests "as well":

> "Members have a right to expect full and forthright answers to their questions submitted during negotiations, particularly with respect to Schedules of affirmative

[18] Panel Report on *Korea – Procurement*, para. 7.87.
[19] Panel Report on *Korea – Procurement*, para. 7.99.
[20] (*footnote original*) We note that DSU Article 7.1 requires that the relevant covered agreement be cited in the request for a panel and reflected in the terms of reference of a panel. That is not a bar to a broader analysis of the type we are following here, for the GPA would be the referenced covered agreement and, in our view, we are merely fully examining the issue of non-violation raised by the United States. We are merely doing it within the broader context of customary international law rather than limiting it to the traditional analysis that accords with the extended concept of *pacta sunt servanda*. The purpose of the terms of reference is to properly identify the claims of the party and therefore the scope of a panel's review. We do not see any basis for arguing that the terms of reference are meant to *exclude* reference to the broader rules of customary international law in interpreting a claim properly before the Panel.
[21] Panel Report on *Korea – Procurement*, paras. 7.100–7.101.

commitments such as those appended to the GPA. However, Members must protect their own interests as well and in this case the United States did not do so. It had a significant amount of time to realize, particularly in light of the wide knowledge of KAA's role, that its understanding of the Korean answer was not accurate. Therefore, we *find* that, even if the principles of a traditional non-violation case were applicable in this situation the United States has failed to carry its burden of proof to establish that it had reasonable expectations that a benefit had accrued."[22]

14. With regard to the possible error in treaty formation, the Panel held that it would consider "whether the United States was induced into error about a fact or situation which it assumed existed in relation to the agreement being negotiated regarding Korea's accession to the GPA":

"[W]e [. . .] first recall our finding that there is a particular duty of transparency and openness on the 'offering' party in negotiations on concessions under the GPA. The negotiations between the Parties under the GPA do not benefit from a generally accepted framework such as the Harmonized System with respect to goods or even the Central Product Classification in services. The Annexes to the GPA which contain the entities whose procurement is covered by the Agreement are basically self-styled Schedules whose interpretation may require extensive knowledge of another country's procurement systems and governmental organization. Therefore, we believe that transparency and forthright provision of all relevant information are of the essence in negotiations on GPA Schedules.

In our view, as discussed fully in the previous section, Korea's response to the US question was not as forthright as it should have been. Indeed, the response could be characterized as at best incomplete in light of existing Korean legislation and ongoing plans for further legislation. However, when addressing this problem, rather than asking whether there was a nullification or impairment of expectations arising from a concession, it might be better to inquire as to whether the United States was induced into error about a fact or situation which it assumed existed in relation to the agreement being negotiated regarding Korea's accession to the GPA. In this case, it clearly appears that the United States was in error when it assumed that the IIA project was covered by the GPA as a result of the entity coverage offered by Korea."[23]

15. The Panel noted that Article 48(1) of the *Vienna Convention* provides that "[a] State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error related to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty". The Panel then went on to recall that, in the course of the negotiations on the Annexes to the *Agreement on Government Procurement*:

"[T]he United States believed that the IIA project was covered. As we have found in section VII:B of these Findings, that was not correct. The IIA project procurement was the responsibility of a non-covered entity. Hence the US error related to a fact or situation which was assumed by the US to exist at the time when the treaty was concluded. In our view, it also appears from the behaviour of the United States that this purported concession arguably formed an essential basis of its consent to be bound by the treaty as finally agreed. Hence the initial conditions for error under Article 48(1) of the Vienna Convention seem to us to be satisfied."[24]

16. After making the finding referenced in paragraph 15 above, the Panel then turned to the second paragraph of Article 48, which states that "Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error." The Panel ultimately found that the United States error was not excusable:

"This raises the question of whether the exclusionary clause of the second paragraph of Article 48 can be overcome. Although we have indicated above that the duty to demonstrate good faith and transparency in GPA negotiations is particularly strong for the 'offering' party, this does not relieve the other negotiating partners from their duty of diligence to verify these offers as best as they can. Here again the facts already recounted in the previous sub-section demonstrate that the United States has not properly discharged this burden. We do not think the evidence at all supports a finding that the United States has contributed by its own conduct to the error, but given the elements mentioned earlier (such as the two and a half year interval between Korea's answer to the US question and its final offer, the actions by the European Community in respect of Korea's offer, the subsequent four-month period, of which at least one month was explicitly designated for verification, etc.), we conclude that the circumstances were such as to put the United States on notice of a possible error. Hence the error should not have subsisted at the end of the two and a half year gap, at the moment the accession of Korea was 'concluded.' Therefore, the error was no longer 'excusable' and only an excusable error can qualify as an error which may vitiate the consent to be bound by the agreement."[25]

[22] Panel Report on *Korea – Procurement*, para. 7.119.
[23] Panel Report on *Korea – Procurement*, paras. 7.121–7.122.
[24] Panel Report on *Korea – Procurement*, para. 7.124.
[25] Panel Report on *Korea – Procurement*, para. 7.125.

17. The following table lists the dispute in which a panel report has been adopted where the provisions of the *Agreement on Government Procurement* were invoked:

Case Name	Number	Invoked Articles
1 *Korea – Procurement*	WT/DS163	Articles 1(1), XXII:2

XXIV. ARTICLE XXIII

A. TEXT OF ARTICLE XXIII

Article XXIII
Exceptions to the Agreement

1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXIII

No jurisprudence or decision of a competent WTO body.

XXV. ARTICLE XXIV

A. TEXT OF ARTICLE XXIV

Article XXIV
Final Provisions

1. *Acceptance and Entry into Force*

This Agreement shall enter into force on 1 January 1996 for those governments[8] whose agreed coverage is contained in Annexes 1 through 5 of Appendix I of this Agreement and which have, by signature, accepted the Agreement on 15 April 1994 or have, by that date, signed the Agreement subject to ratification and subsequently ratified the Agreement before 1 January 1996.

(*footnote original*) [8] For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Communities.

2. *Accession*

Any government which is a Member of the WTO, or prior to the date of entry into force of the WTO Agreement which is a contracting party to GATT 1947, and which is not a Party to this Agreement may accede to this Agreement on terms to be agreed between that government and the Parties. Accession shall take place by deposit with the Director-General of the WTO of an instrument of accession which states the terms so agreed. The Agreement shall enter into force for an acceding government on the 30th day following the date of its accession to the Agreement.[26]

3. *Transitional Arrangements*

(a) Hong Kong and Korea may delay application of the provisions of this Agreement, except Articles XXI and XXII, to a date not later than 1 January 1997. The commencement date of their application of the provisions, if prior to 1 January 1997, shall be notified to the Director-General of the WTO 30 days in advance.

(b) During the period between the date of entry into force of this Agreement and the date of its application by Hong Kong, the rights and obligations between Hong Kong and all other Parties to this Agreement which were on 15 April 1994 Parties to the Agreement on Government Procurement done at Geneva on 12 April 1979 as amended on 2 February 1987 (the "1988 Agreement") shall be governed by the substantive[9] provisions of the 1988 Agreement, including its Annexes as modified or rectified, which provisions are incorporated herein by reference for that purpose and shall remain in force until 31 December 1996.

(*footnote original*) [9] All provisions of the 1988 Agreement except the Preamble, Article VII and Article IX other than paragraphs 5(a) and (b) and paragraph 10.

(c) Between Parties to this Agreement which are also Parties to the 1988 Agreement, the rights and obligations of this Agreement shall supersede those under the 1988 Agreement.

(d) Article XXII shall not enter into force until the date of entry into force of the WTO Agreement. Until such time, the provisions of Article VII of the 1988 Agreement shall apply to consultations and dispute settlement under this Agreement, which provisions are hereby incorporated in the Agreement by reference for that purpose. These provisions shall be applied under the auspices of the Committee under this Agreement.

[26] With respect to accession to the *Agreement on Government Procurement*, in Marrakesh, see the Decision on Accession to the Agreement on Government Procurement, in Section XXVII.

(e) Prior to the date of entry into force of the WTO Agreement, references to WTO bodies shall be construed as referring to the corresponding GATT body and references to the Director-General of the WTO and to the WTO Secretariat shall be construed as references to, respectively, the Director-General to the CONTRACTING PARTIES to GATT 1947 and to the GATT Secretariat.

4. *Reservations*

Reservations may not be entered in respect of any of the provisions of this Agreement.

5. *National Legislation*

(a) Each government accepting or acceding to this Agreement shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by the entities contained in its lists annexed hereto, with the provisions of this Agreement.

(b) Each Party shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

6. *Rectifications or Modifications*

(a) Rectifications, transfers of an entity from one Annex to another or, in exceptional cases, other modifications relating to Appendices I through IV shall be notified to the Committee, along with information as to the likely consequences of the change for the mutually agreed coverage provided in this Agreement. If the rectifications, transfers or other modifications are of a purely formal or minor nature, they shall become effective provided there is no objection within 30 days. In other cases, the Chairman of the Committee shall promptly convene a meeting of the Committee. The Committee shall consider the proposal and any claim for compensatory adjustments, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Agreement prior to such notification. In the event of agreement not being reached, the matter may be pursued in accordance with the provisions contained in Article XXII.

(b) Where a Party wishes, in exercise of its rights, to withdraw an entity from Appendix I on the grounds that government control or influence over it has been effectively eliminated, that Party shall notify the Committee. Such modification shall become effective the day after the end of the following meeting of the Committee, provided that the meeting is no sooner than 30 days from the date of notification and no objection has been made. In the event of an objection, the matter may be pursued in accordance with the procedures on consultations and dispute settlement contained in Article XXII. In considering the proposed modification to Appendix I and any consequential compensatory adjustment, allowance shall be made for the market-opening effects of the removal of government control or influence.

7. *Reviews, Negotiations and Future Work*

(a) The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the General Council of the WTO of developments during the periods covered by such reviews.

(b) Not later than the end of the third year from the date of entry into force of this Agreement and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to improving this Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, having regard to the provisions of Article V relating to developing countries.

(c) Parties shall seek to avoid introducing or prolonging discriminatory measures and practices which distort open procurement and shall, in the context of negotiations under subparagraph (b), seek to eliminate those which remain on the date of entry into force of this Agreement.

8. *Information Technology*

With a view to ensuring that the Agreement does not constitute an unnecessary obstacle to technical progress, Parties shall consult regularly in the Committee regarding developments in the use of information technology in government procurement and shall, if necessary, negotiate modifications to the Agreement. These consultations shall in particular aim to ensure that the use of information technology promotes the aims of open, non-discriminatory and efficient government procurement through transparent procedures, that contracts covered under the Agreement are clearly identified and that all available information relating to a particular contract can be identified. When a Party intends to innovate, it shall endeavour to take into account the views expressed by other Parties regarding any potential problems.

9. *Amendments*

Parties may amend this Agreement having regard, *inter alia*, to the experience gained in its implementation.

Such an amendment, once the Parties have concurred in accordance with the procedures established by the Committee, shall not enter into force for any Party until it has been accepted by such Party.

10. *Withdrawal*

(a) Any Party may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of 60 days from the date on which written notice of withdrawal is received by the Director-General of the WTO. Any Party may upon such notification request an immediate meeting of the Committee.

(b) If a Party to this Agreement does not become a Member of the WTO within one year of the date of entry into force of the WTO Agreement or ceases to be a Member of the WTO, it shall cease to be a Party to this Agreement with effect from the same date.

11. *Non-application of this Agreement between Particular Parties*

This Agreement shall not apply as between any two Parties if either of the Parties, at the time either accepts or accedes to this Agreement, does not consent to such application.

12. *Notes,*[27] *Appendices and Annexes*

The Notes, Appendices and Annexes to this Agreement constitute an integral part thereof.

13. *Secretariat*

This Agreement shall be serviced by the WTO Secretariat.

14. *Deposit*

This Agreement shall be deposited with the Director-General of the WTO, who shall promptly furnish to each Party a certified true copy of this Agreement, of each rectification or modification thereto pursuant to paragraph 6 and of each amendment thereto pursuant to paragraph 9, and a notification of each acceptance thereof or accession thereto pursuant to paragraphs 1 and 2 and of each withdrawal therefrom pursuant to paragraph 10 of this Article.

15. *Registration*

This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Marrakesh this fifteenth day of April one thousand nine hundred and ninety-four in a single copy, in the English, French and Spanish languages, each text being authentic, except as otherwise specified with respect to the Appendices hereto.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXIV

1. Article XXIV:2

18. At its meeting of 27 February 1996, the Committee on Government Procurement adopted the Procedures for Accession to the Agreement.[28]

19. In June 2000, with respect to the process of accession to the *Agreement on Government Procurement*, the Committee on Government Procurement adopted a Checklist of issues for the provision of information by applicant governments.[29] By way of streamlining the accession process, the Committee agreed to an Indicative Time-frame for Accession Negotiations and Arrangements for Reporting on the Progress of Work in document GPA/W/109/Rev.2.[30]

2. Article XXIV:3

20. At its meetings of 18 February and 25 June 1998, the Committee on Government Procurement discussed the legal and procedural aspects of the relationship of the *Tokyo Round Agreement on Government Procurement* to the *1994 Agreement on Government Procurement* on the basis of a Note prepared by the Secretariat in response to the Committee's request.[31]

3. Article XXIV:5

21. At its meeting on 4 June 1996, the Committee on Government Procurement adopted the Procedures for the Notification of National Implementing Legislation.[32]

4. Article XXIV:6

22. In accordance with the procedures established by the Committee on Government Procurement at its meeting of 24 February 1997,[33] parties proposing to make rectifications and modifications to their appendices should notify them to the Committee in the form of relevant replacement or additional pages identifying the proposed changes to be inserted in the loose-leaf system for the Appendices to the Agreement that was established by the Committee at that time.[34]

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[27] For the Notes, see Section XXVIII.

[28] GPA/M/1, Section B. The text of the decision can be found in GPA/1, Annex 2.

[29] GPA/M/13, Section G, and GPA/M/14, Section C. The text of the adopted document can be found in GPA/35.

[30] GPA/58, para. 22 and GPA/M/15, paras. 15–16.

[31] GPA/M/8, Section C and GPA/M/9, Section B.

[32] GPA/M/2, para.7. The text of the decision can be found in GPA/1/Add.1.

[33] GPA/M/5, Section D. See also GPA/W/35/Rev.1, para. 4.

[34] These proposals and any supplementary documents relating to them are circulated in the GPA/MOD/- document series (formerly in the GPA/W/- series). Once a proposal has been approved, the new or amended page(s) is certified in a WT/Let/- document and the relevant documentation derestricted. An up-to-date electronic copy of the loose-leaf system is available on the WTO website (www.wto.org).

23. At its meeting of 23 April 2004, the Committee on Government Procurement adopted a Decision Pursuant to Article XXIV:6(a) of the Agreement on Government Procurement,[35] approving the modification to the Appendices of the European Communities proposed in document GPA/MOD/EEC/1. This modification resulted in the extension of coverage under the Agreement on Government Procurement to the ten new member States of the European Communities, i.e. Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. Following the adoption of that decision, the European Communities made a statement clarifying the content of its modifications made in view of its enlargement.[36] The decision entered into force on 1 May 2004, on the same date as the enlargement of the European Communities to include the above countries.

24. At its meeting of 16 December 2004, the Committee on Government Procurement adopted a Decision pursuant to Article XXIV:6(a) of the Agreement on Government Procurement.[37] The Decision allows Israel to extend by one year the period to reduce its offsets from 30 to 20 per cent. Under its previous Note to Appendix I of the Agreement, Israel was authorized to require offsets in any form up to 30 per cent of the value of a contract until the end of 2004, and should have further reduced this level to 20 per cent of the value of a contract as of 1 January 2005. Based on Israel's proposed modification to its Note to Appendix I,[38] and subsequent informal consultations with other parties, a draft Decision was submitted to, and adopted by, the Committee without further discussion. According to this Decision, Israel may extend by one year the period to reduce its offsets to 20 per cent, and shall submit a report concerning the implementation of its modified Note to Appendix I at the end of 2005.

5. Article XXIV:7

25. Pursuant to Article XXIV:7(a) of the Agreement on Government Procurement, the Committee adopted Annual Reports to the General Council for each year since the entry into force of the Government Procurement Agreement of 1994. These reports are available in the following documents: GPA/8 and GPA/8/Add.1 for 1996;[39] GPA/19 for 1997;[40] GPA/25 for 1998;[41] GPA/30 for 1999;[42] GPA/44 for 2000;[43] GPA/58 for 2001;[44] GPA/73 for 2002;[45] and GPA/75 for November 2002 to June 2003.

26. Pursuant to Article XXIV:7(b) and (c) of the Agreement, the Parties to the Agreement have undertaken further negotiations under the Agreement on Government Procurement. Further information on the negotiations undertaken so far on the non-market-access-related provisions in the text of the Agreement can be found in the above reports. At its meeting of 16 July 2004, the Committee on Government Procurement adopted a Decision on Modalities for the Negotiations on Extension of Coverage and Elimination of Discriminatory Measures and Practices.[46] According to this decision, the Committee as a whole will address the provisions in the draft revised text of the Agreement referred to as "market access issues", as well as issues relating to the presentation and structure of the appendices to the Agreement. At the same time, negotiations on the extension of coverage of each Party's Appendix I as well as on the elimination of discriminatory measures and practices in such Appendices will be largely pursued bilaterally but subject to monitoring by the Committee as a whole. The decision sets the aim that Parties conclude the overall re-negotiation of the Agreement pursuant to Article XXIV:7(b) and (c) by the beginning of 2006.

XXVI. APPENDIX I

A. CENTRAL GOVERNMENT ENTITIES

27. The Panel on *Korea – Procurement* examined whether several entities concerned at successive stages with the procurement of airport construction in Korea, specifically the Korean Airport Construction Authority (KOACA), Korea Airports Authority (KAA) and the Inchon International Airport Corporation (IIAC) were within the scope of Korea's list of "central government entities" as specified in Annex 1 of Korea's obligations in Appendix I of the *Agreement on Government Procurement*. The United States contended that the practices of these entities were inconsistent with Korea's obligations under the *Agreement on Government Procurement*. In this regard, the Panel noted:

> "A critical question we must first address is determining what is explicitly contained in Korea's Schedule. A preliminary issue is the status of Note 1 to Annex 1, in particular the extent to which Parties can qualify the coverage of listed entities through such Notes. In our view, Members determine, pursuant to negotiation, the

[35] GPA/M/22, paras. 14–28. The text of the decision can be found in GPA/78.
[36] GPA/M/22, para. 17, including the text of the statement.
[37] GPA/M/25, paras. 2–3. The text of the decision can be found in GPA/83.
[38] GPA/MOD/ISR/1.
[39] GPA/M/3, para. 42.
[40] GPA/M/7, para. 29.
[41] GPA/M/10, para. 24.
[42] GPA/ M12, para. 34.
[43] GPA/M/14, para. 42.
[44] GPA/M/16, para. 55.
[45] GPA/M/19, para. 62.
[46] GPA/M/23, paras. 2–6. The text of the decision can be found in GPA/79.

scope of the coverage of their commitments as expressed in the Schedules. In this regard, we take note of the panel finding in *United States – Restrictions on Imports of Sugar* ('*United States – Sugar*') wherein the panel observed that Headnotes could be used to qualify the tariff concessions themselves."[47]

28. Accordingly, the Panel noted that:

"[T]he first step of the analysis, therefore, will be to examine Korea's Schedule and determine whether, within the ordinary meaning of the terms therein, the entity responsible for Inchon International Airport (IIA) procurement is covered. This will include a review of all relevant Annexes and Notes."[48]

29. In light of the fact that the Ministry of Construction and Transportation ("MOCT") was included in the list of central government entities in Annex 1 to Korea's Schedule, the Panel went on to consider whether "there exists the possibility of the inclusion of certain procurements of an entity which is not listed, due to its relationship with a listed entity":

"[T]here is a remaining question as to whether there exists the possibility of the inclusion of certain procurements of an entity which is not listed, due to its relationship with a listed entity. These arguably are general issues which arise with respect to any Member's Schedule regardless of the structure and content of the Schedule and any qualifying Notes."[49]

30. The Panel eventually rejected the United States' argument that KAA could be considered a part of MOCT because it was controlled, at least for the purposes of the IIA project, by MOCT. The Panel noted in this respect that:

"There is no use of the term 'direct control' or even 'control' in the sense that the United States wishes to use it. It has not been defined in this manner either in the context used in the Tokyo Round Agreement or elsewhere. We cannot agree with the overall US position that a 'control' test should be read into the GPA. However, we also do not think that it is an entirely irrelevant question. We think the issue of 'control' of one entity over another can be a relevant criterion among others for determining coverage of the GPA, as discussed below.

. . .

[W]e do believe that entities that are not listed in an Annex 1 to the GPA whether in the Annex list or through a Note to the Annex, can, nevertheless, be covered under the GPA. We believe that this flows from the fact that an overly narrow interpretation of 'central government entity' may result in less coverage under Annex 1 than was intended by the signatories. On the other hand, an overly broad interpretation of the term may result in coverage of entities that were never intended to be covered by signatories."[50]

31. The Panel on *Korea – Procurement* then put forward two criteria for answering the question referenced in paragraph 29 above:

"In the present case, our view is that the relevant questions are: (1) Whether an entity (KAA, in this case) is essentially a part of a listed central government entity (MOCT) – in other words, are the entities legally unified? and (2) Whether KAA and its successors have been acting on behalf of MOCT. The first test is appropriate because if entities that are essentially a part of, or legally unified with, listed central government entities are not considered covered, it could lead to great uncertainty as to what was actually covered because coverage would be dependent on the internal structure of an entity which may be unknown to the other negotiating parties. The second test is appropriate because procurements that are genuinely undertaken on behalf of a listed entity (as, for example, in the case where a principal/agent relationship exists between the listed entity and another entity) should properly be covered under Annex 1 because they would be considered legally as procurements by MOCT. In our view, it would defeat the objectives of the GPA if an entity listed in a signatory's Schedule could escape the Agreement's disciplines by commissioning another agency of government, not itself listed in that signatory's Schedule, to procure on its behalf."[51]

32. With respect to the first question, the Panel, persuaded on balance by the indicia of independence of KAA and its successors, found that KAA was not legally unified with or a part of MOCT, basing itself on the following criteria:

"KAA was established by law as an independent juristic entity; it authored and adopted its own by-laws; it had its own management and employees who were not government employees; it published bid announcements and requests for proposals of its own accord; it concluded contracts with successful bidders on its own behalf; and it funded portions of the IIA project with its own monies."[52]

33. With regard to the question whether or not KAA and its successors were acting on behalf of MOCT, at least with respect to the IIA project (i.e., whether the IIA project was really the legal responsibility of MOCT), the Panel, after having reviewed the laws governing construction of the IIA as well as other factual evidence regarding involvement of MOCT in the IIA project, found that:

"[T]here certainly is a role under Korean law for MOCT in the IIA project. It appears to be a role of oversight. We

[47] Panel Report on *Korea – Procurement*, para. 7.30.
[48] Panel Report on *Korea – Procurement*, para. 7.12.
[49] Panel Report on *Korea – Procurement*, para. 7.49.
[50] Panel Report on *Korea – Procurement*, paras. 7.57–7.58.
[51] Panel Report on *Korea – Procurement*, para. 7.59.
[52] Panel Report on *Korea – Procurement*, para. 7.60.

do not think oversight by one governmental entity of a project which has been delegated by law to another entity (which we have already found to be independent and not covered by GPA commitments) results in a conclusion that there is an agency relationship between them."[53]

XXVII. DECISION ON ACCESSION TO THE AGREEMENT ON GOVERNMENT PROCUREMENT

A. TEXT OF THE DECISION

Decision on Accession to the Agreement on Government Procurement

1. *Ministers invite* the Committee on Government Procurement established under the Agreement on Government Procurement in Annex 4(b) of the Agreement Establishing the World Trade Organization to clarify that:

(a) a Member interested in accession according to paragraph 2 of Article XXIV of the Agreement on Government Procurement would communicate its interest to the Director-General of the WTO, submitting relevant information, including a coverage offer for incorporation in Appendix I having regard to the relevant provisions of the Agreement, in particular Article I and, where appropriate, Article V;

(b) the communication would be circulated to Parties to the Agreement;

(c) the Member interested in accession would hold consultations with the Parties on the terms for its accession to the Agreement;

(d) with a view to facilitating accession, the Committee would establish a working party if the Member in question, or any of the Parties to the Agreement, so requests. The working party should examine: (i) the coverage offer made by the applicant Member; and (ii) relevant information pertaining to export opportunities in the markets of the Parties, taking into account the existing and potential export capabilities of the applicant Member and export opportunities for the Parties in the market of the applicant Member;

(e) upon a decision by the Committee agreeing to the terms of accession including the coverage lists of the acceding Member, the acceding Member would deposit with the Director-General of the WTO an instrument of accession which states the terms so agreed. The acceding Member's coverage lists in English, French and Spanish would be appended to the Agreement;

(f) prior to the date of entry into force of the WTO Agreement, the above procedures would apply mutatis mutandis to contracting parties to the GATT 1947 interested in accession, and the tasks assigned to the Director-General of the WTO would be carried out by the Director-General to the CONTRACTING PARTIES to the GATT 1947.

2. It is noted that Committee decisions are arrived at on the basis of consensus. It is also noted that the non-application clause of paragraph 11 of Article XXIV is available to any Party.

B. INTERPRETATION AND APPLICATION OF THE DECISION

No jurisprudence or decision of a competent WTO body.

XXVIII. NOTES

A. TEXT OF THE NOTES

NOTES

The terms 'country' or 'countries' as used in this Agreement, including the Appendices, are to be understood to include any separate customs territory Party to this Agreement.

In the case of a separate customs territory Party to this Agreement, where an expression in this Agreement is qualified by the term 'national', such expression shall be read as pertaining to that customs territory, unless otherwise specified.

Article 1, paragraph 1

Having regard to general policy considerations relating to tied aid, including the objective of developing countries with respect to the untying of such aid, this Agreement does not apply to procurement made in furtherance of tied aid to developing countries so long as it is practised by Parties.

B. INTERPRETATION AND APPLICATION OF THE NOTES

No jurisprudence or decision of a competent WTO body.

[53] Panel Report on *Korea – Procurement*, para. 7.70.

International Dairy Agreement

I. PREAMBLE 1425
A. TEXT OF THE PREAMBLE 1425
B. INTERPRETATION AND APPLICATION OF THE PREAMBLE 1425

II. ARTICLE 1 1426
A. TEXT OF ARTICLE I 1426
B. INTERPRETATION AND APPLICATION OF ARTICLE I 1426

III. ARTICLE II 1426
A. TEXT OF ARTICLE II 1426
B. INTERPRETATION AND APPLICATION OF ARTICLE II 1426

IV. ARTICLE III 1426
A. TEXT OF ARTICLE III 1426
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1. Notification requirements 1427

V. ARTICLE IV 1427
A. TEXT OF ARTICLE IV 1427
B. INTERPRETATION AND APPLICATION OF ARTICLE IV 1427
1. Article IV:1(a) 1427
(a) Preparation of status report 1427
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VI. ARTICLE V 1428
A. TEXT OF ARTICLE V 1428
B. INTERPRETATION AND APPLICATION OF ARTICLE V 1428
1. Article V:3 1428
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A. TEXT OF ARTICLE VI 1428
B. INTERPRETATION AND APPLICATION OF ARTICLE VI 1428
1. Annex 1428
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VIII. ARTICLE VII 1428
A. TEXT OF ARTICLE VII 1428
B. INTERPRETATION AND APPLICATION OF ARTICLE VII 1429
1. Article VII:1(a) 1429
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IX. ARTICLE VIII 1429
A. TEXT OF ARTICLE VIII 1429
B. INTERPRETATION AND APPLICATION OF ARTICLE VIII 1431
1. Article VIII:2 1431
2. Article VIII:3 1431

X. ANNEX ON CERTAIN MILK PRODUCTS 1431
A. TEXT OF ANNEX ON CERTAIN MILK PRODUCTS 1431

I. PREAMBLE

A. TEXT OF THE PREAMBLE

The *Parties* to this Agreement,

Recognizing the importance of milk and dairy products to the economy of many countries[1] in terms of production, trade and consumption;

(*footnote original*) [1] In this Agreement and in the Annex thereto, the term "country" is deemed to include the European Communities as well as any separate customs territory Member of the World Trade Organization.

Recognizing the need, in the mutual interests of producers and consumers, and of exporters and importers, to avoid surpluses and shortages, and to maintain prices at an equitable level;

Noting the diversity and interdependence of dairy products;

Noting the situation in the dairy products market, which is characterized by very wide fluctuations and the proliferation of export and import measures;

Considering that improved cooperation in the dairy products sector contributes to the attainment of the objectives of expansion and liberalization of world trade, and the implementation of the principles and objectives concerning developing countries agreed upon in the Tokyo Declaration of Ministers dated 14 September 1973;

Determined to respect the principles and objectives of the General Agreement on Tariffs and Trade 1994[2] and, in carrying out the aims of this Agreement, effectively to implement the principles and objectives agreed upon in the said Tokyo Declaration;

(*footnote original*) [2] This provision shall apply only among Parties that are Members of the World Trade Organization.

Hereby agree as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

No jurisprudence or decision of a competent WTO body.

II. ARTICLE 1

A. TEXT OF ARTICLE I

Article I
Objectives

The objectives of this Agreement shall be, in accordance with the principles and objectives agreed upon in the Tokyo Declaration of Ministers dated 14 September 1973,

- to achieve the expansion and ever greater liberalization of world trade in dairy products under market conditions as stable as possible, on the basis of mutual benefit to exporting and importing countries;
- to further the economic and social development of developing countries.

B. INTERPRETATION AND APPLICATION OF ARTICLE I

1. The *International Dairy Agreement* replaced the International Dairy Arrangement that had operated since 1 January 1980.

III. ARTICLE II

A. TEXT OF ARTICLE II

Article II
Product Coverage

1. This Agreement applies to the dairy products sector. For the purpose of this Agreement, the term "dairy products" is deemed to include the following products, as defined in the Harmonized Commodity Description and Coding System ("Harmonized System") established by the Customs Co-operation Council:[3]

(*footnote original*) [3] For those Parties which have not yet implemented the Harmonized System, the following Customs Co-operation Council Nomenclature applies with respect to Article II of this Agreement and Article 1 of the Annex:

	CCCN
Milk and cream, fresh, not concentrated or sweetened	04.01
Milk and cream, preserved, concentrated or sweetened	04.02
Butter	04.03
Cheese and curd	04.04
Casein	ex 35.01

HS Code

04.01.10-30 Milk and cream, not concentrated nor containing added sugar or other sweetening matter

04.02.10-99 Milk and cream, concentrated or containing added sugar or other sweetening matter

04.03.10-90 Buttermilk, curdled milk and cream, yoghurt, kephir and other fermented or acidified milk and cream, whether or not concentrated or containing added sugar or other sweetening matter or flavoured or containing added fruit or cocoa

04.04.10-90 Whey, whether or not concentrated or containing added sugar or other sweetening matter; products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter, not elsewhere specified or included

04.05.00 Butter and other fats and oils derived from milk

04.06.10-90 Cheese and curd

35.01.10 Casein

2. The International Dairy Council, established under paragraph 1(a) of Article VII (hereinafter referred to as "the Council"), may decide that the Agreement is to apply to other products in which dairy products referred to in paragraph 1 have been incorporated, if it deems their inclusion necessary for the implementation of the objectives and provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE II

No jurisprudence or decision of a competent WTO body.

IV. ARTICLE III

A. TEXT OF ARTICLE III

Article III
Information and Market Monitoring

1. Each Party shall provide regularly and promptly to the Council the information required to permit the Council to monitor and assess the overall situation of the world market for dairy products and the world market situation for each individual dairy product.

2. Developing country Parties shall furnish the information available to them. In order that these Parties may improve their data collection mechanisms, developed Parties, and any developing Parties able to do so, shall consider sympathetically any request to them for technical assistance.

3. The information that the Parties undertake to provide pursuant to paragraph 1, according to the modalities that the Council shall establish, shall include data on past performance, current situation and outlook regarding production, consumption, prices, stocks and trade, including transactions other than normal commercial transactions, in respect of the products referred to in Article II, and any other information deemed necessary by the Council. Parties shall also provide information on their domestic policies and trade measures, and on their bilateral, plurilateral or multilateral commitments, in the dairy sector and shall make known, as early as possible, any changes in such policies and measures that are likely to affect international trade in dairy products. The provisions of this paragraph shall not require any Party to disclose confidential information

which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

4. The Secretariat of the World Trade Organization (hereinafter referred to as "the Secretariat"), shall draw up, and keep up to date, an inventory of all measures affecting trade in dairy products, including commitments resulting from bilateral, plurilateral and multilateral negotiations.

B. INTERPRETATION AND APPLICATION OF ARTICLE III

1. Notification requirements

2. At its meeting of 20–21 March 1995, the International Dairy Council adopted the notification requirements for information to be provided by the Parties[1] and for the inventory of measures to be kept by the WTO Secretariat under Article III.[2]

V. ARTICLE IV

A. TEXT OF ARTICLE IV

Article IV

Functions of the International Dairy Council and Cooperation between the Parties

1. The Council shall meet in order to:

   (a) make an evaluation of the situation in and outlook for the world market for dairy products, on the basis of a status report prepared by the Secretariat with the documentation furnished by Parties in accordance with Article III, information arising from the operation of the Annex to this Agreement on Certain Milk Products (hereinafter referred to as "the Annex") and any other information available to the Secretariat;

   (b) review the functioning of this Agreement.

2. If after an evaluation of the world market situation and outlook, referred to in paragraph 1(a), the Council finds that a serious market disequilibrium, or threat of such a disequilibrium, which affects or may affect international trade, is developing for dairy products in general or for one or more products, the Council will proceed to identify, taking particular account of the situation of developing countries, possible solutions for consideration by governments.

3. Depending on whether the Council considers that the situation defined in paragraph 2 is temporary or more durable, the measures referred to in paragraph 2 could include short-, medium- or long-term measures to contribute to improve the overall situation of the world market.

4. When considering measures that could be taken pursuant to paragraphs 2 and 3, due account shall be taken of the special and more favourable treatment to be provided for developing countries, where this is feasible and appropriate.

5. Any Party may raise before the Council any matter[4] affecting this Agreement, *inter alia,* for the same purposes provided for in paragraph 2. Each Party shall promptly afford adequate opportunity for consultation regarding such matter affecting this Agreement.

(*footnote original*) [4] It is confirmed that the term "matter" in this paragraph includes any matter which is covered by Multilateral Trade Agreements annexed to the Agreement Establishing the World Trade Organization, in particular those bearing on export and import measures.

6. If the matter affects the application of the specific provisions of the Annex, any Party which considers that its trade interests are being seriously threatened and which is unable to reach a mutually satisfactory solution with the other Party or Parties concerned may request the Chairman of the Committee established under paragraph 2(a) of Article VII, to convene a special meeting of the Committee on an urgent basis so as to determine as rapidly as possible, and within four working days if requested, any measures which may be required to meet the situation. If a satisfactory solution cannot be reached, the Council shall, at the request of the Chairman of the Committee, meet within a period of not more than fifteen days to consider the matter with a view to facilitating a satisfactory solution.

B. INTERPRETATION AND APPLICATION OF ARTICLE IV

1. Article IV:1(a)

(a) Preparation of status report

3. At its meeting of 20–21 March 1995, the International Dairy Council adopted procedural requirements for the status reports to be distributed by the Secretariat under Article IV:1(a).[3]

2. Article IV:1(b)

(a) Review of the functioning of the Agreement

4. Pursuant to Article IV:1(b), at its meeting on 17 October 1995, the International Dairy Council adopted a decision suspending the Annex on Certain Milk Products, with effect from 18 October 1995.[4]

[1] IDA/1, Rule 23.
[2] IDA/1, Rule 30.
[3] IDA/1, Rule 24.
[4] International Dairy Council, Second Session, adopted 13 February 1996, IDA/5.

VI. ARTICLE V

A. TEXT OF ARTICLE V

Article V
Food Aid and Transactions other than Normal Commercial Transactions

1. The Parties agree:

   (a) In cooperation with FAO and other interested organizations, to foster recognition of the value of dairy products in improving nutritional levels and of ways and means through which they may be made available for the benefit of developing countries.

   (b) In accordance with the objectives of this Agreement, to furnish, within the limits of their possibilities, dairy products by way of food aid. Parties should notify the Council in advance each year, as far as practicable, of the scale, quantities and destinations of their proposed contributions of such food aid. Parties should also give, if possible, prior notification to the Council of any proposed amendments to the notified food-aid contributions. It is understood that contributions could be made bilaterally or through joint projects or through multilateral programmes, particularly the World Food Programme.

   (c) Recognizing the desirability of harmonizing their efforts in this field, as well as the need to avoid harmful interference with normal patterns of production, consumption and international trade, to exchange views in the Council on their arrangements for the supply and requirements of dairy products as food aid or on concessional terms.

2. Donated exports, exports destined for relief purposes or welfare purposes, and other transactions which are not normal commercial transactions shall be effected in accordance with Article 10 of the Agreement on Agriculture. The Council shall cooperate closely with the FAO Consultative Sub-Committee on Surplus Disposal.

3. The Council shall, in accordance with conditions and modalities that it will establish, upon request, discuss and consult on all transactions other than normal commercial transactions and other than those covered by the Agreement on Subsidies and Countervailing Measures.

B. INTERPRETATION AND APPLICATION OF ARTICLE V

1. Article V:3

(a) Information on transactions

5. At its meeting of 20–21 March 1995, the International Dairy Council defined the procedural requirements in respect of parties requested to furnish information on the transactions defined in Article V:3.[5]

VII. ARTICLE VI

A. TEXT OF ARTICLE VI

Article VI
Annex[6]

Without prejudice to the provisions of Articles I to V, the products listed below shall be subject to the provisions of the Annex:

Milk powder and cream powder, excluding whey powder

Milk fat

Certain cheeses

B. INTERPRETATION AND APPLICATION OF ARTICLE VI

1. Annex

(a) Paragraph 3

6. At its meeting of 2–3 May 1994, the Management Committee established by the participants to the Protocol Relating to Milk Fat as of 2 April 1973,[7] decided to suspend under the previous International Dairy Arrangement the minimum prices for butter and anhydrous milk fat contained in Article 3:2(b) of the Protocol for a period of 12 months.[8]

(b) Paragraph 4

7. At its meeting of 20–21 March 1995, the International Dairy Council adopted notification requirements for cases where prices in international trade of the products covered approached the minimum prices mentioned in Article 4 of the Annex.[9]

VIII. ARTICLE VII

A. TEXT OF ARTICLE VII

Article VII
Administration

1. *International Dairy Council*

   (a) An International Dairy Council shall be established within the framework of the World Trade Organization (hereinafter referred to as the "WTO"). The Council shall comprise repre-

[5] IDA/1, Rule 25.
[6] See Section X.
[7] L/3835, BISD 20S/11, Article VII:1.
[8] DPC/PTL/40, para. 4.
[9] IDA/1, Rule 26.

sentatives of all Parties to the Agreement and shall carry out all the functions which are necessary to implement the provisions of the Agreement. The Council shall be serviced by the Secretariat. The Council shall establish its own rules of procedure. The Council may, as appropriate, establish subsidiary working groups or other bodies.

(b) *Regular and special meetings*

The Council shall normally meet as appropriate, but not less than twice each year. The Chairman may call a special meeting of the Council either on his own initiative, at the request of the Committee established under paragraph 2(a), or at the request of a Party to this Agreement.

(c) *Decisions*

The Council shall reach its decisions by consensus. The Council shall be deemed to have decided on a matter submitted for its consideration if no member of the Council formally objects to the acceptance of a proposal.

(d) *Cooperation with other organizations*

The Council shall make whatever arrangements are appropriate for consultation or cooperation with intergovernmental and non-governmental organizations.

(e) *Admission of observers*

(i) The Council may invite any non-Party government to be represented at any meeting as an observer and may determine rules on the rights and obligations of observers, in particular with respect to the provision of information.

(ii) The Council may also invite any of the organizations referred to in paragraph 1(d) to attend any meeting as an observer.

2. *Committee on Certain Milk Products*

(a) The Council shall establish a Committee on Certain Milk Products (hereinafter referred to as "the Committee") to carry out all the functions which are necessary to implement the provisions of the Annex. This Committee shall comprise representatives of all Parties. The Committee shall be serviced by the Secretariat. It shall report to the Council on the exercise of its functions.

(b) *Examination of the market situation*

The Council shall make the necessary arrangements, determining the modalities for the information to be furnished under Article III, so that the Committee may keep under constant review the situation in and the evolution of the international market for the products covered by the Annex, and the conditions under which the provisions of the Annex are applied by Parties, taking into account the evolution of prices in international trade in each of the other dairy products having implications for the trade in products covered by the Annex.

(c) *Regular and special meetings*

The Committee shall normally meet once each quarter. However, the Chairman of the Committee may call a special meeting of the Committee on his own initiative or at the request of any Party.

(d) *Decisions*

The Committee shall reach its decisions by consensus. The Committee shall be deemed to have decided on a matter submitted for its consideration if no member of the Committee formally objects to the acceptance of a proposal.

B. INTERPRETATION AND APPLICATION OF ARTICLE VII

1. Article VII:1(a)

8. The International Dairy Council was established under the GATT framework according to Article VII:1(a) of the International Dairy Agreement of 1979.[10]

9. At its First Session of 20–21 March 1995, the International Dairy Council adopted its Rules of Procedure.[11]

2. Article VII:2(a)

10. At its meeting on 17 October 1995, the International Diary Council decided to suspend the Application of the Annex on Certain Milk Products and the functioning of the Committee on Certain Milk Products, whose rules of procedures were set out in Rules 15 to 22,[12] with effect from 18 October 1995.[13]

IX. ARTICLE VIII

A. TEXT OF ARTICLE VIII

Article VIII
Final Provisions

1. *Acceptance*

(a) This Agreement is open for acceptance, by signature or otherwise, by any State or separate

[10] BISD 26S/91.
[11] IDA/1.
[12] IDA/1.
[13] IDA/3.

customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in the Agreement Establishing the WTO (hereinafter referred to as the "WTO Agreement"), and by the European Communities.

(b) Any government[5] accepting this Agreement may at the time of its acceptance make a reservation with regard to the application of the Annex with respect to any product(s) specified therein. Reservations may not be entered in respect of any of the provisions of the Annex without the consent of the other Parties.

(*footnote original*) [5] For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Communities.

(c) Acceptance of this Agreement shall carry denunciation of the International Dairy Arrangement done at Geneva on 12 April 1979, which entered into force on 1 January 1980, for Parties having accepted that Arrangement. Such denunciation shall take effect on the date of entry into force of this Agreement for that Party.

2. *Entry into force*

(a) This Agreement shall enter into force, for those Parties having accepted it, on the date of entry into force of the WTO Agreement. For Parties accepting this Agreement after that date, it shall be effective from the date of their acceptance.

(b) The validity of contracts entered into before the date of entry into force of this Agreement shall not be affected by this Agreement.

3. *Validity*

This Agreement shall remain in force for three years. The duration of this Agreement shall be extended for further periods of three years at a time, unless the Council, at least eighty days prior to each date of expiry, decides otherwise.

4. *Amendment*

Except where provision for modification is made elsewhere in this Agreement, the Council may recommend an amendment to the provisions of this Agreement. The proposed amendment shall enter into force upon acceptance by all Parties.

5. *Relationship between the Agreement and the Annex and Attachments*

The following shall be deemed to be an integral part of this Agreement, subject to the provisions of paragraph 1(b):

- the Annex mentioned in Article VI;
- the lists of reference points mentioned in Article 2 of the Annex and contained in Attachment A;
- the schedules of price differentials according to milk fat content mentioned in paragraph 4 of Article 3 of the Annex and contained in Attachment B;
- the register of processes and control measures referred to in paragraph 5 of Article 3 of the Annex and contained in Attachment C.

6. *Relationship between the Agreement and Other Agreements*

Nothing in this Agreement shall affect the rights and obligations of Parties under the General Agreement on Tariffs and Trade and the WTO Agreement.[6]

(*footnote original*) [6] This provision shall apply only among Parties that are Members of the WTO or GATT.

7. *Withdrawal*

(a) Any Party may withdraw from this Agreement. Such withdrawal shall take effect upon the expiration of 60 days from the date on which written notice of withdrawal is received by the Director-General of the WTO.

(b) Subject to such conditions as may be agreed upon by the Parties, any Party may withdraw its acceptance of the application of the provisions of the Annex with respect to any product(s) specified therein. Such withdrawal shall take effect upon the expiration of 60 days from the date on which written notice of withdrawal is received by the Director-General of the WTO.

8. *Deposit*

Until the entry into force of the WTO Agreement, the text of this Agreement shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT who shall promptly furnish a certified copy thereof and a notification of each acceptance thereof to each Party. The texts of this Agreement in the English, French and Spanish languages shall all be equally authentic. This Agreement, and any amendments thereto, shall, upon the entry into force of the WTO Agreement, be deposited with the Director-General of the WTO.

9. *Registration*

This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Marrakesh this fifteenth day of April nineteen hundred and ninety-four.

B. INTERPRETATION AND APPLICATION OF ARTICLE VIII

1. Article VIII:2

11. On 12 December 1994, the parties to the *International Dairy Agreement*[14] agreed:

> "[A]ll decisions and procedures currently in effect in the International Dairy Agreement will be applied on a *de facto* basis during the period following the period following entry into force of the International Dairy Agreement until such time as the International Dairy Council adopts a definitive decision on these matters."[15]

2. Article VIII:3

12. Following a decision of the Parties to *the International Dairy Agreement* on 30 September 1997,[16] the General Council, at its meeting of 10 December 1997, decided to delete the *International Dairy Agreement* from Annex 4 of the *WTO Agreement*, with effect from 1 January 1998.[17]

X. ANNEX ON CERTAIN MILK PRODUCTS

A. TEXT OF ANNEX ON CERTAIN MILK PRODUCTS

ANNEX ON CERTAIN MILK PRODUCTS

Article 1

Product Coverage

1. This Annex applies to:

   (a) milk powder and cream powder falling under HS heading Nos. 04.02.10–99 and 04.03.10–90;

   (b) milk fat falling under HS heading No. 04.05.00, having a milk fat content equal to or greater than 50 per cent by weight; and

   (c) cheeses falling under HS heading No. 04.06.10–90, having a fat content in dry matter, by weight, equal to or more than 45 per cent and a dry matter content, by weight, equal to or more than 50 per cent.

Field of application

2. For each Party, this Annex is applicable to exports of the products specified in paragraph 1 manufactured or repacked inside its own customs territory.

Article 2

Pilot Products

The minimum export prices established under Article 3 shall be established with respect to the pilot products of the following specifications:

(a) Designation: *Skimmed milk powder*
Milk fat content: less than or equal to 1.5 per cent by weight
Water content: less than or equal to 5 per cent by weight

(b) Designation: *Whole milk powder*
Milk fat content: 26 per cent by weight
Water content: less than or equal to 5 per cent by weight

(c) Designation: *Buttermilk powder*[7]
Milk fat content: less than or equal to 11 per cent by weight
Water content: less than or equal to 5 per cent by weight

(*footnote original*) [7] Derived from the manufacture of butter and anhydrous milk fat.

(d) Designation: *Anhydrous milk fat*
Milk fat content: 99.5 per cent by weight

(e) Designation: *Butter*
Milk fat content: 80 per cent by weight

(f) Designation: *Cheese*

Packaging:

In packages normally used in the trade, of a net content by weight of not less than 25 kgs. or 50 lbs., except for cheese, of 20 kgs. or 40 lbs., respectively, as appropriate.

Terms of sale:

F.o.b. from the exporting Party or free-at-frontier exporting Party.

By derogation from this provision, reference points for the Parties listed in Attachment A may be as provided therein.

Prompt payment against documents.

Article 3

Minimum Prices

Level and observance of minimum prices

1. Each Party shall take the steps necessary to ensure that the export prices of the products defined in Article 2 shall not be less than the minimum prices applicable under this Annex. If the products are exported in the form of goods in which they have been incorporated, Parties shall take the steps necessary to avoid circumvention of the price provisions of this Annex.

2. (a) The minimum price levels set out in this Article take account, in particular, of the current market situation, dairy prices in producing Parties, the need to ensure an appropriate relationship between the

[14] Argentina, Australia, Bulgaria, Egypt, the European Communities, Hungary, Japan, New Zealand, Norway, Poland, Romania, Switzerland and Uruguay.
[15] L/7568.
[16] IDA/1.
[17] WT/L/251.

minimum prices established in the Annex, the need to ensure equitable prices to consumers, and the desirability of maintaining a minimum return to the most efficient producers in order to ensure stability of supply over the longer term.

(b) The minimum prices provided for in paragraph 1 applicable at the date of entry into force of this Agreement are fixed at:

(i) US$1,200 per metric ton for the skimmed milk powder defined in Article 2(a);

(ii) US$1,250 per metric ton for the whole milk powder defined in Article 2(b);

(iii) US$1,200 per metric ton for the buttermilk powder defined in Article 2(c);

(iv) US$1,625 per metric ton for the anhydrous milk fat defined in Article 2(d);

(v) US$1,350 per metric ton for the butter defined in Article 2(e);

(vi) US$1,500 per metric ton for the cheese defined in Article 2(f).

3. (a) The levels of the minimum prices specified in this Article may be modified by the Committee, taking into account, on the one hand, the results of the operation of the Annex and, on the other hand, the evolution of the situation of the international market.

(b) The levels of the minimum prices specified in this Article shall be subject to review at least once a year by the Committee. In undertaking this review the Committee shall take account in particular, to the extent relevant and necessary, of costs faced by producers, other relevant economic factors of the world market, the need to maintain a long-term minimum return to the most economic producers, the need to maintain stability of supply and to ensure acceptable prices to consumers, and the current market situation and shall have regard to the desirability of improving the relationship between the levels of the minimum prices set out in paragraph 2(b) and the dairy support levels in the major producing Parties.

Adjustment of minimum prices

4. If the products actually exported differ from the pilot products in respect of the fat content, packaging or terms of sale, the minimum prices shall be adjusted so as to protect the minimum prices established in this Annex for the products specified in Article 2 of this Annex, according to the following provisions:

Milk fat content:

Milk powders. If the milk fat content of the milk powders falling under Article 1(a), excluding buttermilk powder,[8] differs from the milk fat content of the pilot products as specified in Article 2(a) and Article 2(b), then for each full percentage point of milk fat as from 2 per cent, the minimum price shall be adjusted in proportion to the difference between the minimum prices in force for the pilot products as specified in Article 2(a) and Article 2(b).[9]

(*footnote original*) [8] As defined in Article 2(c) of this Annex.

(*footnote original*) [9] See Attachment B, "Schedule of Price Differentials According to Milk Fat Content".

Milk fats. If the milk fat content of the milk fat falling under Article 1(b) differs from the milk fat content of the pilot products as specified in Article 2(d) or Article 2(e) then, if the milk fat content is equal to or greater than 82 per cent or less than 80 per cent, the minimum price of this product shall be, for each full percentage point by which the milk fat content is more than or less than 80 per cent, increased or reduced in proportion to the difference between the minimum prices in force for the pilot products as specified in Article 2(d) or Article 2(e), respectively.

Packaging:

If the products are offered otherwise than in packages normally used in the trade, of a net content by weight of not less than 25 kgs. or 50 lbs., or for cheese, of not less than 20 kgs. or 40 lbs., respectively, as appropriate, the minimum prices shall be adjusted so as to reflect the difference in the cost of packaging relative to the cost of the type of package specified above.

Terms of sale:

If sold on terms other than f.o.b. from the exporting Party or free-at-frontier exporting Party,[10] the minimum prices shall be calculated on the basis of the minimum f.o.b. prices specified in paragraph 2(b), plus the real and justified costs of the services provided; if the terms of the sale include credit, this shall be charged for at the prevailing commercial rates in the exporting Party concerned.

(*footnote original*) [10] See Article 2 of this Annex.

Exports and imports of skimmed milk powder and buttermilk powder for purposes of animal feed

5. By derogation from the provisions of paragraphs 1 to 4, a Party may, under the conditions defined below, export or import, as the case may be, skimmed milk powder and buttermilk powder for purposes of animal feed at prices below the minimum prices provided for in this Annex for these products. A Party may make use of this possibility only to the extent that it ensures that the products exported or imported are subjected to the processes and control measures which will be applied in the country of export or destination so as to ensure that

the skimmed milk powder and buttermilk powder thus exported or imported are used exclusively for animal feed. These processes and control measures shall have been approved by the Committee and recorded in a register established by it.[11] A Party wishing to make use of the provisions of this paragraph shall give advance notification of its intention to do so to the Committee which shall meet, at the request of any Party, to examine the market situation. The Parties shall furnish the necessary information concerning their transactions in respect of skimmed milk powder and buttermilk powder for purposes of animal feed, so that the Committee may follow developments in this sector and periodically make forecasts concerning the evolution of this trade.

(*footnote original*) [11] See Attachment C, "Register of Processes and Control Measures". It is understood that exporters would be permitted to ship skimmed milk powder and buttermilk powder for animal feed purposes in an unaltered state to importers which have had their processes and control measures inserted in the Register. In this case, exporters shall so inform the Committee.

Special conditions of sales

6. Parties undertake, within the limit of their institutional possibilities, to ensure that practices such as those referred to in Article 4 do not have the effect of directly or indirectly bringing the export prices of the products subject to the minimum price provisions below the agreed minimum prices.

Transactions other than normal commercial transactions

7. The provisions of paragraphs 1 to 6 shall not be regarded as applying to donated exports or to exports destined for relief purposes or food-related development purposes or welfare purposes, provided these have been notified to the Council as provided for in Article V of the Agreement.

Article 4
Provision of Information

In cases where prices in international trade of the products covered by Article 1 are approaching the minimum prices mentioned in paragraph 2(b) of Article 3, and without prejudice to the provisions of Article III of the Agreement, Parties shall notify to the Committee all the relevant elements for evaluating their own market situation and, in particular, credit or loan practices, twinning with other products, barter or three-sided transactions, refunds or rebates, exclusivity contracts, packaging costs and details of the packaging, so that the Committee can make a verification.

Article 5
Obligations of Exporting Parties

Exporting Parties agree to use their best endeavours, in accordance with their institutional possibilities, to supply on a priority basis the normal commercial requirements of developing importing Parties, especially those used for food-related development purposes and welfare purposes.

Article 6
Cooperation of Importing Parties

1. Parties which import products covered by Article 1 undertake in particular:

(a) to cooperate in implementing the minimum price objective of this Annex and to ensure, as far as possible, that the products covered by Article 1 are not imported at less than the appropriate customs valuation equivalent to the prescribed minimum prices;

(b) without prejudice to the provisions of Article III of the Agreement and Article 4 of this Annex, to supply information concerning imports of products covered by Article 1 from non-Parties;

(c) to consider sympathetically proposals for appropriate remedial action if imports at prices inconsistent with the minimum prices threaten the operation of this Annex.

2. Paragraph 1 shall not apply to imports of skimmed milk powder and buttermilk powder for purposes of animal feed, provided that such imports are subject to the measures and procedures provided for in paragraph 5 of Article 3.

Article 7
Derogations

1. Upon request by a Party, the Committee shall have the authority to grant derogations from the provisions of paragraphs 1 to 5 of Article 3 in order to remedy difficulties which observance of minimum prices could cause certain Parties. The Committee shall take a decision on such a request within three months from the date of the request.

2. The provisions of paragraphs 1 to 4 of Article 3 shall not apply to exports, in exceptional circumstances, of small quantities of natural unprocessed cheese which would be below normal export quality as a result of deterioration or production faults. Parties exporting such cheese shall notify the Secretariat in advance of their intention to do so. Parties shall also notify the Committee quarterly of all sales of cheese effected under this provision, specifying in respect of each transaction the quantities, prices and destinations involved.

Article 8
Emergency Action

Any Party which considers that its interests are seriously endangered by a country not bound by this Annex can request the Chairman of the Committee to convene an emergency meeting of the Committee within

two working days to determine and decide whether measures would be required to meet the situation. If such a meeting cannot be arranged within the two working days and the commercial interests of the Party concerned are likely to be materially prejudiced, that Party may take unilateral action to safeguard its position, on the condition that any other Parties likely to be affected are immediately notified. The Chairman of the Committee shall also be formally advised immediately of the full circumstances of the case and shall call a special meeting of the Committee at the earliest possible moment.

International Bovine Meat Agreement

I. PREAMBLE 1435
A. TEXT OF THE PREAMBLE 1435
B. INTERPRETATION AND APPLICATION OF THE PREAMBLE 1435
II. ARTICLE I 1435
A. TEXT OF ARTICLE I 1435
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VIII. ANNEX 1439
A. TEXT OF THE ANNEX 1439
B. INTERPRETATION AND APPLICATION OF THE ANNEX 1439

I. PREAMBLE

A. TEXT OF THE PREAMBLE

The *Parties* to this Agreement,

Convinced that increased international cooperation should be carried out in such a way as to contribute to the achievement of greater liberalization, stability and expansion in international trade in meat and live animals;

Taking into account the need to avoid serious disturbances in international trade in bovine meat and live animals;

Recognizing the importance of production and trade in bovine meat and live animals for the economies of many countries, especially for certain developed and developing countries;

Mindful of their obligations to the principles and objectives of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as "GATT 1994");[1]

(*footnote original*) [1] This provision shall apply only among Parties that are Members of the World Trade Organization.

Determined, in carrying out the aims of this Agreement to implement the principles and objectives agreed upon in the Tokyo Declaration of Ministers dated 14 September 1973, in particular as concerns special and more favourable treatment for developing countries;

Hereby *agree* as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

No jurisprudence or decision of a competent WTO body.

II. ARTICLE I

A. TEXT OF ARTICLE I

Article I
Objectives

The objectives of this Agreement shall be:

1. to promote the expansion, ever greater liberalization and stability of the international meat and livestock market by facilitating the progressive dismantling of obstacles and restrictions to world trade in bovine meat and live animals, including those which compartmentalize this trade, and by improving the international framework of world trade to the benefit of both consumer and producer, importer and exporter;

2. to encourage greater international cooperation in all aspects affecting the trade in bovine meat and live animals with a view in particular to greater rationalization and more efficient distribution of resources in the international meat economy;

3. to secure additional benefits for the international trade of developing countries in bovine meat and live animals through an improvement in the possibilities for these countries to participate in the

expansion of world trade in these products by means of *inter alia*:

(a) promoting long-term stability of prices in the context of an expanding world market for bovine meat and live animals; and

(b) promoting the maintenance and improvement of the earnings of developing countries that are exporters of bovine meat and live animals;

the above with a view thus to deriving additional earnings, by means of securing long-term stability of markets for bovine meat and live animals;

4. to further expand trade on a competitive basis taking into account the traditional position of efficient producers.

B. INTERPRETATION AND APPLICATION OF ARTICLE I

1. General

1. The *International Bovine Meat Agreement* replaced the Arrangement Regarding Bovine Meat that had operated since 1 January 1980.

III. ARTICLE II

A. TEXT OF ARTICLE II

Article II
Product Coverage

This Agreement applies to the products listed in the Annex[1] and to any other product that may be added by the International Meat Council (hereinafter also referred to as "the Council"), as established under the terms of Article V, in order to accomplish the objectives and provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE II

No jurisprudence or decision of a competent WTO body.

IV. ARTICLE III

A. TEXT OF ARTICLE III

Article III
Information and Market Monitoring

1. Each Party shall provide regularly and promptly to the Council the information which will permit the Council to monitor and assess the overall situation of the world market for meat and the situation of the world market for each specific meat.

2. Developing country Parties shall furnish the information available to them. In order that these Parties may improve their data collection mechanism, developed country[2] Parties and any developing country Parties able to do so, shall consider sympathetically any request to them for technical assistance.

(*footnote original*) [2] In this Agreement the term "country" is deemed to include the European Communities as well as any separate customs territory Member of the World Trade Organization.

3. The information that the Parties undertake to provide pursuant to paragraph 1, according to the modalities that the Council shall establish, shall include data on past performance and current situation and an assessment of the outlook regarding production (including the evolution of the composition of herds), consumption, prices, stocks of and trade in the products referred to in Article II, and any other information deemed necessary by the Council, in particular on competing products. Parties shall also provide information on their domestic policies and trade measures including bilateral and plurilateral commitments in the bovine sector, and shall notify as early as possible any changes in such policies and measures that are likely to affect international trade in bovine meat and live animals. The provisions of this paragraph shall not require any Party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

4. The Secretariat of the World Trade Organization (hereinafter referred to as "Secretariat") shall monitor variations in market data, in particular herd sizes, stocks, slaughtering and domestic and international prices, so as to permit early detection of the symptoms of any serious imbalance in the supply and demand situation. The Secretariat shall keep the Council apprised of significant developments on world markets, as well as prospects for production, consumption, exports and imports. The Secretariat shall draw up and keep up to date an inventory of all measures affecting trade in bovine meat and live animals, including commitments resulting from bilateral, plurilateral and multilateral negotiations.

B. INTERPRETATION AND APPLICATION OF ARTICLE III

1. Notification requirements

2. At its meeting on 20–21 June 1995, the International Meat Council adopted the procedural and notification requirements for the information concerning domestic policies, statistics and trade measures including bilateral and plurilateral commitments in the bovine meat sector to be furnished by the parties under Article III (Rules 15 to 18).[2]

[1] See Section VIII.

[2] IMA/1. In the questionnaires to be filled out by parties, the parties were to provide the document reference for any policies or measures notified under the notification procedures of the Committees on Agriculture and Sanitary and Phytosanitary Measures (IMA/2).

V. ARTICLE IV

A. TEXT OF ARTICLE IV

Article IV
Functions of the International Meat Council and Cooperation between the Parties

1. The Council shall meet in order to:

(a) evaluate the world supply and demand situation and outlook on the basis of an interpretative analysis of the present situation and of probable developments drawn up by the Secretariat, on the basis of documentation provided in conformity with Article III, including that relating to the operation of domestic and trade policies and of any other information available to the Secretariat;

(b) proceed to a comprehensive examination of the functioning of this Agreement;

(c) provide an opportunity for regular consultation on all matters affecting international trade in bovine meat.

2. If after evaluation of the world supply and demand situation referred to in paragraph 1 (a), or after examination of all relevant information pursuant to paragraph 3 of Article III, the Council finds evidence of a serious imbalance or a threat thereof in the international meat market, the Council will proceed by consensus, taking particular account of the situation in developing countries, to identify for consideration by governments[3] possible solutions to remedy the situation consistent with the principles and rules of GATT 1994.

(*footnote original*) [3] For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Communities.

3. Depending on whether the Council considers that the situation defined in paragraph 2 is temporary or more durable, the measures referred to in paragraph 2 could include short-, medium-, or long-term measures taken by importers as well as exporters to contribute to improve the overall situation of the world market consistent with the objectives and aims of this Agreement, in particular the expansion, ever greater liberalization, and stability of the international meat and livestock markets.

4. When considering the suggested measures pursuant to paragraphs 2 and 3, due consideration shall be given to special and more favourable treatment to developing countries, where this is feasible and appropriate.

5. The Parties undertake to contribute to the fullest possible extent to the implementation of the objectives of this Agreement set forth in Article I. To this end, and consistent with the principles and rules of the GATT 1994, Parties shall, on a regular basis, enter into the discussions provided in paragraph 1 (c) with a view to exploring the possibilities of achieving the objectives of this Agreement, in particular the further dismantling of obstacles to world trade in bovine meat and live animals. Such discussions should prepare the way for subsequent consideration of possible solutions of trade problems consistent with the rules and principles of the GATT 1994, which could be jointly accepted by all the Parties concerned, in a balanced context of mutual advantages.

6. Any Party may raise before the Council any matter[4] affecting this Agreement, *inter alia*, for the same purposes provided for in paragraph 2. The Council shall, at the request of a Party, meet within a period of not more than fifteen days to consider any matter affecting this Agreement.

(*footnote original*) [4] It is confirmed that the term "matter" in this paragraph includes any matter which is covered by the Multilateral Trade Agreements annexed to the Agreement Establishing the WTO, in particular those bearing on export and import measures.

B. INTERPRETATION AND APPLICATION OF ARTICLE IV

3. Pursuant to Article IV:1, at its meeting of 2 June 1997, the International Meat Council completed its evaluation of the world supply and demand situation and outlook in the bovine meat sector.[3]

VI. ARTICLE V

A. TEXT OF ARTICLE V

Article V
Administration

1. *International Meat Council*

An International Meat Council shall be established within the framework of the World Trade Organization (hereinafter referred to as "the WTO"). The Council shall comprise representatives of all Parties to the Agreement and shall carry out all the functions which are necessary to implement the provisions of the Agreement. The Council shall be serviced by the Secretariat. The Council shall establish its own rules of procedure. The Council may, as appropriate, establish subsidiary working groups or other bodies.

2. *Regular and special meetings*

The Council shall normally meet as appropriate, but not less than twice each year. The Chairman may call a special meeting of the Council either on his own initiative or at the request of a Party to this Agreement.

[3] IMA/W/11. See also IMA/W/1, IMA/W/7 and IMA/W/7/Corr. 1.

3. *Decisions*

The Council shall reach its decisions by consensus. The Council shall be deemed to have decided on a matter submitted for its consideration if no member of the Council formally objects to the acceptance of a proposal.

4. *Cooperation with other organizations*

The Council shall make arrangements as appropriate for consultation or cooperation with intergovernmental and non-governmental organizations.

5. *Admission of observers*

(a) The Council may invite any non-Party government to be represented at any of its meetings as an observer and may determine rules on the rights and obligations of observers, in particular with respect to the provision of information.

(b) The Council may also invite any of the organizations referred to in paragraph 4 to attend any meeting as an observer.

B. INTERPRETATION AND APPLICATION OF ARTICLE V

4. Pursuant to Article V:1, at its meeting of 21–22 June 1995, the International Meat Council adopted its Rules of Procedure.[4]

5. Pursuant to Article V:5(b), at its meeting of 21–22 June 1995, the International Meat Council issued a standing invitation to the United Nations Economic Commission for Europe (ECE), FAO, the International Trade Centre (ITC), OECD and UNCTAD.[5]

VII. ARTICLE VI

A. TEXT OF ARTICLE VI

Article VI
Final provisions

1. *Acceptance*

(a) This Agreement is open for acceptance, by signature or otherwise, by any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in the Agreement Establishing the WTO (hereinafter referred to as "WTO Agreement"), and by the European Communities.

(b) Reservations may not be entered without the consent of the other Parties.

(c) Acceptance of this Agreement shall carry denunciation of the Arrangement Regarding Bovine Meat, done at Geneva on 12 April 1979, which entered into force on 1 January 1980, for Parties having accepted that Arrangement. Such denunciation shall take effect on the date of entry into force of this Agreement for that Party.

2. *Entry into force*

This Agreement shall enter into force for those Parties having accepted it, on the date of entry into force of the WTO Agreement. For Parties accepting this Agreement after that date, it shall be effective from the date of their acceptance.

3. *Validity*

This Agreement shall remain in force for three years. The duration of this Agreement shall be extended for further periods of three years at a time, unless the Council, at least eighty days prior to each date of expiry, decides otherwise.

4. *Amendment*

Except where provision for modification is made elsewhere in this Agreement, the Council may recommend an amendment to the provisions of this Agreement. The proposed amendment shall enter into force upon acceptance by all Parties.

5. *Relationship between the Agreement and other Agreements*

Nothing in this Agreement shall affect the rights and obligations of Parties under the General Agreement on Tariffs and Trade or the WTO Agreement.[5]

(*footnote original*) [5] This provision shall apply only among Parties that are Members of the WTO or the GATT.

6. *Withdrawal*

Any Party may withdraw from this Agreement. Such withdrawal shall take effect upon the expiration of sixty days from the date on which written notice of withdrawal is received by the Director-General of the WTO.

7. *Deposit*

Until the entry into force of the WTO Agreement, the text of this Agreement shall be deposited with the Director-General to the Contracting Parties to GATT who shall promptly furnish a certified copy thereof and a notification of each acceptance thereof to each Party. The texts of this Agreement in the English, French and Spanish languages shall all be equally authentic. This Agreement, and any amendments thereto, shall, upon the entry into force of the WTO Agreement, be deposited with the Director-General of the WTO.

8. *Registration*

This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

[4] IMA/1.
[5] IMA/4, para. 8.

Done at Marrakesh on this fifteenth day of April nineteen hundred and ninety four.

B. INTERPRETATION AND APPLICATION OF ARTICLE VI

6. At its meeting of 30 September 1997 the International Meat Council decided to terminate the *International Bovine Meat Agreement*.[6] Pursuant to Article X:9 of the *WTO Agreement*, the General Council deleted the *International Bovine Meat Agreement* from Annex 4 of the *WTO Agreement* with its termination effective as of 1 January 1998.[7]

VIII. ANNEX

A. TEXT OF THE ANNEX

ANNEX
PRODUCT COVERAGE

This Agreement applies to bovine meat. For the purpose of this Agreement, the term "bovine meat" is considered to include the following products, as defined by the Harmonized Commodity Description and Coding System ("Harmonized System") established by the Customs Co-operation Council:[6]

(*footnote original*) [6] For those Parties which have not yet implemented the Harmonized System, the following Customs Co-operation Council Nomenclature applies with respect to Article II:

CCCN

(a) Live bovine animals 01.02

(b) Meat and edible offals of bovine animals, fresh, chilled or frozen ex 02.01

(c) Meat and edible offals of bovine animals, salted, in brine, dried or smoked ex 02.06

(d) Other prepared or preserved meat or offal of bovine animals ex 16.02

HS code

01.02 – Live bovine animals:
0102.10 – Pure-bred breeding animals
0102.90 – Other

02.01 – Meat of bovine animals, fresh or chilled:
0201.10 – Carcasses and half-carcasses
0201.20 – Other cuts with bone-in
0201.30 – Boneless

02.02 – Meat of bovine animals, frozen:
0202.10 – Carcasses and half-carcasses
0202.20 – Other cuts with bone-in
0202.30 – Boneless

02.06 – Edible offal of bovine animals, fresh, chilled or frozen:
0206.10 – Of bovine animals, fresh or chilled
– Of bovine animals, frozen:
0206.21 – Tongues
0206.22 – Livers
0206.29 – Other

02.10 – Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal:
0210.20 – Meat of bovine animals
ex0210.90 – Edible offal of bovine animals

16.02 – Other prepared or preserved meat, meat offal or blood:
1602.50 – Of bovine animals

B. INTERPRETATION AND APPLICATION OF THE ANNEX

No jurisprudence or decision of a relevant WTO body.

[6] IMA/8.
[7] WT/L/252.

GATT Disputes

Australia – Ammonium Sulphate	*The Australian Subsidy on Ammonium Sulphate* Working Party Report, adopted 3 April 1950, BISD II/188
Australia – Glacé Cherries	*Australia – Imposition of Countervailing Duties on Imports of Glacé Cherries from France and Italy in Application of the Australian Customs Amendment Act 1991* Panel Report, 28 October 1993, unadopted, SCM/178
Belgium – Family Allowances	*Belgian Family Allowances (allocations familiales)* Working Party Report, adopted 7 November 1952, BISD 1S/59
Belgium – Income Tax	*Income Tax Practices Maintained by Belgium* Panel Report, adopted 7 December 1981, BISD 23S/127 and 28S/114
Brazil – EEC Milk	*Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community* Panel Report, adopted 28 April 1994, BISD 41S/II/467
Brazil – Internal Taxes	*Brazilian Internal Taxes* Working Party Report, adopted 30 June 1949, BISD II/181 and 186
Canada – Eggs	*Canadian Import Quotas on Eggs* Working Party Report, adopted 17 February 1976, BISD 23S/91
Canada – FIRA	*Canada – Administration of the Foreign Investment Review Act* Panel Report, adopted 7 February 1984, BISD 30S/140
Canada – Gold Coins	*Canada – Measures Affecting the Sale of Gold Coins* Panel Report, 17 September 1985, unadopted, L/5863
Canada – Grain Corn	*Panel on Canadian Countervailing Duties on Grain Corn from the United States* Panel Report, adopted 26 March 1992, BISD 39S/411
Canada – Herring and Salmon	*Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* Panel Report, adopted 22 March 1988, BISD 35S/98
Canada – Ice Cream and Yoghurt	*Canada – Import Restrictions on Ice Cream and Yoghurt* Panel Report, adopted 5 December 1989, BISD 36S/68
Canada – Lead and Zinc	*Canada – Withdrawal of Tariff Concessions (Lead and Zinc)* Panel Report, adopted 17 May 1978, BISD 25S/42
Canada – Manufacturing Beef CVD	*Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC* Panel Report, 13 October 1987, unadopted, SCM/85
Canada – Potatoes	*Exports of Potatoes to Canada* Panel Report, adopted 16 November 1962, BISD 11S/55 and 88
Canada – Provincial Liquor Boards (EEC)	*Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies* Panel Report, adopted 22 March 1988, BISD 35S/37

Canada – Provincial Liquor Boards (US)	*Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* Panel Report, adopted 18 February 1992, BISD 39S/27
Cuba – Consular Taxes	*The Phrase "Charges of any Kind" in Article I:1 in Relation to Consular Taxes* Ruling by the Chairman, 24 August 1948, BISD II/12
Cuba – Textiles I	*Report of Working Party 7 on the Cuban Schedule* 13 September 1948, unadopted, GATT/CP.2/43
Cuba – Textiles II	*Report of Working Party 8 on Cuban Textiles* 10 August 1949, unadopted, GATT/CP.3/82
EC – Article XXVIII	*Canada/European Communities – Article XXVIII Rights* Award by the Arbitrator, 16 October 1990, BISD 37S/80
EC – Audio Cassettes	*EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan* Panel Report, 28 April 1995, unadopted, ADP/136
EC – Citrus	*European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* Panel Report, 7 February 1985, unadopted, L/5776
EC – Sugar Exports (Australia)	*European Communities – Refunds on Exports of Sugar* Panel Report, adopted 6 November 1979, BISD 26S/290
EC – Sugar Exports (Brazil)	*European Communities – Refunds on Exports of Sugar – Complaint by Brazil* Panel Report, adopted 10 November 1980, BISD 27S/69
EEC – Airbus	*German Exchange Rate Scheme for Deutsche Airbus* Panel Report, 4 March 1992, unadopted, SCM/142
EEC – Animal Feed Proteins	*EEC – Measures on Animal Feed Proteins* Panel Report, adopted 14 March 1978, BISD 25S/49
EEC – Apples (US)	*European Economic Community – Restrictions on Imports of Apples – Complaint by the United States* Panel Report, adopted 22 June 1989, BISD 36S/135
EEC – Apples I (Chile)	*EEC Restrictions on Imports of Apples from Chile* Panel Report, adopted 10 November 1980, BISD 27S/98
EEC – Apples II (Chile)	*EEC – Restrictions on Imports of Apples* Panel Report, 20 June 1994, unadopted, DS39/R
EEC (Member States) – Bananas I	*EEC – Member States' Import Regimes for Bananas* Panel Report, 3 June 1993, unadopted, DS32/R
EEC – Bananas II	*EEC – Import Regime for Bananas* Panel Report, 11 February 1994, unadopted, DS38/R
EEC – Canned Fruit	*European Economic Community – Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes* Panel Report, 20 February 1985, unadopted, L/5778
EEC – Copper Scrap	*European Economic Community – Restrictions on Exports of Copper Scrap* Panel Report, adopted 20 February 1990, BISD 37S/200
EEC – Cotton Yarn	*European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil* Panel Report, adopted 30 October 1995, BISD 42/17

EEC – Dessert Apples	*European Economic Community – Restrictions on Imports of Dessert Apples – Complaint by Chile* Panel Report, adopted 22 June 1989, BISD 36S/93
EEC – Import Restrictions	*EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong* Panel Report, adopted 12 July 1983, BISD 30S/129
EEC – Imports of Beef	*European Economic Community – Imports of Beef from Canada* Panel Report, adopted 10 March 1981, BISD 28S/92
EEC – Minimum Import Prices	*EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables* Panel Report, adopted 18 October 1978, BISD 25S/68
EEC – Newsprint	*Panel on Newsprint* Panel Report, adopted 20 November 1984, BISD 31S/114
EEC – Oilseeds I	*European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* Panel Report, adopted 25 January 1990, BISD 37S/86
EEC – Oilseeds II	*European Economic Community – Follow-Up on the Panel Report "Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins"* Panel Report, 31 March 1992, BISD 39S/91
EEC – Parts and Components	*European Economic Community – Regulation on Imports of Parts and Components* Panel Report, adopted 16 May 1990, BISD 37S/132
EEC – Pasta Subsidies	*European Economic Community – Subsidies on Export of Pasta Products* Panel Report, 19 May 1983, unadopted, SCM/43
EEC – Poultry (US)	*EEC – United Kingdom Application of EEC Directives to Imports of Poultry from the United States* Panel Report, adopted 11 June 1981, BISD 28S/90
EEC – VAT and Threshold	*Panel on Value-Added Tax and Threshold* Panel Report, adopted 16 May 1984, BISD 31S/247
EEC – Wheat Flour Subsidies	*European Economic Community – Subsidies on Export of Wheat Flour* Panel Report, 21 March 1983, unadopted, SCM/42
France – Compensation Tax	*French Special Temporary Compensation Tax on Imports* Contracting Parties Decision, 17 January 1955, BISD 3S/26
France – Import Restrictions	*French Import Restrictions* Panel Report, adopted 14 November 1962, BISD 11S/55 and 94
France – Income Tax	*Income Tax Practices Maintained by France* Panel Report, adopted 7 December 1981, BISD 23S/114 and 28S/114
France – Wheat Exports	*French Assistance to Exports of Wheat and Wheat Flour* Panel Report, adopted 21 November 1958, BISD 7S/46
Germany – Sardines	*Treatment by Germany of Imports of Sardines* Working Party Report, adopted 31 October 1952, BISD 1S/53
Germany – Starch Duties	*German Import Duties on Starch and Potato Flour* Working Party Report, 16 February 1955, unadopted, BISD 3S/77
Greece – Import Duties	*Increase of Import Duties on Products included in Schedule XXV (Greece)* Working Party Report, adopted 3 November 1952, BISD 1S/51

Greece – Import Taxes	*Special Import Taxes Instituted by Greece* Working Party Report, adopted 3 November 1952, BISD 1S/48
Greece – Phonograph Records	*Greece – Increase in Bound Duty* Group of Experts Report, 9 November 1956, unadopted, L/580
Greece – USSR Tariff Quotas	*Greece – Preferential Tariff Quotas to the USSR* Working Party Report, adopted 2 December 1970, BISD 18S/179
India – Tax Rebates	*Application of Article I:1 to Rebates on Internal Taxes* Ruling by the Chairman, 24 August 1948, BISD II/12
Italy – Agricultural Machinery	*Italian Discrimination Against Imported Agricultural Machinery* Panel Report, adopted 23 October 1958, BISD 7S/60
Jamaica – Margins of Preference	*Jamaica – Margins of Preference* Panel Report, adopted 2 February 1971, BISD 18S/183
Japan – Agricultural Products I	*Japan – Restrictions on Imports of Certain Agricultural Products* Panel Report, adopted 2 March 1988, BISD 35S/163
Japan – Alcoholic Beverages I	*Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* Panel Report, adopted 10 November 1987, BISD 34S/83
Japan – Leather (Canada)	*Japan's Measures on Imports of Leather* Panel Report, adopted 10 November 1980, BISD 27S/118
Japan – Leather I (US)	*Japanese Measures on Imports of Leather* Panel Report, adopted 6 November 1979, BISD 26S/320
Japan – Leather II (US)	*Panel on Japanese Measures on Imports of Leather* Panel Report, adopted 15 May 1984, BISD 31S/94
Japan – Semi-Conductors	*Japan – Trade in Semi-Conductors* Panel Report, adopted 4 May 1988, BISD 35S/116
Japan – Silk Yarn	*Japan Measures on Imports of Thrown Silk Yarn* Panel Report, adopted 17 May 1978, BISD 25S/107
Japan – SPF Dimension Lumber	*Canada/Japan – Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber* Panel Report, adopted 19 July 1989, BISD 36S/167
Japan – Tobacco	*Japanese Restraints on Imports of Manufactured Tobacco from the United States* Panel Report, adopted 11 June 1981, BISD 28S/100
Korea – Beef (Australia)	*Republic of Korea – Restrictions on Imports of Beef – Complaint by Australia* Panel Report, adopted 7 November 1989, BISD 36S/202
Korea – Beef (NZ)	*Republic of Korea – Restrictions on Imports of Beef – Complaint by New Zealand* Panel Report, adopted 7 November 1989, BISD 36S/234
Korea – Beef (US)	*Republic of Korea – Restrictions on Imports of Beef – Complaint by the United States* Panel Report, adopted 7 November 1989, BISD 36S/268
Korea – Resins	*Panel Report on Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States* Panel Report, adopted 27 April 1993, BISD 40S/205
Netherlands – Income Tax	*Income Tax Practices Maintained by the Netherlands* Panel Report, adopted 7 December 1981, BISD 23S/137 and 28S/114

New Zealand – Finnish Transformers	*New Zealand – Imports of Electrical Transformers from Finland* Panel Report, adopted 18 July 1985, BISD 32S/55
Norway – Apples and Pears	*Norway – Restrictions on Imports of Apples and Pears* Panel Report, adopted 22 June 1989, BISD 36S/306
Norway – Textiles	*Norway – Restrictions on Imports of Certain Textile Products* Panel Report, adopted 18 June 1980, BISD 27S/119
Norway – Trondheim Toll Ring	*Panel Report on Norwegian Procurement of Toll Collection Equipment for the City of Trondheim* Panel Report, adopted 13 May 1992, BISD 40S/319
Spain – Soyabean Oil	*Spain – Measures Concerning the Domestic Sale of Soyabean Oil – Recourse to Article XXIII:2 by the United States* Panel Report, 17 June 1981, unadopted, L/5142
Spain – Unroasted Coffee	*Spain – Tariff Treatment of Unroasted Coffee* Panel Report, adopted 11 June 1981, BISD 28S/102
Sweden – AD Duties	*Swedish Anti-Dumping Duties* Working Party Report, adopted 26 February 1955, BISD 3S/81
Thailand – Cigarettes	*Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* Panel Report, adopted 7 November 1990, BISD 37S/200
UK – Bananas	*United Kingdom Waivers – Application in Respect of Customs Duties on Bananas* Panel Report, 11 April 1962, unadopted, L/1749
UK – Cotton Textiles	*United Kingdom Import Restrictions on Cotton Textiles* Panel Report, adopted 5 February 1973, BISD 20S/237
UK – Dollar Quotas	*United Kingdom – Dollar Area Quotas* Panel Report, adopted 30 July 1973, BISD 20S/230 and 236
UK – Ornamental Pottery	*Article I – United Kingdom Waiver (Ornamental Pottery)* Panel Report, 19 March 1959, unadopted, SECRET/105
Uruguay – Recourse to Article XXIII	*Uruguayan Recourse to Article XXIII* Panel Report, adopted 16 November 1962, BISD 11S/95
US – Canadian Pork	*United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada* Panel Report, adopted 11 July 1991, BISD 38S/30
US – Canadian Tuna	*United States – Prohibition of Imports of Tuna and Tuna Products from Canada* Panel Report, adopted 22 February 1982, BISD 29S/91
US – Cement	*United States – Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico* Panel Report, 7 September 1992, unadopted, ADP/82
US – Customs User Fee	*United States – Customs User Fee* Panel Report, adopted 2 February 1988, BISD 35S/245
US – CVD (India)	*Panel on United States Countervailing Duties* Panel Report, adopted 3 November 1981, BISD 28S/113
US – DISC	*United States Tax Legislation (DISC)* Panel Report, adopted 7 December 1981, BISD 23S/98 and 28S/114
US – Dried Figs	*Article XIX – Increase in the United States Duty on Dried Figs* Working Party Decision, 8 November 1952, BISD 1S/28

US – Export Restrictions (Czechoslovakia)	*United States Export Restrictions* Contracting Parties Decision, 8 June 1949, BISD II/28
US – Fur Felt Hats	*Report of the Intersessional Working Party on the complaint of Czechoslovakia concerning the Withdrawal by the United States of a Concession under the terms of Article XIX* Report, adopted 22 October 1951, GATT/CP/106
US – Lead and Bismuth I	*United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom* Panel Report, 15 November 1994, unadopted, SCM/185
US – Magnesium	*United States – Measures Affecting the Export of Pure and Alloy Magnesium from Canada* Panel Report, 9 August 1993, unadopted, SCM/174
US – Malt Beverages	*United States – Measures Affecting Alcoholic and Malt Beverages* Panel Report, adopted 19 June 1992, BISD 39S/206
US – Manufacturing Clause	*United States Manufacturing Clause* Panel Report, adopted 15 May 1984, BISD 31S/74
US – Margins of Preference	*Margins of Preference* Contracting Parties Decision, 9 August 1949, BISD II/11
US – MFN Footwear	*United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil* Panel Report, adopted 19 June 1992, BISD 39S/128
US – Nicaraguan Trade	*United States – Trade Measures Affecting Nicaragua* Panel Report, 13 October 1986, unadopted, L/6053
US – Non-Rubber Footwear	*United States – Countervailing Duties on Non-Rubber Footwear from Brazil* Panel Report, adopted 13 June 1995, BISD 42S/208
US – Norwegian Salmon AD	*Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* Panel Report, adopted 27April 1994, BISD 41S/I/229
US – Norwegian Salmon CVD	*Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* Panel Report, adopted 28 April 1994, BISD 41S/II/576
US – Section 337	*United States Section 337 of the Tariff Act of 1930* Panel Report, adopted 7 November 1989, BISD 36S/345
US – Softwood Lumber I	*Panel on United States Initiation of a Countervailing Duty Investigation into Softwood Lumber Products from Canada* Panel Report, 3 June 1987, unadopted, BISD 34S/194
US – Softwood Lumber II	*Panel on United States – Measures Affecting Imports of Softwood Lumber from Canada* Panel Report, adopted 27 October 1993, BISD 40S/358
US – Sonar Mapping	*United States – Procurement of a Sonar Mapping System* Panel Report, unadopted, GPR.DS1/R
US – Spring Assemblies	*United States – Imports of Certain Automotive Spring Assemblies* Panel Report, adopted 26 May 1983, BISD 30S/107
US – Sugar	*United States – Restrictions on Imports of Sugar* Panel Report, adopted 22 June 1989, BISD 36S/331

US – Sugar Quota	*United States – Imports of Sugar from Nicaragua* Panel Report, adopted 13 March 1984, BISD 31S/67
US – Sugar Waiver	*United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions* Panel Report, adopted 7 November 1990, BISD 37S/228
US – Superfund	*United States – Taxes on Petroleum and Certain Imported Substances* Panel Report, adopted 17 June 1987, BISD 34S/136
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US – Swedish Steel	*United States – Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden* Panel Report, 29 August 1990, unadopted, ADP/47
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